



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

**IN THE MATTER OF**

**CHARLES LOUGHERY,  
Complainant**

**v.**

**SALFORD TOWNSHIP,  
Respondent**

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**Docket No. AP 2010-1172**

**INTRODUCTION**

Charles Loughery (the “Requester”) submitted a request to Salford Township (“Township”) seeking records related to a newsletter and records related to his conduct pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”). The Township partially denied the request, asserting that the records were pre-decisional and also constituted drafts and creative works in progress. It also asserted that certain records do not exist. 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 the Township is required to take further action as set forth herein.

**FACTUAL BACKGROUND**

On October 18, 2010 the Requester submitted a right-to-know request seeking:

1. Any documents, including but not limited to internal documents, emails, voicemails (or transcripts thereof), memoranda, notes and also any letters to any law enforcement agency, that assert or purport to document attempts by [Requester] acting either privately, or in his capacity as a Township Supervisor, to subvert, violate or otherwise circumvent any law, including laws of the Commonwealth of Pennsylvania.

2. Any documents, including but not limited to internal documents, emails, voicemails (or transcripts thereof), memoranda, notes and also any letters to any law enforcement agency, that assert or purport to document attempts by [Requester] acting either privately, or in his capacity as a Township Supervisor, to hinder any investigation into the criminal conduct of any person or persons now, or late, employed by or connected with [the Township].
3. All earlier draft versions of the article by Tom Neff published on page 11 of the recently published Salford Township Newsletter, including any editorial comments or notations written thereon.
4. All emails or memoranda that indicate the recipients of drafts of the above referenced Neff article.
5. Complete mailing list for recently mailed Newsletter in its electronic form (CD-Rom).
6. Documents that indicate any other distribution of copies of the Newsletter not distributed by mail.
7. Invoice for printing of the Newsletter or other document indicating number of copies produced.
8. Audiotape from September 8 BOS meeting that includes Solicitor's comments about libel.
9. Resolution authorizing the publication of the recently mailed Newsletter.

(the "Request"). The Request also stated that it seeks information in the Township Supervisors' possession.

After timely invoking an extension, the Township's Open Records Officer ("ORO"), responded, granting access to Parts 5, 7 and 8 of the Request. The Township, however, stated that records related to Parts 1, 2, 6 and 9 do not exist within the Township's possession. The Township also denied Parts 3 and 4 as drafts/creative works in progress under Section 708(b)(14) and/or internal, predecisional deliberations under Section 708(b)(10).

The Requester timely appealed, arguing that 1) the response to Parts 1, 2, 6 and 9 was ambiguous because the existence of records is unclear; 2) drafts of a newsletter article are not exempt under either Section 708(b)(10) or (14), which applies only to institutions of learning; and 3) the

correspondence sought is also not exempt. He challenges the nonexistence of responsive records and advises that the records may exist in possession of the Supervisors and should be obtained from them.

After the record closed, the Township submitted an affidavit attesting to the provision of responsive records within its possession or control that are not considered exempt, and provided records it deems exempt in an effort to avoid litigation. Based upon the submission, the Township asked the Requester to withdraw, or, alternatively, for the OOR to find the appeal moot.

Because mootness was raised, the OOR reviewed the untimely submission, including the provided records and the affidavit of the ORO regarding the search and inquiry for responsive records. The Township affidavit states that “all Township Board members and the Township secretary were asked to provide any and all responsive records ... [to] which access was previously denied based on an exemption.” Accordingly, all drafts of the newsletter article and emails or memoranda indicating recipients of the drafts have been provided in its discretion. The Township did not explain the search or inquiry conducted to indicate whether records responsive to Parts 1 and 2 are within the Supervisor’s possession as challenged 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 before it to properly adjudicate the matter.

The Township is a local agency subject to the RTKL and 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. Here, the Township supplied records responsive to Parts 3 and 4 of the Request, and waived its asserted exceptions with regard to them. Accordingly, the only issue on appeal is whether all records responsive to the remaining parts of the Request —Parts 1, 2, 6 and 9 — were adequately addressed.

The Township supplied an affidavit of its ORO attesting that all responsive records in its possession had been furnished in response to the Request, and confirming that the Township Supervisors had been consulted for any responsive records as to Parts 3 and 4. However, the Township did not confirm that the Supervisors had been consulted for records responsive to Parts 1 and 2, as the Requester challenged in his appeal. With regard to Parts 6 and 9, the Township advised that records do not exist; in its response to Parts 1 and 2, the Township advised that responsive records did not exist in its *possession*.

As the Township did not assert any exceptions with regard to Parts 1 and 2, the only issue to be addressed is whether the Township provided all existing responsive records to moot the appeal in its entirety. The OOR consistently holds that records in possession of an agent and official representing an agency that document a transaction or activity of the agency are records of

the agency and must be disclosed in response to a right-to-know request. *See, e.g., Boyd v. Langhorne Borough*, OOR Dkt. AP 2010-1040, 2011 PA O.O.R.D. LEXIS \_\_\_\_\_. As the Township did not submit responsive records for Parts 1 and 2, and did not address the grounds for appeal, particularly whether the records were within possession of Supervisors, it has failed to meet its burden. *See* 65 P.S. § 67.305.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **dismissed as moot in part**, and the Township is directed to provide any existing responsive records in the Township's control, including possession of Township Supervisors, to the Requester within thirty (30) days. 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 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 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 6, 2011**

**LUCINDA GLINN, ESQ.**  
**APPEALS OFFICER**

Sent to: Charles Loughery; Barbara Lynch for Township