

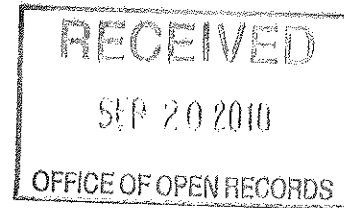


David Rittenhouse  
P.O. Box 193  
Eagleville, PA 19408

September 20, 2010

VIA Fax & Federal Express

Terry Mutchler,  
Executive Director  
Office of Open Records  
Commonwealth Keystone Building  
400 North Street, 4th Floor  
Harrisburg, PA 17120-0225



Re: Rittenhouse v Lower Milford Township, Docket # AP2010-0735

Dear Director Mutchler:

Enclosed herewith is Complainant, David Rittenhouse Motion for Reconsideration. I copy of this Motion has been sent to council for Lower Milford Township.

Very truly yours,

David Rittenhouse

enclosure

cc: Emil W. Kantra II, Esq (via fax 484-788-0632)

**BEFORE THE OFFICE OF OPEN RECORDS**

IN THE MATTER OF:	:	Docket No. AP 2010-0735
	:	
DAVID RITTENHOUSE,	:	
Complainant	:	
	:	
v.	:	
	:	
LOWER MILFORD TOWNSHIP,	:	
Respondent	:	

**MOTION FOR RECONSIDERATION OF THE COMPLAINANT, DAVID RITTENHOUSE**

The Petitioner, Complainant, David Rittenhouse files this Motion for Reconsideration under the General Rules of Administrative Practice and Procedure, 1 Pa. Code Section 35.241 and respectfully represents:

1. On September 10, 2010, the Office of Open Records ("OOR") issued and mailed a Final Determination in the above caption appeal, a true and correct copy is attached hereto and made a part of as Exhibit "A".

**ERRORS ASSERTED**

2. The Petitioner, Complainant, David Rittenhouse, asserts the following errors of fact and law:

A. The Respondent, Lower Milford Township supplemented the record with a Memorandum of Law, a redacted copy of the privileged record and an attestation of work-product privilege, none of which was supplied to the Complainant as required by the Appeals Officer in her letter to both the Complainant and Respondent dated August 23, 2010, a true and correct copy is attached hereto and made a part of as Exhibit "B". Complainant asked Respondent directly for documents used to supplement the record with no response from the respondent, see letter to Emil W. Kantra II, Esquire dated September 8, 2010; a true and correct copy is attached hereto and made a part of as Exhibit "C". This Petition is made without the benefit and ability to review the records supplemented by the Respondent.

B. The Respondent supplied to the OOR a redacted copy of the privileged record. By supplying the redacted copy the Respondent has:

(1) Waived its privilege to the unredacted portions of the record.

(2) Admitted it could have but did not comply with Section 706 of the Act which states "... the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access..."

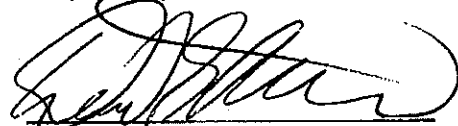
C. The Respondent has admitted that the privilege document was sent to both the Solicitor for the Township and the Solicitor for the Planning Commission, by doing so the Respondent has voluntarily waived the right of privilege by:

(1) Submitting to the Solicitor for the Planning Commission, a non party to all litigation and in fact a separate agency and adjudicating body as set forth in the Respondent's own Ordinances.

(2) Having ex parte communications with an adjudicating body.

WHEREFORE, the Petitioner, Complainant, David Rittenhouse, respectfully requests that the Office of Open Records grant reconsideration of its Final Determination, issued on September 10, 2010 and therefore reverse its decision and direct the Respondent, Lower Milford Township to Grant the Request and supply all documents to the Complainant or in the alternate, remand this matter to the Hearing Officer for leave to supplement the record.

Respectfully submitted,



David Rittenhouse

Exhibit A



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF

DAVID RITTENHOUSE,  
Complainant

v.

LOWER MILFORD TOWNSHIP,  
Respondent

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Docket No. AP 2010-0735

### INTRODUCTION

David Rittenhouse (the "Requester") submitted a request to Lower Milford Township ("Township") pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, ("RTKL"), seeking records related to a proposed quarry and asbestos. The Township partially denied access under the work-product privilege. 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 **denied** and the Township is not required to take further action.

### FACTUAL BACKGROUND

On June 30, 2010, the Requester submitted a right-to-know request seeking "all communications, including letters, faxes, e-mails, phone logs, memos, reports, lab results related to asbestos at or around the proposed quarry for the land comprising of approximately 628 acres situated on both sides of West Mill Hill Road" (the "Request").

After invoking a thirty-day extension, Gina Wooler, Open Records Officer (ORO), timely responded by providing eleven separate e-mails and attachments and denying access to remaining records related to the proposed quarry and asbestos as protected by the attorney work-

product doctrine under Rule 4003.3 of the Pennsylvania Rules of Civil Procedure, 4003.3 (the "Response").

The Requester timely appealed arguing that the Township did not establish the work-product privilege, which protects only the mental impressions of an attorney ("Appeal").

The Township supplemented the record with a Memorandum of Law in support of its partial denial, a redacted copy of the privileged record and an attestation of work-product privilege from its Solicitor, Emil Kantra, Esq. ("Attestation"). Counsel explains that the Requester is involved in 8 separate pending litigation matters with the Township involving various zoning challenges and an action for injunctive relief involving the Department of Environmental Protection in *Geryville Materials, Inc., v. DEP*, Case No. 152 MD 2009.

The Township clarifies that only one responsive record had been withheld in response to the Request, referred to as "Privileged Document" in the e-mail of Phillip Getty, the Township-hired hydrogeologist to the Solicitor of the Township and Solicitor of the Planning Commission relating to pending litigation. Counsel advises the "Privileged Document" was prepared in anticipation of litigation and contents include Getty's mental impressions and opinions in relation to the proposed quarry. The redacted copy of the September 18, 2009 e-mail, referred to by the Township as "Privileged Document" is included with the submission, and notes an "ArchiveSummary.txt" is attached. From the e-mail description, the attachment is a series of figures and the redacted e-mail itself contains the "detailed draft report regarding the proposed quarry plan."

Counsel argues that the work-product privilege extends beyond mental impressions or strategy of an attorney to those of an attorney's hired representative since Pa. R.C.P. 4003.3 states that "[w]ith respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions

respecting the value or merit of claim or defense or respecting strategy or tactics.” Getty is the consultant of the Township, and a representative for the purpose of pending litigation.

Solicitor Kantra attested in accordance with 18 Pa. C.S. §4904 that the e-mail dated September 18, 2009 from Getty to the solicitors on the pending litigation is the only record withheld. He attests the e-mail includes “mental impressions, conclusions, opinions, legal theories, legal research, strategy and work product of Phillip Getty.”

### 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, presented through sworn testimony, to 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 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).

The Township cited the work-product privilege as its grounds for withholding the single e-mail from disclosure. There is no dispute that the e-mail, and its contents regarding the

proposed quarry, pertain to and are prepared in anticipation of litigation involving the Requester. There is no dispute that the contents of the e-mail redacted are authored by Getty, a non-attorney representative of the Township, retained for litigation. Work-product of an attorney is defined as:

mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.

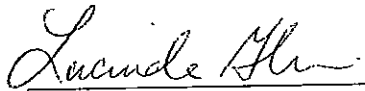
Pa. R.C.P. 4003.3.

Under Rule 4003.3, the work-product privilege extends beyond the mental impressions of an attorney to the mental impressions of a representative of an attorney *relating to strategy or the value or merit of any claim or defense*. In support of the privilege, the Township supplied an Attestation of Solicitor Kantra relating to the content of the redactions. The Attestation represents that the redactions from the e-mail constitute "mental impressions, conclusions, opinions, legal theories, legal research, strategy and work product of Phillip Getty." In *LaValle v. Office of General Counsel*, 564 Pa. 482, 495, 769 A.2d 449, (2001), the Pennsylvania Supreme Court recognized that the work-product privilege applies to a representative other than an attorney with regard to opinions relating to the merit of a claim or defense or relating to strategy or tactics. The Attestation is sufficient in showing that the redactions reflect protected mental impressions, and thus overcomes the presumption of openness.

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**. 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 Lehigh 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: September 10, 2010**

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

Sent to: David Rittenhouse; Marie K. Rudzinski, Esq. for Township

Exhibit B



**pennsylvania**  
OFFICE OF OPEN RECORDS

August 13, 2010

*Via U.S. Mail*

David Rittenhouse  
PO Box 193  
Eagleville, PA 19408

Gina Wooler  
Open Records Officer  
Lower Milford Twp  
7607 Chestnut Hill Church Road  
Coopersburg, PA 18036

**Re: AP 2010-0735, *Rittenhouse v. Lower Milford Township* ("Township")**

Dear Parties:

I write to introduce myself as the assigned Appeals Officer for the above appeal filed with the Office of Open Records (OOR) under the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, ("RTKL"). You will also receive or have received a letter from Executive Director Terry Mutchler explaining the appeals process and schedule for submitting any additional information you would like considered. The record in this matter will close on **August 23, 2010** absent a request from the OOR for clarification. This means that any submissions received after that date will not be considered unless the OOR specifically requests them.

**To the Open Records Officer of the Township**, I need additional information before issuing a Final Determination. The Township alleged the records sought are denied under the attorney work-product doctrine and cited Pa. R.C.P. 4003.3. Please be advised that no bases for denial will be considered other than those raised in the agency's original response. *See Signature Information Solutions v. Aston Tp.*, 995 A.2d 510 (Pa. Commw. 2010). Please describe the responsive records so that the application of the alleged privilege to each record or type of record is clear, and how specifically each record qualifies as "mental impressions" of counsel. For the privilege asserted, you may consult other decisions and supply the requisite proof as by affidavit or index attesting to how the records are work-product of an attorney. Please include citation of applicable legal authority in support. You may also respond to the grounds for appeal.

All facts relied upon **must be supported by an Affidavit made under penalty of perjury** by someone with personal knowledge. Please see the OOR website, which is searchable, for sample forms. Both parties are encouraged to review prior decisions that may impact the decision in this appeal, *e.g., Picollella v. County of Lycoming*, OOR Dkt. AP 2009-0815.

Please note that the *agency* has the burden of overcoming the presumption that records are public and supplement the record in accordance with the deadline set forth above.

Please include docket no. **AP 2010-0735** on all submissions related to this appeal and always send a copy to the opposing party. Submissions *via facsimile* are preferred to ensure timely receipt. Thank you in advance for your cooperation in this process.

Very truly yours,

Lucinda Glinn  
Appeals Officer

Exhibit C

David S. Rittenhouse  
PO Box 193  
Eagleville, PA 19408

September 8, 2010

VIA FACSIMILE 484-788-0632

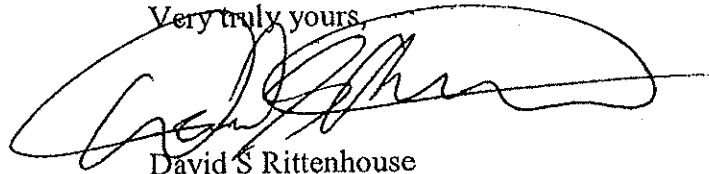
Emil W. Kantra II, Esquire  
Fitzpatrick Lentz & Bubba, P.C.  
4001 Schoolhouse Lane  
PO Box 219  
Center Valley, PA 18034-0219

RE: Rittenhouse v. Lower Milford Township  
Docket No. AP2010-0735

Dear Attorney Kantra:

In reading your August 18<sup>th</sup> letter, it was my assumption that you were going to file documents or information on behalf of the township on or before August 23<sup>rd</sup>. As of this date, I have not received any correspondence that you sent to the Appeals Officer at the Office of Open Records. If this is incorrect, please forward me the documents which were sent to them as stated by Lucinda Glinn, Appeals Officer in her August 13<sup>th</sup> letter otherwise I will assume that the Office of Open Records will make a determination without any other submissions on behalf of the Township.

Very truly yours,



David S Rittenhouse

DSR/bjc

Cc: Lucinda Glinn, Appeals Officer/ via facsimile 717-425-5343



October 4, 2010

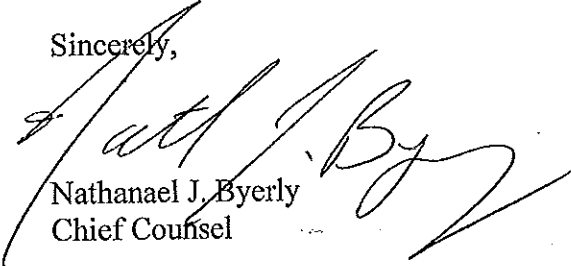
David Rittenhouse  
PO Box 193  
Eagleville, PA 19408

RE: Petition for Reconsideration OOR Dkt. AP 2010-0735

Dear Mr. Rittenhouse:

We are in receipt of your Petition for Reconsideration dated September 20, 2010 that was received by this office in connection with the Office of Open Records (OOR) Final Determination in *Rittenhouse v. Lower Milford Township*, OOR Dkt. AP 2010-0735. We hereby deny your Petition.

Sincerely,



Nathanael J. Byerly  
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records  
Emil Kantra II, Esquire  
Gina Wooler