



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

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| IN THE MATTER OF | : | |
| | : | |
| BLAKE DUNBAR AND | : | |
| LOWER PERKIOMEN VALLEY | : | |
| REGIONAL SEWER AUTHORITY, | : | |
| Complainant | : | |
| | : | |
| v. | : | Docket No. AP 2010-0552 |
| | : | |
| LOWER PROVIDENCE TOWNSHIP, | : | |
| Respondent | : | |

INTRODUCTION

A request for records was submitted to Lower Providence Township (the “Township”) pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”) seeking records related to the Perkiomen Creek Interceptor. The Township provided records but withheld those it deemed exempt by the attorney-client privilege, predecisional deliberations and noncriminal investigation exemption. The Requester timely 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 directed.

FACTUAL BACKGROUND

On May 4, 2010, Robert L. Brant, Esquire as Solicitor for Lower Perkiomen Valley Regional Sewer Authority (“Authority”) (collectively, the Requester) submitted a right-to-know request as follows:

1. “Any and all documents, memoranda, correspondence, e-mails, letters, reviews, reports and/or writings relative to the Perkiomen Creek Interceptor authored or prepared by any Lower Providence Township employee, consultant, representative, staff, committee, official, or resident.”

2. “Any and all documents, memoranda, correspondence, e-mails, letters, reviews, reports and/or writings relative to the Perkiomen Creek Interceptor authored or direct to any Lower Providence Township employee, consultant, representative, staff, committee, official, or resident.”

(“Request”). On May 7, 2010 the Township replied to Mr. Brant extending the deadline to respond. On June 3, 2010, the Township provided a final response directed to Wendy McKenna, Esquire of Robert Brant & Associates law firm. The Township provided a matrix of responsive records and six redacted emails. The matrix identified the responsive records by date and as either emails or emails with attachment. No further description was provided. The matrix also identified which exemption or privilege the Township designated as applicable to withhold the identified record. Certain records were identified as not being records of the agency.

On June 17, 2010 on Robert Brant & Associates letterhead, Blake E. Dunbar, Esquire appealed stating “[t]his office requested documents from [the Township]...We are appealing the denial of this request.” The appeal identified the requester as Blake E. Dunbar, Esquire. The grounds set forth for the appeal are that the agency failed to comply with the RTKL by 1) failing to sufficiently describe responsive records and 2) failing to factually substantiate the legal grounds set forth for denial.

On June 22, 2010 the undersigned appeals officer asked Mr. Dunbar if he wished to have his client as the named party in the appeal. On June 23, 2010 Mr. Dunbar requested that his client, the Authority, should be the named party and on June 25, 2010 filed an amended appeal asking that the name of the requester be amended to Robert L. Brant, Solicitor, Lower Perkiomen Valley Regional Authority. On June 25, 2010 Michael J. Sheridan, Esquire entered his appearance on behalf of the Township and objected to the appeal as “defective because it was not

filed by Robert L. Brant or the [] Authority, the persons who filed the right to know request...” The Township argues that the appeal does not indicate that Blake Dunbar filed the Appeal in a representative capacity. The Township asserts that the appeal filed to amend the caption was untimely filed by the requester and must be dismissed.

The Township also substantively responded to the appeal with the sworn statement of Michael Sheridan, Esquire. According to Mr. Sheridan, the Authority owns a sewage treatment plant and sewage transmission line known as the interceptor. The Township sends sewage to the Authority's plant and is party to an intermunicipal agreement entered into with five other municipalities, which governs the operations of the Authority. The Authority is seeking a permit from the Department of Environmental Protection (“DEP”) to construct a new section of its interceptor, known as the Middle Interceptor. Based upon complaints received by residents beginning in December 2009 and after investigating the matter, on April 15, 2010 the Township Board of Supervisors authorized the Township Solicitor to file an objection with the DEP to the permit application. On May 7, 2010 the Township organized a site visit involving DEP, the Army Corps of Engineers, representatives of neighboring townships, Township residents, and Township officials.

The Township provided the Requester copies of the emails concerning the action by the Township of organizing the site visit. It also provided 137 emails and made available a copy of the Township's file captioned “LPVRS Middle Interceptor Project.” The Township provided a revised matrix which numbers the records and provides a more detailed description of the origin of the withheld records. The legal grounds asserted for withholding the records are the same as those asserted in the original denial.

A. Predecisional Deliberation:

The Township withheld records numbered 2 through 38, 41 through 50, 52 through 55, 56 through 58 (all dated prior to April 16, 2010) and 62, 63 and 66 (regarding a letter from Township Solicitor to DEP) as records of predecisional deliberations. It identifies the records as one of the following: 1) email between complaining resident and individual Township supervisor; 2) email regarding a meeting with a complaining resident; 3) email with a complaint by resident concerning middle interceptor to Township or an individual Township supervisor or to a third party or another agency, with copy to a Township supervisor; email to/from Authority official or employee to/from Township re interceptor; 4) email with attached notes from a staff/Solicitor meeting; 5) emails to/from Township solicitor to/from Township supervisor, Township staff, or solicitor's experts and consultants; 6) interagency email; or 7) interagency email to or from DEP. The Township states that emails dated prior to April 16, 2010 relate to predecisional deliberations leading up to the April 16, 2010 Solicitor letter to DEP. The Township asserts that emails to or from DEP (numbers 62, 63, 66) are also records of predecisional deliberations as DEP has not yet taken action on the April 16 letter.

B. Noncriminal Investigation

The Township asserts that records identified as 1 through 11, 13, 19, 47, 52, 54, 58, 62, 63, 66, 67, and 77 involve complaints from residents concerning the Middle Interceptor which, in part, triggered the investigation by the Township.

C. Attorney-Client Privilege

The Township identifies records numbered 20, 25-31, 33, 37-46, 51, 53, 55-57, 59-61, 64-65, 72, 73, and 75 as exempt by the attorney-client privilege or attorney work product. The Township contends that each of the emails is communication to and from the Township solicitor

in his role as the attorney for the Township. It notes that most involve the period leading up to the decision of the Board on April 15, 2010 authorizing the letter to DEP to object to the Authority's permit application.

D. Not Records of the Township

The Township contends that records identified as number 11, 13, 21, 54, 58, 62, 63, 66, 67 and 77 are not records of the Township, rather records of emails to or from individual supervisors through the individual supervisors personal email account that were not forwarded by the Supervisor to the Board or the Township manager or other employee or official of the Township. The Township acknowledges that the emails exist on the Township's computer server, but that no one but the individual supervisor assigned to the account(s) has access to the emails. The Township contends these emails are personal correspondence of the individual supervisor who does not have authority to act on behalf of the Township without a majority vote of the Board. The matrix lists the cited exemption as (b)(12). The Township asserts that the supervisors have an expectation of privacy in their personal email accounts.

E. Redaction of Medical Information

Finally, the Township provided six emails that were redacted to withhold medical information pursuant to section 708(b)(5). These records are identified as numbers 68-71, 74, and 76. The Requester does not challenge the permissibility of these redactions.

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. Records in possession of a local agency are presumed to be

public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. §67.305.

As an initial matter, the OOR finds that the appeal is properly before the OOR. The Request was made by Robert Brant, Esquire who identified himself as the solicitor for the Authority. The agency responded, initially to Mr. Brant, and then provided a final response to Mr. Brant's associate, Wendy McKenna, Esquire. The appeal was submitted by Blake Dunbar, Esquire, also an associate of Robert Brant & Associates and states that Mr. Dunbar's office requested the records. There is no dispute that Mr. Dunbar is an associate of Robert Brant & Associates. Robert Brant is identified as the solicitor of the Authority. The Township recognized the authority of the associates of Robert Brant & Associates to act in regard to the Request by sending the final response to Wendy McKenna and advising her of the right to appeal. Therefore, the appeal by Mr. Dunbar, on behalf of Robert Brant, solicitor for the Authority, is timely. Amending the above caption to reflect Robert Brant & Associates' client, the Authority, does not alter the timeliness of the appeal.

A. Predecisional Deliberation Exemption

The Township asserts that records numbered 2 through 38¹, 41 through 50, 52 through 55, 56 through 58 (all dated prior to April 16, 2010) and 62, 63 and 66 (regarding letter from Township Solicitor letter to DEP) relate to predecisional deliberations. For the reasons set forth in section B below, records numbered 2 through 11, 13, 19, 47, 52, and 54, 58, 62, 63, 66 are exempt by the noncriminal investigation exemption. Therefore, it is only necessary to determine if records numbered 12 (email re: meeting with complaining resident); 14 – 17 (emails to or from

¹ The Township's Response in Objection to the Appeal includes record number 21 as excluded by section 708(b)(10); however, in its original matrix and the one submitted during the appeal the Township does not assert the applicability of this exemption. No basis for withholding other than that set forth in an agency's original denial may be considered. *See Signature Information Solutions v. Aston Township*, 1311 CD 2009 (Cmwlth. Crt., May 26, 2010). Therefore, the status of record number 21 is considered in subsection D.

Authority or to/from Township re interceptor); 18 (notes from staff/solicitor meeting); 20, 25 - 28, 30, 31, 37, 38, 41 - 46, 53, 55 - 57 (emails from or to Township solicitor); 22 (Authority email), 23 - 24 (interagency emails); and 29, 32 - 36, 48 - 50 (interagency emails to or from DEP) are exempt by the predecisional deliberations exemption.

The RTKL exempts (10) (i) a record that reflects:

“(A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including ... contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

Here, the Request sought records related to the Interceptor. The Township contends that the identified records reflect or were used in deliberations regarding the Township's course of action relative to the Interceptor, decided on April 15, 2010 and acted upon by letter dated April 16, 2010. The Township provided the sworn statement of its solicitor to support a finding that responsive records dated prior to April 16, 2010 are either internal communications between agency employees or officials or between agency employees or officials and members of another agency (here, DEP) or are “other documents used in the predecisional deliberations.” Each of the records at issue is dated prior to April 16, 2010, supporting application of the predecisional deliberation exemption. Therefore, the only outstanding issue is whether all information within the emails is exempt.

Pursuant to Pennsylvania Supreme Court precedent, to establish this exception the information protected cannot be purely factual in nature. *See Com. v. Vartan*, 557 Pa. 390, 733 A.2d 1258 (1999). The record is devoid of information sufficient to support a finding that the Township demonstrated that all of the withheld information is deliberative and not factual. Therefore, the Township is required to release requested records identified in this subsection A

which contain purely factual information and may redact all other information contained within the full record.

B. Noncriminal Investigation Exemption.

The RTKL exempts the following records:

(17) A record of an agency relating to a noncriminal investigation, including:

(i) Complaints submitted to an agency.

(ii) Investigative materials, notes, correspondence and reports.

...

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

The Township identifies records numbered 1-11, 13, 19, 47, 52, 54, 58, 62, 63, 66, 67, and 77 as relating to complaints from residents concerning the Middle Interceptor which in, part, triggered the Township's investigation. The Authority asserts that expansion of the exemption to include records beyond the initial complaint, such as subsequent correspondence or exchanges of information, is impermissible. However, the investigative exemption excludes all records related to the investigation, including the complaints and the investigative materials, notes, correspondence and reports. The Authority does not dispute the Township's assertion that the identified records relate to the investigation, it contends only that emails subsequent to the complaint that include factual information are not exempt. The OOR disagrees. There is no requirement to disclose factual information in records related to noncriminal investigations. Therefore, the Township met its burden to show that the 27 emails identified above relate to a noncriminal investigation regarding the Authority's permit application for the Middle Interceptor.

C. Attorney-client Privilege.

The Township asserts that records numbered 20, 25-31, 33, 37-46, 51, 53, 55-57, 59-61, 64-65, 72, 73, and 75 are protected by the attorney-client privilege. The public status of the records numbered 25-28, 30, 31, 33, 37, 38, 41- 46, 53, and 55 – 57 are discussed above in section A. The extent that the application of the attorney-client privilege further protects those records is discussed below in this section. The OOR notes that the matrix provided does not identify record number 29 as protected by the privilege and identifies the record as an interagency email to or from DEP. Therefore, the status of this record is also set forth in subsection A under the predecisional deliberation exemption which is the exemption set forth on the matrix.

Pennsylvania case law holds that the attorney-client privilege has requirements to trigger its protections, including a demonstration that the communication at issue is confidential and made by a client to an attorney related to provision of legal services. *Slater v. Rimar, Inc.*, 462 Pa. 138, 147, 338 A.2d 584, 589 (1975). The Township must establish four criteria: (1) the holder of the privilege is a client; (2) the attorney is an integral party to communication; (3) the communication is made confidentially for the purpose of securing or providing legal advice; and (4) the privilege is not waived.

The Township and its staff or supervisors are the holder of the privilege as the client of the Township solicitor. The Township asserts that the records are each emails, with or without attachments of letters or memos, from or to the Township solicitor and from or to supervisors, Township staff, or solicitor's experts and consultants. However, a mere assertion that emails were sent or received by the Township solicitor does not provide sufficient evidence that the solicitor is an “integral party to the communication.” Further, there is insufficient evidence that

each of the emails designated as protected by the attorney-client privilege were prepared for the purpose of providing legal advice. In *Evans v. Rose Tree Media School District*, OOR Dkt. AP 2009-0977 the OOR evaluated whether the agency provided sufficient evidence of the application of the attorney-client privilege. In finding the privilege applies, the OOR noted that the District provided the substance of the records at issue and the circumstances surrounding their creation and use. Here, the Township fails to provide more than an assertion of the applicability of the privilege. Therefore, there is insufficient evidence to find that the privilege applies. The OOR gives paramount respect to the attorney-client privilege and recognizes the importance of vociferously guarding this privilege. However, as noted above, the law requires the Township to provide some objective indicia before the OOR can conclude the privilege is applicable.

D. Emails Which Relate to Township Business are Records of the Township

The Township contends that records identified as numbers 11, 13, 21, 54, 58, 62, 63, 66, 67 and 77 are not records of the Township because they were transmitted through an individual supervisor's dedicated email account. The email account is on the Township's computer server. The fact that the Township has restricted access to only the Township supervisor assigned to the designated email account does not alter the fact that the emails are the records of the Township. The emails to or from these accounts reflect activity in connection with a supervisor's role as a governing member of the Township, thus an activity of the Township; regardless of whether the individual supervisor forwarded the email to other Township staff or officials. Further, whether a Township supervisor has actual authority to act without majority vote of the Board does not alter whether the email is a record of the Township.

Determination of whether a record is a record of an agency is based whether the record “documents a transaction or activity of an agency and that is created, received or retained...in connection with a transaction, business or activity of the agency.” 65 P.S. §67.102. The emails were created or received in connection with the business or activity of the agency conducted by the supervisor in his role as an official of the Township. They document a transaction or activity of the agency because the Township acknowledges that each regard issues related to Township business involving the Interceptor. Therefore, the emails qualify as records of the Township.

In the alternative, the agency asserts that section (b)(12) exempts the records from public disclosure. Section 708(b)(12) protects the following records:

(12) Notes and working papers prepared by or for a public official or agency employee used solely for that official’s or employee’s own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.

65 P.S. §67.708(b)(12). As discussed above, the emails transact business related to the supervisor's position as an official of the Township. The information maintained in the notes or work papers excluded by section (b)(12) do not need to be “personal” in nature, like a reminder of a doctor’s appointment, but must be purely personal in use. *See Shield s v. City of Philadelphia*, OOR Dkt. AP 2009-0787. The Township acknowledges that emails sent to or from supervisors relate to its involvement with the Interceptor, and there is no basis for finding them to be purely personal. Therefore, section (b)(12) does not apply.

The application of other cited exemptions to the records numbered 11, 13, 54, 58, 62, 63, 66, 67, and 77 are discussed in either section A or section B above. Record 21 is identified as an email with a letter attached. The Township failed to set forth any other basis for withholding the email. Therefore, it is required to provide the email identified as record number 21.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part and denied in part** as follows:

1. **Granted in part** in regard to records identified as numbers 12, 14 – 17, 18, 20, 25 -28, 30, 31, 37, 38, 41 – 46, 53, 55 – 57, 22, 23 – 24, 29, 32 – 36 and 48 – 50 as to purely factual information not protected by section 708(b)(10).
2. **Denied** in regard to records identified as numbers: 1 through 11, 13, 19, 47, 52, and 54, 58, 62, 63, 66, 67 which are exempt by section 708(b)(17).
3. **Granted in part** as to records identified as numbers 20, 25-31, 33, 37-46, 51, 53, 55-57, 59-61, 64-65, 72, 73, and 75 as to the Township's denial based upon the application of the attorney-client privilege except to the extent that the records are found partially protected by section 708(b)(10).
4. **Granted** as to record number 21.

The Township is required to provide copies of the granted and granted in part records to the Requester 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 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. This Final Determination shall be posted at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: July 19, 2010



AUDREY BUGLIONE, ESQ.
APPEALS OFFICER

Sent to: Blake Dunbar, Esquire, Michael Sheridan, Esquire