



1. All Records pertaining to the date on which [the District] initiated its investigation and subsequent audit of Clients.
2. All Records pertaining to [the District's] decision to investigate/audit Clients, from any time before the date on which [the District] initiated its investigation and subsequent audit of Clients.
3. All Records related to the audit and investigation of Clients, other than those provided by Clients to [the District], from the time [the District] initiated its investigation and subsequent audit to present.
4. All Records pertaining to Businesses that [the District] or an appellate court/body deemed exempt/excluded from the BPT<sup>2</sup> during the Time Period.
5. All Records pertaining to manufacturers that [the District] or an appellate court/body deemed exempt/excluded from the BPT during the Time Period.
6. All Records pertaining to manufacture[r]s that [the District] audited or investigated during the Time Period.
7. All Records pertaining to Businesses producing or manufacturing farm products that [the District] or an appellate court deemed exempt/excluded from the BPT during the Time Period.
8. All Records pertaining to Businesses producing or manufacturing farm products that [the District] audited or investigated during the Time Period.
9. All Records pertaining to any taxpayer appeal of [the District's] assessment of a BPT during the Time Period.
10. All Records pertaining to businesses within [the District's] jurisdiction engaged in food processing, preparation, production, and/or fabrication during the Time Period.
11. All of [the District's] "General and Specific Tax Ledgers and Related Records" as defined by Section TA-6 of the PMRM,<sup>3</sup> and related to the BPT, for the required retention period of seven (7) years.
12. All of [the District's] "Occupational Tax Lists" as specified by Section TA-8 of the PMRM and related to the BPT.

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<sup>2</sup> Here, the Request seeks records related to the "Business Privilege Tax", a local tax levied by the District against local businesses.

<sup>3</sup> The Pennsylvania Municipal Records Manual, a records retention guide and schedule promulgated by the Pennsylvania Historic And Museum Commission.

13. All of [the District's] "Monthly Report to Taxing District" or equivalent as defined in Section TA-13 of the PMRM, and related to the BPT, for the required retention period of seven (7) years.

14. All of [the District's] "Tax Collector[] Return Sheets" or equivalent as defined in Section TA-14 of the PMRM, and related to the BPT, for the Time Period.

15. All of [the District's] "Abatements and Exonerations" related to the BPT for the Time Period.

16. All Records – internal and published – related to [the District's] policies, procedures, protocols, methods, and purposes of assessing, investigating, administering, and/or levying the BPT.

On December 20, 2021, the District invoked a 30-day extension,<sup>4</sup> 65 P.S. § 67.902(b), along with a request for clarification, arguing that the timeframe and every item (except for Item 12) of the Request was insufficiently specific for various reasons and seeking additional terms or inclusions. 65 P.S. § 67.703.

On December 21, 2021, the Requester provided some additional context, but largely argued that the District was seeking to shift the burden under the RTKL to the Requester regarding the District's LTBRA claims.

On January 17, 2022, the District submitted a request for additional time to the Requester, explaining that it had been closed for the holidays, and both the IT Department director and the District's tax office had been unable to work due to illness. 65 P.S. § 67.902. The same day, the Requester consented to an extension until February 16, 2022.

On February 14, 2022, the District submitted a response, addressing each Item of the Request separately.

The District denied Items 1-3, because the District would not confirm or deny whether the Requester's clients were under audit, pursuant to the LTBRA and the Pennsylvania Criminal Code,

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<sup>4</sup> The District was closed for three days between the receipt of the Request and the issuance of the 30-day extension.

18 Pa.C.S. § 7326. The District granted Item 4 in part, providing a copy of the “Keystone Central School District Taxpayer Request for Determination Form”, but otherwise denied the Request for the reasons stated above. The District denied Items 5, 6, 7, and 8, arguing that the definition of “manufacturer” was determined through a formal tax determination process, and therefore barred under the LTBRA and the Criminal Code. The District granted Item 9 in part, providing meeting minutes and agendas, a petition for review form and a copy of the District’s regulations, but denying all records relating to any individual Business Privilege Tax (“BPT”) assessments. The District granted Item 10 in part, providing administrative records and ordinances, but denying all records relating to any individual BPT assessments and arguing that it could not retrieve records by industry code because they were not stored by industry code in its database. The District granted payment records responsive to Item 11, but redacted “personally identifying information” and “personal financial information.” 65 P.S. § 67.708(b)(6)(i). The District denied access to Item 12, arguing that no responsive occupational tax lists exist, but granted access to Item 13, except that personal identification and financial information were redacted. *Id.* The District denied access to Item 14, arguing that no responsive records exist, and granted tax collection meeting records with responsive “abatement” discussion in response to Item 15. Finally, the District granted the ordinances, engagement letters, meeting records, blank forms, contracts and board resolutions and regulations responsive to Item 16 of the Request.

On March 8, 2022, the Requester appealed to the OOR, arguing that the District must be required to show that the withheld records are confidential tax information under the LTBRA, that the response to Items 1-3, 6 and 8 had ignored the implicit request for “criteria” used for tax determinations, that the District had improperly applied LTBRA to Items 4, 5, and 7, which sought the identities of persons exempt from tax, not taxpayers, that the District had incorrectly narrowed

the Request in several points, and that the District must be required to produce records responsive to Items 5-8 and 10 regardless of the challenges the District's database structure may pose in conducting that search.<sup>5</sup> The OOR invited the parties to supplement the record and directed the District to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On March 29, 2022, the District submitted a position statement, noting that it had produced 1,282 pages of responsive records, but withheld 75,449 pages of records. The District additionally argued that a variety of the withheld records implicated the attorney-client privilege because they consist of discussion between the District, tax contractors, and an attorney hired by the District regarding BPT audits. The District asserted again that some requested records do not exist, and that the District does not store information in its database in a way which would allow it to search the database by industry code, as the Requester argues. In support of these arguments, the District submitted nine affidavits:

1. The affidavit of Susan Blesh, the District's Open Records Officer, who attests that a good faith search was conducted for responsive records. Ms. Blesh also sets forth the timeline of the appeal, the exact details of the search conducted, the construction of the District's exemption log, the process of redaction, the rationale for the District's interpretations of the Request, and the number of records provided.
2. The affidavit of Chad Krape, the District's Technology Supervisor, who attests to how he produced the raw data encoded in the District's exemption log.
3. The affidavit of Hailey Guerriero, an employee of the Keystone Central Tax Office, who attests that she had helped determine which records are subject to the LTBRA and which were privileged, and that the District is unable to provide "exonerations" because it does not use that term and it cannot search its database by industry code.
4. The affidavit of Charles (Terry) Rice, Chief Information Officer for McCarthy & Company, P.C., Certified Public Accountants, who attests that he had prepared records by redacting personal names of taxpayers.

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<sup>5</sup> The Requester initially granted the OOR a 30-day extension to issue a final determination and granted the OOR additional time throughout the course of the appeal. *See* 65 P.S. § 67.1101(b)(1) ("Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).").

5. The affidavit of Karen Bean, an employee of the Keystone Central Tax Office, who attests that she manually processed 8,740 tax returns to help create the exemption log.

6. The affidavit of Stephanie Mincer, an employee of the Keystone Central Tax Office, who attests that she also helped prepare the tax returns for the exemption log.

7. The affidavit of Dale Rupert, an employee of RBA Professional Data Systems, who attests that while the District's database can store industry codes, the District did not choose to store that data in the database because it did not require it.

8. The affidavit of Gary Williams, an auditor at McCarthy & Company, P.C., Certified Public Accountants, who attests that he examined the records in the possession of the District's auditor and determined that a set of the responsive records are individual tax records, and other records are communications subject to the attorney-client privilege.

9. The affidavit of Noel Greene, an employee of the Keystone Central Tax Office, who attests that she helped to prepare the tax returns.

Finally, the District submitted an exemption log listing 33276 entries, including the medium of storage, the date of each record's creation, the number of pages, the subject matter, the authors and recipients of each record.

On April 6, 2022, the Requester submitted a response, arguing that the District had waived the attorney-client privilege by failing to raise it in the District's final response, that the District had not demonstrated that it conducted a reasonable search for records because it had not disclosed the keywords it used to search for responsive records, and that while the Requester did not contest the decision to withhold the 31,999 tax returns listed in the District's exemption log, the remaining 1,263 documents were not described with sufficient detail to establish that they could be withheld entirely by the LTBRA. The Requester reiterated the argument that the District had unreasonably narrowed the Request to avoid confirming the existence of other responsive records and argued

that if the District was unable to perform an electronic search for records by industry code, it should have conducted a manual search.

On April 12, 2022, the District submitted a rebuttal, arguing that there was no *per se* waiver rule and it was permitted to raise the issue of privilege for the first time on appeal, that the District had conducted a reasonable search for records in response to the Request, that the District is not required to provide all search terms used, that the exemption log was sufficiently detailed, that the District's interpretations of the Request were reasonable, and that the District is not able to retrieve the requested information through a manual search.

### **LEGAL ANALYSIS**

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

### **1. The appeal is dismissed as moot in part**

On appeal, the District submitted an exemption log which listed 31,999 individual tax returns, subject to exemption under the LTBRA. In response, the Requester confirmed that they



would not contest that those tax documents were exempt and were not seeking them. Because there is no longer any case or controversy related to those 31,999 tax returns, the appeal is dismissed as moot as to those records. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, \*6 (holding that an appeal is properly dismissed as moot where no controversy remains).

**2. The District’s interpretation of Items 1-3, 6 and 8 of the Request was reasonable, but the District’s interpretation of Item 16 of the Request was not**

Items 1-3, 6, and 8 of the Request seek:

1. All Records pertaining to the date on which [the District] initiated its investigation and subsequent audit of Clients.
2. All Records pertaining to [the District’s] decision to investigate/audit Clients, from any time before the date on which [the District] initiated its investigation and subsequent audit of Clients.
3. All Records related to the audit and investigation of Clients, other than those provided by Clients to [the District], from the time [the District] initiated its investigation and subsequent audit to present.
6. All Records pertaining to manufacture[r]s that [the District] audited or investigated during the Time Period.
8. All Records pertaining to Businesses producing or manufacturing farm products that [the District] audited or investigated during the Time Period.

The Request also included a glossary of terms, which defines “related” or “pertaining to” as “defining, describing, containing, discussing, embodying, reflecting, identifying, stating, dealing with, analyzing or in any way referring to, pertaining to, or relating to something or someone.” The District submitted a request for clarification, essentially proposing that these Items of the Request could encompass any record related to a specific date, or the Requester’s clients. In response, the Requester stated, essentially, that the Request was sufficiently clear and that the District’s objections were unreasonable.

The District ultimately denied these Items of the Request, arguing that it would be illegal to confirm the existence of a tax audit or investigation under the LTBRA. On appeal, the Requester argues that Items 1-3, 6, and 8 should include documents setting forth the criteria of the District's decision to conduct an audit, and records showing the criteria for how the District determines that an entity is a manufacturer. The District argues that it reasonably interpreted Items 1-3 as seeking only records addressing audits or tax investigations which it might be conducting against the Requester's clients, and Items 6 and 8 as seeking records of actual audits and investigations into entities the District had legally determined were manufacturers.

An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513; *Signature Info. Solutions, Inc. v. City of Warren*, OOR Dkt. AP 2012-0433, 2012 PA O.O.R.D. LEXIS 557. The RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d at 824). The OOR determines the reasonableness of the agency's interpretation from the text and context of the request alone, as neither the OOR nor the Requester are permitted to expand the request on appeal. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515 (Pa. Commw. Ct. 2010); *McKelvey v. Office of Attorney General*, 172 A.3d 122 (Pa. Commw. Ct. 2017) (“Once a RTKL request is submitted, a requester is not permitted to expand or modify the request on appeal.”).

Here, the Requester submitted a series of broad requests, which could not be addressed without some level of interpretation. Additionally, the Requester's glossary did not attempt to narrow the Request, but instead confirmed that he wanted all records connected to the subjects of these Items of the Request. While it is possible to argue, for example, that Item 1 also seeks any

records detailing the process the District uses to time investigations generally, the natural, reasonable reading of Item 1 is that it seeks records regarding the audit of Requester's clients specifically.<sup>6</sup> Therefore, the District's interpretation of Items 1-3, 6 and 8 of the Request as seeking records related to actual investigations and audits was reasonable.<sup>7</sup>

Item 16 of the Request, however, seeks:

16. All Records – internal and published – related to [the District's] policies, procedures, protocols, methods, and purposes of assessing, investigating, administering, and/or levying the BPT.

The District notes in its response that it interpreted the meaning of the prepositional phrase “internal and published” to mean that Item 16 of the Request was seeking only such records as were simultaneously internal and published, rather than for records which are internal and unpublished, or which are published but not internal. The District cites both to a dictionary definition of the word “and” and the Requester's clarification, wherein the Requester defined the term “published” as evidence for this interpretation. This is not a reasonable interpretation of Item 16 of the Request; the use of the word “and” in the prepositional phrase is intended to identify both policies which are published and policies which are internal.

Because the District's interpretation of Item 16 of the Request is not reasonable, the District has not submitted evidence that it produced all records responsive to Item 16, or that the internal, unpublished or published documents would be exempt. Therefore, the District is required to provide any additional records which are responsive to Item 16 of the Request.

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<sup>6</sup> The OOR does not endorse the strained interpretations of Items 1-3 of the Request that the District put forth in its request for clarification, which were similarly “literally correct” but unreasonable readings of the Request, but those interpretations were not ultimately applied to deny any part of the Request.

<sup>7</sup> The Requester also raised the issue of interpretation as related to Items 4, 5, and 7; however, a review of the issues between the parties shows that this is a matter of statutory interpretation, not interpretation of the Request, and the OOR addresses this issue below.

The District argues, on appeal, that it did not uncover any further records which would be encompassed by this understanding of Item 16 of the Request, but it did not provide evidence to demonstrate this. To the extent that no additional responsive records exist, the District should provide the Requester with a verification or affidavit demonstrating the search for these Items specifically.

### **3. The Request seeks confidential tax information**

The District denied substantively all records responsive to Items 1-7 and 8 of the Request as seeking records exempt under the LTBRA. Specifically, the District alleges that even acknowledging the existence of an active audit or tax investigation responsive to Items 1-3 would violate the LTBRA, and that it only determines which entities are “manufacturers”, and thus exempt from BPT, through a tax determination process. The District also denied, in part, Items 11-14 as seeking records containing confidential tax information.

The LTBRA provides that:

Any information gained by a local taxing authority as a result of any audit, return, report, investigation, hearing or verification shall be confidential tax information. It shall be unlawful, except for official purposes or as provided by law, for any local taxing authority to:

- (1) Divulge or make known in any manner any confidential information gained in any return, investigation, hearing or verification to any person.
- (2) Permit confidential tax information or any book containing any abstract or particulars thereof to be seen or examined by any person.
- (3) Print, publish or make known in any manner any confidential tax information.

53 Pa.C.S. § 8437.

The LTBRA does not define “confidential tax information”, but the OOR has been guided by the Commonwealth Court’s decision in *Juniata Valley School District v. Wargo*, 797 A.2d 428 (Pa. Commw. Ct. 2002). In *Wargo*, decided under the now-repealed Right-to-Know Act, the

Commonwealth Court held that the Act “specifically protects the confidentiality of information on earned income tax returns.” *Id.* at 431. Therefore, the Court held that all information obtained from such returns—including names and addresses—fall “within the category of confidential information obtained from tax declarations and returns.” *Id.* Contrary to the Requester’s argument that exemptions under the RTKL must be narrowly construed, the purpose of the LTBRA is not as a remedial public access statute, and courts construe it as shielding all information obtained through one of the listed prohibited forms. *See Scranton Times, L.P. v. Scranton Single Tax Off.*, 736 A.2d 711, 714 (Pa. Commw. Ct. 1999); *see also Commonwealth v. Engelkemier*, 148 A.3d 522 (Pa. Commw. Ct. 2016). Recently, the Court determined regarding a similar taxing statute that even aggregated data from which no individual liability or determination of payment or non-payment could be made was exempt due entirely to the source of the information being protected tax returns. *Pa. Dep’t of Revenue v. Wagaman*, 2021 Pa. Commw. Unpub. LEXIS 688 (Pa. Commw. Ct. 2021).<sup>8</sup>

However, the OOR has found that the information must strictly have been gained from one of the exempt tax activities or records to qualify for protection. *Abramson v. Lower Merion Twp.*, OOR Dkt. AP 2019-1267, 2019 PA O.O.R.D. LEXIS 1483. Therefore, the OOR determines confidential tax information strictly by determining whether the information was, in fact, “gained [...] as a result of any audit, return, report, investigation, hearing or verification” related to the District’s role as a local taxing authority. This standard is broader than the ones rehearsed in the prior cases, which were primarily concerned with tax returns only. Here, any information at all which is obtained during the District’s tax investigations must be exempt.

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<sup>8</sup> An unpublished opinion of the Commonwealth Court may be cited for its persuasive value. 210 Pa. Code § 69.414.

Consequentially, Items 1, 2 and 3 seek records exempt under the LTBRA, because they are seeking information arising from tax investigations or audits; even Item 1, which seeks only records pertaining to the date on which an audit was commenced, would require the District to reveal that it is collecting taxes from specific companies and initiating audits thereof. Likewise, Items 6-8 facially seek records of audits and tax investigations which would show the exempt status of those businesses.

The District also withheld over a thousand documents from its response to the Request generally because they contained confidential tax information, ranging from audit documents, taxpayer letters, tax determination communications, taxpayer listings, taxpayer spreadsheets, and various internal emails. In support of this exemption, the District submitted the affidavit of Ms. Guerriero, who attests that:

2. Having supported the tax software and provided services as the [District] supervisor between August 8, 2016 – March 7, 2022[,] I am temporarily supporting the [District] tax office until the vacancy is filled. I am familiar with [the District’s] tax database and system.

[...]

6. On December 13, 2021, I sent a copy of [the Request] [...] to Jennifer Brown, Esq. and Gary Williams, McCarthy & Company.

10. On January 5, 2022, after a thorough and good faith search of all [District] relevant electronic databases, I along with Jennifer Brown, Esq. examined and identified records which are attorney client communications and/or “any information gained by a local taxing authority as a result of any audit, return, report, investigation, hearing or verification [...]”

17. On January 12, 2022, Susan Blesh and I discussed defining the search criteria to be provided to Chad Krape.

18. On January 12, 2022, I contacted [Mr. Krape] and asked him to search electronic communication related to business privilege tax information requested by [Requester].

19. Because the [Requester] did not provide any query, keywords, filters, or other search criteria to provide them with the information, records, and data, Chad searched using criteria from Susan Blesh and I.

25. Throughout the month of March 2022[,] after [a] thorough and good faith examination[] of the records, Jennifer Brown, Esq., Gary Williams, and I met via phone on numerous occasions to determine whether any of the records were Attorney Client communications and/or [exempt under the LTBRA]. [...] [We] considered the following factors: [...] whether the record pertained to information gained as a result of an audit, return, report, investigation, haring or verification.

Under the RTKL, an affidavit may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the District acted in bad faith, “the averments in [the verification] should be accepted as true.” *McGowan v. Pa. Dep’t of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (*citing Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Here, the affidavit of Ms. Guerriero, along with the exemption log submitted, show that the District applied the correct criteria in examining the records to see if they were exempt under the LTBRA, and that the records were withheld if they pertained to information acquired as the result of a return or audit. Given the broad nature of the protection provided by the LTBRA and the quantity of evidence submitted by the District, the District has shown by a preponderance of the evidence that the records are “more likely than not” to contain exempt tax data. *Delaware County v. Schaefer ex rel. Philadelphia Inquirer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012); *see also Brock v. Pa. Dep’t of Health*, OOR Dkt. 2021-2834, 2022 PA O.O.R.D. LEXIS 378; *Pakutz v. Pa. Dep’t of State*, OOR Dkt. AP 2021-0415, 2021 PA O.O.R.D. LEXIS 1419.

The Requester argues that while the District has undoubtedly shown that it has many records containing information made confidential by the LTBRA, it has not shown that it could not redact that information and provide the remainder of the communication in each instance. 65

P.S. § 67.706. This is the ordinary approach the OOR takes to public records which contain non-public information. *Id.* Here, however, the Commonwealth Court opinions cited above make clear that even derivative information based on the tax data is exempt. *See Dep't of Revenue v. Wagaman*, 2021 Pa. Commw. Unpub. LEXIS 688 (Pa. Commw. Ct. 2021). Furthermore, the only thing that renders any of the listed communications responsive to the Items of the Request at issue are their connections to the exempt tax information.

#### **4. The District has demonstrated that certain records are privileged**

The District withheld fourteen documents exclusively on the basis of the attorney-client privilege.<sup>9</sup> The RTKL defines “privilege” as “[t]he attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth.” 65 P.S. § 67.102. In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *Bousamra v. Excelsa Health*, 210 A.3d 967, 982-83 (Pa. 2019) (citing *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007), *aff'd* 992 A.2d 65 (2010)). “[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege must prove waiver under the fourth prong.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1192

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<sup>9</sup> The Requester argues that matters of privilege must be raised in the agency’s final response, or they are waived. However, an agency is permitted to raise new grounds on appeal, and the OOR cannot find any support for the idea that the attorney-client privilege should be an exception. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013); *McClintock v. Coatesville Area Sch. Dist.*, 74 A.3d 378 (Pa. Commw. Ct. 2013).



(Pa. Commw. Ct. 2014). An agency may not, however, rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to withhold records”). An agency may not rely on a bald assertion that the attorney-client privilege applies; instead, the agency must prove that the necessary elements are met. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to withhold records”). “In Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.” *Gillard v. AIG Ins. Co.*, 15 A.3d at 59, 609 Pa. at 88-89 (2011). “The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice, where the disclosure might not have occurred absent the privilege, and where the client’s goal is to obtain legal advice.” *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001).

In support of this argument, the District submitted the affidavit of Ms. Guerriero, who attests that:

10. On January 5, 2022, after a thorough and good faith search of all [District] relevant electronic databases, I along with Jennifer Brown, Esq. examined and identified records which are attorney client communications and/or “any information gained by a local taxing authority as a result of any audit, return, report, investigation, hearing or verification [...]”

25. Throughout the month of March 2022[,] after [a] thorough and good faith examination[] of the records, Jennifer Brown, Esq., Gary Williams, and I met via phone on numerous occasions to determine whether any of the records were Attorney Client communications and/or [exempt under the LTBRA]. [...] [We] considered the following factors: [w]hether Jennifer Brown, Esq, Tax Attorney for [the District] was involved in providing legal advice relevant to the business privilege tax without the presence of stranger, and not for the purpose of committing a crime or tort. We also considered whether the privilege has been

claimed or waived by the [District]. It was determined that records meeting those factors were Attorney Client communications and that the [District] had claimed and did not waive privilege.

Under the RTKL, an affidavit may serve as sufficient evidentiary support for withholding records. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. In this instance, the District's affidavit and the fourteen entries in the exemption log demonstrate that the withheld records are email conversations between Jennifer Brown, Esq., the District's retained tax attorney, the District, and the tax and accounting contractors retained by the District, with whom she would have privity. The subject matter and attestation indicate that these were all discussions about BPT policies, and the District has attested that these conversations involved seeking legal advice from Attorney Brown. Therefore, the District has demonstrated each of the elements of attorney-client privilege as it pertains to these fourteen email conversations.

#### **5. The District has demonstrated that it conducted a good-faith search for records**

On appeal, the Requester challenges the District's search for records in three specific ways - the Requester argues that the District's keywords for its electronic search may have been too narrow; the Requester argues that it was error for the District to state that it had no records of tax exoneration because even if the District's regulations do not use the term, it is common in tax parlance; and, the Requester argues that the District has incorrectly relied upon the design of their databases to avoid a search for industry codes.

In response to a request for records, "an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]" 65 P.S. § 67.901. While the RTKL does not define the term "good faith effort," in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, the Commonwealth Court concluded that:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all

potentially responsive records from those in possession.... When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.... After obtaining potentially responsive records, an agency has the duty to review the record and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018), *aff'd*, 243 A.3d 19 (Pa. 2020). Additionally, the Commonwealth Court has held that an open records officer's inquiry of agency members may constitute a "good faith effort" to locate records, stating that open records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

*Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is "the open-records officer's duty and responsibility" to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

In support of its search, the District submitted the affidavit of Ms. Blesh, who attests that:

4. In regard to the [Request], a thorough and good faith examination and search of the files and databases in the possession, custody, and control of the School District, and after inquiring with the relevant School District personnel, and if applicable, relevant third-party contractors as to whether the records exist in its possession, the School District has made the determination that beyond the 182 records/~1,262 pages that the School District has produced on February 14, 2022, no other records are public records - they are excluded pursuant to the Right-to-Know Law.

5. The School District merged all of its prior software's tax data into the RBA software when leasing the RBA software in 2012. This resulted in one electronic tax database of records, data, and information relevant to KCSD Business Privilege Tax returns collected, and/or processed, and financial reports created from them by the [District] Tax Office.

6. On December 13, 2021, I sent a copy of the ... Request ... to Hailey Guerriero, [District] Tax Office Supervisor.

7. On December 14, 2021, I asked Hailey Guerriero to discuss the [] District's records related to the [R]equest in the possession of the [] District's auditor, Gary

Williams, McCarthy & Company, P.C. and Tax Attorney, Jennifer Brown, Esq. I explained the importance of the Request, searching for records relevant to the [R]equest, identified the type of records requested, and explained what was required of [the District] to comply. After thorough and good faith examination of the records Gary Williams, Hailey Guerriero, and Jennifer Brown, Esq. found the records are in accord with attorney client communication and/or “any information gained by a local taxing authority as a result of any audit, return, report, investigation, hearing or verification shall be confidential tax information.” Gary Williams, Hailey Guerriero, and Jennifer Brown, Esq. told me these records are not public records and are not to be provided in the Response.

8. On December 14, 2021, I met with the Tax Office employees about the ... Request. I explained the importance of the Request, searching for records relevant to the [R]equest, identified the type of records requested, and explained what was required of [the District] to comply.

9. On December 20<sup>th</sup>, December 22<sup>nd</sup>, 2021, and January 5, 2022, I had phone conversations with Hailey Guerriero and Jennifer Brown, Esq. to discuss the records in [the District’s] possession.

15. On January 10, 2022, Hailey Guerriero and I reviewed the RBA system to determine if reports could be extracted using industry codes specific to the ... Request: manufacturers, farm products, food processing, preparation, production, and/or fabrication. After a thorough and good faith examination and search of the software database for the requested tax information, records, and data Hailey Guerriero and I could not extract the industry codes based on the data in the database.

16. This is because the software as described in Paragraphs 15, has many options that users can select to extract information, data and/or records to compile, maintain, format, or organize its said information, records and/or data based on a users’ need. However, the [] District did not select to compile, maintain, format, or organize its records using these industry codes, at the time it leased the software.

17. On January 12, 2022, Hailey Guerriero and I discussed defining the electronic search criteria to be provided to Chad Krape, [] Technology Supervisor.

18. On January 12, 2022, Hailey Guerriero contacted Chad Krape and asked him to search for [] District electronic communication related to business privilege audit and tax information requested by [Requester].

19. Because the [Requester] did not provide any query, keywords, filters, or other search criteria to use, the [] District developed the search criteria to extract information, records, and data, and Chad Krape searched using criteria prepared by Hailey Guerriero and I.

20. On January 12th and January 13, 2022[,] Chad Krape searched the [] District email server for records, information, and data using criteria provided by Hailey Guerriero and me.

33. On March 11, 2022[,] I asked Chad Krape for PDF versions of the records, information and/or data from the list referenced in paragraph 26.

34. On March 11, 2022[,] Chad Krape provided me the PDF versions of the records, information and/or data.

35. I reviewed and analyzed the PDF versions of the records, information and/or data referenced in Paragraph 34 and inserted the records, information and/or data information into the Log. [These] records, information and/or data comprises KCSD Right-to-know Law Log for the Exemptions, Redactions, and Privileged Records (“Log”) rows 23,262 through 23,404, inclusive. Upon analysis of this information, records and data, I redacted the personal name of taxpayers and replaced it with “TP”. With regard to each portion of the information, records and data which comprise rows 23,262 through 23,404, inclusive, of the Log, I have indicated in the Log whether the information, record or data constitutes attorney - client communications, taxpayer personal information and/or information gained by the local taxing authority as a result of any audit, return, report, investigation, hearing or verification.

43. The Business Privilege Tax Resolutions/Code does not define or include the term “exoneration.” The Business Privilege Tax Regulations include the term “Abatement.”

Under the RTKL, an affidavit may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Ms. Blesh’s affidavit makes it clear that the District engaged in a thorough search for responsive records, culminating in the large volume at issue on appeal.

Relevant to the Requester’s three objections, the District does not describe the search terms it used to locate records on appeal, but it is not required to do so to demonstrate that a good faith search for records occurred. To the extent that the Requester believes that the District may have avoided using any particular terms, nothing prohibits him from filing a new request and asking the District to use those terms specifically. Next, the Requester focuses on the District’s claim that it does not categorize any BPT matters as “exonerations” to indicate that the District may have failed

to search for certain records. However, it is unclear from the record what “exoneration” captures in this context that “abatement” does not, and it is clear from the record that the District gathered and reviewed all of its existing BPT records even if it did not specifically identify which relate to tax exonerations.

Finally, the Requester’s argument that the District has withheld records based on the District’s server formatting is contrary to the evidence of record. Section 705 of the RTKL states that “an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705. However, it is not the creation of a record to pull records from a database, and a requester may not be penalized for the way in which an agency chooses to store those records. *Pa. Dep’t of Env’tl. Prot. v. Cole*, 52 A.3d 541, 548 (Pa. Commw. Ct. 2012) (citing *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, Pa. Unpub. LEXIS 38 (Pa. Commw. Ct. 2012)).

Here, Item 10 of the Request sought “all [r]ecords pertaining to businesses within [the District’s] jurisdiction engaged in food processing, preparation, production, and/or fabrication [.]” The District has demonstrated that it does not maintain its records by industry, but as the record shows, the District has already searched all BPT records, which would necessarily include any “engaged in food processing, preparation, production, and/or fabrication.” Furthermore, the RTKL does not require the District to go back and arbitrarily categorize records by industry when it does not do so natively; only to provide public records as they exist. Therefore, the District has demonstrated that it conducted a good faith search for responsive records.

## CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part, denied in part**, and **dismissed as moot in part**, and the District is required to provide any additional responsive records related to Item 16 of the Request within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Clinton County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>10</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: May 4, 2022**

*/s/ Jordan C. Davis*

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Jordan C. Davis, Esq.  
Appeals Officer

Sent to: James Clark, Esq. (via email only);  
Susan Blesh (via email only)

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<sup>10</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).