



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>WENDY McKENNA,</b>	:	
<b>Complainant</b>	:	
	:	<b>Docket No.: AP 2010-0742</b>
<b>v.</b>	:	
	:	
<b>LOWER PROVIDENCE TOWNSHIP,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Wendy McKenna, on behalf of the Lower Perkiomen Valley Regional Sewer Authority, (the “Requester”) submitted a request (the “Request”) to Lower Providence Township (“Township”) seeking various records generally related to the Perkiomen Creek Interceptor (“Interceptor”) pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”). The Township denied the Request in part under the attorney-client privilege and various exemptions under the RTKL. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted** and the Township is required to take further action as set forth herein.

**FACTUAL BACKGROUND**

On June 30, 2010, the Request was filed seeking

1. Any and all e-mails or electronic communications between Rick Brown and Fred Walker dated December 1, 2009 to the present.

2. Any and all e-mails or electronic communications between ... Brown and Catherine Beyer dated December 1, 2009 to the present.
3. Any and all e-mails or electronic communications between ... Brown and the Pennsylvania Department of Environmental Protection dated December 1, 2009 to the present.
4. Oaks Middle Interceptor/PA DEP Public Water Meeting Minutes attached to e-mail communication from Casey Snyder to Eileen Sardo dated February 23, 2010.
5. All ... Township Board of Supervisors Meeting Minutes from December 1, 2009 to the present.
6. All Minutes of any ... Township committee at which any action or discussions occurred concerning the ... Interceptor from December 1, 2009 to present.
7. Any report, memorandum or writing prepared by John Chambers as referenced in the e-mail communication from Joe Dunbar to Colleen Eckman dated March 17, 2010.

After invoking a thirty-day extension to respond pursuant to 65 P.S. § 67.902(b), the Township granted items 5 and 7 of the Request, and partially granted items 1-3. The Township advised that the attorney-client privilege applies to certain response records related to items 1-3 and advised that other responsive records for these three items were withheld as exempt because the records 1) contain medical information pursuant to 65 P.S. 67.708(b)(5); 2) reflect the internal, predecisional deliberations of the Township under 65 P.S. 67.708(b)(10)(i); and 3) relate to a noncriminal investigation pursuant to 65 P.S. 67.708(b)(17). The Township also advised that the record sought in item 4 of the Request was withheld as exempt under 65 P.S. 67.708(b)(10)(i). Additionally, the Township alleged that no responsive records exist with respect to item 6 of the Request.

The Requester appealed to the OOR on August 13, 2010, challenging the privilege and exemptions cited by the Township with respect to items 1-4 of the Request. The OOR invited both parties to supplement the record no later than August 24, 2010. On August 25, 2010, the Township provided the OOR with additional materials. As

these materials were received after the record closed in this appeal, 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 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).

In the present case, the Township initially provided an unsworn, unsigned statement objecting to various specific e-mails in response to items 1-4, as well as a matrix listing each item that was withheld and an unsigned, unsworn position statement providing background to the appeal. While such documents, when signed under penalty of perjury, may serve as sufficient evidence to overcome the presumption that records are public,<sup>1</sup> the Township failed to bolster its statements with evidentiary support by submitting them under penalty of perjury. Consequently, the OOR holds that the Township failed to overcome the burden of establishing that either the attorney-client privilege or exemptions under the RTKL apply to items 1-4.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and the Township is required to provide responsive records within 30 calendar 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 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 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

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<sup>1</sup> *See Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. 2010).

FINAL DETERMINATION ISSUED AND MAILED: August 31, 2010



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APPEALS OFFICER  
J. CHADWICK SCHNEE, ESQ.

Sent to: Wendy McKenna; Denise Walsh