



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**JAMES MOLLICK,
Complainant**

v.

**WORCESTER TOWNSHIP,
Respondent**

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Docket No. AP 2010-0863

INTRODUCTION

James Mollick, (the “Requester”) submitted a request to Worcester Township (the “Township”) pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”) seeking e-mails sent to a Supervisor relating to an appeal of a final determination and/or another Supervisor. The Township denied the request as disruptive, for insufficient specificity, privileged attorney-client communication and denied any e-mails sent on personal computers/personal accounts. The Requester timely 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 July 22, 2010, the Requester submitted a right-to-know request seeking

1. Any and/or all e-mails from Solicitor Jim Garrity to John Harris regarding the decision and/or appeal of OOR Docket No. 2009-1064 since January 4, 2010.
2. Any and/or all e-mails from John Harris to Solicitor Jim Garrity regarding the decision and/or appeal of OOR Docket No. 2009-1064 since January 4, 2010.
3. Any and/or all e-mails from Solicitor Jim Garrity to John Harris regarding the "Susan Caughlan

Overhill Driveway situation" since January 4, 2010.

4. Any and/or all e-mails from John Harris to Solicitor Jim Garrity regarding the "Susan Caughlan Overhill Driveway situation" since January 4, 2010.

5. The e-mail sent by Solicitor Jim Garrity to John Harris on February 15, 2010 concerning Township business and/or the "Susan Caughlan Overhill Driveway situation".

6. The e-mail sent by Solicitor Jim Garrity to John Harris on February 15, 2010 concerning Township business and/or the decision and/or appeal of OOR Docket No. 2009-1064.

7. Any and/or all e-mails sent by Solicitor Jim Garrity to John Harris making any reference, suggestion or inquiry as to whether there were any "personal" e-mails on home, private or personal computers regarding the "Susan Caughlan Overhill Driveway situation" for the past 3 years, including the e-mail transmitted by Mr. Garrity to Mr. Harris on February 15, 2010.

8. Any and/or all e-mails sent by Solicitor Jim Garrity to John Harris dealing with home, private and/or personal computers and/or personal e-mails and/or the "Susan Caughlan Overhill Driveway situation" for the past 3 years.

9. Any and/or all e-mails sent by Solicitor Jim Garrity to John Harris dealing with searching home, private and/or personal computers for personal e-mails pertaining to the "Susan Caughlan Overhill Driveway situation" for the past 3 years.

10. Any and/or all e-mails sent by Solicitor Jim Garrity to the Worcester Board of Supervisors collectively and/or individually dealing with home, private and/or personal computers and/or personal e-mails regarding the "Susan Caughlan Overhill Driveway situation" for the past 3 years.

11. Any and/or all e-mails sent by Solicitor Jim Garrity to the Worcester Board of Supervisors collectively and/or individually regarding searching home, private and/or personal computers for personal e-mails pertaining to the "Susan Caughlan Overhill Driveway situation" for the past 3 years.

12. Any and/or all e-mails sent by Supervisor Arthur Bustard to Solicitor Garrity dealing with home, private and/or personal computers and/or personal e-mails and/or the "Susan Caughlan Overhill Driveway situation" for the past 3 years.

13. Any and/or all e-mails sent by John Harris to Solicitor Garrity dealing with home, private and/or personal computers and/or personal e-mails and/or the "Susan Caughlan Overhill Driveway situation" since January 4, 2010.

14. Any and/or all e-mails sent to Supervisor Steve Quigley dealing with home, private and/or personal computers and/or personal e-mails regarding the "Susan Caughlan Overhill Driveway situation" for the past 3 years.

15. Any and/or all e-mails sent to Supervisor Steve Quigley by Solicitor Jim Garrity regarding the "Susan Caughlan Overhill Driveway situation" since January 4, 2010.

16. Any and/or all e-mails from Solicitor Jim Garrity to Supervisor Quigley regarding the decision and/or appeal of OOR Docket No. 2009-1064 since January 4, 2010.

17. Any and/or all a-mails from Solicitor Jim Garrity to the Worcester Board of Supervisors collectively and/or individually and/or the Township Manager and/or the Assistant Township manager and/or any Township employee regarding the "Susan Caughlan Driveway situation" at 2686 Overhill Drive including the e-mail in which Mr. Garrity suggested waiving the attorney-client privilege to put the issue to bed once and for all by divulging the contents of a written opinion that he had prepared. I would like these for the last 3 years.

18. Any notes, memo's, faxes, messages, etc. regarding the Susan Caughlan Overhill Driveway situation and/or the OOR decision and/or appeal docket 2009-1064 for the past 3 years to present.

(the "Request").

Eunice Kriebel, Open Records Officer (ORO), timely responded invoking a thirty-day extension. The Township denied access as follows:

Part 1 as disruptive because access to the e-mail sent February 15, 2010 by Solicitor Garrity to Supervisor Bustard and ex-Supervisor Harris ("E-mail") had been sought three times before, including in a prior appeal holding it privileged as an attorney-client communication. *See Mollick v. Worcester Tp.*, OOR Dkt. AP 2010-0557. The Township asserts that the burden of proof is upon the Requester to prove the privilege does not apply citing *Silberstein v. MacNeal*, Dkt. No. 009-SU-004714-08 (York CCP 2010) in support.

Parts 2, 3, 4 as non-existent based upon a search of Township files and asserts that individuals like Harris are not a "local agency" and so not capable of being public records.

Parts 5, 6, 7, 8, 9, 10, 11, 13 as having one responsive record, being the E-mail which is privileged and has been sought repeatedly, constituting a disruptive request. The Township advises that the Township does not retain e-mails of a personal nature

Part 12 for the reasons above and as insufficiently specific under Section 703. The Township advises that one record that may be responsive is an e-mail from Supervisor Bustard to Solicitor Garrity sent February 15, 2010 ("Bustard E-mail"), which was addressed in the prior appeal, AP 2010-0557, and held to be privileged as attorney-client communication.

Parts 14, 16 and 17 as disruptive since responsive records were previously provided.

Part 15 as disruptive as the records do not exist and no additional records are responsive since his earlier February request.

Part 18 as insufficiently specific to the extent it seeks records regarding the OOR decision and or appeal docket 2009-1064. Based on the understanding it pertains to the OOR Dkt. AP 2009-1064, the Township denies as disruptive, and notes that certain responsive records relate to the noncriminal investigation involving an alleged zoning violation, and incorporated and attached its prior responses to the previous requests by Requester made on October 25, 2009, February 22, 2010, April 12, 2010 and April 22, 2010.

("Denial").

The Requester timely appealed as to Parts 1, 5 through 9 arguing that the Township's prior responses were incomplete and claims did not include an e-mail from the Solicitor to John Harris ("Appeal"). He acknowledges he made prior requests and attached copies of them and the Township's prior responses. By way of background, the Requester explains that the Township identified three e-mails as responsive: (1) an e-mail sent on February 15, 2010 from Supervisor Bustard to Solicitor Garrity; (2) an e-mail sent on February 15, 2010 from Solicitor Garrity to Supervisor Bustard; and (3) an e-mail sent on February 16, 2010 from Solicitor Garrity to Supervisor Caughlan. He explains the Township disclosed e-mails relating to impending litigation when the Solicitor appealed the OOR's decision in *Mollick*, OOR Dkt. AP 2009-1064 without Township approval, namely the February 16th e-mail in unredacted form. He contends that since the content of the Caughlan e-mail did not meet the elements needed for the attorney-client privilege, the Solicitor's affidavit regarding its privileged nature is "compromised."

The Requester contends the Request is not disruptive because he had never before specifically identified an e-mail to ex-Supervisor Harris ("Harris E-mail"), and the e-mail was not previously produced. The Harris E-mail, since it was sent to a private citizen, cannot be privileged as Harris was not a client as of January. He also argues that the Township/Solicitor did not make a good faith effort to respond or it would have identified the Harris E-mail. He attached a DVD of parts of the meetings on February 17, 2010 and March 17, 2010, when he questioned the Supervisors about communications to the Solicitor about appealing *Mollick*, AP 2009-1064 to court. He also attached the Solicitor e-mail to Caughlan which states that he checked with Harris regarding whether he has personal e-mails on the "Susan Caughlan driveway issue," implying existence of an e-mail to Harris, and indicating non-privileged contents. The Appeal focuses upon the e-mail(s) from Solicitor Garrity to John Harris as related to Township issues.

The Township supplemented the record with an affidavit of Solicitor James Garrity attesting that only the Harris E-mail is potentially responsive to Parts 1, 5 through 9 of the Request (“Solicitor Affidavit”). He attests that the Township made a good faith effort to obtain responsive e-mails from ‘the agency’ and advises the Requester has submitted 24 part requests to which the Harris E-mail is potentially responsive. He attests to the cost for attorneys’ fees incurred by the Township in order to respond to the Requester’s numerous requests. The Solicitor advises the Harris E-mail is privileged as the OOR held in *Mollick v. Worcester Township*, OOR Dkt. AP 2010-0557 as the subject-matter pertained to allegedly impending litigation involving *Mollick*, AP 2009-1064. The Township also submitted a legal memorandum in which it argues that the Requester previously requested all e-mails pertaining to *Mollick*, AP 2009-1064 and Susan Caughlin’s driveway.

The Requester responded to the Township’s submission, asserting it waived the privilege. He advised that he seeks an affidavit regarding the claimed non-existence of records in Parts 2, 4 and affidavits in support of its denial for Parts 10 through 16 and claims none of the requests are disruptive. The Requester asks the OOR to determine whether the Harris e-mails at issue here and the Bustard e-mails from prior appeals were transmitted on a personal computer or Township computers. Given the size of the record and incorporation of prior requests and appeals addressed, the Requester extended the due date of the Final Determination to November 9th.

This Appeal is limited to Request Parts 1, 4, 5, 6, 7, 8 and 9 because the Requester states at the end of his appeal in bold **“These are the only requests that I will be appealing.”** Therefore, only those parts of the Request seeking e-mails to Harris are properly on appeal.

LEGAL ANALYSIS

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). 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.” 65 P.S. §67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing and the OOR has the requisite and necessary information and evidence, provided through sworn written testimony, to properly adjudicate the matter.

The Township is a local agency required to disclose public records. *See* 65 P.S. §67.302. Records in possession, custody or control 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. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. §67.708(b). Here, the Township withholds the Harris E-mail asserting the Requester is “disruptive” under Section 506(a), re-asserts the attorney-client privilege, and notes the OOR held the Harris E-mail to be exempt as attorney-client privileged in AP 2010-0557.

There is no dispute that the Requester previously requested all e-mails pertaining to Susan Caughlan’s driveway issue and/or *Mollick*, AP 2009-1064. The dispute surrounds the Township’s responses to the prior requests, in particular its alleged failure to specifically identify the Harris E-mail until the day the record closed in AP 2010-0557. In this Appeal, the facts are

clarified and undisputed that Harris was an *ex*-Supervisor on February 15, 2010. The Requester argues that the failure to identify the e-mails in the prior requests and appeals as including Harris is significant because he was not a client of the Solicitor at the time the Harris E-mail was sent.

1. The Township did not establish that the Request is disruptive.

Under Section 506(a), an agency can establish that a requester is disruptive by showing that he has made repeated requests for the same records and that the “repeated requests” have placed an “unreasonable burden on the agency.” The Township submitted that the Request repeats a number of earlier requests for e-mails about the *Mollick*, AP 2009-1064 appeal or Susan Caughlin’s driveway. However, the Request in Parts 5 and 6, seeks e-mails from the Solicitor to Harris about Township business generally in addition to those specific subjects. Moreover, the Township argues in its memorandum that the “relevant requests” previously submitted by the Requester sought e-mails to or from the Supervisors “while in office.” (Emphasis in original.) Thus, the Township concedes that the prior requests did not seek e-mails to Harris while he was an *ex*-Supervisor, as the Request does here.

The Township made a strong case that the numerosity and complexity of the Requester’s requests overall place an unreasonable burden, financial and logistical, on the Township. But to establish disruptive requester, the Township must also show that the requests are made for the same records. From careful reading of the numerous requests, that is not the case here and the Township may be liable for disclosing e-mails from its Solicitor, sent on its behalf, to a non-client who is not an agent of the Township at the time sent.

2. The Harris E-mail is not subject to the attorney-client privilege.

The Solicitor argues that the e-mail sent to Harris while he was no longer a Supervisor governing the Township remains privileged as a confidential attorney-client communication

because if the privilege “can be lost at the end of the attorney-client relationship as to events which occurred during the relationship, then the privilege has no meaning at all.” (Emphasis in original.) The OOR disagrees. Once Harris was no longer a Supervisor, he was no longer a governing member of the Board of Supervisors for the Township, and thus not part of the local agency client. When an employee or official leaves a local agency, the client relationship no longer exists, and an element of the attorney-client privilege is absent.

The Township fails to establish that it satisfied the four elements needed for the attorney-client privilege to attach under *Slater v. Rimar*, 462 Pa. 138, 148, 338 A.2d 584, 589 (1975),¹ because its conclusion is based upon the flawed assumption that Harris remained a client after his status as a Township Supervisor ended. As Harris is no longer a client, he is a third party to whom attorney communications are not privileged. See *Nationwide Mut. Ins. v. Fleming*, 2007 Pa. Super. 145, 924 A.2d 1259 (2007) (relating to waiver of the privilege). Also, any communications to him cannot be to seek or provide legal advice because he is not a client receiving legal services. As a matter of law, the attorney-client privilege does not apply to the Harris E-mail, and it may not be withheld on that basis.

The Township also argues that the OOR already held the Harris E-mail to be privileged in *Mollick v. Worcester Township*, OOR Dkt. AP 2010-0557. However, in that appeal the e-mail was characterized by the Township as correspondence to two Township Supervisors relating to impending litigation, and the status of Harris was not explained as that of a past-Supervisor *at the time the Solicitor sent the e-mail at issue*. Had the status of Harris as a non-client, and non-Supervisor been clear, the OOR would not have upheld exemption of the e-mail as privileged. The presentation of these additional material facts enables the OOR to rectify that error now.

¹ To meet the test, the agency asserting the privilege must show the following: (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.

The OOR notes that as an ex-Supervisor, Harris is no longer presumptively within Township control as he is no longer part of the local agency. Thus, to the extent the Request sought any e-mails on Harris' personal computer, the Township has no legal obligation to obtain them under Section 901. There is no dispute that the Harris E-mail is within the Township's possession and control, and thus must be disclosed.²

CONCLUSION

For the foregoing reasons, the Requester's Appeal is **granted in part and denied in part**, and the Township is directed to disclose the Harris E-mail to the Requester within thirty (30) days. The Township is not required to obtain e-mails from Harris' personal computer.

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 as per Section 1303. This Final Determination shall be posted on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: November 5, 2010



LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Dr. James Mollick; M. Joseph Clement, Esq. for Township

² The Montgomery County Court of Common Pleas recently held that e-mails of Township Board of Supervisor members created on their personal home computers are not public records subject to disclosure under the RTKL in *Township of Worcester v. Office of Open Records, et al.*, No. 09-09584 (Montg. CCP Sept. 22, 2010) as they are not records 'of' the agency or within its possession. While the OOR disagrees, *see Bowders v. York Twp.*, OOR Dkt. AP 2009-0087, 2009 PA O.O.R.D. LEXIS 138, it shall apply this holding in appeals arising in Montgomery County unless a higher court rules otherwise.