



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

DYLAN SEGELBAUM AND YORK
DAILY RECORD,
Requester

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Docket No: AP 2018-2006

v.

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COUNTY OF YORK,
Respondent

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INTRODUCTION

Dylan Segelbaum (“Requester”), a reporter with the York Daily Record, submitted a request (“Request”) to the County of York (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records and emails of the County and its solicitor for a certain timeframe. The County denied the Request, stating that certain records do not exist and others are protected by the attorney-client privilege. 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, denied in part** and **dismissed as moot in part**, and the County is required to take further action as directed.

FACTUAL BACKGROUND

On November 9, 2018, the Request was filed seeking:

[1] Copies of all emails that Susan Byrnes, Chris Reilly and Doug Hoke sent to, or received from, Glenn Smith from Oct. 25-Nov. 9, 2018.

[2] Documents, such as termination letter, resignation letter and separation agreement, outlining the discharge of Glenn Smith from his position as York County solicitor.

On November 9, 2018, the County denied the Request, stating that records responsive to Item 1 of the Request are protected by attorney-client privilege and that there are no records responsive to Item 2 of the Request.

On November 9, 2018, the Requester appealed to the OOR, challenging the denial of Item 1 of the Request¹ and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On November 26, 2018, the County submitted a position statement, arguing that the withheld emails are protected by attorney-client privilege and the attorney-work product doctrine. The County further states that the withheld information are exempt from disclosure because they reflect internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A), and interests in real estate, 65 P.S. § 67.708(b)(22)(1)(A). In support of its position, the County submitted the affidavit made under the penalty of perjury from Michelle Pokrifka, Assistant Solicitor to the County, and a privilege log identifying four withheld records.

On November 27, 2018, the OOR ordered the County to provide the responsive records for *in camera* review. On December 11, 2018, the OOR received the records for *in camera* review and an inspection index identifying six records.²

¹ As the Requester does not challenge the denial of Item 2 of the Request, the Requester has waived any objections regarding the sufficiency of the responsive information provided by the County. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

² Emails 3 and 4 identified in the privilege log have been provided to the Requester, in part.

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 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 parties did not request a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The County 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 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 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)(1). 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)).

The County withheld emails claiming they are protected by privilege, citing attorney-client privilege and the attorney-work product doctrine. The County further states that the withheld information is exempt under Section 708(b)(10)(i)(A) and Section 708(b)(22)(1)(A) of the RTKL.

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. *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; instead, the agency must prove all four elements. *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”). 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).

The attorney-work product doctrine 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’t. 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”).

Here, in support of the County's assertion that the above privileges and exemptions apply to the withheld records, Attorney Pokrifka attests:

7. That a review of the few emails between the Commissioners and their Solicitor on the dates requested reveal that the communications related to matters that were currently being deliberated by the Commissioners and specifically related to discussion and evaluation [of] the potential acquisition of real estate for which advice and counsel was sought regarding the legal issues affecting such matter and such information includes the internal pre-decisional deliberations of the Commissioners of the County...

8. That one email addressed conflict counsel issues and contracts with private counsel within the County which is a matter currently being deliberated by the Commissioners which is further exempt in accordance with 65 P.S. § 67.708(b)(10).

9. That the same email provided mental impressions of the Solicitor and opinions, notes and theories regarding the subject matter of the use of conflict counsel and the contractual relationship between the County and such conflict counsel providers. Such information is protected by the attorney-client work product...

10. That further communications invited the Commissioners to a meeting to receive legal opinion regarding these issues. That such request is not an email, but an invitation to a meeting, and such invitation included in the subject line information that was being discussed by the Solicitor at the subject meeting.

11. That one email provided by the Solicitor communication information regarding threatened litigation against ... [the] County.

12. That all communications related to facts which the Solicitor was engaged for the purpose of providing a legal opinion, legal assistance and legal advice and was not for any other purpose.

13. The privilege is and has been claimed by the Commissioners as the client of the Solicitor and has not been waived in any manner.

The OOR also conducted *in camera* review of the six withheld records and determines the following:

Email 1 dated 10/26/2018 is partially privileged and the County may redact after the first sentence of each email contained in Email 1 to protect a discussion between client and attorney regarding a legal issue.

Email 2 dated 10/26/2018 is privileged communication as an attorney providing a legal opinion to his clients regarding a specific matter.

Email 3 dated 10/27/2018 and Email 4 dated 10/28/2018 are public records and have been provided to the Requester;³ however, both emails are a chain that also include Email 2 dated 10/26/2018 (above) that is not subject to public access.

Invite 5 dated 10/31/2018 does not contain any privileged communication, nor does it contain any substantive information other than the scheduling of a meeting.

Email 6 dated 11/5/2018 does not reveal any privileged communication, rather it is a general discussion regarding the need for an upcoming meeting.

Additionally, the County references Section 708(b)(10)(i)(A) of the RTKL. Section 708(b)(10)(i)(A) exempts from public disclosure a record that reflects “[t]he internal, predecisional deliberations of an agency...” In order for this exemption to apply, three elements must be satisfied: 1) “The records must ... be ‘internal’ to a governmental agency,” *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 379 (Pa. Commw. Ct. 2013); 2) the deliberations reflected must be predecisional, i.e., before a decision on an action; and 3) the contents must be deliberative in character, i.e., pertaining to proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011). To establish that records are deliberative, an agency must show that the information relates to the deliberation of a particular decision. *McGowan*, 103 A.3d at 378-88. After conducting *in camera* review, the OOR determines that Email 1, Invite 5 and Email 6 do not contain any deliberative information that would be exempt under Section 708(b)(10) of the RTKL.⁴ The portion of Email 1 that is not subject to privilege, also does not contain discussions regarding any proposed action or decisions to be made. Invite 5 does not contain any deliberative information and is simply an invitation to a meeting. Lastly, Email 6 does not contain deliberative

³ The County has provided copies on appeal to the Requester; therefore, the appeal, as it pertains to the records provided, is dismissed as moot.

⁴ The term “deliberation” is generally defined as “[t]he act of carefully considering issues and options before making a decision or taking some action....” BLACK’S LAW DICTIONARY 492 (9th ed. 2009).

information, but is merely statement of an upcoming meeting. *See Heintzelman v. Pa. Dep't of Cmty. & Econ. Dev.*, OOR Dkt. AP 2014-0061, 2014 PA O.O.R.D. LEXIS 254, *aff'd* No. 512 C.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 644 (Pa. Commw. Ct. 2014).

The County also asserts that Section 708(b)(22)(i)(A) exempts from disclosure “contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to the following: [t]he leasing, acquiring or disposing of real property or an interest in real property.” 65 P.S. § 67.708(b)(22)(i)(A). Based upon the OOR’s review, Email 1, Invite 5 or Email 6 are not “real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency. Accordingly, the records are not exempt under Section 708(b)(22) of the RTKL.

Therefore, the County has met its burden of withholding a portion of Email 1, Email 2 (and as included in Emails 3 and 4) as privileged communications but failed to establish that the remainder of Email 1, Invite 5 and Email 6 are not subject to access.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part, denied in part** and **dismissed as moot in part**, and the County is required to provide access to records identified as Email 1 (in part), Invite 5 and Email 6 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 to the York 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 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: February 11, 2019

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent via email to: Dylan Segelbaum;
Michelle Pokrifka, Esq.

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