



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>JAMES MOLLICK</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket Nos. AP 2009-0731</b>
	:	
<b>WORCESTER TOWNSHIP</b>	:	
<b>Respondent</b>	:	
	:	

**INTRODUCTION**

Mr. James Mollick, (the “Requester”) submitted a request to Worcester Township (the “Township”) seeking records related to the “2 minute rule” pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The Township partially granted the request and partially denied the request. The Requester 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 July 12, 2009, the Requester submitted a right-to-know request to the Township seeking the following:

1. I would like to have any and/or all emails referred to by John Harris at the April 7, 2008 Worcester Board of Supervisors Meeting regarding the “2 minute rule”, between Supervisors John Harris and/or Art Bustard and/or Steve Quigley, regardless

2. I would like to have any and/or all emails between Supervisors John Harris and/or Art Bustard and or Steve Quigley regarding the “2 minute rule”, regardless as to whether it was transmitted on their personal computers and/or personal email accounts for the past 2 years.
  
3. I would like to have any and/or all notes, memo’s, faxes, letters, and/or written documentation of any kind between Supervisors John Harris and/or Art Bustard and/or Steve Quigley and/or Township manager John Cornell and/or Eunice Kriebel regarding the “2 minute rule” referenced by John Harris at the April 7, 2008 Worcester Board of Supervisors Meeting, for the past 2 years.<sup>1</sup>

He asked that the records be provided in electronic medium if available. (the “Request”). After the Township properly extended the deadline to respond, Eunice C. Kriebel, the Township Assistant Open Records Officer, partially denied the requests citing the attorney-client privilege and also advising that some of the records requested did not exist. The Requester timely appealed. The records at issue, the Township’s response and the Requester’s submission in support of his appeal are summarized below.

The Township identified and denied the following emails:

	Date	From	To	Content
A	1/20/2008	Harris	Solicitor	Seeking advice on “2 minute rule”
B	1/20/2008	Solicitor	Harris	Offering advice on “2 minute rule”

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<sup>1</sup> The Township denied this request stating that no records responsive to this request exist. The Requester did not challenge the Township’s denial of this request.

C	1/20/2008	Harris	Other Supervisors, Manager and Solicitor	Relaying Solicitor's advice on "2 minute rule"
D	7/17/2008	Supervisor	Other Supervisors and copying the Solicitor and the Manager	Seeking Solicitor's advice regarding the "2 minute rule" and enforcement of the rule
E	7/18/2008	Supervisor	Solicitor and other Supervisors and copying Manager	Commenting on Solicitor's advice regarding the "2 minute rule"
F	7/18/2008	Solicitor	Supervisor copying other Supervisors and Manager	Offering advice on the "2 minute rule"

**1. Attorney-client privilege applies.**

The Township argues that the emails are protected from disclosure by the attorney-client privilege and cited *Slater v. Reimar, Inc.*, 462 Pa. 138, 148, 338 A.2d 584, 589 (1975). The Township stated that the emails "relate to facts of which [the Solicitor] was informed by his client, not in the presence of strangers, for the purpose of securing legal services and/or legal assistance and/or advice." The Township argued that the "issue in question - formulation of a '2 minute rule' for public comment during Board of Supervisor meetings - is of the "type for which a client would reasonably and logically seek advice from the Township attorney." The

Township argued it met its initial burden of proving the application of the privilege and that the Requester has the burden of proving an exception to the attorney-client privilege, citing *Gould v. City of Aliquippa*, 750 A.2d 934 (Pa. Cmwlth. 2000); *Joyner v. SEPTA*, 730 A.2d 35, 38 (Pa. Cmwlth. Ct. 1999).

The Township added that the RTKL cannot be construed “to operate retroactively unless clearly and manifestly so intended by the General Assembly.” 1 Pa.C.S. §1926. Therefore, it contends the request may only seek private emails from a personal computer created after January 1, 2009. The Requester cites *Mollick v. Worcester Township*, OOR Dkt. AP 2009-0438 as support that a retroactivity prohibition is not implicated by his request.

The Requester stated that he was not seeking any emails authored by or sent directly to the Solicitor but only those **referred to** by John Harris at the April 7, 2008 meeting that were between the Supervisors only. He argued those emails that only copy the Solicitor are emails “primarily sent to a Quorum of the Supervisors and Manager” and therefore public under the RTKL and the Sunshine Act. He argued that the two Acts are to be construed together, citing *Mellin v. City of Allentown*, 430 A.2d 1048 (Pa. Cmwlth. 1981). The Requester stated that the alleged privileged discussions were never announced as such at a public meeting under Title 65 Pa. C.S.A. § 707 and/or § 708 as required to be exempt. He added that since the email was not from or to the Solicitor no legal advice was conveyed because the “mere copying of an e-mail to a Solicitor, as in this situation, is not sufficient to trigger the privilege . . .” citing *Mollick v. Worcester Township*, OOR Dkt. AP 2009-0438.

As to the email from the Solicitor, the Requester cites *Zubey v. Dept. of Environmental Protection*, OOR Dkt. AP 2009-0141 and asked that the Solicitor provide a statement attesting that the necessary criteria to establish the attorney-client privilege is met. He asserted that the

privilege was waived by copying the Manager, who he argued is not the client “as the term applies to the Supervisors or the Board of Supervisors.” The Requester asked that each Supervisor provide an index of emails consistent with *Zubey* and that the Solicitor provide an affidavit attesting to the accuracy of each index and to the application of the privilege to the emails in question and in each index. The Township provided the affidavit of its Solicitor and its open records officer, John Cornell, supporting his August 31, 2009 denial.

## **2. Attorney-Work Product Privilege Applies.**

The Township asserted that the emails from the Solicitor to the Supervisors and the Manager are protected by the attorney-work product privilege as “mental impressions, conclusions or opinions of the [ ] Solicitor as expressed to his clients with regard to the ‘2 minute rule’.”

The Requester contended that the attorney-work product privilege did not apply because 1) the emails do not involve civil litigation, 2) they are not marked or described as attorney-work product, and 3) there is no mention of a draft to support the idea of work product.

## **3. Request May Only Seek Records Created After January 1, 2009.**

The Township asserted that the records may not be disclosed because the RTKL cannot be construed to operate retroactively, citing 1 Pa.C.S. §1926. It argued that “[s]ince private emails from a personal computer were clearly not ‘public records’ prior to January 1, 2009 . . . [the] request may only seek records under the [RTKL] from January 1, 2009 to the date of the request.”

## **LEGAL ANALYSIS**

The OOR is authorized to hear appeals for Commonwealth and local agencies. 65 P.S. §67.503(a). The Township is a local agency subject to the RTKL and required to disclose public records. 65 P.S. §67.301. Records in possession of a local agency are presumed to be “public”

unless: (1) the record is exempt under Section 708(b); (2) the record is protected by a legal privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305.

Section 102 of the RTKL, defines the term “record” as:

“Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image- processed document.”

The Requester does not challenge the denial of request number 3. Therefore, the Appeal is limited to the denial of requests number 1 and 2 for emails. First, the Township’s assertion that the RTKL cannot be construed to operate retroactively fails. The RTKL does not preclude requesters from submitting requests for records created prior to the effective date, and to construe the statute in that manner would leave individuals without a mechanism to obtain those public records. *See Mollick v. Worcester Twp.*, OOR Dkt. AP 2009-0438. The analysis in *Mollick*, OOR Dkt. AP 2009-0538 is fully adopted and incorporated herein. Therefore, records, including emails, created prior to 2009 are subject to the RTKL. The Township has not identified any records responsive to Request no. 2, above. Nor has the Township provided any basis for denial of records that may exist but were not identified or provided. Therefore, to the extent responsive emails exist on the Supervisors’ personal or work computers they must be provided unless otherwise exempt from public disclosure. The Township’s additional grounds for denial of request no. 1 are discussed below.

**The Attorney-Client Privilege Applies to Portions of the Emails.**

Pennsylvania courts have determined that four criteria must be met to establish the privilege: (1) the holder of the privilege is a client; (2) the attorney as an integral party to the

communication; (3) the communication was made confidentially for the purpose of securing or providing legal advice; and (4) the privilege is not waived. *See, e.g. Nationwide Mutual Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. 2007) (citing *Commonwealth v. Mrozek*, 657 A.2d 997, 998 (Pa. Super. 1995)),

The *Nationwide* court made clear that the attorney-client privilege protects from disclosure only those communications which are confidential and **made by a client to his attorney** for the provision of legal services. *Id.* Equally, however, it recognized that "the privilege protects confidential communications **from an attorney to his or her client** only to the extent that such communications contain and would thus reveal confidential communications from the client." *Id.* (citing *Slusaw v. Hoffman*, 861 A.2d 269, 273 (Pa. Super. 2004)). *See also Richter v. Goldberg*, 78 Pa. Super 309, 311-312 (Pa. Super. 1022) (finding that only confidential communications between client and attorney are privileged and that communications made for the purpose of communicating that information to another party are not confidential and are thus, not privileged.)

Here, the Township has provided sufficient evidence that the attorney-client privilege applies to each of the identified emails.

- (1) The holder of the privilege is the client - which is the Township.
- (2) The Solicitor is an integral part of each communication. This is clear where the email is from or directly to the Solicitor (emails A, B and F, above). It is less clear where the emails merely copy the Solicitor (email D) or where the Solicitor is one of many intended recipients (emails C and E). However, while the Requester is correct that mere copying of the Solicitor is insufficient to trigger the Attorney-client privilege, see e.g., *Mollick v. Worcester Twp.*, OOR Dkt. AP 2009-0438, in this case the

(3) The communications were made for the purpose of securing (emails A, D, and E) or conveying (B, C, and F) legal advice regarding the “2 minute rule.” Email E, which the Township advises contains comments on the Solicitor’s advice, was sent directly to the Solicitor. Commenting back to the Solicitor regarding the provided legal advice is a form of seeking additional legal advice, confirming the advice given, or seeking clarification of the advice given. Therefore, email E also was made for the purpose of securing or conveying legal advice.

(4) The privilege was not waived. The Requester argues that the Township waived the privilege by copying the Manager. However, it is well settled in Pennsylvania law that the attorney-client privilege applies to governmental agencies and their lawyers. *Sedat, Inc. v. Department of Environmental Resources*, 641 A.2d 1243 (Pa. Cmwlth. 1994); *Okum v. Unemployment Board of Review*, 465 A.2d 1342 (Pa. Cmwlth. 1983). Specifically, governmental agencies, such as the Township, “may claim the privilege for communications between their attorney and their agents or employees who are authorized to act on behalf of the entities.” *Gould v. City of Aliquippa*, 750 A.2d 934, 937 (Pa. Cmwlth. 2000). Therefore, including the Manager in the email correspondence does not waive the privilege.

The Township has met its burden of proving that the attorney-client privilege applies. Once the privilege is shown to apply, the “burden shifts to the party seeking disclosure to set

forth facts showing that disclosure will not violate the attorney-client privilege, *e.g.*, because the privilege has been waived or because some exception applies.” *Nationwide*, 924 A.2d at 1266. Waiver can occur in a variety of circumstances. For instance, it can be waived by communicating the confidential information to a third party. *Bonds v. Bonds*, 689 A.2d 274, 277 (Pa. Super. 1997). Waiver can also occur through inadvertent disclosure. *See Carbis Walker, LLP v. Hill, Barth & King, LLC*, 930 A.2d 573, 586 (Pa. Super. 2007).

The Requester argues that the emails are to a quorum of Supervisors and the Manager and therefore public under the RTKL and the Sunshine Act as read together, citing *Mellin v. City of Allentown*, 430 A.2d 1048 (Pa. Cmwlth. 1981), because the alleged privileged discussions were never announced as such at a public meeting under Title 65 Pa. C.S.A. § 707 and/or § 708 as required to be exempt. As discussed above, the Supervisors and the Manager are the constituents of the Township. Therefore, relaying the privileged information amongst these individuals is not disclosure of the privileged information to a third party. Although the Citizen focuses upon the impropriety and potential Sunshine Law violation attendant to communications between a quorum of Supervisors, *i.e.*, two out of three, under 65 Pa. C.S. §704, the OOR notes that the RTKL does not offer the remedy, and to the extent a Sunshine Law violation may have occurred, that issue is beyond the purview of the OOR and must be addressed in the proper forum.

There is no evidence in the record that the privilege was waived by communication to a third party or by inadvertent disclosure. Therefore, the Township has overcome the presumption of openness and properly withheld the information in the emails as protected by the attorney-client privilege. However, an agency “may not deny access to the record if the information which is not subject to access is able to be redacted.” 65 P.S. 67.706. To the extent the emails

contain information that is not seeking legal advice or relaying legal advice the information must be disclosed unless otherwise exempt from disclosure. For instance, the Township has not provided any evidence that disclosure of the portion of the emails containing the identity of the sender and recipients, the date, time, etc. violates the attorney-client privilege.

Because the attorney-client privilege applies, it is unnecessary for the OOR to determine whether the attorney work-product privilege applies to that information protected by the attorney-client privilege. The Township has not provided any evidence that the attorney work-product privilege applies to the date, time, and identity of sender or recipient. Therefore, the portion of the emails containing that information must be provided unless otherwise exempt from disclosure.

## **CONCLUSION**

For the foregoing reasons, Requester's appeal is **granted in part and denied in part**. The appeal of the denial of the information that is protected by the attorney-client privilege is denied. The appeal of the denial of the information contained in the emails that is not protected by the attorney-client privilege is granted and the Township is required to provide the emails to the Requester in redacted form. 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. §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: October 8, 2009**

A handwritten signature in black ink, appearing to read 'Audrey Buglione', written in a cursive style.

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**AUDREY BUGLIONE, ESQ.  
APPEALS OFFICER**

Sent to: James L. Mollick, MD; Joseph Bagley, Esq., Counsel for Worcester Township