



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

In the Matter of	:	
JAMES L. MOLLICK, MD,	:	
Complainant	:	
v.	:	Docket No. AP 2009-0438
	:	(consolidated with AP 2009-0460)
WORCESTER TOWNSHIP,	:	
Respondent	:	

INTRODUCTION

Dr. James L. Mollick (the “Citizen”) submitted a request to Worcester Township (“Township”) seeking e-mails to or from Township Supervisors concerning nominations to Township-appointed positions pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The Township responded that the e-mails did not constitute public records under the RTKL, were not within the Township’s possession, or were privileged. The Citizen filed a timely appeal with the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the Citizen’s appeal is **granted**, and the Township is required to take further action as directed.

FACTUAL BACKGROUND

This Final Determination consolidates two appeals filed by the Citizen against the Township, OOR Dkt. AP 2009-0438 and OOR Dkt. AP 2009-0460, which relate to two requests he submitted for e-mails sent among Township Supervisors related to specific issues addressed by the Township. Both appeals were consolidated to Docket No. AP 2009-0438.

First Request

On April 5, 2009, the Citizen submitted a right-to-know request seeking:

A copy of any and/or all e-mails between Supervisors John Harris and/or Arthur Bustard and/or Chase Kneeland and/[or] Steve Quigley pertaining to either the nomination and/or consideration of Ceasar Gambone to the Zoning Board and/or Doug Rotonondo to the Planning Commission and/or any nomination for the re-organization meeting of January 7, 2008 regardless as to whether they were transmitted on personal computers and/or personal e-mail accounts.

(the “Nomination Request”). In response, within five business days, John Cornell, the Open Records Officer (ORO) for the Township, responded that an additional thirty days was needed for legal review and due to bona fide staffing limitations.

On May 7th, the Township partially denied and partially granted the Nomination Request. The Township supplied one e-mail chain regarding nominations for the Planning Commission, copied to the Solicitor, from which personal e-mail addresses were redacted.

The Township advised that:

e-mails and or other written communications transmitted on the personal computers and/or e-mail accounts of Supervisors Harris, Bustard and Quigley and former Supervisor Kneeland, ... do not constitute “public records” in the possession, custody or control of Worcester Township. Worcester Township does not pay for computers or email accounts for its Supervisors nor does the Township reimburse the Supervisors for such expenses...[and further] E-mails sent or received on the personal or business e-mail accounts of the Supervisors and not sent to or copied to anyone at the Township office are not in the control or the possession of the Township.

The Township concluded that the records were not “of” the Township. The Township explained that to be liable for disclosure of records not within its physical possession, the record must be in possession of an entity with whom it contracts for a governmental function under Section 506(d).

The Township argued that any Supervisor e-mail that “either expressly or impliedly sought the Solicitor’s legal opinion or advice on the message” is protected by the attorney-client privilege.

The Township also argued that the RTKL cannot be “retroactive” under 1 Pa. C.S. §1926, meaning records created before January 1, 2009, its effective date, are not subject to the law.

Second Request

On May 9th, the Citizen submitted a right-to-know request for a copy of the e-mail that Supervisor John Harris referenced at the January 16, 2008 Board meeting, in which he stated in regard to Cesear Gambone's possible nomination to the Zoning Board that he "sent an e-mail to each of the 2 of them [Supervisors Bustard and Quigley], I said this person is someone who would like to be on the Zoning Board, how does that sit with you... we went ahead and made a motion and...passed it" (the "Harris E-mail Request"). The Citizen sought the e-mails regardless of their transmission on the Supervisors' personal computers and/or personal e-mail accounts.

The Township ORO timely responded on May 14th that access was being denied because Supervisor Harris is not provided with a computer or e-mail account by the Township, nor reimbursed for one by the Township. The Township again argued retroactivity, and lack of possession by the Township of the Harris E-mail. In addition, the Township argued that the record is protected from disclosure pursuant to Section 708(b)(10)(1)(A) because it reflects the internal, predecisional deliberations of an agency's members or officials regarding a discussion of a prospective Zoning Hearing Board member (the "Denial"). The Township asserted that the Harris E-mail, as described, was soliciting impressions or opinions by the Supervisors on the qualities of a certain candidate for Zoning Hearing Board. The Township did not supply any facts to support its assumption that the Harris E-mail, or any responsive e-mails, actually contained recommendations or opinions.

The Appeals

On May 26th, the OOR received a timely appeal from the Citizen regarding the partial denial of the Nomination Request (AP 2009-0438). In support, he explains that the records of the Supervisors from 2007 or 2008 regarding Township business or activities, such as

nomination for a Zoning Hearing Board, qualify as records of the Township and can be construed to be within its possession as that term should be interpreted. He also argues that since the Township has only three Supervisors, that any deliberations regarding Township business by e-mail among two Supervisors is a quorum, so such communications should be open to the public under the Sunshine Law, 65 Pa. C.S. §§701 *et seq.*. He contends that any communications in which deliberations were conducted should have been announced at a public meeting, to qualify as a proper executive session, or conference. The Citizen contends that under Section 708(b)(10)(ii), e-mails among a quorum cannot be protected as predecisional deliberations.

On June 2nd, the Citizen timely appealed the denial of the Harris E-mail Request, raising the same arguments and addressed each of the Township's grounds for Denial (AP 2009-0460).

The Citizen appended to both Appeals a DVD showing a portion of the public meeting held on January 16, 2008 in which Supervisor Harris refers to an e-mail he sent regarding solicitation of nominations for the Zoning Hearing Board. He also appended a copy of an e-mail amongst the Supervisors in which Supervisor Harris asks opinion on the Township's electronic media policy and the prior notice required for videotaping. The e-mail does not appear to have been copied to the Township and is alleged to show that the three Supervisors discuss matters of policy outside a public meeting by e-mail. The Citizen notes it was disclosed under the RTKL.

The OOR invited both parties to submit additional materials in support of their respective positions. In response, counsel for the Township submitted a letter arguing that since the Township does not pay for, procure or supply the computers for its Supervisors, and does not route the emails addressed to Supervisors through Township computers, the e-mails are not records of the Township. The Township contends that the only e-mails it receives are those voluntarily forwarded to the Township Manager or other Township employees, and that such e-

mails are disclosed. The Township further compares conversations on personal cell phones to e-mail correspondence on personal computers to suggest their private nature. The letter counsel submitted contained identical language for both appeals, and did not defend based upon the predecisional deliberative exception with regard to the Harris E-mail. Given the similarity of the defenses raised and the identity of parties, the OOR suggested consolidation of the two appeals into one Appeal, for which a single Final Determination would be issued. The Citizen agreed and the appeals were consolidated to Docket No. AP 2009-0438.¹

Upon request by the OOR for additional supplementation of the grounds for Denial in light of OOR Final Determinations and case law regarding these issues, the Township submitted a “Letter Memorandum” on June 23rd of its legal argument. The Township argued that it has no physical possession of the records, and no duty to obtain records that are outside of its physical possession absent a contract for a governmental function under Section 506(d). The Township

[took] the position that it is the duty of the requester to prove that the document or documents in question constitute a ‘public record;’ that is, it is not the duty or the burden of proof of the Township to prove that the record is non-public. Only in the instance where an agency claims an exemption under Section [708(b)] is such a burden placed upon the local agency under the RTKL. ...Those presumptions set forth in the RTKL, such as the fact that a record in the possession of a local agency is presumed to be a public record, do *not* apply in the cases of exemptions under [708(b)] or for the protection of *privileges* or for records exempted by federal or state law or court order. All of those burdens of proof remain with the requester.

[*Letter Memorandum*, p.2.] The Township also argues that the OOR’s Final Determinations in *Mollick v. Worchester Township*, OOR Dkt. AP 2009-0042 (appealed) and *Mollick v. Worchester Township*, OOR Dkt. AP 2009-0058 (appealed) were wrongly decided.²

¹ For reference, the Nomination Request and Harris E-mail Request are collectively referred to as the “Requests.”

² The Township states the grounds upon which it challenged the OOR’s Final Determinations to the Court of Common Pleas. As these grounds were not raised or supported with regard to this consolidated appeal, they are not properly presented for disposition here and are not addressed.

With regard to the Sunshine Law violations alleged by Citizen due to the undisputed communication among a quorum of Supervisors to discuss Township business, the Township argued that the Sunshine Law does not apply because no pre-arranged meeting was held, and no deliberations necessarily occurred. With regard to “possession” of a record, the Township contends that absent a contract for performance of a governmental function, an agency has no obligation to obtain records outside its physical possession. The Township rejected all applicability of the Commonwealth Court’s recent decision in *Lukes et al. v. DPW*, 2009 Pa. Commw. LEXIS 452 (June 3, 2009), because it was decided based upon the repealed RTKL.

The Citizen did not receive the Township’s submission, and thus extended the due date for the Final Determination to July 8th to allow his response to be included in the record. He refutes the Township’s claim that its Supervisors are not part of the local agency since they comprise the governing body and the Township cannot function without them. Further, he notes that no privacy right exists in protecting public records from disclosure due to an allegedly private maintenance of the records by its Supervisors on their personal computers.

The parties do not dispute that the e-mails in question were created on and/or transmitted via Supervisors’ personal computers and non-Township owned computers nor under Township e-mail accounts. The parties do not dispute that the Supervisors are the governing body of the Township, and that two of three are a quorum. There is no dispute that the subject matter of the e-mails relates to the Township business/activity of nominations for the Zoning Hearing Board. The Township does not dispute that e-mails responsive to the Nomination Request are public in nature, provided they are copied to or voluntarily supplied to the Township, and thus within its physical possession. The Township also does not dispute that the burden of proving a Section 708(b) exception lay with the Township, and must be met by a preponderance of the evidence.

The issue before the OOR is whether Supervisor e-mails are records “of the Township” that it is obligated to produce despite not having physical possession and not owning the means of transmission, and if so, whether the e-mails are properly shielded based upon content by the attorney-client privilege, and for the Harris E-mail, by the predecisional deliberative exception.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). The Township is a local agency subject to the RTKL required to disclose public records. 65 P.S. §67.302. Records of a local agency like the Township are presumed to be “public” unless the record is: (1) exempt under Section 708(b); (2) protected by a legal privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. *See* 65 P.S. §67.305. Here, the Township asserts that the e-mails sought in the Requests do not qualify as records “of the Township” because they were created by Township Supervisors on their own personal computers and/or e-mail accounts and were not copied to the Township. The Township also argues that the burden of proof under the current RTKL to show a record is “public” is placed upon the Citizen, other than for exceptions asserted under Section 708(b).

With regard to the public nature of the records at issue, the Township argues two separate legal grounds for its Denials: (1) the e-mails do not qualify as “public records” as defined in the RTKL because e-mails copied to the Solicitor may be soliciting legal advice, and so qualify for protection under the attorney-client privilege; and (2) the Harris E-mail is protected under Section 708(b)(10)(i), the predecisional deliberative exception. In addition, the Township contends that it is not obligated to provide records pre-dating the RTKL effective date, because that would violate the general rule against retroactivity. Each argument is addressed.

1. The Township has a duty to provide records pre-dating January 1, 2009.

The Township contends with regard to both Requests that the Township has no obligation to respond because that would require a retroactive application of the RTKL contrary to the principles of statutory construction. The Township contends that the Statutory Construction Act, 1 Pa. C.S. §1926, provides that laws should not be construed to apply retroactively unless the law explicitly so states. The Township interprets the retroactivity prohibition to mean that the RTKL cannot apply to any records created prior to its effective date of January 1, 2009. Accepting the Township's position *arguendo*, then an agency has no duty to disclose any records created prior to the effective date. The OOR finds the Township's analysis seriously flawed.

The OOR concludes that the retroactivity prohibition is not implicated in the Requests. Both Requests were submitted subsequent to January 1, 2009, such that the current RTKL applies. Because the RTKL took effect on January 1st, and repealed its predecessor, any and all requests submitted subsequent to that date are analyzed based upon the current RTKL. The RTKL does not preclude requesters from submitting requests for records created prior to the effective date, and to construe the statute in that manner would leave citizens without a mechanism to obtain public records. Statutory construction principles do not permit such an absurd result. The OOR thus finds the e-mails from 2007-2008 are subject to the RTKL.

2. The E-mails sought in the Requests qualify as records "of an agency."

The Township contends that the e-mails requested by the Citizen do not qualify as public records because they are not "records," "of an agency" and do not qualify as records in "possession" of the Township. The Township relies upon its construction of "possession" as limited to physical possession, unless the Township contracts with a third party to provide a governmental function in accordance with Section 506(d). A review of the Requests and the Township's legal arguments reveals that these e-mails are records that may be presumed public.

'Record' is defined as "information... that documents a transaction or activity of an agency and that is created, received, or retained pursuant to law *or* in connection with a transaction business or activity of the agency." 65 P.S. §67.102. On their face, the requests seek information that documents activity of the Township through its Supervisors, in connection with business of the Township, *i.e.*, nomination of officers. Thus, the e-mails at issue qualify as "records" as that term is defined in the RTKL.

The Township contends that e-mails sent or received by Township Supervisors, if not "copied to the Township" are not records "of the agency" and cannot be deemed to be within the Township's possession. The OOR finds this argument unpersuasive. The Commonwealth Court recently undertook thorough statutory construction of duties to disclose in the RTKL context under the prior law, 65 P.S. §66.1 *et seq.* ("Old Law"). *See Lukes et al. v. DPW*, 2009 Pa. Commw. LEXIS 452 (June 3, 2009). In *Lukes*, the Court recognized that physical possession of a record is not the litmus test of an agency performing its duties of disclosure, rather it is *control*.

An agency must obtain records from third parties, even if it never had physical possession of the records, in order to meet its statutory duty as part of performing its diligent search and inquiry for responsive records. *Id.* In recognition of the purpose of the RTKL, the Commonwealth Court explained that to permit an agency to relieve itself of responsibility after determining that it does not have physical possession of a record does a disservice to openness.

The Court reasoned

While DPW does not, at the present time, physically possess copies of the Provider Agreements, DPW has undeniable access to and can exert control over the Provider Agreements. DPW does not have the right to evade disclosure of public documents by keeping these records with the Health Plan. We, therefore, conclude that the Provider Agreements are "maintained" by DPW and are "records" for purposes of the Law. To conclude otherwise would promote the very mischief the Law seeks to remedy by permitting agencies to place records in the hands of third parties to circumvent disclosure.

Id. at *29.

The OOR concludes that e-mails of Township Supervisors are within Township control. To conclude otherwise would ignore the reality that the Township Supervisors are a crucial part of the Township and as the *de facto* governing body, may compel themselves to furnish any and all copies of responsive e-mails maintained that pertain to the nominations at issue. The OOR also concludes that the possession or control over records is not dictated by whether the Township funds defray cost of or provide personal computer service to its Supervisors. Were the non-payment for or non-ownership of computers or computer access to be sufficient to preclude public access to records of an agency, then any agency could conduct its business and activities on private computers or communicate about matters it wants to remain secret via private e-mail accounts.

With regard to the contention that the Township cannot be obligated to obtain its Supervisor's e-mails because no contract for performance of a government function exists, the OOR finds this contention as wholly without merit and a misconstruction of Section 506(d). Section 506(d) addresses "Agency Possession," and as to those records "of an agency" that are in possession of a party with whom the agency has contracted to perform a governmental function, and which relates to that governmental function, the RTKL requires an agency to obtain that record. However, Section 506(d)(1) cannot be reasonably construed to mean that the only time that an agency is required to provide a record that is outside its physical possession is when the agency contracts for a governmental function. Here, to intimate that a contract is necessary to reach the e-mails is illogical as the Supervisors perform the essential governmental function of governance of the Township, and need not have a contract to so state. Further, as the OOR has previously determined, record that are within the control of an agency must be obtained if held by a third party, absent a contract. *See Signature v. Montgomery Tp.*, OOR Dkt. AP 2009-0289.

Electronic correspondence among Township Supervisors relating to Township business qualifies as Township records because they document communication of its governing body.³ The e-mails sought in the Requests address Township business or activities, and thus qualify as records of the Township that must be disclosed absent protection by an exemption. Given the fact that the Supervisors have control over themselves and their own computers, the OOR concludes that the Township did not comply with its obligation to perform a diligent search among the Township representatives in possession of the records and provide the public records.

3. The Township fails to establish that the attorney-client privilege applies here.

In both its Denials and its Letter Memorandum, the Township contends that e-mails sent among Supervisors are protected under the attorney-client privilege because if e-mails by and/or between Township Supervisors exist, they were likely copied to the Solicitor. However, the Township did not demonstrate any of the elements needed to establish the privilege, and assumed, rather than substantiated, the inclusion of the Solicitor upon all the e-mails in question. The attorney-client privilege does not extend to all communication to or from a Solicitor as the Township assumes, and do not cloak Township e-mails that merely copy or inform the Solicitor.

Pennsylvania case law holds that the attorney-client privilege has a number of requirements that must be satisfied in order to trigger its protections, *Slater v. Rimar, Inc.*, 462 Pa. 138, 147, 338 A.2d 584, 589 (1975), none of which are present here. The privilege applies only to confidential communications made by a client to an attorney related to providing legal services. *Id.* E-mails between two Supervisors are not for the purpose of obtaining legal advice, which is the only proper subject for the assertion of the attorney-client privilege. The mere

³ Although the Citizen focuses upon the impropriety and potential Sunshine Law violation attendant to communications between a quorum of Supervisors, *i.e.*, two out of three, under 65 Pa. C.S. §704, the OOR notes that the RTKL does not offer the remedy, and to the extent a Sunshine Law violation may have occurred, that issue is beyond the purview of the OOR and must be addressed in the proper forum.

copying of an e-mail to a Solicitor is not sufficient to trigger the privilege as the OOR advised the Township in prior Final Determinations, OOR Dkt. AP 2009-0042, AP 2009-0058. The Citizen's Requests do not seek e-mails to or from the Solicitor, and to the extent that any of the e-mails solicited legal advice from the Solicitor, the Township needed to substantiate that fact.

As the OOR held in *Zubey v. Department of Environmental Protection*, OOR Dkt. AP 2009-0141, application of the attorney-client privilege must be shown, not merely asserted. Pennsylvania law requires the party asserting the privilege to establish the elements, including showing that the communications at issue are confidential and made by a client to an attorney related to provision of legal services. *Slater v. Rimar, Inc.*, *supra* at 147, 338 A.2d at 589. Case law holds that four criteria must be met to establish the privilege: (1) the holder of the privilege is a client; (2) the attorney as an integral party to communication; (3) the communication was made confidentially for the purpose of securing or providing legal advice; and (4) the privilege is not waived. The Township did not submit any facts to demonstrate these four criteria, which is a predicate to showing the record is non-public such that the burden would shift to the requester.

Unlike the Department in *Zubey*, no statement of counsel attesting that the four criteria are met was submitted, nor was a log of the e-mails at issue submitted, showing inclusion of the attorney as party to the communication and basic subject matter submitted. The Township did not submit material to establish that "the communication was made confidentially for the purpose of ... legal advice" as required to show the privilege applies in the first instance. Rather, the Township contends in its Letter Memorandum that the burden of showing a communication qualifies as attorney-client privileged rests on the requester. The OOR holds as a matter of law that the burden of establishing the existence and application of a privilege to preclude a record from the definition of "public record," rests squarely and solely upon the agency asserting it.

The OOR does not disagree with the Township that once the privilege is shown to apply, that the burden is then upon the requester to show that the substance of the information should be disclosed in spite of its privileged nature. As the e-mails are described in the Requests, or as the Harris E-mail was described during the public meeting, the e-mails did not seek legal advice. As e-mails from the Solicitor are not requested, the e-mails would not convey legal advice.

The RTKL is clear that the agency must overcome the legal presumption of openness, and show that a record does not qualify as public because it is privileged. *See* 65 P.S. §67.305. The Township failed to show the application of the privilege,

4. The Township failed to establish that the Harris E-mail is protected by the predecisional deliberative exception.

The Township asserted that the Harris E-mail, which was discussed by Supervisor Harris at the January reorganization meeting, and the substance of which was clearly Township business, as to the nomination of a future officer, was protected from disclosure under Section 708(b)(10)(i). Section 708(b)(10)(i)(A) provides that “a record that reflects the internal, predecisional deliberations of an agency... relating to a...contemplated or proposed policy or course of action or any research, memos, or other documents used in the predecisional deliberations” are protected from disclosure. *See* 65 P.S. §67.708(b)(10)(i)(A). To qualify for protection under this exception, three elements are required: (1) the record must be internal to the agency claiming protection; (2) it must be predecisional, so an indication of a decision to come must be shown; and, (3), it must be “deliberative” in character, meaning the record sought must *reflect* an agency’s deliberations, and relate to a proposed policy or course of action for the agency. *See Schmitz v. Pa. Turnpike Comm’n*, OOR Dkt. AP 2009-0321 (citing *LaValle v. OGC*, 564 Pa. 482, 496, 769 A.2d 449, 458 (2001) (interpreting meaning of “internal predecisional deliberations” in context of the prior RTKL)).

In this case, the Township did not submit any facts to show any of the three required elements. The OOR cannot presume that each of these elements exists based upon the assertions contained in the Letter Memorandum. Based on the record, the Harris E-mail was sent by Supervisor Harris to other Supervisors regarding the nomination for Zoning Officer and whether either had an objection to that potential nominee. The OOR notes that a decision was clearly contemplated based upon the facts of record, and that one was rendered at some point, and that the solicitation of Supervisors likely occurred prior to that decision. Moreover, the type of communication may have been deliberative in character as the nomination of a Zoning Officer seeks recommendations. However, none of these requisite facts were submitted to the OOR and the OOR cannot presume them to exist despite their likelihood under the circumstances.

The RTKL is clear that “the burden of proving that a record of a ...local agency is exempt from public access shall be on the ... local agency receiving a request by a preponderance of the evidence.” 65 P.S. §67.708(a). To prove by “preponderance of the evidence” means to prove by the “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). Here, the Township submitted no evidence to exempt the Harris E-mail from public view. Since the Township did not provide adequate legal or factual grounds to show that the e-mails relating to Township business with respect to the nominations for Zoning Officer sent by/to Township Supervisors are exempt from disclosure under the predecisional deliberative exception, the Township did not meet its burden of proof and they must be disclosed.

CONCLUSION

For the foregoing reasons, the Citizen’s Appeal is **granted**. The OOR finds, consistent with its prior Final Determinations on this issue that e-mails of Township Supervisors regarding Township business are records “of” the Township because they are communications by and

through its governing body about Township business and/or activities. The OOR also concludes that the Township did not overcome the presumption of openness by showing that the records requested were privileged communications. Further, the OOR concludes that the Township failed to meet its burden of proof that the Harris E-mail and related e-mail(s) it shielded under Section 708(b)(10)(i) qualify as predecisional deliberations. Accordingly, the Township is directed to procure and provide the requested Supervisor e-mails within thirty (30) days.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Montgomery County Court of Common Pleas. 65 P.S. §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. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: July 8, 2009



LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: James L. Mollick, MD; Joseph Bagley, Esq., Counsel for Worcester Township