



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF

**BARBARA ERNSBERGER,**  
Complainant

v.

**MOON TOWNSHIP,**  
Respondent

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**Docket No. AP 2010-0085**

### INTRODUCTION

Barbara Ernsberger, Esq. (the “Requester”) submitted a request to Moon Township (“Township”) seeking records related to proposed Wal-Mart development, including correspondence and memoranda pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”). The Township advised that the records were protected under the attorney-client privilege because they all pertain to a pending litigation, and cited Section 708(b)(22) and (b)(17). The Requester timely 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 as directed.

### FACTUAL BACKGROUND

On December 21, 2009, the Requester submitted a right-to-know request seeking

1. Any comment to any Ordinance Requirements Report dated after August 6, 2008;
2. Any response to comments pertaining to any Ordinance Requirements Reports dated after August 6, 2008;
3. Any geotechnical investigations filed since August 6, 2008;

4. Any and all letters, correspondence, memoranda, and /or e-mails regarding any new traffic impact study filed since August 6, 2008;
5. Any and all letters, correspondence, memoranda, and /or e-mails regarding comments as to any new traffic impact study filed since August 6, 2008;
6. Any and all letters, correspondence, memoranda, and /or e-mails regarding responses to comments as to any new traffic impact study filed since August 6, 2008;
7. Any and all letters, correspondence, memoranda, and /or e-mails regarding any request for deviations filed since August 6, 2008;
8. Any and all request for deviations filed by Wal-Mart since August 6, 2008;
9. Any and all traffic impact studies and/or amendments thereto for the proposed Wal-Mart Development dated after September 3, 2009 except [sic] the Traffic Impact Study dated September 3, 2009 which is not requested;
10. Any and all letters, correspondence, memoranda, and /or e-mails regarding the September 3, 2009 Traffic Impact Study for the proposed Wal-Mart Development; and
11. Any and all letters, correspondence, memoranda, and /or e-mails between Moon Township and the Pennsylvania Department of Transportation regarding the proposed Wal-Mart Development.

(the “Request”).

Jeanne Creese, the Open Records Officer (ORO), timely responded by granting Nos. 1 and 2, and denying the remainder on the advice of the Solicitor because they relate to pending litigation, can be disclosed through discovery, and are “involved in an investigation” (the “Denial”). The Requester timely appealed on January 28<sup>th</sup>. She contends that the Denial is insufficient to show any exception by citation to legal authority, and the Township failed to meet its burden (“Appeal”).

The Township's counsel responded that the records sought in Nos. 3 through 11 all go to the subject-matter of the pending litigation and are therefore protected by the attorney-client work product privilege. Any information that has been obtained, such as the geotechnical investigations, the Township's counsel advised, is part of the pending litigation. With regard to those parts of the Request that seek correspondence (Nos. 4-7), it seeks correspondence with counsel, which is protected as attorney-client privileged information. The Township also asserts Section 708(b)(22) to protect the geotechnical investigations because no decision to proceed with the construction project has been made. The Township also asserts that the records regarding whether to proceed with a modified plan or to grant permits relate to a noncriminal investigation and are thus protected by Section 708(b)(17) also. The Township submitted an attestation by its Solicitor that "the averments and legal position set forth in the foregoing Township Letter from the [ORO] are true and correct to the best of my knowledge and belief." ("Attestation").

The Requester submitted legal argument in response and claimed that to her knowledge, there is no ongoing litigation with reference to many of the records including the geotechnical investigations. She claims that Wal-Mart's final major land development plan was approved by the Township Supervisors in November 2008, and that no major modification was necessary to trigger the need for a modified plan, or any subsequent approval of modification. The Requester submitted minutes from April 29, May 6 and July 29, 2009 that state that as of those dates, Wal-Mart had not resubmitted any additional plans. Thus, she argues that Section 708(b)(22) does not apply. She also argues the Township did not submit facts to show that an investigation is in progress.

To permit supplementation of the record, the Requester agreed to extend the Final Determination date to March 12, 2010. The Township supplemented the record by letter to explain the contents of a geotechnical investigation and a traffic impact study and provide an additional attestation identical to the first, which attests to the contents of the ORO's letter. The

Township Solicitor explains that “the sole and exclusive reason **at this point** for even considering an amendment to the project and to obtain these reports is to potentially settle the pending lawsuit.” *See* Letter of February 26<sup>th</sup>, emphasis in original. The Township also submitted a copy of the last status report filed by the Requester with the Commonwealth Court as to the litigation (“Status Report”). The Status Report states that the parties, including appellants represented by the Requester, “are exploring a potential settlement pending review and approval by [PennDOT] of a Traffic Impact Statement prepared by Wal-Mart’s traffic engineers David E. Wooster & Associates.” ¶3. In the Fourth Status Report, the Requester states that the modified Traffic Impact Statement, once approved by PennDOT, will be provided to appellants.

### **LEGAL ANALYSIS**

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The Township is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.302. A record in possession of a local agency is presumed to be public unless it is exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. §67.305. The Request sought geotechnical reports, traffic impact studies, Wal-Mart’s requests for deviations and correspondence/memoranda regarding same.

There is no dispute of fact that the Requester and the Township are involved in litigation relating to the Wal-Mart development, and that they are engaged in settlement discussions for which they file status reports with the Commonwealth Court relating to Wal-Mart’s proposed development. There can also be no dispute of fact that the traffic impact studies that are in review by PennDOT, and are related to the pending litigation. *See* Fourth Status Report. The OOR reviews the attorney-client and work product privileges, and the exceptions at Section 708(b)(22) and (b)(17) as they pertain to the records requested.

## 1. The Geotechnical Investigations and Traffic Impact Studies

The Township asserted Section 708(b)(22) to protect the records sought in each part of the Request. Under Section 708(a), the County bears the burden of establishing its exceptions by a preponderance of the evidence, meaning “greater weight of the evidence.” *See Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). Section 708(b)(22) exempts from disclosure “contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations *made for or by an agency* relative to . . . construction projects.” 65 P.S. §67.708(22). There is no dispute that the geotechnical investigations relate to a construction project, *i.e.*, Wal-Mart development. From the description of the geotechnical investigations at issue, they contain engineering and feasibility estimates and constitute an evaluation regarding the construction of a Wal-Mart. The exception expressly does not apply once a decision to proceed with construction has occurred. *See* 65 P.S. §67.708(b)(22)(i)(C).

Here, the record reflects that a decision has been made on the conditional use approval, but the construction has not begun. From the record, *including the Requester’s submission* to the Commonwealth Court regarding the status of settlement, the investigations at issue are those that were made subsequent to the appeal to the Commonwealth Court being filed. There is no dispute that construction has not occurred, and the record shows the decision is currently in abeyance and subject to change or modification in the course of the settlement discussions. The Township has also attested that the decision regarding the construction based upon any geotechnical investigations not already provided to the Requester has not occurred, and that the decision to do so would be part of a decision to settle the litigation.

Accordingly, the OOR finds that a decision has not been made with regard to the records in No. 3, and that those records are properly excepted.

As no facts have been substantiated to show that (b)(22) applies to protect the correspondence and memoranda requested, the Township failed to meet its burden of proof to protect Nos. 4-7 and 10-11 of the Request. The request for deviations and traffic impact studies for the proposed Wal-Mart development (Nos. 8 and 9), are not shown to be comprised of engineering reports or feasibility studies in order to qualify for this exception.

## **2. The Noncriminal Investigative Exception Applies to Most of the Request.**

The Township asserted that the Request seeks records related to the assessment of the Wal-Mart proposed development, and how to move forward with that project in the scope of a future settlement. From the record presented, there is no dispute that these records all relate to the proposed Wal-Mart development and its approval by the Township, which action triggered the pending litigation with the Requester's clients. Section 708(b)(17) protects any records "relating to a noncriminal investigation, including (ii) investigative materials, notes, correspondence and reports, ...and (vi) a record that, if disclosed, would ...reveal the institution, progress, or result of an agency investigation, **except... modification...of a ...permit.**" 65 P.S. 67.708(b)(17) (emphasis supplied). Also from the record requested, including the minutes supplied by the Requester, there can be no dispute that the Township is considering modification of the approval of plans for the proposed Wal-Mart development, but no modification has been submitted or approved.

The Township contends that the Request seeks records relating to a potential modified plan to be submitted by Wal-Mart. There is no dispute that conditional use approval has been granted, and is appealed. There also appears from this record to be no dispute that the parties are in the midst of settlement negotiations in which modifications may be made to that approval, or possibly to modified plans. The record is unclear whether the Township approval of the modification is necessary as may be required for a "major" modification.

The extent of the modification that may be needed is not clear because the decision on that matter has not been made and is under investigation by the Township. The Township has attested to the fact that it is in the process of investigating its settlement options and pursuing how best to proceed in order for the Wal-Mart development to move forward. In light of the undisputed fact of the investigation into whether a modification of plans is necessary to resolve the litigation with Requester, and what is entailed in that modification, the OOR finds that the Attestation and legal submissions are sufficient to establish that the Township is undertaking an investigation into potential modifications by Wal-Mart of its permit or similar authorization to proceed with development. Therefore, the records that have been prepared by the Township, or on its behalf/under its direction, are investigative and properly protected by Section 708(b)(17).

The correspondence sought in 4-7 and 10, and 11, all relate to the investigation that the Township is undertaking to assess the degree of modification necessary for the Wal-Mart development to proceed, and therefore, the correspondence is properly protected by this exception. The traffic impact studies that have been submitted to PennDOT for review have been prepared as part of the investigation into modifying this project, and are thus also protected.

The request for deviations filed by Wal-Mart and the geotechnical studies are not shown to be protected as “investigative notes, correspondence” or records that, if revealed, would show the progress of its investigation. Therefore, No. 8 of the Request cannot be protected on this basis.

### **3. The Privileges Do Not Protect the Deviations from Disclosure.**

The Township asserted that the attorney-client and work product privileges apply to protect all of the records sought in Parts 3 through 11 due to the fact that the Requester and the Township are litigating the approval of the conditional use request submitted by Wal-Mart, and approved by the Township, and thus asserted it as to the deviations sought in No. 8. The Township must overcome the presumption of openness and show that these privileges apply here.

The mere fact that litigation is pending as to the subject-matter of the Request is not alone sufficient to establish the exemption and does not extend to records submitted to the Township by a third-party when it was not done on its behalf for litigation strategy. The deviations, having been prepared and submitted by Wal-Mart, cannot qualify for protection as confidential communications privileged under the attorney-client relationship.

The request for deviations filed by Wal-Mart is not presented as a record prepared by or on behalf of the Township, and indeed, if it exists, had been filed by Wal-Mart with the Township. As described, the deviations are not protected as attorney-client privileged. Without establishing that Wal-Mart's deviations were prepared on behalf of the Township to assist the Township in its litigation, the deviations sought in No. 8 cannot be protected under the privileges asserted.

Although some of the correspondence and/or memoranda sought in Nos. 4-7 and 10 may qualify as work-product or attorney client privileged, the privilege was not established and they are already protected under Section 708(b)(17).

### **CONCLUSION**

For the foregoing reasons, the Requester's appeal is **granted in part and denied in part**. The geotechnical investigations (No. 3) are properly protected under Section 708(b)(22), and are no longer protected once a decision is made. The correspondence and memoranda, Nos. 4-7 and 10, and the traffic impact studies obtained for the purpose of assessing the need for modified plans including related correspondence in No. 11 are protected by Section 708(b)(17). The request for deviations, No. 8, has not been shown to be protected and is directed to be disclosed within thirty (30) days.

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 Allegheny 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.

This Final Determination shall be placed on the website at <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: March 12, 2010**



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

Sent to: Barbara Ehnsberger, Esq.; Michael Santicola, Esq. for Township