



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

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**GLENN HARMON,
Requester**

v.

: Docket No.: AP 2017-1926

**LONDONDERRY TOWNSHIP,
Respondent**

INTRODUCTION

Glenn Harmon (“Requester”) submitted a request (“Request”) to Londonderry Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking information regarding an identified press conference (“Press Conference”). The Township partially denied the Request, arguing that some responsive records were subject to the attorney-work product doctrine. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Township is required to take further action as directed.

FACTUAL BACKGROUND

On September 7, 2017, the Request was filed, seeking “a complete and unedited transcript of the recent Press Conference and related notes and correspondence and the 9/5/2017 Minutes of the Board of Supervisors.” On October 16, 2017, after extending the response period under 65 P.S. § 67.902, the Township granted access to the requested meeting minutes and certain records

related to the Press Conference.¹ The Township denied access to other responsive records, claiming that an unedited transcript did not exist and that additional notes and correspondence were protected under the attorney-work product doctrine.

On October 23, 2017, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure. The Requester limited his appeal to the Township's denial of notes and correspondence claimed to be confidential under the attorney-work product doctrine.² The Requester also claimed that the attorney-work product doctrine was waived because the Township Solicitor "conducted the press conference, presented the materials and conducted the discussion at a public meeting of the Township Board[,] which makes his related notes and correspondence public records not subject the [privilege.]" The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

¹ The Solicitor's report at the September 5, 2017 meeting of Township Supervisors included the following statement:

In another matter, the Township received correspondence from FEMA dated August 31, 2017, (copy attached) regarding the Township's need to take corrective actions involving its compliance with the flood plain requirements and the Community Assistance Visit specifically regarding the islands owned by York Haven Power (Cube Hydro). The letter will be available for review and will also be posted on the Township's web site.

In part, the letter reads "The Federal Emergency Management Agency (FEMA) supports this compliance agreement and its' implementation as a corrective action to address the identified violations. FEMA does not support any change to the compliance agreement that would include the continued use of the existing structures."

Township Board of Supervisors Regular Meeting Minutes, Sept. 5, 2017 available at https://www.londonderry.org/pdfs/uploaded/bc/minutes/September%205,%202017%20Regular%20Meeting_2017-09-05.pdf (last accessed on Nov. 27, 2017). While the September 5, 2017 meeting minutes included many public comments related to the flood plain issues discussed in the FEMA letter, it did not include any reference to the Press Conference that is the subject of the Request.

² On appeal, the Requester states that "the only written information available would be contained in the notes and correspondence related to the press conference." As a result, the Requester has waived any objections regarding the Township's claim that it does not possess a transcript of the Press Conference, the sufficiency of the correspondence provided in response to the Request, and the Township's claim that the only records withheld were the notes and correspondence of its Solicitor. *See Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

On November 2, 2017, the Township submitted a position statement reiterating its grounds for denial. The Township also argued that the Requester failed to sufficiently address the Township's grounds for denial and, therefore, the Requester's appeal did not comply with 65 P.S. § 67.1101(a). In support of its position, the Township submitted the affidavit of Jeffrey Burkhart, the Township's Assistant Open Records Officer.

On December 1, 2017, the OOR ordered the Township to submit the withheld records for *in camera* review. On December 15, 2017, the Township submitted copies of the responsive records for *in camera* review, along with a corresponding Inspection Index. Through its Inspection Index, the Township asserted that all records were withheld under the attorney-client privilege and that Index Items 7 and 13 were also subject to the attorney-work product doctrine and the notes and working papers exemption of the RTKL, 65 P.S. § 67.708(b)(12).³ In support of its supplemental position statement and Inspection Index, the Township submitted the affidavits of Ron Kopp, Chairman of the Township's Board of Supervisors, and Stephan Letavic, Township Manager.

On March 28, 2018, in response to an OOR request for clarification, the Township submitted an updated Inspection Index to incorporate three e-mails excluded from the original Index.

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,

³ The Township is permitted to assert these new reasons for denying access to records on appeal to the OOR. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

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 law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the Township requested a hearing; however, the OOR conducted an *in camera* review of the withheld records and has the requisite information and evidence before it to properly adjudicate the matter. As a result, the Township’s request for a hearing is denied.

The Township is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local or local agency are presumed 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 respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly 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.” *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)).

1. The appeal is sufficient under Section 1101(a) of the RTKL

The Township claims that the Requester’s appeal is insufficient because it fails to address the Township’s grounds for denial. Section 1101(a)(1) of the RTKL states that an “appeal shall state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record and shall address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a)(1) (emphasis added); *see also Dep’t. of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Commw. Ct. 2011) (“[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency’s stated reasons for denying a RTKL request”). Pursuant to this Section, the Commonwealth Court has held that a requester must “state why the records [do] not fall under the asserted exemptions and, thus, [are] public records subject to access.” *Saunders v. Pa. Dep’t. of Corr.*, 48 A.3d 540, 543 (Pa. Commw. Ct. 2012).

In the appeal, the Requester argues that the Township waived the cited privilege because its Solicitor discussed the contents of the records in public, “which makes his related notes and correspondence public records....” The Commonwealth Court has held that a general statement that records are public and not subject to an exemption is sufficient to meet the requirements of

Section 1101(a)(1). *See Barnett v. Pa. Dep't of Pub. Welf.*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). Therefore, the Requester has sufficiently challenged the Township's grounds for denying access to the notes and correspondence withheld under the attorney-work product doctrine, and the OOR may reach the merits of the appeal.

2. The Township does not contest the release of several e-mails and attachments previously provided to the Requester

In its supplemental submission, the Township indicates that the following records were previously provided to the Requester in response to prior RTKL requests, specifically Index Items 15, 16 and 17. As the Township acknowledges that the records were previously provided to the Requester, the Township has waived any claim that those records may be withheld under the attorney-client privilege. As a result, these Inspection Index Items are subject to public access.

3. Portions of the withheld records are protected by the attorney-client privilege and/or the attorney-work product doctrine

The Township argues that it withheld some records identified in the Inspection Index because they are protected by the attorney-client privilege and/or the attorney-work product doctrine. The RTKL excludes records subject to a privilege from the definition of "public record." *See* 65 P.S. § 67.102. The RTKL defines "privilege" as "[t]he 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 this Commonwealth." *Id.*

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. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). An agency may not 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”). Instead, the agency must establish the first three prongs of the privilege for it to apply. *See Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014); *see also Office of the Governor v. Davis*, 122 A.3d 1185 (Pa. Commw. Ct. 2015). However, once the agency has done so, the requester has the burden of proving that the agency waived the privilege. *Bagwell*, 103 A.3d at 420-21.

The attorney-work product doctrine, on the other hand, prohibits disclosure “of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. The Pennsylvania Supreme Court has explained that the attorney-work product doctrine “manifests a particular concern with matters arising in anticipation of litigation.” *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011) (citing *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001) and stating that “[t]he ‘work product rule’ is closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation”); *see also Heavens v. Pa. Dep’t of Env’tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) (“[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked”).

Mr. Letavic attests that:

8. The records ... are communications between me and the Township's counsel including, the Township Solicitor, Mark Stewart, as well as Counsel Jim Diamond and Susan Yocum, all of Eckert Seam[an]s Cherin and Mellott, LLC.
9. Counsel was retained by the Township and has been providing legal advice and guidance as the Township pursues an extensive noncriminal investigation, and the upcoming enforcement, of Township floodplain ordinances for the hundreds of properties that are located on the islands within the Township's borders that are within regulated floodways.
10. In light of the upcoming anticipated enforcement litigation between the Township and those in the regulated floodways that have Township floodplain ordinance compliance issues, the Township elected to consult with its counsel for legal advice and guidance prior to hosting a press conference.
11. The email correspondence that was exchanged between counsel and me, was confidential as the Township sought legal advice and guidance on how best to approach the press conference, and the possible discussion points at the press conference.
12. The Township specifically requested legal advice and guidance from its counsel in light of the noncriminal investigation and pending enforcement process the Township would soon be undertaking.
13. None of the email communications between counsel and me were disclosed at any time during the press conference, nor have I disclosed those communications to any third party—either before or after the press conference.
14. Upon information and belief, neither I, nor ... [the] Township has waived any privilege as to the communications with Township counsel regarding the press conference.

Through Mr. Letavic's affidavit, the Township has demonstrated that it is the client of its Solicitor and that the Township sought legal advice and guidance with respect to the Press Conference. Mr. Kopp also attested that the withheld notes and correspondence provided the Solicitor's legal advice regarding the Press Conference.

The affidavits and an *in camera* review of the withheld records establish that portions of the withheld records include the Solicitor's legal advice to the Township and the disclosure of information by the Township to obtain legal advice, both of which are protected by the attorney-client privilege. *See Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001). Additionally, many of the withheld records include mental impressions of the Township's attorneys.

The records submitted for *in camera* review contain two draft documents, Index Items 7 and 13. While a draft may contain communications between an attorney and client, the draft itself is not privileged on its face. Draft documents submitted to an agency solicitor for review are generally protected under both the attorney-client privilege and the attorney-work product doctrine, unless those drafts consist of purely factual information or where the privilege has been waived. *See Andritz Sprout-Bauer v. Beazer East*, 174 F.R.D. 609, 634 (M.D. Pa. 1997) ("Drafts of documents prepared by counsel or circulated to counsel for comments on legal issues are considered privileged if they were prepared or circulated for the purpose of giving or obtaining legal advice and contain information or comments not included in the final version). Here, the Township submitted evidence demonstrating that notes remained internal to the Township and its Solicitor. *See id.* Specifically, Mr. Letavic attests that:

15. In addition to email correspondence, Counsel Susan Yocum also prepared and provided documents advising on possible topics, and opinions related thereto, for the press conference. The documents were prepared talking points for internal discussion between the other participants prior to the press conference.
16. Again, these documents were confidential as the Township sought legal advice and guidance on how best to approach the press conference and the issues to address in light of the enforcement process the Township would soon be undertaking.

17. The internal discussion documents prepared by counsel are contained at LT006-013 and LT017-024 [(Index Items 7 and 13)].
18. None of the documents prepared by Counsel Yocum were made public at any time during the press conference by me, Ron Kopp, or Jim Diamond, nor have I, at any time, made those documents public or shared the[] documents with any outside third party.

Therefore, based on an *in camera* review of these records and the evidence submitted, the Township has met its burden of proving that the records and portions of records described below are subject to the attorney-client privilege and/or the attorney-work product doctrine and are not subject to public access.

- Index Item 1 (first two paragraphs of the body of the e-mail)⁴
- Index Item 2 (the entire body of the e-mail)
- Index Item 5 (first paragraph of the body of the e-mail)
- Index Item 6 (second sentence of the first paragraph)
- Index Item 7
- Index Item 11 (words 13 to 17 of the first sentence)
- Index Item 12 (second paragraph of the body of the e-mail)
- Item 13
- Item 22 (first four lines of text of the body of the e-mail)
- Item 26 (second sentence of the body of the e-mail)
- Item 27 (entire body of the e-mail)
- Item 28 (entire body of the e-mail)
- Item 29 (entire body of the e-mail)
- Item 30 (entire body of the e-mail)
- Item 31 (entire body of the e-mail)

The remaining records or parts of records are not subject to redaction because they contain general or factual information through which no legal advice is sought, and the records do not reveal any information that is protected by the attorney-client privilege or the attorney-work product doctrine. *See Scarcella v. City of Sunbury*, OOR Dkt. AP 2015-2895, 2016 P.A. O.O.R.D. LEXIS 450 (holding that the factual content of a report prepared for an attorney and withheld under

⁴ For purposes of this Final Determination, the term “body of the e-mail” refers to the written information conveyed in the e-mail and includes the portion of the e-mail following the salutation and preceding the closing of the message.

the attorney-client privilege and attorney-work product doctrine was subject to public access); *see also Upjohn Co. v. United States*, 449 U.S. 383 (1981) (privilege extends only to communications and not to underlying facts); *City of Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (E.D.Pa. 1962) (the protection of the privilege only extends to communications and not to facts). Rather, the contents of these records relate to routine responsibilities associated with providing legal services to the Township, such as circulating documentation internally and scheduling meetings.

On appeal, the Requester argued that the privilege was waived and claimed that the contents of the responsive notes and correspondence were disclosed because the Solicitor conducted the Press Conference and conducted a discussion at a public meeting. Generally, when a client voluntarily discloses privileged communications to a third party, the privilege is waived. *See Bagwell*, 103 A.3d at 414; *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001). In response, the Township explains that “[n]one of the notes and correspondence exchanged between the Township and its counsel are were made public or presented at any public meeting[,]” an assertion supported by each affidavit submitted. As a result, the evidence submitted by the Township demonstrates that the responsive correspondence remained internal to the Township and was not revealed during the Press Conference or during a public meeting. As a result, the Requester failed to meet his burden of proving that the Township waived the attorney-work product doctrine.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part** and **denied in part**, and the Township required to provide access to records as set forth above. 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 Dauphin County Court of Common Pleas. 65 P.S. § 67.1301. All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: April 3, 2018

/s/ Benjamin A. Lorah

APPEALS OFFICER
BENJAMIN A. LORAH, ESQ.

Sent to: Glenn Harmon (via e-mail only);
Sara Yocum, Esq. (via e-mail only);
Stephan Letavic (via e-mail only)

⁵ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).