



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
MARK FAZLOLLAH on behalf of	:	
<i>The Philadelphia Inquirer,</i>	:	
Complainant	:	
	:	Docket No.: AP 2010-1189
v.	:	
	:	
PHILADELPHIA HOUSING	:	
AUTHORITY,	:	
Respondent	:	

INTRODUCTION

Mark Fazlollah, a reporter for *The Philadelphia Inquirer*, (the “Requester”) submitted a request (the “Request”) to the Philadelphia Housing Authority (“PHA”) seeking correspondence between certain individuals pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”). PHA partially denied the Request, stating that certain records were protected by the attorney-client privilege and/or 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 **dismissed as moot in part** and PHA is required to take further action as set forth herein.

FACTUAL BACKGROUND

On November 2, 2010, the Request was filed, seeking

[A]ll records since January 2009 relating to contacts between Carl R. Greene, Shelly James, Robert L. Archie (of the Philadelphia School Reform Commission and Duane Morris LLC), John Estey (of Ballard [Spahr] Andrews & Ingersoll LLP and DRPA) and Patrick O'Connor (of Temple University and Cozen O'Connor) involving the Pennsylvania Association of Public Service Agencies, also known as PAPSA.

This request includes, but is not limited to, all emails, memo[s] and notes of conversations involving ... Greene, Estey, Archie and O'Connor or ... James regarding [PAPSA].

I also seek to review any pages of invoices from Duane Morris LLC in which PHA was billed for work done by Robert Archie since 2009. Similarly, I seek to review any pages of invoices from Cozen O'Connor in which PHA was billed for work done by Patrick O'Connor since 2009. Lastly, I seek to review any pages of invoices from Ballard Spahr Andrews & Ingersoll LLP in which PHA was billed for work done by ... Estey during 2009. In these invoices, I seek the portion of the documents showing the hours worked by any of these three attorneys, as well as the amount charged and dates of the billings.

On December 10, 2010, PHA granted the Request in part, providing invoices for Archie and Estey. PHA stated that no invoices exist for O'Connor. PHA denied the remainder of the Request, stating that records between Greene, James and PHA's outside counsel are protected under the attorney-client privilege and/or the attorney-work product doctrine.

On December 14, 2010, the Requester appealed to the OOR, alleging that the records sought were records related to various individuals' roles as executives of PAPSA, rather than attorneys. The OOR invited both parties to supplement the record. On December 27, 2010, PHA provided a number of responsive records to the Requester and alleged in an unsworn statement that all responsive records had been provided.

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 necessary, requisite information and evidence before it to properly adjudicate the matter.

PHA 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. 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 “evidence which as a whole shows that the fact sought to be proved is more probable than not.” BLACK'S LAW DICTIONARY 1064 (8th ed.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

In the present case, PHA unquestionably provided responsive records to the Requester. Consequently, the appeal is moot as to the records already provided. PHA, however, alleged in an unsworn statement that all responsive records have been provided. The OOR finds that this unsworn statement does not provide sufficient evidentiary support as to whether, in fact, all records were provided and, accordingly, whether any records were withheld on the basis of privilege as originally asserted. *See Lucia v. City of Warren*, OOR Dkt. AP 2010-1064, 2010 PA O.O.R.D. LEXIS 881 (holding that an agency “did not provide any information from which the OOR can conclude that *all* responsive records were provided and no other responsive records exist”).

The RTKL excludes records subject to privilege from its definition of “public records.” *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.” *See id.*

The OOR has previously addressed the application of the attorney-client privilege to records under the RTKL in a number of Final Determinations. *See, e.g., Romig v. Macungie Borough*, OOR Dkt. AP 2010-0674, 2010 PA O.O.R.D. LEXIS 573; *Staley v. Pittsburgh Water & Sewer Authority*, OOR Dkt. AP 2010-0544, 2010 PA O.O.R.D. LEXIS 466; *Fikry v. Retirement Board of Allegheny County*, OOR Dkt. AP 2009-1149, 2010 PA O.O.R.D. LEXIS 19. In order for the attorney-client privilege to apply, an agency must affirmatively demonstrate 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).

In the present case, PHA initially alleged that certain records were being withheld on the basis of privilege, but, on appeal, stated that all responsive records were provided. The OOR gives paramount respect to the attorney-client privilege and recognizes the importance of vociferously guarding such a privilege. However, an agency must overcome the presumption of openness and support responsive records' exemption from public access. *See* 65 P.S. § 67.305. To establish the attorney-client privilege, PHA must show that all responsive records qualify as "confidential communications" under the four-part test outlined in *Slater v. Rimar*, 338 A.2d 584, 589 (Pa. 1975). PHA failed to do so. *See, e.g., Bari v. Philadelphia Housing Authority*, OOR Dkt. AP 2010-0848, 2010 PA O.O.R.D. LEXIS 823; *Romig v. Macungie Borough*, OOR Dkt. AP 2010-0674, 2010 PA O.O.R.D. LEXIS 573.

The OOR is mindful that an agency cannot produce records that do not exist within its "possession, custody or control" and, accordingly, is not ordering the creation of any records listed in the Request. Absent an agency's provision of a sufficient evidentiary basis as to whether all records have been provided and/or whether privilege applies to the specific records sought, however, the OOR will order the disclosure of responsive public records. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-

0778, 2010 PA O.O.R.D. LEXIS 755; *Schaefer v. Delaware County*, OOR Dkt. AP 2010-0752, 2010 PA O.O.R.D. LEXIS 735.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **dismissed as moot in part** and PHA is required to provide all responsive records within thirty (30) days, if all records have not already been provided to Requester. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Philadelphia 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 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: January 12, 2011



APPEALS OFFICER
J. CHADWICK SCHNEE, ESQ.

Sent to: Mark Fazlollah; Nichole Tillman