



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

**In the Matter of
MARC KAPLIN,
Complainants**

v.

**LOWER MERION TOWNSHIP,
Respondent**

:
:
:
:
:
:
:
:
:
:
:

Docket No. AP 2010-0125

INTRODUCTION

Mr. Marc Kaplin, Esquire (the “Requester”) submitted a request to Lower Merion Township (“the Township”) pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”) seeking records related to a pending Conditional Use Application. The Township partially granted the request, but denied access to records that it considered exempt pursuant to section 708(b)(10)(i) or the attorney-client privilege. The Requester timely appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the Requester’s appeal is **granted in part** and **denied in part**, and the Township is required to take further action.

FACTUAL BACKGROUND

On December 21, 2009, the Requester submitted a right-to-know request to the Township seeking records related to particular properties, a pending Conditional Use Application (“Application”), recreational trails and the Pencoyd Bridge. On January 21, 2010, after extending the deadline to respond, the Township partially granted the request. It denied access to those

records that it considered exempt by 1) section 708(b)(10)(i) because the records reflect the internal, predecisional deliberations regarding the conditional use application or 2) the attorney client privilege because the records are communications between/among Township staff and special counsel to the Township regarding the Conditional Use Application. On February 11, 2010 the Requester timely appealed to the OOR. In support of his position he provided a brief history of the matter that was the subject of the records request which is summarized as follows:

The Requester represents Righters Ferry Association, LP (“RFA”). The RFA sought to obtain permission for a conditional use of the property from the Township Board of Commissioners (“Board”). The Board held several hearings on the RFA Application ending December 9, 2009. The period for deliberation and a decision began after the record closed on December 9, 2010. At the hearings, the Township entered its appearance as an opposing party to the RFA application. Special counsel for the Township, Barry Pritchard, Esquire, participated in the hearings by cross-examining RFA’s witnesses and presenting the Township’s own evidence through several Township employees. The Township’s solicitor represented the Board. Owners of properties adjacent to the RFA property also entered their appearance in the hearings in opposition to the RFA application.

In his appeal, the Requester argues that the cited exceptions do not apply. He explains that the Request covers January 1, 2008 to December 9, 2009. He asserts that records of Township staff cannot be protected as predeliberative as the Township staff have no authority to make a decision regarding the Application and it would be improper for the Board to be deliberating with staff members as the “Township staff was engaged in hostile actions to prohibit RFA’s Application.”

This is not disputed by the Township as the Township Solicitor’s office, High Swartz, admitted that the Board is its client in the Conditional Use Application litigation, not the Township, which hired its own special counsel to represent it in hearings held before the Board.

The Township and the Board identified themselves as separate entities for the purpose of attorney representation during the Application hearings in order for the Township to present evidence to the Board opposing the RFA Application. See Viola Affidavit, ¶6,7; High Affidavit, ¶4; Pritchard Affidavit, ¶ 2, 4.

The Gilbert High, Esquire, on behalf of the Township, supplemented the record with the sworn affidavits of Brenda Viola, Township secretary, and Barry Pritchard, Jr., Esquire, special counsel to the Township, as well as his own sworn affidavit, regarding the asserted exceptions.

A. Predeliberative Decisional Exemption Asserted for Nine Pages of Emails.

The Township asserts that nine (9) pages of emails between Township staff and/or individual Board members were withheld pursuant to the exemption for predecisional deliberations set for in Section 708(b)(10). Ms. Viola attests that these 9 pages of emails are “an exchange of information concerning the timing of the deliberative process leading up to a decision on the conditional use application by the Board of Commissioners, the manner in which the deliberations will take place, who will participate in those deliberations and how the final written decision will be prepared.” *Viola Affidavit*, ¶ 4.

B. Attorney-Client Privilege Asserted for 32 pages of Emails

The Township asserts that the attorney-client privilege applies to 32 pages of emails that have been withheld. No other grounds for denying access were asserted. Of the thirty-two pages “[eleven] pages of documents exchanged between members of the Township staff and Mr. Pritchard in conjunction with his representation” were identified. *Viola Affidavit*, ¶7. The Township explains that Barry Pritchard, Esquire was retained by the Township as special counsel in conjunction with the presentation of evidence in the hearings before the Board relating to the Application. *Viola Affidavit*, ¶ 6, *Pritchard Affidavit*, ¶ 2. The eleven withheld records are “an exchange of information and

advices related to the substance of testimony to be presented to the Board of Commissioners including a multi-page outline of the testimony to be presented by one witness.” *Pritchard Affidavit*, ¶ 4; *Viola Affidavit*, ¶7. Attorney Pritchard further attests that “the balance of the documents are an exchange of emails between myself and members of the Township staff containing advice, asking questions and transmission of exhibits to be used by me and Township witnesses in the presentation of testimony to the Board.” *Id.*

The Township also identified nineteen pages of emails between HighSwartz and the Board that were withheld. Gilbert High, Esquire, of High Swartz, stated that “I have been retained by the Township [] as its Solicitor. In the course of that representation our office has provided counsel to the Board of Commissioners concerning a conditional use application filed on behalf of [RFA].” *High Affidavit*, ¶2. The Township identified the withheld records as “[nineteen] pages of emails exchanged between [High Swartz] and members of the Board wherein advice was sought and provided regarding allegations contained in a 12-page letter dated November 16, 2009 received from [the Requester] and containing legal argument.” *Viola Affidavit*, ¶8; *High Affidavit*, ¶ 4. “[The letter] was previously provided to [the Requester].” *Viola Affidavit*, ¶8.

Finally, the Township identified two additional emails that were withheld. It described those emails as being correspondence “to and from the [HighSwartz] and Township staff seeking and providing advice concerning the process of deliberation relating to the conditional use decision.” *Id.*

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The Township is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.302. Records of a local agency are presumed “public” unless the record is: (1) exempt under Section 708(b); (2) protected by a privilege; or (3) exempt from

disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305. The Township contends Section 708(b)(10) and the attorney-client privilege protects those records that it has withheld from disclosure. Each exception is addressed in turn.

1. Section 708(b)(10) Protects Internal Communications.

Section 708(b)(10)(i) protects records that reflect “internal, predecisional deliberations of an agency... or predecisional deliberations between agency members, employees or officials...”. 65 P.S. §67.708(b)(10)(i)(A). Under Section 708(a), the Township must show that a claimed exception applies by a preponderance of the evidence meaning by the “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). The OOR has consistently held that to establish this exception, an agency must show the communication is: (1) ***internal*** to the agency, including representatives, (2) ***predecisional***, meaning it was made before a decision was made; and (3) ***deliberative in character*** in that it makes recommendations or expresses opinions on legal or policy matters. Purely factual information is not protected by this exception. *Com. v. Vartan*, 557 Pa. 390, 733 A.2d 1258 (1999).

The Township represented that the withheld emails are “an exchange of information concerning the timing of the deliberative process leading up to a decision on the conditional use application by the Board of Commissioners, the manner in which the deliberations will take place, who will participate in those deliberations and how the final written decision will be prepared.” Viola Affidavit, ¶4.

The Township staff and Board have represented in this appeal that they are separate parties, represented by different attorneys, for purposes of the Conditional Use Application

hearing. Therefore, emails between Township staff and the Board related to the Conditional Use Application hearing are not internal in the context of this appeal and the exemption does not apply.

2. The Attorney-Client Privilege.

The attorney-client privilege applies to “confidential communications” made in connection with providing legal services. *Slater v. Rimar, Inc.*, 462 Pa. 138, 148, 338 A.2d 584, 589 (1975); *Com. v. DuPont*, 1999 Pa. Super. 88, 730 A.2d 970 (1999), *app. den.*, 561 Pa. 669, 749 A.2d 466 (2000); *Gocial v. Indep. Blue Cross*, 827 A.2d 1216 (Pa. Super. 2003). Courts have developed a four-part test to assess whether a communication qualifies as “privileged”: (1) the holder of the privilege is a client; (2) the attorney is an integral party to communication; (3) the communication is made confidentially for the purpose of securing or providing legal advice; and (4) the privilege is not waived. *Slater v. Rimar, supra*.

The Township has represented through the affidavit of its attorney, Barry Pritchard Jr., Esquire, and its open records officer that the 11 pages of emails withheld are between Attorney Pritchard and his client during the Application hearings, the Township.. The subject of the emails is the litigation pending on the Application, and the communications were made for the purpose of obtaining or providing legal advice. Communications by and between special counsel and his client in the course of litigation regarding the case, are “confidential communications” that qualify for privileged protection. There is no evidence that the privilege has been waived. The Township is not required to provide those emails.

As to the 19 pages of emails between High Swartz and the Board, the Township provided sufficient evidence in the form of the Affidavit of Ms. Viola and Attorney High that the attorney-client privilege also applies to those emails because High Swartz represented the Board in regard to the matter of the Application hearings and his office is an integral party to the communications

made for the purpose of securing or providing legal advice regarding a letter received by the Board during and regarding the Application hearings. However, under Pennsylvania law privilege can be waived in certain circumstances where the communication is made to a third party. *Nationwide, supra*, 2007 Pa. Super. 145. In the instant matter, there is undisputed evidence in the record that the 19 pages of emails between the Board and its attorney were communicated to the Township. The Township open records officer states in her affidavit on behalf of the Township that “I have also been provided with and have withheld 19 pages of emails exchanged between [High Swartz] and members of the Board [] wherein advice was sought and provided regarding allegations contained in a [] letter dated November 16, 2009 received from [the Requester].” Viola Affidavit, ¶ 8.

As set forth above, the Township and Board are separate for purposes of the Conditional Use Application hearing in which the Township presented evidence and the Board adjudicated. Generally, a board or governing body of a township, along with its staff, are, for purposes of the RTKL, the township itself and no distinction is made between the two. However, in this matter, the Township and Board identified themselves as separate entities and each had legal representation for the Application hearings in order for the Township to present evidence to the Board opposing the RFA Application. *See* Viola Affidavit, ¶6,7; High Affidavit, ¶4; Pritchard Affidavit, ¶ 2, 4. Therefore, there is substantial evidence that the privilege was waived as to the Board’s and its attorney’s communications, because they were communicated to a third party, the Township. The Township does not assert any other grounds for withholding the records, therefore, the Township is required to provide the withheld 19 pages of emails.

Finally, as to the additional two pages of emails to and from High Swartz, regarding the process of the deliberations relating to the Conditional Use Application, the attorney-client

privilege does not apply. As discussed above, the Township is not High Swartz's client in the matters related to the Conditional Use Application. The Township does not assert any other grounds for withholding the records. Therefore, the Township is directed to provide these emails.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part and denied in part**. The Township is directed to provide the nine (9) emails withheld pursuant to the asserted pre-deliberative exemption. It is also required to provide the nineteen (19) emails between High Swartz and the Board which were communicated to the Township and the two (2) emails between High Swartz and the Township as set forth above. The Township is not required to provide the 11 emails between attorney Pritchard and the Township. 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. §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. This Final Determination shall be placed on the website at <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: March 26, 2010



AUDREY BUGLIONE, ESQ.
APPEALS OFFICER

Sent to: BRENDA VIOLA, MARC KAPLIN, ESQUIRE