



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
PHIL TAVERNA,	:	
Complainant	:	
	:	Docket No.: AP 2010-1222
v.	:	
	:	
PALMER TOWNSHIP,	:	
Respondent	:	

INTRODUCTION

Phil Taverna (the “Requester”) submitted a request (the “Request”) to Palmer Township (“Township”) seeking records related to a development pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”). The Township denied the Request, stating that certain records are protected by privilege and that the Request improperly sought answers to questions rather than records. 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 **denied in part** and the Township is required to take further action as set forth herein.

FACTUAL BACKGROUND

On December 23, 2010, the Request was filed, stating

At some point in time the Board of Supervisors decided to allow Fox Run Estate’s Developers, the Grebows not to correct the SWMP errors in Fox

Run Estates. Specifically the decision to not implement the bypass swale. This occurred by 12/08.

I would like to see any paper work or anything that supports that decision. For example who was involved in the meetings where that decision was made.

What was the vote tally?

When did the meetings occur?

What engineering reports supported that decision.

What legal reports supported that decision.

[Were] there any reports of money exchanging hands in this matter.

Was there an alternative plan arrived at to make the FRE site legal according to Act 167 and all other storm water laws etc.

Please include all copies of those alternative plans please include any notes etc. for the above.

On December 27, 2010, the Township denied the Request, referring to portions of a December 13, 2010 letter from the Township regarding a prior RTKL request. In that letter, the Township stated as follows:

First it should be noted that your request for information is generally based upon certain assumptions by you that are your personal opinions and not facts and to that extent will not be responded to on that basis.

The Township does not agree or admit to all opinions and conclusions and allegations asserted by you in your request and therefore will not be responding to the first portion of your request. Secondly, to the extent your request ... is for information supporting the actions or decisions made based upon communications with the Township's attorney, the same is denied because the information sought would be privileged and confidential. Thirdly, the Township has no obligation to answer the questions or respond to your allegations in your request. However, without waiving the Township's rights referred to above, you are not entitled to any "legal reports" as that information is privileged. Otherwise, the Township has already provided you with full access to the Fox Run development subdivision file at the Township on several occasions.

On December 28, 2010, the Requester appealed to the OOR, stating that that a meeting and vote was taken by the Township's Board of Supervisors regarding the development. The OOR invited both parties to supplement the record. After the record

closed, the Township submitted a verified position statement.¹ Because these materials were not timely received, they were not considered.

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, the facts are undisputed, and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Township 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

¹ This position statement provided evidentiary support for withholding invoices from the Township’s Solicitor, which was not at issue in this appeal.

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).

1. The Township did not establish that its records are subject to privilege

The Request sought “paper work or anything that supports [the] decision” “to not implement the bypass swale.” The Request also sought “copies of those alternative plans [under Act 167].”

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.” *Id.*

The OOR has previously addressed 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).

The OOR discussed the attorney-work product doctrine in *Mumma v. Juniata Twp. Bd. Of Supervisors*, OOR Dkt. AP 2009-0707, 2009 PA O.O.R.D. LEXIS 99, citing a Pennsylvania Supreme Court decision rendered under the former Right to Know Act:

The Commonwealth Court has previously indicated that records reflecting attorney work product would not qualify as public records under the Act, *see Maleski v. Corporate Life Ins. Co.*, 163 Pa. Commw. 36, 45, 641 A.2d 1, 5 (1994) (citation omitted), and we find this to be a correct interpretation. The work product doctrine, as embodied in Pennsylvania Rule of Civil Procedure 4003.3, protects from disclosure, inter alia, “mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics,” including those of a party’s representative who is not the party’s attorney. Pa.R.C.P. No. 4003.3.

Lavalle v. Office of General Counsel, 769 A.2d 449, 457 (Pa. 2001). A sworn affidavit attesting to the contents of a particular record may satisfy an agency’s burden of establishing that the attorney-work product doctrine:

Here, the [agency] provided a sworn affidavit that the letter and three emails “were prepared in anticipation of litigation by members of the bar and contain entirely mental impressions, conclusions, legal theories, results of research and litigation tactics.” [The attorney’s] attestation under penalty of perjury that the requested records are attorney work product is a sufficient legal basis for denying the Requestor’s appeal as to the letter and e-mails. As such, the [agency] has met the burden of proving that the records are exempt from disclosure.

Mumma, OOR Dkt. AP 2009-0707, 2009 PA O.O.R.D. LEXIS 99; *see Fikry*, OOR Dkt. AP OOR Dkt. AP 2009-1149, 2010 PA O.O.R.D. LEXIS 19.

In the present case, the Township provided no timely evidence as to whether or how either the attorney-work product doctrine or the attorney-client privilege applies to any responsive records. The OOR gives paramount respect to the work-product doctrine and attorney-client privilege and recognizes the importance of vociferously guarding both. However, an agency must overcome the presumption of openness and support responsive records' exemption from public access. *See* 65 P.S. § 67.305. Here, the Township fails to identify what records are subject to protection through a privilege. To establish the attorney-client privilege, the Township 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). The Township 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.

2. The Township is not required to answer questions under the RTKL

The remainder of the Request asked a number of questions related to the development at issue. The OOR has previously held that a request must seek records, rather than answers to questions in order to comply with the requirements of 65 P.S. § 67.703. *See Meztli v. Slippery Rock Borough*, OOR Dkt. AP 2009-1006, PA O.O.R.D. LEXIS 776; *Shaner v. Dept. of Agric.*, OOR Dkt. AP 2009-0678, 2009 PA O.O.R.D. LEXIS 113; *Weller v. PBPP*, OOR Dkt. AP 2009-0242, 2009 PA O.O.R.D. LEXIS 52.

Consequently, the OOR finds that the remainder of the Request did not properly seek records and instead asked questions.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part** and the Township **is required to provide all** "paper work or anything that supports [the] decision" "to not implement the bypass swale" and "copies of those alternative plans [under Act 167]" 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 Northampton 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 21, 2011



APPEALS OFFICER
J. CHADWICK SCHNEE, ESQ.

Sent to: Phil Taverna; Charles Bruno, Esq.