pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JOE WELLS AND THE ROCKET,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2022-1035**
	:	
SLIPPERY ROCK UNIVERSITY OF	:	
PENNSYLVANIA,	:	
Respondent	:	

FACTUAL BACKGROUND

On April 19, 2022, Joe Wells, a News Editor for The Rocket (collectively, "Requester"), submitted a request ("Request") to Slippery Rock University of Pennsylvania ("University") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking documents related to the discipline, demotion, and/or discharge of its former Provost and Vice President for Academic Affairs, Abbey Zink. *See* Request. The University did not issue a response within five business days of receipt of the Request, so the Request was deemed denied. 65 P.S. § 67.901.

On April 29, 2022, the Requester filed an appeal with the Office of Open Records ("OOR"), stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the University to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On April 29, 2022, the University made two email submissions. First, the University sent an email to the OOR indicating the Request was under review because the requested documents pertain to personnel matters. The University also sent an email to the Requester informing him it was electing to take a thirty-day extension. 65 P.S. § 67.902(b)(2). Upon receipt of the University's April 29, 2022 email, the OOR forwarded the message to the Requester and asked that all parties be copied on all future correspondence. Similarly, the Requester forwarded to the OOR the University's April 29, 2022 email that was sent to him and notified the University that he would not accept the University's extension because the Request was already deemed denied and the matter was now before the OOR.

On May 4, 2022, the University submitted its position statement, indicating there was one record related to the Request which was redacted pursuant to 65 P.S. § 67.305.[1] The University attached the record that consists of a two-page email, which was redacted on the basis of privilege, in hopes to satisfy the Request.

On May 5, 2022, the Requester submitted a statement indicating his desire to proceed with the appeal of the University's deemed denial and made several arguments. Essentially, the Requester reiterated he appealed the deemed denial, challenged the redactions taken by the University in the two-page record, questioned the contention that only one responsive record exists, claimed the University did not conduct a good faith search, and contended while the University did not raise it, 65 P.S. § 67.708(b)(7) does not apply, and sought an *in camera* review of the record in question.

[1] 65 P.S. § 67.305. Presumption

(a) GENERAL RULE. – A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record. The presumption shall not apply if:
  (1) the record is exempt under section 708;
  (2) the record is protected by a privilege; or
  (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree….

On May 10, 2022, the University provided an unredacted copy of the responsive record to the OOR for *in camera* review. On the same day, the University made a supplemental submission, contending that the appeal appeared to be moot because the Requester published an article that quoted a redacted portion of the responsive record. Additionally, the University asserted the redactions made to the responsive record are privileged and were made in attempt to settle a potential claim.

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). 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 reasonable probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2).

The University is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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. 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). 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." 65 P.S. § 67.708(a).

1. The Request was deemed denied

First, it must be noted that neither party contests that this Request was deemed denied. The Requester, in his appeal and submission, indicated the Request was deemed denied. The University, in its submission, acknowledged the Requester "…submitted an initial [RTKL] request to the University that was deemed denied." Pursuant to Section 901 of the RTKL, "[t]he time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency. If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied." 65 P.S. § 67.901. In this case, the Request was submitted on April 19, 2022. Five business days from April 19, 2022 is April 26, 2022. Therefore, the University had until April 26, 2022, to either issue a final response or issue a letter to notify the Requester that it elected to take a thirty-day extension.

2. The University failed to demonstrate that the responsive email is subject to redaction

The University argues that the email was properly redacted because it is protected by privilege. Under the RTKL, "[a] record in the possession of a Commonwealth agency or local agency is presumed to be a public record … [unless:] (1) the record is exempt under section 708; (2) the

record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. § 67.305(a). The burden of proof is on the public body to demonstrate that a record is privileged and cannot be disclosed. 65 P.S. § 67.708(a)(1). The RTKL defines privilege as including: the attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege, or other privilege recognized by a court interpreting the laws of the Commonwealth. 65 P.S. § 67.102.

In the instant case, the University argues a privilege regarding settlement of potential litigation is recognized by a court interpreting the laws of the Commonwealth and it cited to two cases in support of its argument.

First, in *City of Pittsburgh v. Silver*, the Commonwealth Court held that "correspondence contained in the file of an assistant city solicitor between attorneys for the estate of Curtis Mitchell and city officials regarding efforts to negotiate a settlement of pending litigation" were not subject to public access under the RTKL because the release of such records would violate the ethics-based rule of confidentiality under the Rule 1.6(a) of the Pennsylvania Rules of Professional Conduct, although the Court noted that a fully-executed settlement agreement would be subject to public access. 50 A.3d 296, 301 (Pa. Commw. Ct. 2012). In *Office of Open Records v. Center Township*, the Commonwealth Court clarified that:

> In *Silver*, this Court declined to determine whether the OOR or the trial court erred in concluding that the settlement negotiations at issue were covered under the attorney-client privilege or the work-product doctrine. Presumably, we did so because the settlement negotiations involved discussion with third parties and did not reflect the solicitor's legal impressions and, therefore, were not protected under either privilege… Instead, this Court focused on Pa.R.P.C. 1.6 and its embodiment of the rule of confidentiality provides protection to a wider scope of client information than is afforded by the attorney-client privilege and work-product doctrine in that it 'applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.' Pa.R.P.C. 1.6. Although the RTKL specifically shields from disclosure information covered under the attorney-client privilege and the work-product doctrine, see 65

> P.S. § 67.102 (defining 'privilege'), both of which are referenced in Pa.R.P.C. 1.6, the RTKL does not have a counterpart provision embodying the ethics-based rule of confidentiality that is otherwise covered under Pa.R.P.C. 1.6. At its core, then, the issue in *Silver* concerned a clash between the RTKL, which permits disclosure of information protected by the ethics-based rule of confidentiality, and Pa.R.P.C. 1.6, which prohibits such disclosure. It is against this backdrop, and the fact that disclosure of the settlement negotiations violated the ethics-based rule of confidentiality, that this Court concluded, *sua sponte*, that our Supreme Court's authority under Article V, Section 10(c) trumped the RTKL's requirement that the documents should be disclosed and that the OOR lacked subject matter jurisdiction to order disclosure.
>
> When its holding is understood in context, *Silver* stands for the limited proposition that the RTKL cannot mandate and the OOR cannot order the disclosure of settlement documents when that disclosure would contravene the ethics-based rule of confidentiality in Pa.R.P.C. 1.6.

95 A.3d 354, 360-61 (Pa. Commw. Ct. 2014)

The University argues that the redactions were appropriate because the communication occurred in the settlement of potential litigation, which is the same as attempting to settle actual litigation, citing to *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305 (Pa. Commw. Ct. 1993). In *Reading Eagle*, the Commonwealth Court noted:

> Section 8 of the Sunshine Act is an acknowledgement that the public would be better served in certain matters if the governing body had a private discussion of the matter prior to a public resolution. Litigation is one of those issues, because if knowledge of litigation strategy, of the amount of settlement offers or of potential claims became public, it would damage the municipality's ability to settle or defend those matters and all the citizens would bear the cost of that disclosure. Section 8, however, requires that even though it is in the public interest that certain matters be discussed in private, the public has a right to know what matter is being addressed in those sessions.

Id. at 306-07.

The University argues that releasing information publicly that reveals settlement offers involving matters of pending litigation or potential claims is not required and is not in the best interest of the University. The University contends that its representatives should be able to communicate offers to resolve claims to potential litigants without the possibility of requiring the

University to disclose its discussions with either the potential claimants or their attorneys. Also, the University contends that its argument "is self-explanatory upon the *in camera* review…."

Here, there was one email, dated April 5, 2022, consisting of two pages submitted for *in camera* review. The April 5, 2022 email confirms the Provost's employment status, requests a written response regarding a temporary assignment, and discusses leave usage and balances. The University's submission combined with an *in camera* review of the responsive record simply does not support a finding that the information withheld are privileged communications that constitutes a negotiation of settlement of a potential claim. As such, the University did not meet its burden of proof that the email is privileged.

3. The University failed to demonstrate that additional responsive records do not exist

The University argues that the April 5, 2022 email is the only record responsive to the Request. In response, the Requester asserts that, "[a]s the Provost is the second-highest administrative position only to the [U]niversity president, a reasonable conclusion would be this demotion was communicated … presumably by SRU President William Behre, through a written means as has been done previously for other administrators" and "[a]s the current document were hastily located shortly after this appeal was filed, we would like to assure the [U]niversity made a good-faith search for all documents pertaining to this [R]equest."

It is the agency's responsibility to make a good faith effort to determine if a record requested under the RTKL is a public record and exists as a record of the agency. 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)(citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 857 F.Supp.2d 129, 138-39 (D.D.C. 2012)). 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).

Here, there is no mention of a search in the University's submission. As a result, no evidence has been submitted into the record by the University showing if it conducted a search or how it determined only one record exists that is responsive to the Request. Based on the record, the University did not meet its burden to show a good faith search was conducted and only one responsive record exists. *See* 65 P.S. § 67.305; *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **dismissed as moot in part**, and the University is required to provide an unredacted copy of the April 5, 2022 email, and to conduct a good faith search and provide all additional responsive records to the Requester, 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 or petition for review to the Commonwealth Court of Pennsylvania. 65 P.S. § 67.1301(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. 65 P.S. § 67.1303. 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.[2] This Final Determination shall be placed on the website at: https://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: June 1, 2022

/s/ Lois Lara

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APPEALS OFFICER
LOIS LARA, ESQ.

Sent to: Joe Wells (via email only)
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[2] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).