

On May 5, 2023, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Borough partially denied the Requests, arguing, the following:

Item #12.2023 – the Request is disruptive because the records were previously provided, as evidence by *Long v. Bath Borough*, AP 2022-2675, and the Request was filed to burden the Borough staff. The Borough also argues that the “audit trail” does not exist and cannot be created, as explained in AP 2022-2675.³

Item #14.2023 – the Request is insufficiently specific and overly burdensome, 65 P.S. §67.703, the records contain information that is protected by the attorney-client privilege and attorney work-product doctrine, and, for the timeframe of Oct. 20, 2021 – Oct. 22, 2022, no responsive records exist.

Item #15.2023⁴ –

c) Treasurer’s reports from 2016 through the first quarter of 2023: deemed denied because the Borough could not produce the records until June 16, 2023.

d) Clarification on 2020 Audit Report: Management representation letter dated December 8, 2022, is protected by the attorney-client privilege and consist of notes and working papers underlying an audit, 65 P.S. § 67.708(b)(9). Information and communications related to the 2020 audit report that may be relevant or useful in understanding the audit findings, denied as it asks a question and does not seek records and is insufficiently specific, 65 P.S. §67.703, communications with auditors and accountants are protected by the attorney-client privilege and consist of notes and working papers underlying an audit, 65 P.S. § 67.708(b)(9).

f) Stevens & Lee Invoices and Hours for [RTK] requests (2022-2023): an invoice that is specifically for services related to RTK request does not exist, invoices contain information that is protected by the attorney-client privilege.⁵

g) ARPA funding allocation details (2021-2022): breakdown of how ARPA funding was allocated and disbursed and documentation related to projects, programs or initiatives funded by ARPA, were

³ 2022 PA O.O.R.D. LEXIS ____.

⁴ Item #15.2023, consists of twelve (12) subparts, which we will delineate as a) through l), for clarity. In addition, because the Request is limited to the records identified as being challenged in the appeal form, certain portions the Borough’s response to subparts of Item #15.2023, will not be addressed in this Final Determination.

⁵ The Borough provided a vendor transaction list by vendor that contains the list of payments made by the Borough to Stevens & Lee for the relevant timeframe. Based on the list of records at issue on appeal, the Requester is not challenging the sufficiency of the Borough’s response, as the list only includes “*invoices* of Stevens & Lee related to RTK requests,” with respect to this portion of Item #15.2023. (Emphasis added).

partially denied because certain records do not exist and “any other relevant materials” is insufficiently specific, 65 P.S. §67.703. Communications, correspondence or agreements related to ARPA funding allocations, partially denied because it is insufficiently specific, 65 P.S. §67.703, and no agreements exist, but emails between the Borough and Northampton County and the Borough and the Department of Community and Economic development were provided.

h) Electric bills for Borough property and lighting and additional information related to billing, surcharges, taxes or fees related to electricity usage: denied as insufficiently specific and overly burdensome, 65 P.S. §67.703.

j) Planning studies, surveys, reports related to the Bathwick LLC Development Plans: partially denied, arguing that certain records are protected by copyright and may only be accessed by inspection.

l) Revenue and expenditure records related to the Borough Solid Waste and Recycling Fund and records related to account charge-offs: partially denied, arguing that a portion of the Item is overly broad and overly burdensome and that records related to charge-offs do not exist.

The Borough’s final response was attested to by the Borough Manager and Open Records Officer, Bradford Flynn, subject to the penalty of perjury pursuant to 18 Pa.C.S. § 4904.

On May 12, 2023, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.⁶ More specifically, the Requester identified the following records in the appeal form as “Records at Issue in this Appeal”: Quickbooks Audit Trail Log, emails, Treasurer’s reports for 2016-current, Audit Management letter for 2020 [a]udit, records [of] communications regarding the 2020 audit, invoices of Stevens and Lee related to RTK requests, ARPA funding allocation, [e]lectric [u]tility bills, [p]lanning and traffic studies related to Bathwick Apartment Complex, Solid waste and Recycling Fund, charge

⁶ The Requester granted the OOR additional to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

off policy.” The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On May 25, 2023, the Requester submitted a position statement in support of the appeal, setting forth arguments for each of the respective Request Items that are at issue on appeal.⁷ Regarding the audit trail, the Requester argues that they are financial records accessible under the RTKL and that the Borough has the burden of proving that the records do not exist. Regarding the email communications, the Requester argues that this portion of the Requests is sufficiently specific, that the Borough must justify the application of the attorney-client privilege and that there is public interest in the communications of public officials and employees when they relate to costs of handling RTKL requests. The Requester argues that the portion of the Requests seeking Treasurer’s Reports is sufficiently specific and that there is a public interest in the transparency of Borough management. Regarding the 2020 audit report records, the Requester asserts the management representation letter is a public record because the audit process should be considered part of a legislative process and that the record is not protected by the attorney-client privilege. Regarding the Stevens & Lee legal invoices related to responding to RTKL request, the Requester argues that the Borough must prove the non-existence of specific records related to invoicing for work on RTKL requests and that under Section 506(d) of the RTKL the Borough must contact Stevens & Lee to obtain the records. The Requester also argues that the Borough must prove the claim of attorney-client privilege with a more detailed justification of the privilege. Regarding the ARPA funding records, the Borough should have records even though the funds have not yet been allocated, and, that the portion of Request seeking “any other relevant materials” and “any

⁷ While the Requester submitted argument related to Items in the Request, other than those records identified at issue in the appeal form, this Final Determination will be limited to the record expressly designated by the Requester as being challenged on appeal.

communications, correspondence, or agreements related to the ARPA funding allocation process” is not insufficiently specific. The Requester argues that the portion of the Request seeking Borough Electric bills is sufficiently specific and the large number of records does not make the Request insufficiently specific and the non-existence of a breakdown of the electric bills by property or meter is not a valid reason for denial under the RTKL. Regarding the portion of the Request seeking planning studies and surveys for the Bathwick Apartments project, the Requester argues that copyright laws should not block access to the records, that the fair use doctrine under copyright laws allows access and, while acknowledging that the Borough agreed to provide access by inspection, the Requester argues that the Borough is required to provide copies under RTKL. Finally, regarding the Request Item seeking records related to the Borough’s solid waste and recycling fund and charge-off policy, the Requester argues that the Borough must prove the non-existence of records, that there should be some records of accounts that are delinquent and have been charged-off and that the Borough should provide account records related to charge-offs, including current status and decision criteria. The Requester further argues that while acknowledging that the solid waste and recycling funds were previously comingled with the general fund, the Borough should provide records in some format.

On May 25, 2023, the Borough submitted a position statement reiterating its grounds for denial and incorporating the Borough’s May 5, 2023, final response by reference. The Borough claims that the appeal is limited to the records identified in the appeal as “Records at Issue in This Appeal.” The Borough also argues that the Requester has failed to set forth legal grounds for appeal, pursuant to Section 1101(a) of the RTKL, 65 P.S. §67.1101(a). In support of its position, the Borough submitted the affidavit of James Kratz, Esq., the Borough solicitor, as well as the

Bradford attestations contained in the Borough's May 5, 2023, final response letter and a supplemental Bradford sworn statement.

On June 23, 2023, the Borough submitted a letter indicating that records responsive to the portion of the Request seeking Treasurer's Reports had been saved to a flash drive and that the Requester had been informed that the flash drive could be retrieved from the Borough Office for a fee of \$4.99, the cost of the flash drive. The Borough also submitted a copy of the June 16, 2023, letter sent to the Requester informing him of the steps of the search conducted and the contents of the flash drive. The Borough solicitor stated that on June 21, 2023, the Requester paid for and retrieved the flash drive.

On July 14, 2023, the Requester submitted a supplement statement and requested that the OOR admit the submission into evidence. The Requester asserts that a Borough financial report received in response to a separate RTKL request serves to dispute the Borough's argument that Stevens & Lee legal invoices do not distinguish between services related to RTKL request and other legal services. The submission included a copy of the March 3, 2023, financial report referenced by the Requester.

By letter dated July 14, 2023, the OOR reopened the record and set a supplemental submission schedule to provide the Borough with an opportunity to submit a response to the Requester's supplemental statement.⁸ The OOR also informed the parties that no further submissions would be accepted after July 20, 2023, without a showing of good cause.

The Requester also submitted a statement on July 17, 2023, asserting that Attorney Kratz's representation of the Borough in this appeal amounts to an impermissible conflict of interest under

⁸ The Requester agreed to an extension of the Final Determination deadline to accommodate the consideration of the supplemental submissions.

the Pennsylvania Rules of Professional Conduct because the redaction of his law firms' invoices are at issue in this appeal.

On July 20, 2023, the Borough submitted a reply to the Requester's supplemental statements, which included a letter of the same date from Mr. Flynn made subject to the penalty of perjury. The Borough reiterates its position that Stevens & Lee legal invoices did not track services for RTKL requests separate from other legal services through the date of the Request in March 2023. The Borough explains that the financial report is not a Stevens & Lee invoice and that the dollar figure reported for legal expenses related to RTKL requests was an estimate provided to Mr. Flynn by a bookkeeper who had been tasked with reviewing all invoices for "keywords relative to RTKL matters" to arrive at a number for the purpose of tracking RTKL legal services going forward. The Borough also objected to the admission of the Requester's July 17, 2023, statement, as well as any additional replies submitted in response to the Borough's July 20, 2023, submission, arguing that the OOR's reopening of the record was solely to allow the Borough to reply to the Requester's July 14, 2023, supplemental statement.

On July 20, 2023, the Requester submitted a response to the Borough's July 20th submission. The OOR's correspondence of July 14, 2023, reopened the record for consideration of the Requester's statement of that date and to solely permit the Borough to reply, as it is the party bearing the burden of proof on appeal,⁹ and clearly stated that no further submissions would be accepted after July 20th; therefore, the Requester's July 17 and July 20, 2023, statements will not be admitted to the record. Furthermore, the Requester's July 20, 2023, statement is cumulative and duplicative of arguments made in the appeal and in submissions provided during the appeal. *See* 65 P.S. § 67.1102(a)(2) (stating that "[t]he appeals officer may admit into evidence testimony,

⁹ 65 P.S. § 67.708(a)(1).

evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute”).

On August 16, 2023, the Borough submitted a supplemental statement made under penalty of perjury by Mr. Flynn, in response to the OOR’s request for clarification regarding the date of the requested 2020 Audit management representation letter sought in Item #15.2023, and for which the Borough denied access.¹⁰ The statement explained that a December 7, 2022, letter titled “Communication with Those Charged with Governance” that was addressed to the Borough council was inadvertently provided to the Requester with records responsive to a prior RTKL request that was at issue in AP 2022-2675. The statement further explained that the record denied in this matter was erroneously identified as being dated December 7, 2023; however, the Borough clarified that the record presently at issue, the management representation letter was, in fact, dated December 8, 2023.¹¹

On August 21, 2023, the Borough submitted an exemption log and supplemental Kratz Affidavit, in compliance with the OOR’s August 10, 2023, directive, that further explains the redactions made to the responsive legal invoices. In addition, the Borough explained that the legal invoices were reviewed again, as Attorney Kratz had determined that some generic legal descriptions had been redacted. The Borough asserts that the re-reviewed and re-redacted invoices

¹⁰ The Borough’s clarification was initially submitted on August 15, 2023, but the Borough resubmitted the same correspondence on August 16, 2023, for the purpose of including an attestation made pursuant to 18 Pa.C.S. § 4904.

¹¹ On August 15, 2023, the Requester submitted correspondence requesting that the OOR seek clarification regarding the confusion between the two different audit related documents and, also, submitted a copy of the December 7, 2022, “Communication With Those Charged With Governance.” However, the OOR had already sought clarification regarding this issue by correspondence dated August 10, 2023. Accordingly, the Requester’s correspondence is redundant and moot and, therefore, not admitted in to evidence. In addition, the Requester submitted correspondence with an attached billing statement he received from the Borough, which he asserts proves that the billing documentation from Stevens and Lee are “fraudulent and are being extremely exaggerated in order to [w]eaponize the [RTK] war against requester.” The submission also included a link to a YouTube video of a Borough meeting. Subsequently, on September 6, 2023, the Requester submitted correspondence and a copy of the same billing statement pointing out specific alleged billing inconsistencies. However, the accuracy of the billing statements is not at issue or even within the purview of an appeal before the OOR. Accordingly, the Requester’s August 17, 2022 and September 6, 2023, submissions will also not be admitted into evidence. *See* 65 P.S. § 67.1102(a)(2).

comport with caselaw governing the legal standard for the attorney-client privilege and attorney work-product doctrine. The Borough provided the re-redacted invoices with the supplement submission.

On August 30, 2023, the Requester submitted a statement in response to the exemption log, arguing that the inclusion of a third-party bookkeeper waives the privilege, that the Borough's claim of the attorney work-product doctrine has not been proven, and that there is a discrepancy between the costs noted in the Borough's July 20, 2023, submission and the costs noted in the exemption log.

LEGAL ANALYSIS

The Borough is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the 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 agency subject to the RTKL, the Borough is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as "such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The appeal is sufficient under Section 1101 of the RTKL

With respect to each individual Item set forth in the appeal, the Borough asserts that the appeal should be dismissed because the Requester's appeal is deficient under Section 1101 of the RTKL. 65 P.S. § 67.1101(a). More specifically, the Borough argues that the Requester "does not assert any acceptable factual or legal grounds to support his appeal." However, the Requester

appealed using the OOR's standard appeal form, which provides that the signature of the Requester constitutes a statement that the requested records are public records that exist in the possession of the agency and challenges the denial, partial denial, or deemed denial of any portion of the Request. *See Barnett v. Pa. Dep't of Public Welf.*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). In addition, the Requester identified particular portions of each of the Requests that he was placing at issue on appeal. The OOR has found that this statement is sufficient to satisfy a requester's burden under Section 1101(a). *See, e.g., McCaffrey v. Upper Merion Area Sch. Dist.*, OOR Dkt. AP 2020-1510, 2020 PA O.O.R.D. LEXIS 3083; *Geleff v. Exeter Twp.*, OOR Dkt. AP 2022-2244, 2022 PA O.O.R.D. LEXIS 2658. Therefore, the appeal is sufficient, and the OOR may reach the merits.

In addition, the Requester's appeal form identifies the "Records at Issue on Appeal" as:

Quickbooks Audit Trail Log, Emails, Treasurer[']s Report 2016-current, Audit Management Letter for 2020 Audit, records communications regarding the 2020 audit, invoices of Stevens and Lee related to RTK requests, ARPA funding allocation, Electric Utility bills, Planning and traffic studies related to BathWick Apartment Complex, Solid Waste and Recycling fund, charge off policy.

The Borough asserts that the appeal is limited the final responses provided for the categories of records identified by the Requester as being challenged. The Requester also submitted an appeal statement as an attachment to the appeal filing. However, based on a review of the statement, the Requester did not identify any additional categories of records as being challenged. Therefore, the appeal is limited to the records identified as "Records at Issue on Appeal" in the appeal form.

2. The Requests are not disruptive

The Borough argues that the Requests were submitted to the Borough in "bad faith to create distraction and additional burden on the Borough in an attempt to overload [the Manager] and ... staff and create expense to the Borough because of [the Manager's] consulting of the Borough Solicitor" The Borough further argues that the Requests are repetitive and disruptive and many

of the records were provided in response to earlier requests, as evidenced by the OOR Final Determination in *Long v. Borough of Bath and Driveloeker, LLC*, OOR Dkt. AP 2022-2675, 2022 PA O.O.R.D. LEXIS _____. The Borough alleges that the Requester is abusing the RTKL process because of personal issues that may exist between the Requester and the Borough Manager, Bradford Flynn.

Section 506(a) of the RTKL provides that “[a]n agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.” 65 P.S. § 67.506(a). “Under this section ... an agency must demonstrate that (1) ‘the requester has made repeated requests for th[e] same record[(s)]’ and (2) ‘the repeated requests have placed an unreasonable burden on the agency.’” *Pa. Office of the Governor v. Bari*, 20 A.3d 634, 645 (Pa. Commw. Ct. 2011); *see also Slate v. Pa. Dep’t of Env’tl. Prot.*, OOR Dkt. AP 2009-1143, 2010 PA O.O.R.D. LEXIS 97 (“A repeated request alone is not enough to satisfy § 506(a)(1)”). Repeated requests for the same records, although phrased differently, may be denied as disruptive. In *Mezzacappa v. West Easton Borough*, the OOR held that a request must be repeated more than once to constitute a “repeated request” for purposes of 65 P.S. § 67.506(a). OOR Dkt. AP 2012-0992, 2012 PA O.O.R.D. LEXIS 967 (“Because the Borough has only established that the Requester has made one repeated request, rather than multiple ‘repeated requests,’ the OOR finds that the Request was not disruptive”). The OOR’s decision in *Mezzacappa* was subsequently upheld by the Northampton County Court of Common Pleas and the Commonwealth Court. *Borough of West Easton v. Mezzacappa*, No. C-48-CV-2012-7973 (North. Com. P1. Jan. 9, 2013) (“[A] request is not disruptive when a requester [seeks] the same records only twice”), *aff’d* 74 A.3d 417 (Pa. Commw. Ct. 2013).

Attachments to the appeal and almost two pages of background information presented as an introduction to the Borough's final response indicate that some personal animus may exist between the Requester and the Borough Manager. However, a requester's identity or motivation for making a request is not relevant to determining whether a record is accessible to the public under the RTKL. *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013). Regarding the assertion that the Requests are repetitive and disruptive, the Borough has not presented evidence to demonstrate that any of the records sought have been previously requested more than once in the past. Therefore, we determine that the Requests are not duplicative or disruptive under 65 P.S. § 67.506(a).

3. The Borough provided records on appeal

On June 23, 2023, the Borough submitted a letter indicating that a flash drive containing records responsive to the portion of the Request seeking Treasurer's Reports had been saved to a flash drive and that the Requester was informed by letter of June 16, 2023, that the flash drive could be retrieved from the Borough Office for a fee of \$4.99, the cost of the flash drive. The Borough solicitor stated that on June 21, 2023, the Requester paid for and retrieved the flash drive and also requested that the Requester confirm receipt of the flash drive. While the Requester did not reply to confirm receipt of the flash drive, he has not disputed receiving the records in any of the submissions made during the course of the appeal. Accordingly, the appeal is moot as to the Treasurer's Report records from 2016 through the first quarter of 2023, that were provided to the Requester on a flash drive by the Borough on or about June 21, 2023.

4. Borough AORO Tracking #12.2023

The Request designated as AORO Tracking #12.2023, sought, in pertinent part, the following:

... information on user activity within the Borough[?] ... QuickBooks account system related to the allocation of funds and recordings of transactions for the mayor's insurance premium payments from December 2018 to December 2022. Please provide the following information a copy of the Audit Trail Report from QuickBooks for the specified time period, as it should contain this information.¹²

The Borough denied this portion of the Request, asserting that, as explained in AP 2022-2675, because of various QuickBooks user errors, a single Audit Log containing the requested health insurance does not exist and cannot not be drawn from the software. The Borough also argues that under Section 705 of the RTKL, it is not required to create a record. Regarding the existence of the QuickBooks audit trail the Borough relies on the factual averments in the May 5, 2023 final response, attested to by Manager Flynn, that references submissions and communications related to *Long v. Bath Borough*, OOR Dkt. AP 2022-2675. In the final response, Manager Flynn attests, as follows:

You were given a copy of the Final Determination for OOR AP 2022-2675 via email from Appeals Officer Hecker, so you are aware of this. You are also aware that you stated to Appeals Officer Hecker that you were asking for the Audit Trail Report from Quickbooks prior to her rendering the Final Determination for OOR AP 2022-2675. See your email of February 16, 2023, to Appeals Officer Hecker which is attached hereto as **Attachment #4**. During your appeal at OOR AP 2022-2675, you were aware that Appeals Officer Hecker was informed on January 30, 2023, and February 23, 2023, that:

“It is impossible to obtain a single, accurate report from the Borough's Quickbooks for each relevant time period. Why? The Borough's bookkeeper has reported that, in past years, the previous bookkeepers had entered information into Quickbooks that was incorrect. For example, rather than entering individual [Delaware Valley Health Trust] bills as they were received, there are some months when multiple months of bills were entered as a single amount which made that entry incorrect with need for correction. Also, another barrier from being able to create a single, correct report from Quickbooks is that the Mayor's health expenses were tracked in different accounts over multiple years. For example, both 2021 and 2022 have one (1) deposit each that were posted to an incorrect insurance reimbursement line which is where the Borough

¹² As set forth above, the appeal is limited to the records listed as being at issue on appeal and, regarding #12.203, the appeal indicates that “Quickbooks Audit Trail Log” remains at issue for adjudication.

posts items such as PIRMA deposits. These payments are in a different account and so a single, correct Quickbooks report is not possible. Also, there were some deposits from payments from the Mirabitos that were posted to incorrect accounts. The Borough's bookkeeper had to perform extensive research to reconcile entries and create the excel spreadsheets prepared and already provided to Mr. Long to provide a single, correct report for each relevant year."

The Borough's evidence, while it could be more detailed, consists of the Flynn sworn May 5, 2023, final response to the instant Requests that contains the Borough's explanation regarding why a QuickBooks audit trail does not exist, which was also submitted under penalty of perjury, that was submitted during the prior appeal at AP 2022-2675. The Requester's arguments consist of reasons why the Audit Trail should exist and he also expresses concerns about accurate financial recordkeeping, as well as Borough transparency, but the unsworn statements do not amount to evidence that the record does, in fact, exist. Under the RTKL, an agency must only prove that a record is exempt from disclosure by a preponderance of the evidence. 65 P.S. § 67.708(a)(1). "A preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry." *Delaware County v. Schaefer ex rel. Philadelphia Inquirer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012). In this instance, the Borough's evidence demonstrates by a preponderance that an Audit Trail record does not exist. *Hodges*, 29 A.3d at 1192; 65 P.S. § 67.708(a).

4. AORO Tracking #14.2023

The Request designated as AORO Tracking #14.2023, sought, the following:

... any and all email communications sent or received by any elected official, employee, or vendor of the Borough ... that include the name 'Mike Long' or 'Michael Long.' Please include communications from the following time periods:

September 26, 2022[] to March 26, 2023
October 20, 2021[] to October 22, 2021

Please include any emails related to the following topics:

Right-to-know requests
Dissertations
Elections
Facebook
Videos
Social media posts
Policy
Ordinance[.]

Regarding the October 2021 timeframe, the Borough denied this portion of the Request, arguing that no records exist. While it fell outside the timeframe, the Borough did provide a copy of an email dated October 27, 2021, that includes the name “Mike Long” and the word “dissertation.” Further, in the appeal submission, the Requester expressly states, regarding the email communications containing the name “Mike Long” or “Michael Long,” that he is appealing the partial denial of the records sought from September 26, 2022 to March 26, 2023. Therefore, the OOR interprets the appeal of the Borough’s response to this portion of the Request designated as Tracking #14.2023, as only relating to the September 26, 2022 to March 26, 2023 timeframe.

Regarding the September 26, 2022 to March 26, 2023 timeframe, the Borough denied this portion of the Request, arguing that it is overly broad, burdensome and insufficiently specific, 65 P.S. § 67.703, and that the records potentially contain material that is protected by the attorney-client privilege and attorney work-product doctrine. The Borough also asserts that the applicable timeframe implicates emails related to the RTKL request that was before the OOR in AP 2022-2675, and, therefore, some emails exchanged with the Appeals Officer in that matter are already in the Requester’s possession. Finally, the Borough asserts that the Requester emailed Borough Council members during the applicable timeframe, so the responsive records would contain several duplicative emails. On appeal, the Borough relies on Manager Flynn’s factual attestations in the

May 5, 2023, final response and, regarding the claim of privilege, the Borough relies on Attorney Kratz's affidavit.

Section 703 of the RTKL provides, in pertinent part, “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested” 65 P.S. § 67.703. When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d at 824). In determining whether a particular request is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Pa. Dep’t of Educ.*, 119 A.3d at 1125. Second, the scope of the request must identify a discrete group of documents (*e.g.*, type or recipient). *See Id.* at 1125. Third, “[t]he timeframe of the request should identify a finite period of time for which the records are sought.” *Id.* at 1126. This factor is the most fluid and is dependent upon the request’s subject matter and scope. *Id.* Failure to identify a finite timeframe will not automatically render a sufficiently specific request overbroad; likewise, a short timeframe will not transform an overly broad request into a specific one. *Id.*

Mr. Flynn attested to the following in the Borough’s final response:

Your request does not identify any specific elected official, any specific employee, or any specific vendor. It also doesn’t specifically identify a subject matter of Borough business. It only provides general terms. To start a good faith review, the first step taken was to have the Borough’s IT Administrator search the Borough’s server for any emails containing “Mike Long” or “Michael Long” for the period September 26, 2022, to March 26, 2023. That search has revealed 521 potentially

responsive documents. In case any of the potentially responsive documents contain information that my limited staff should not be reviewing, I wasn't able to authorize my limited staff to review the 521 potentially responsive documents. Also, it was impossible for me to review the 521 potentially responsive documents because of my existing workload and legal requirement to answer your Right-to-Know AORO #12.2023, #13.2023, #14.2023 and #15.2023 requests within the time period required by the RTKL. Further, I estimate that it would take me 60 hours of dedicated time for me to review the 521 potentially responsive documents to identify and remove emails that are confidential per the attorney-client privilege. My engaging in such a process would materially adversely impact on the Borough because I would not be performing my existing job responsibilities and, therefore, not fulfilling my existing job responsibilities as the Manager of the Borough.... This request #14.2023 is insufficiently specific and overly broad and overly burdensome.

This request would cause me to review potentially responsive emails to form a factual opinion whether they are responsive or not subject to access because of attorney-work product and/or attorney-client privilege which asks me to render either a legal or factual opinion on an issue in response to a RTK request which makes this request #14.2023 insufficiently specific. See Askew V. Pennsylvania Office of Governor, 65 A.3d 989 (Pa. Cmwlth. 2013).

Also, this request #14.2023 causes an overly broad and overly burdensome search that the RTKL does not intend

The Borough relies on *Pa. Dep't of Educ., supra.*; *Mollick v. Twp. of Worcester*, 32 A.2d 859 (Pa. Commw. Ct. 2011); *Montgomery County v. Iverson*, 50 A.3d 281 (Pa. Commw. Ct. 2012) and *Keystone Nursing & Rehab of Reading, LLC v. Simmons-Ritchie*, 222 A.3d 1226 (Pa. Commw. Ct. 2020) and OOR Final Determinations *Mezzacappa v. Northampton Cnty. Dist. Atty's Off.*, OOR Dkt. AP 2022-2110, 2023 PA O.O.R.D. LEXIS 887, and *Sanchez v. Chester Cnty.*, OOR Dkt. AP 2021-1129, 2021 PA O.O.R.D. LEXIS 1168.

The timeframe consists of six months and has a finite beginning and ending date and a defined scope, as the Request seeks email communications. Regarding a subject matter, the Request does not state a transaction or activity of the Borough; however, the fact that a request uses keywords in place of a properly defined subject matter does not necessarily mean that a request is insufficiently specific. A broad keyword search may still be sufficiently specific where

a request specifies senders or recipients of emails. *See Office of the Governor v. Engelkemier*, 148 A.3d 522, 532-33 (Pa. Commw. Ct. 2016). In *Engelkemier*, the request sought all emails sent and received by the Governor’s Chief of Staff over five-and-a-half-months, and the requester provided a list of 109 search terms to guide the search. In finding the request sufficiently specific, the Court stated:

A keyword list is not necessarily a substitute for a properly-defined subject matter(s) -- i.e., a particular transaction or activity of an agency. If terms on a list are too general or too broad, a requester runs the risk that the request will be rejected for lack of specificity, if not by the agency then by the OOR or this Court. A clearly-defined subject matter, such as “liquor privatization,” by contrast, has a better chance of passing the specificity test.

Engelkemier, 148 A.3d at 531. Therefore, the Court found that, although the keyword list was lengthy and broad, the fact that the request had a narrow timeframe and scope, along with the agency’s response stating that it was producing records, meant that the request was sufficiently specific. *Id.* at 532.

In this matter, Item #14.2023, the provides two variations on the Requester’s name and a list of other keywords. The OOR has previously determined that a request for a keyword search of a requester’s name, over the course of six months, does not reasonably indicate some business of an agency, and, thus, was insufficiently specific. *See Cooper v. Lycoming Cnty.*, OOR Dkt. AP 2022-0771, 2022 PA O.O.R.D. LEXIS 1119; *see also e.g. Dennis v. Conneaut Sch. Dist.*, OOR Dkt. AP 2022-0707, 2022 PA O.O.R.D. LEXIS 1321 (where the keywords were the iterations of first names and surnames, the request did not reasonably indicate some business of an agency and was, therefore, insufficiently specific). However, the OOR has found keyword lists specific where they relate to well-known matters of agency business and the request identifies senders and recipients. *See Benzing v. City of Pittsburgh*, OOR Dkt. AP 2018-0188, 2018 PA O.O.R.D. LEXIS 383; *Winklosky v. Pa. Office of Admin.*, OOR Dkt. AP 2018-1438, 2018 PA O.O.R.D. LEXIS

1391. Here, it is not clear that “Mike Long” or Michael Long” is related to a category of Borough business or activity, outside of being a RTKL requester. Additionally, the list of keywords are very broad topics, “Right-to-know requests[,] [d]issertations[,] [e]lections[,] [f]acebook[,] [v]ideos, [s]ocial media posts, [p]olicy, [and] [o]rdinance,” and, also, do not specify “what category or type of [Borough] business or activity for which [the Requester is] seeking information.” *Mollick*, 32 A.3d at 871.

Therefore, without a stated subject matter, the breadth of this portion of the Requests is largely undefined, thereby requiring the Borough to make judgements as to whether the records are related a District transaction or activity. *See Pa. Dep’t Env. Prot. v. Legere*, 50 A.3d 260, 264-65 (Pa. Commw. Ct. 2012). As such, the Request is insufficiently specific to enable the District to ascertain which records are being requested. 65 P.S. § 67.703. However, nothing in this Final Determination prevents the Requester from filing new, more detailed request with the District.¹³

4. AORO Tracking #15.2023

AORO Tracking #15.2023 consists of several Request Items, seven of which are at issue on appeal. Each individual Request Item that is being challenged will be analyzed under a separate subsection.

d. Subject: ... Clarification on 2020 Audit Report

... I am requesting clarification on certain items related to the Borough[']s ... 2020 audit report.... Please provide the following information:

1. A copy of the management representation letter dated December 7, 2023.

The Borough denied this portion of the Requests, stating that the letter sought is a privileged written communication with the auditor and is not subject to access pursuant to Section

¹³ Because we have determined that AORO Tracking #14.2023, is insufficiently specific, the Borough’s argument that certain emails may be protected by the attorney-client privilege or attorney work-product doctrine will not be addressed.

102 of the RTKL and the accountant-client privilege, 63 P.S. § 9.11a. The Borough also claimed that the responsive letter is part of the underlying working papers that are not part of the audit reports and, is therefore, exempt under Section 708(b)(17)(v) of the RTKL.

Section 708(b)(17) of the RTKL provides that records “relating to a noncriminal investigation” are exempt from disclosure, including “work papers underlying an audit.” 65 P.S. § 67.708(b)(17)(v). The Borough clarified that, despite some confusion between a December 7, 2022 “Communication with Those Charged With Governance” issued in relation to the 2020 Audit and inadvertently provided in response to a prior RTKL request, and the requested Management Representation Letter dated December 8, 2023, the records identified as responsive to number 1 of subpart *d.*, is the December 8, 2023, Management Representation Letter.

The Borough argues that the “... Management Representation Letter of 12-8-22 is part of the underlying working papers of the Borough’s 2020 audit report and not part of the audit report per RTKL Section 102....” and “[l]ike the Borough Management Representation Letter of 12-8-22, all written communications by and between the Borough and employees and CPA(s) of CRY are not subject to access per RTKL Section 102 (definition of “public record”, “privilege” and “financial record”) and per the Pennsylvania accountant-client privilege at 63 P.S. Section 9.11a.” In support of the Borough’s argument, in the May 25, 2023, sworn submission statement, Mr. Flynn attests, as follows:

With respect to the Borough’s 2020 audit report, the report was prepared by the firm of certified public accountants being Campbell, Rappold & Yurasits, LLP (“CRY”), located at 1033 South Cedar Crest Boulevard, Allentown, PA 18103-5443....

Melissa A. Grube is the certified public accountant of CRY who was/is in charge of the Borough’s 2020 audit report. CPA Grube has been a licensed certified public accountant since 1990 and the last renewal of her license was December 14, 2021. The current expiration of her CPA license is December 31, 2023.

For Section 708(b)(17) of the RTKL to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

The May 25 2023, Flynn submission included a copy of the December 7, 2020, “Communication with Those Charged With Governance” document and a copy of a report from the Pennsylvania Licensing System Verification service managed by the Bureau of Professional and Occupational Affairs, indicating that Melissa Grube was licensed as a Certified Public Accountant at the time of the 2020 Borough Audit. Additionally, in Mr. Flynn’s sworn clarification statement of August 15, 2023, further states:

... on Thursday, December 8, 2022, at 2:57 PM, I received an email from Paul G. Mack, CPA, CFE with Campbell, Rappold, Yurasits, manager of the Borough’s audits. At the time, we were completing the 2020 audit work. Paul’s email included a draft management representation letter for my approval consideration. On the same day, I reviewed and approved the content of the draft letter, placed the body of the draft letter onto Borough letterhead, electronically signed the document and emailed to Paul a PDF version of the Borough’s management representation letter dated December 8, 2022, addressed to Campbell, Rappold & Yurasits....

Section 1005(7) of the Pennsylvania Borough and Incorporated Towns Code (“Code”), 8 P.A.C. §1005, authorizes the Borough Council to adopt an ordinance “for the appointment of an independent auditor who shall be a certified public accountant registered in this Commonwealth,

a firm of certified public accountants ... or a competent public accountant or a competent firm of public accounts.” Section 1059.11 of the Code delineates the powers and duties of an independent auditor:

(a) Powers and duties. — If an independent auditor is appointed under section 1005(7) (relating to powers of council), the independent auditor shall have the same powers and duties and be subject to the same penalties as the auditors under this chapter. The independent auditor shall annually examine, audit and settle all accounts in which the borough is concerned. The audit shall consist of an examination in accordance with generally accepted auditing standards and shall include tests of the accounting records and other auditing procedures as the independent auditor considers necessary in the circumstances. The independent auditor shall make and publish the annual financial report in the same form and manner and at the same time as required in this part of the auditors of the borough.

(a) Powers and duties. — If an independent auditor is appointed under section 1005(7) (relating to powers of council), the independent auditor shall have the same powers and duties and be subject to the same penalties as the auditors under this chapter. The independent auditor shall annually examine, audit and settle all accounts in which the borough is concerned. The audit shall consist of an examination in accordance with generally accepted auditing standards and shall include tests of the accounting records and other auditing procedures as the independent auditor considers necessary in the circumstances. The independent auditor shall make and publish the annual financial report in the same form and manner and at the same time as required in this part of the auditors of the borough.

(b) Reporting. — The independent auditor shall audit the accounting records of the borough for the fiscal year and shall prepare a report on the examination which shall be subject to appeal in the same manner as reports of the auditors under this chapter. The report shall set forth:

- (1) The scope of the examination.
- (2) The independent auditor’s opinion of the fairness of the presentation of the financial statement of the borough, which shall show a complete statement of the financial condition of the borough, giving in detail the actual indebtedness, the amount of funded debt, the amount of floating debt, the valuation of the taxable property in the borough, the assets of the borough with their character and value and the date of the maturity of the respective forms of funded debt of the borough.
- (3) The amount of any balance or shortage or any expenditure of any kind or made in a manner prohibited or not authorized by a statute which came to the independent auditor’s attention during the course of the examination and which, in the independent auditor’s opinion,

causes a financial loss to the borough as provided in section 1059.3 (relating to surcharge by auditors) shall be a surcharge against an officer against whom the balance or shortage shall appear, subject to appeal, entry as judgment, certification and enforcement as provided in this chapter.

8 Pa.C.S. §§ 1059.11(a)-(b). In addition, the Bath Borough Code provides that the Borough Manager's duties include, among others, the following:

(8) He shall keep the Council informed as to the conduct of Borough affairs; submit periodic reports on the condition of the Borough finance and such other reports as the Council requests; and make such recommendations to the Council as he deems necessary;

(9) He shall submit to Council, as soon as possible after the close of the fiscal year, *a complete report on the financial and administrative activities of the Borough for the preceding year....*

Bath Borough Code §§ 123-6 (B)(8) – (9) (emphasis added).

The RTKL does not define the “work papers underlying an audit,” but the OOR has relied on the definition promulgated by the American Institute of Certified Public Accountants, which defines “work papers” as records of “the procedures applied, the tests performed, the information obtained, and the pertinent conclusions reached in the engagement.” *See Harmon v. Londonderry Twp.*, OOR Dkt. AP 2017-2276, 2018 PA O.O.R.D. LEXIS 140 (citing *Kelly & Assoc. v. NEIU*, 36 Pa. D. & C. 5th 300, 316 (Lackawanna C.C.P. 2014). The copy of the December 7, 2020, “Communication with Those Charged With Governance” describes aspects of the audit process, including “significant audit matters,” difficulties encountered in the audit, if any, “corrected and uncorrected misstatements” related to representations from management, and “other audit findings or issues,” among others, to the Borough during the 2020 Audit and what information would be reported to the Borough. In addition, the document states, “[w]e have requested certain representations from management that are included in the management representation letter” Taken together, such information comports with the “work papers” definition. Further, in *Catania*

v. Pa. Dep't of Educ., OOR Dkt. AP 2019-1657, 2019 PA O.O.R.D. LEXIS 1680, the OOR applied the definition of a management representation letter found in the *American Institute of Certified Public Accountants, Audit & Attest Standards*, AU Sec. 333, to determine whether the management representation letters related to the Department's audit of the Harrisburg School District were considered auditor working papers that were exempt from disclosure pursuant to Section 708(b)(17)(v) of the RTKL. AU Sec. 333, provides: A management representation letter is a document containing written representations from the management of an audited entity that the information provided to the auditor is accurate and complete. Such a letter is typically a prerequisite for an auditor to issue a clean statement of an entity's finances.¹⁴ Additionally, in *Harmon*, the OOR the definition to conclude that a memorandum from a township's auditor constituted working papers underlying an audit under Section 708(b)(17)(v). 2018 PA O.O.R.D. LEXIS 140, *8. Finally, the Public Company Accounting Oversight Board AU Section 339A provides: Working papers are records kept by the auditor of the procedures applied, the tests performed, the information obtained, and the pertinent conclusions reached in the engagement. Examples of working papers are audit programs, analyses, memoranda, letters of confirmation and representation, abstracts of company documents, and schedules or commentaries prepared or obtained by the auditor. Working papers also may be in the form of data stored on tapes, films, or other media.¹⁵ Based on the evidence provided, the OOR finds that Borough has the legislative fact-finding authority to conduct investigative financial audits. In addition, Mr. Flynn's description of the content and purpose of the management representation letter demonstrates that

¹⁴See <https://us.aicpa.org/content/dam/aicpa/research/standards/auditattest/downloadabledocuments/au-00333.pdf>; see also <https://pcaobus.org/oversight/standards/auditing-standards/details/AS2805> (last accessed September 19, 2023).

¹⁵ See <https://pcaobus.org/oversight/standards/archived-standards/details/AU339A> (last accessed September 19, 2023).

it falls within the common definition of an auditor's "working papers", such that the Borough was permitted to withhold this document under Section 708(b)(17)(v) of the RTKL.

e. Subject: ... Stevens & Lee Invoices and Hours for RTKL requests 2022-2023

... I am requesting a copy of all invoices and records of payment made to Stevens & Lee for services rendered related to right-to-know requests for the years 2022 and 2023.

Additionally, I would like to request a breakdown of the hours spent by Stevens & Lee handling each right-to-know request during the same time period.

Please provide the following information:

1. Copies of all invoices and records of payment made to Stevens & Lee for services rendered related to right-to-know requests for the years 2022 and 2023.
2. A breakdown of the number of hours spent by Stevens & Lee handling each right-to-know request for the years 2022 and 2023.

If any records or portions thereof are denied or redacted, please cite the specific exemption(s) and provide a written explanation for the denial or redaction.

The Borough responded by partially granting this portion of the Request. The Borough provided redacted invoices, arguing that the redacted material is protected by the attorney-client privilege and attorney work-product doctrine. The Borough also provided a transactional list by vendor showing the payments made to Stevens & Lee for the relevant timeframe in response to the portion of the Item seeking payment records. However, the Borough did not provide the invoice and payment records broken out by legal services rendered for RTKL requests, as it claims they do not exist because all solicitor legal services are billed under one billing code.

Mr. Flynn attested to the following in the final response:

The invoices always contain matter 00001 because that matter is the Stevens & Lee's billing code number for general and miscellaneous Solicitor legal services. The invoices sometimes also contain other matter numbers as separate matter numbers are initiated for professional service agreements, Bath Subdivision and Land Development Ordinance ("SALDO") applications by developers and other

matters when the Borough requests the billing for those services tracked to a new, separate matter number....

Please also note that a Stevens & Lee invoice that is specific only to services rendered related to right-to-know requests for 2022 and January thru March 2023 does not exist. The Borough Solicitor provided legal work in 2022 and January 2023 thru March 2023 for general and miscellaneous Solicitor legal services unrelated to right-to-know requests and in some months in 2022 and January 2023 thru March 2023 legal services related to right-to-know requests. Both of those services fell under Stevens & Lee matter 00001 billing code. The monthly invoices from Stevens & Lee for matter 00001 do not breakdown services via separate subtotals or organize the time entries and descriptions of the work by right-to-know request(s) because those services historically have not been billed separately. The time entries and descriptions in matter 00001 for legal work related to right-to-know requests and legal work for unrelated matters within 00001 are interspersed. There is a grand total for matter 00001 on each invoice but not individual subtotals under matter 00001 as the legal work for matter 001 is part of general and miscellaneous Solicitor legal services. The time entries and descriptions of the work for matter 00001 are often on the same invoice for other certain matters like the SALDO applications known as developer matters or professional service escrow matters. Thus, the invoices and payments by the Borough for same do not provide a total of the number of hours spent by Stevens & Lee for each right-to-know request in 2022 and January 2023 thru March 2023 as it shows a total for “all” work (whether for legal work related to right-to-know requests or legal work unrelated to right-to-know requests) and then payment was made on the total. Thus, this Request is denied per RTKL Section 705 because the breakdown requested does not exist on the Stevens & Lee invoices.

In further support of the Borough’s argument, Attorney Kratz affirms the following:

20. A Stevens & Lee invoice that is specific only to services rendered related to [RTK] requests for 2022 and January thr[ough] March 2023 does not exist.

21. I provided legal work in 2022 and January thr[ough] March 2023 for general and miscellaneous Solicitor services unrelated to [RTK] requests and in some months in January thr[ough] March 2023 legal services related to [RTK] requests. Both of those services fell under Stevens & Lee matter 00001 billing code.

22. The monthly invoices from Stevens & Lee for matter 00001 do not breakdown services via separate subtotals or organize the time entries and descriptions of the work by [RTK] requests because these services historically have not been billed separately. The time entries and descriptions in matter 00001 for legal work related to [RTK] requests and legal work for unrelated matters within 00001 are interspersed. There is a grand total for matter 00001 on each invoice but not individual subtotals as the legal work for matter 00001 is part of general and miscellaneous Solicitor legal services. The time entries and descriptions of the

work for the matter 00001 are often on the same invoice for other certain matters like the SALDO applications known as developer matters or profession service escrow matters.

23. Thus, the subject Stevens & Lee invoices do not provide a total number of hours spent ... for each [RTK] request in 2022 and January thr[ough] March 2023 as it shows a total for 'all' work

24. Thus, [the] breakdown requested by RTKL Request Bath AORO Tracking #15.2023 does not exist on the subject Stevens & Lee invoices....

The Requester argues that under Section 506(d) of the RTKL, 65 P.S. § 67.506(d), the Borough is required to obtain invoice and payment records relative to services for RTKL requests, as Stevens & Lee is a third-party contractor performing a governmental function. In a supplemental submission, the Requester further asserts that the March 3, 2023 Profit & Loss Budget vs. Actual report for the Borough's General fund serves to dispute the Borough's claim that legal services and payments are not tracked separately for the category of RTKL requests because the report contains an amount for "Legal – RTK Requests." The Requester further argues that the Borough has not demonstrated that the redactions are privileged and the Borough must provide detailed justifications for the redactions.

The Borough satisfied the first portion of subpart *f.*, by providing copies of the responsive invoices and an accounting of the payments made to Stevens & Lee. Regarding the second portion that seeks a breakdown of hours and payments related to legal services for RTKL requests, the Borough's evidence demonstrates that the records do not exist in the breakdown sought because the billing records were not maintained in such a format and the Borough is not required to create a record to satisfy the Request. *See* 65 P.S. § 67.705 ("When responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record."). It is unclear what the Requester is arguing when he

asserts that Section 506(d) of the RTKL requires the Borough to obtain the records from Stevens & Lee, as the invoices were issued by Stevens & Lee. If the Requester is asserting that the Borough or Stevens & Lee should comb through the invoices to determine what records may be related to RTKL requests and extract the entries, as set forth above, Section 705 clearly states that when the record sought does not exist in manner indicated in the Request, the agency “shall not be required to create a record ... or to compile, maintain, format or organize a record” that is not currently maintained in that manner.

The Requester also argues that the Borough has not sufficiently met its burden of proving that the redacted portions of the invoices are privileged. In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *Bousamra v. Excelsa Health*, 210 A.3d 967, 982-83 (Pa. 2019) (citing *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007), *aff'd* 992 A.2d 65 (2010)). “[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege must prove waiver under the fourth prong.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2014). An agency may not, however, rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to withhold records”).

The attorney work-product doctrine, on the other hand, prohibits disclosure “of the 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. “The purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation.” *Bousamra v. Excelsa Health*, 210 A.3d 967, 976 (Pa. 2019) (internal citations omitted); *see also Heavens v. Pa. Dep’t of Env’t Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) (“[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked”). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978 (internal citation omitted), the work-product doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id.* at 979 (internal citations and quotation omitted). In *Levy*, the Pennsylvania Supreme Court discussed the attorney-client privilege in regard to descriptions of legal services contained within legal invoices stating, “[T]he determination of the applicability of the attorney-client privilege does not turn on the category of a document, such as whether it is an invoice or fee agreement. Instead, the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege.” *Id.* In determining whether the privilege applied to a particular entry in an invoice, the Court approved a “line-by-line analysis.” *Id.* The Court also discussed what content is considered privileged:

[T]he relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege. For example, descriptions of legal services that address the client’s motive for seeking counsel, legal advice, strategy, or other confidential communications are undeniably protected under the attorney client privilege. In contrast, an entry that generically states that counsel made a telephone call for a specific amount of time to the client

is not information protected by the attorney-client privilege but, instead, is subject to disclosure under the specific provisions of the RTKL.

Id. at 373-74 (citations omitted); *see also Slusaw v. Hoffman*, 861 A.2d 269, 272-73 (Pa. Super. Ct. 2004) (holding that production of evidence from attorneys regarding meetings and telephone calls would not violate attorney-client privilege where it would not call for disclosure of confidential communications).

In response to the OOR's directive, the Borough submitted an exemption log detailing the explanations for each redaction made to the legal invoices, along with the Supplemental Kratz Affidavit. In support of the redactions contained in the Stevens & Lee legal invoices, the Kratz Affidavit states the following:

14. The Borough is and has been a client of Stevens & Lee circa 1999 and for all times relevant to RTKL Request Bath AORO Tracking #15.2023.

15. Except for the work descriptions for parts of the invoices specific to matters 00209..., 00212 ..., 00213 ..., and 00216 ... in 2022, the work descriptions within all other parts of the legal invoices in 2022 are overwhelmingly privileged under the attorney-client privilege and attorney[-] work-product doctrine and, therefore, all of those work descriptions have been redacted from the invoices....¹⁶

16. Except for the work descriptions for parts of the invoices specific to matters 00209..., 00215 ..., 00213 ..., and 00216 ... in 2023, in 2022, the work descriptions within all other parts of the legal invoices in 2022 are overwhelmingly privileged under the attorney-client privilege and attorney[-] work-product doctrine and, therefore, all of those work descriptions have been redacted from the invoices....

17. The parts of the invoices with redacted work descriptions contain descriptions of attorney work that includes: assignments given to Stevens & Lee attorney(s), details of the assignments, facts provided by the client relevant to work assigned for the purpose of securing an opinion of law or legal assistance to the Borough on legal matters and include names of cases, witnesses, residents, strategy and work performed as well as responses of the attorney(s) including quoting or paraphrasing retained outside counsel for the Borough being supervised by Stevens & Lee attorney to certain work assigned.

¹⁶ The Kratz Affidavit goes on to describe the reasons why certain entries were not redacted from the legal invoices for the 2022 and 2023, invoices. Such information is not relevant to the OOR's determination of whether the redacted material is privileged, as claimed by the Borough.

18. The redactions were made to remove any substantive and material information from the invoices relative to the attorney-client privilege and attorney-work product doctrine to protect the privileged information as privileged information is outside the scope of what constitutes a ‘public record’ under the [RTKL]....

In addition to *Davis* and *Bousamra*, the Borough also relies on *Levy v. Senate of Pennsylvania*, 34 A.3d 243 (Pa. Commw. Ct. 2011) and *Levy v. Senate of Pennsylvania*, 65 A.3d 261 (Pa. 2013) (“*Levy I*”), in support of the argument that the redactions to the legal invoices are appropriate. In *Levy II*, the Supreme Court discussed the attorney-client privilege in regard to descriptions of legal services contained within legal invoices. 65 A.3d 361, 373 (Pa. 2013) (“[T]he determination of the applicability of the attorney-client privilege does not turn on the category of a document, such as whether it is an invoice or fee agreement. Instead, the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege.”). In determining whether the privilege applied to a particular entry in an invoice, the Court approved a “line-by-line analysis.” *Id.* The Court also discussed what content is considered privileged:

[T]he relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege. For example, descriptions of legal services that address the client’s motive for seeking counsel, legal advice, strategy, or other confidential communications are undeniably protected under the attorney client privilege. In contrast, an entry that generically states that counsel made a telephone call for a specific amount of time to the client is not information protected by the attorney-client privilege but, instead, is subject to disclosure under the specific provisions of the RTKL.

Id. at 373-74 (citations omitted).

The Borough states that, applying the relevant caselaw, Attorney Kratz conducted a subsequent review and revised the redactions made to the legal invoices. In further support of the Borough’s argument, the Supplemental Kratz Affidavit states that Attorney Kratz was admitted to the Pennsylvania bar, that he is employed by Stevens & Lee, and that he has served as the Assistant

Borough Solicitor and the Borough Solicitor since 2005. The Supplemental Kratz Affidavit further states, the following:

35. While preparing an exemption log for each of the 23 responsive invoices, I realized there were some legal services descriptions that were redacted that generically stated the legal services provided like attending a meeting for a certain amount of time and I realized there were certain other legal services descriptions redacted that referenced communications from or to *opposing* legal counsel relative to legal services that I performed on behalf of the Borough. Therefore, I re-reviewed the responsive ... invoices and re-redacted them to comport with *Levy II*, [*Davis*] ... and *Gillard [v. AIG Ins. Co.]*¹⁷ ..., relative to the attorney-client privilege and attorney-work product doctrine per *Bousamra*....

36. Attached hereto as Exhibit ‘A’ is the less redacted responsive Stevens & Lee invoice....¹⁸

62. Please further note that in Exemption Log for Redacted Work Descriptions for Invoice 99135797 dated March 10, 2023 (Exhibit ‘W’), I found certain entries that are exempt per RTKL Sections 708(b)(16)(ii) and (vi)(A) and/or 708(b)(17)(ii) and (vi)(A) because the law enforcement person who contacted me didn’t specify [the] specific type of possible enforcement because the law enforcement person was only making a preliminary inquiry and hasn’t contacted me since.

63. I am responsible for the redactions (redacted work description entries) contained within the redacted legal invoices attached hereto as Exhibit ‘A’. I reviewed the invoices, performed the redactions, prepared the privilege logs and attest that the redactions were made to comport with attorney-client privilege and attorney-work product doctrine and certain redactions ... for Invoice 99135797 ... (Exhibit ‘W’) were made to comport with Sections 708(b)(16)(ii) and (vi)(A) and/or 708(b)(17)(ii) and (vi)(A) as identified in said log.

64. The redaction logs identify the relevant responsive invoice by invoice number and date of invoice, the matter # for the entry, the date of the entry for the work description, the subject matter of the entry generally described, the recipient of the legal service, the recipient of the entry and the legal basis for exclusion.

65. The redacted work descriptions describe legal services sought by the Borough and/or legal services performed by me that relate to facts of which I was informed by the Borough, outside the presence of strangers, or obtained on behalf of the Borough for the purpose of providing either an opinion of law, legal services, or assistance in a legal matter for the Borough, and not for the purpose of committing a crime or tort.

¹⁷ 15 A.3d 44 (Pa. 2011).

¹⁸ In paragraphs 37-59, the Supplemental Kratz Affidavit details which Exhibit from “B” through “X” consist of an exemption log for the redactions for each of the respective invoices, as well as the date of the invoice.

66. The redacted work descriptions were communications made by me to the Borough, outside the presence of strangers, for the purpose of providing either an opinion of law, legal services, or assistance in a legal matter for the Borough and were received by the Borough Manager and Borough bookkeeper, outside the presence of strangers, and not for the purpose of committing a crime or tort.

67. The redacted work descriptions describe the nature of the legal services sought by the Borough and/or performed for the Borough to address the Borough's motives for seeking legal services from me, the Borough Solicitor, for various legal matters during the relevant time period including, but not limited to, legal services relative to enforcement of certain existing ordinances, creation or possible creation of certain ordinances, subdivision and land development planning, certain personnel matters, certain real estate tax assessment matters, certain Zoning Hearing Board matters and certain [RTKL] requests.

68. The redacted work descriptions contain my wording (my mental impressions) to identify particular legal services sought by the Borough from me ... and/or my wording (mental impressions) identifying legal services performed relative to the legal services sought by the Borough and/or reveal a part of confidential communications between me and the Borough relative to the legal services sought by the Borough and/or performed for the Borough during the relevant time period, which communications are protected by attorney-client privilege and attorney-work product doctrine.

69. My wording (my mental impressions) in the redacted work description entries identify the particular legal services sought by the Borough and/or provided to the Borough in response to the same and are my notes and/or summaries relative to the legal services and certain entries alone, and, especially, certain combinations of entries together reveal the Borough's legal strategy and are exempt from access per the attorney-work product doctrine to protect from adversaries....

70. Because the redactions describe the legal services sought by the Borough and/or provided to the Borough as described above and my mental impressions, notes and/or summaries relative to said legal services as described above, the redacted work descriptions are exempt per attorney-client privilege and attorney-work product doctrines....

71. The Borough is and has been a client of Stevens & Lee since circa 1999 and for all times relevant to the RTKL Request Bath AORO Tracking #15.2023.

72. The holder of the attorney-client privilege is the Borough and the Borough did not waive the privilege.

A review of the exemption log shows that the services described in the invoices were provided to Borough officials including, the Borough manager, the Borough engineer, the Borough Zoning Officer, the Borough Planning Commission, as well as Borough employees. The redactions are described as consisting of descriptions of legal services sought and the responses provided by the Borough solicitor. Other entries are described as legal service provided in response to a communication the Borough received from a third party, litigation strategy relative to a Borough litigation matter and legal service provided to the Borough in response to action taken by opposing counsel in a litigation matter. A review of the redacted records comports with the exemption log and the Supplemental Kratz affidavit. In addition, the revised redacted invoices contain considerably fewer redactions and not all redactions are full, block redactions of an entire entry, like the initial records provided to the Requester. *See Seman and W.G. Tomko, Inc. v. Baldwin Borough*, OOR Dkt. AP 2023-0778, 2023 PA O.O.R.D. LEXIS 1364 (concluding that the submission of less redacted invoices, along with attorney attestation satisfied burden of proving privilege).

The Requester asserts that any privilege was waived because the Borough bookkeeper was listed in the exemption log as a “recipient of entry,” along with the Borough Manager and the bookkeeper is “identified as a third-party contractor, not a Borough employee.” Regarding this claim, the Requester does not submit further evidence of the bookkeeper’s employment status. Further, as noted in *Levy*, “[p]rivileged persons include agents of either the client or the lawyer who facilitates communications between them and agents of the lawyer who facilitate representation.” 34 A.3d at 254-55 (citing the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 (2000)), *aff’d in part and rev’d in part on other grounds*, 65 A.3d 361 (Pa. 2013). The invoices must be paid by the Borough and it is reasonable to infer that the

task is assigned to the Borough's bookkeeper, which would explain why the legal invoices are received and viewed by the bookkeeper. Regardless of how the bookkeeper is employed by the Borough, that individual would fall within the ambit of privilege. The Requester also asserts that there are costs discrepancies contained in the exemption log and redacted invoices, as compared to the Borough's July 20, 2023, appeal submission that suggest the records are not accurate. The Requester states, "[c]larity from the Borough on which record accurately portrays the actual costs would be highly advisable...." The Requester references the vendor transaction list provided by the Borough showing the payments made to Stevens & Lee. However, whether there are cost inconsistencies and what the Borough paid for legal services, as compared to what Stevens & Lee billed are concerns beyond the purview of the RTKL. Finally, the Requester argues that the Borough's claim of attorney work-product protection is "sweeping" and "without sufficient justification." However, as set forth above, a review of the Borough's evidence, including the exemption log and redacted records demonstrates that the redactions made to the responsive invoices were proper under the attorney-client privilege or attorney-work product doctrine. As a result, the Borough has properly redacted the invoices. *See McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382- 83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (In the absence of any competent evidence that the Borough acted in bad faith, "the averments in [the attestations] should be accepted as true."); 65 P.S. § 67.305.

f. Subject: Right to Know Request-ARPA Funding Allocation Details (2021-2022)

Pursuant to the Pennsylvania Right-to-Know Law, I am requesting complete financial details regarding the allocation of American Rescue Plan Act (ARPA) funding for the Borough of Bath for the years 2021 and 2022.

Please provide the following information:

1. A breakdown of how the ARPA funding was allocated by the Borough of Bath in 2021 and 2022, including any amounts disbursed to individuals or businesses, if applicable.
2. Documentation related to the specific programs, projects, or initiatives funded by the ARPA funding, including budget reports, financial statements, and any other relevant materials.
3. Any communications, correspondence, or agreements related to the ARPA funding allocation process, including agreements with other entities or organizations.

If possible, please provide these materials in an electronic format such as a PDF or Word document. If any records or portions thereof are denied or redacted, please cite the specific exemption(s) and provide a written explanation for the denial or redaction.

Regarding #1 and #2 of subpart *f.* of this portion of the Request, the Borough provided copies of two reports the Borough submitted to the U.S. Department of Treasury related to ARPA funding that were filed in 2021 and 2022. In addition, With respect to #3 of subpart *f.*, the Borough was able to provide one email chain that Borough officials were included on and that also included the Northampton County Department of Community and Economic Development and the Pennsylvania Department of Community and Economic Development. as well as United States Congresswoman, Susan Wild, and staff. The Borough argues that no additional records exist because none of the ARPA funds have been spent to date and, therefore, no financial records exist for the use of the funding. In addition, the Borough asserts that the agreements sought in #3 of subpart *f.*, also do not exist because “no agreements for the ARPA funding allocation process exist.” In support of the Borough’s position, it relies on Mr. Flynn’s attestations in the May 5, 2023, final response. Mr. Bradford attested, the following:

The Borough was issued two payments relative to the federal American Rescue Plan Act of 2021 (ARPA). The first payment in the amount of \$139,628.73 was deposited on July 7, 2021, into the Borough’s General Fund bank account. The second payment in the amount of \$140,070.20 was deposited on September 9, 2022, into the Borough General Fund bank account. The Borough has received a total

ARPA funding in the amount of \$279,698.93. The Borough has submitted two annual reports with the US Department of Treasury, for the years 2021 and 2022 (Attachment #13). While the Borough has reported anticipated use of funding via the reports, the Borough is not able to give a final determination as to how all of the ARPA funds have or will be expended. The Borough advanced the funding for the projects listed as anticipated use of ARPA funding via the reports. The Borough did this so none of the ARPA funds allocated to the Borough would be spent as the Borough is pursuing a review and advice from an independent certified public accountant to ensure anticipated expenditures of the ARPA funds meet ARPA program guidelines. The Borough has through 2024 to issue any final report(s) to the US Department of Treasury on the actual use of its allocated ARPA funding. Because none of the ARPA funds allocated to the Borough have been spent, there aren't financial records for actual use of the ARPA funding.

The Requester argues that additional ARPA records should exist because, while “the Borough may not have finalized the allocation of ARPA funds, there should be records related to the planning and decision-making process for the allocation of these funds.” The Borough’s evidence consists of Mr. Flynn’s attestation that the Borough has only reported on the “anticipated use of funding” because the Borough is in the process of obtaining advice from a certified public account to determine whether “to ensure anticipated expenditures of the ARPA funds meet ARPA program guidelines” and further, “none of the ARPA funds allocated to the Borough have been spent.”

#1 and #2 of subpart *f.*, specifically seek, in relevant part, “amounts disbursed,” “programs, projects, or initiatives funded,” and “budget reports, financial statements and other relevant materials.” #3 seeks, “[a]ny communications, correspondence, or agreements related to the ARPA funding allocation process....” Mr. Flynn’s attestations demonstrate that no funding has been disbursed, the step that would have to be completed before any budget reports or financial statements would be generated by a grant recipient and no additional records exist. *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018), *aff’d*, 243 A.3d 19 (Pa. 2020). Further, Mr. Flynn is the Borough Manager and, based on the ARPA

reports, he is the official who is administering the ARPA funding process for the Borough. *See Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that a good faith search has been conducted by an agency when it “contact[ed] the Bureau most likely to possess responsive records,... explain[ing] why that Bureau is most likely to possess those records.”); *Moore v. Pa. Dep’t of Corr.*, No. 1638 C.D. 2017, 2017 Pa. Commw. Unpub. LEXIS 704 (finding that the agency’s evidence lacked sufficient detail “[t]o support [its] conclusion that ‘no responsive records exist within the [agency’s] custody, possession or control...”). Additionally, the Requester has not submitted evidence to demonstrate that additional records exist. In the absence of any competent evidence that the Borough acted in bad faith, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Finally, the OOR is without jurisdiction to determine whether records should exist. *See, e.g., Marciniak v. Prospect Borough*, OOR Dkt. AP 2022-0786, 2022 PA O.O.R.D. LEXIS 1339 citing *Troupe v. Borough of Punxsutawney*, OOR Dkt. AP 2010-0743, 2010 PA O.O.R.D. LEXIS 731 (“While ... evidence may establish that a [record] should exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such [record]--the OOR may only determine whether a responsive record does, in fact, exist”); *Gorol v. Forest Hills Borough*, OOR Dkt. AP 2019-0329, 2019 PA O.O.R.D. LEXIS 427 (same). Accordingly, the Borough has proven that a good faith search was conducted and that additional records responsive to #1through #3 of subpart *f.*, do not exist within its possession, custody or control. *See Hodges*, 29 A.3d at 1192; 65 P.S. § 67.708(a).

g. Subject: Right to Know Request-Copies of Electric Bills for Borough Properties and Lighting (2019 - Current)

Please provide the following information:

1. Copies of the electric bills for all [B]orough properties and lighting for the years 2019 to the present date.
2. Any additional information related to the billing, including any surcharges, taxes, or fees related to the electricity usage.

The Borough denied, arguing that subpart g. of the Requests is overly broad and overly burdensome. Regarding this portion of the Request, the Borough does not argue that the Request language does not satisfy the specificity test set forth by the courts; however, a plain reading of #1 of this subpart shows that it facially states a subject matter (electric usage by the Borough), a scope (copies of electric bills) and a finite timeframe (2019 to the date of the Request). *Pa. Dep't of Educ.*, 119 A.3d at 1125. Rather, the Borough argues that due to the number of records implicated, this portion of the Request is overly broad and burdensome.

The Borough relies on *Keystone Nursing & Rehab of Reading, LLC v. Simmons-Ritchie*, 2020 Pa. Commw. Unpub. LEXIS 8, as well as *Mezzacappa v. Northampton Cnty.*, OOR Dkt. AP 2022-2110, 2022 PA O.O.R.D. LEXIS 2601, and *Sanchez v. Chester Cnty.*, OOR Dkt. AP 2021-1129, 2021 PA O.O.R.D. LEXIS 1168, in support of its argument that this portion of the Request is overly broad and overly burdensome. In the Borough's final response of May 5, 2023, Mr. Bradford attested, the following:

There are 23 electric meters for the various Borough properties. That means one master invoice can be between 8 and 12 pages in length x 12 months x 4 years. That is 576 pages of invoices for 2019 thru 2022. In addition, there are 36 (12 x 3 months) pages of invoices for January 2023 thr[o]u[gh] March 2023. This is conservative because the Borough is additionally charged separately and invoiced accordingly for holiday lighting from approximately November through February of each year requested (utility pole angels and snowflakes). Thus, that is conservatively 612 pages of invoices (for a period of 4 years and 3 months) that would need to be located and organized for production. I estimate that would take 24 hours of dedicated personnel time to recover and compile the documents. The scope of the request (4 years and 3 months on 23 electric meters) is clearly overly broad and overly burdensome.

In addition, Mr. Flynn attests that the Borough's administrative staff consists of himself, as the full-time Manager, a full-time office secretary and a part-time office clerk.

Although the burdensome nature of a request does not render it overbroad, it may be considered as a factor in determining specificity. *See Legere*, 50 A.3d at 265 (“The fact that a request is burdensome does not deem it overbroad”); *see also City of Phila. Off. of the Dist. Att’y v. Bagwell*, 155 A.3d 1119, 1143 (Pa. Commw. Ct. 2017) (finding that an open-ended request that fails to give an agency guidance in its search for the information sought may be so burdensome that the request will be found overbroad under the RTKL); *Ruggiero v. Lackawanna County*, OOR Dkt. AP 2014-0043, 2014 PA O.O.R.D. LEXIS 157 (“[A] request involving the detailed review of voluminous documents does not relieve the agency of its requirements to presume the records are open and available and [to] respond in accordance with the RTKL”). For example, in *Keystone Nursing*, the Commonwealth Court found a request to the Department “for all correspondence through all mediums, electronic and written, sent and received by four named individuals, [including the Department’s former Secretary], over a 48-day timeframe” to be insufficiently specific. 2020 Pa. Commw. Unpub. LEXIS 8, *54-55. In doing so, the Court found that the request in that case “place[d] an unreasonable burden on Department to compile all correspondence sent and received by the highest tier of employees at Department.” *Id.* at 55. In *Keystone*, the Commonwealth Court also acknowledged that the number of records likely within the possession of an agency and the likelihood that those communications contain exempt information are a consideration when performing the specificity balancing test.

In *Mezzacappa v. Northampton County*, that was cited by the Borough, the OOR found that a request for all emails to and from the agency containing several general keywords was so overly broad as to be insufficiently specific. OOR Dkt. AP 2022-2110, 2022 PA O.O.R.D. LEXIS

2601. In that case, the agency presented detailed attestations from its solicitor and IT director, the latter of whom affirms that the agency had already spent 62 hours searching for responsive records containing a subset of the keywords, and that this search identified 11,000 responsive items, totaling 339,400 pages. The IT director further attested that a search including the remaining keywords identified nearly 20,400 records, totaling approximately 359,400 pages. The solicitor attested that, based on his own experience and consultation with document review professionals, together with a partial review of potentially responsive records, it would take nearly a year's worth of full-time work to review and redact responsive records, which included privileged records and records subject to a number of exemptions. Very recently, in *Davis v. Lower Merion Sch. Dist.*, OOR Dkt. AP 2023-1499, 2023 PA O.O.R.D. LEXIS 1851, the OOR rejected the school district's claim that the request for "the 2022-2023 school year, all documentation of attempts made to notify parents or guardians of a victim or [a] suspect directly involved in an incident listed in section 1303-A(b)(4.1) or (4.2) of the Safe Schools Act, as is required under 22 Pa. Code § 10.25," was overly burdensome despite the necessity of reviewing student files and communication logs to ascertain the universe of records. The OOR considered the task of identifying the records, as well as, the need to review the records for exempt information such as personal identification information, and concluded "although the District has provided some explanation of why conducting the search for responsive records is burdensome and provided evidence showing the likelihood that personal identification information or other potentially exempt information will be included in the records, the District did not demonstrate that it is not possible to search for responsive records or to review and redact any records it locates" and the way the district stores its records does not render the request insufficiently specific and burdensome. *Davis*, 2023 PA O.O.R.D. LEXIS 1851, *13-14.

The Borough has provided some explanation of its search and the estimate that the universe of records would be at least 576 pages, and that the Borough administrative staff is limited. However, as compared to the estimated number of records in *Mezzacappa*, which was approximately 359,800 pages, the number of records implicated in this matter is significantly smaller. Further, the OOR found in *Sanchez*, cited by the Borough, that the request did not include a subject matter and in both *Mezzacappa* and *Sanchez*, the agencies proved that the records would have to be review for potential exemptions. Here, the Borough's estimate of the records may require extensive work for the administrative staff, but the identification of the types of records has been made and the Borough has not demonstrated that the records will require redaction, as compared to only needing to be compiled and organized. Accordingly, based on the totality of the record, although portion #1 of subpart g. of the Requests may be burdensome, the Borough has not demonstrated that #1 of subpart g. is insufficiently specific under Section 703 of the RTKL. *See Legere, supra*. As such, the Borough is required to conduct a good faith search and to provide all responsive electric bill records to the Requester.

However, with respect to #2 of subpart g. of the Requests, seeking "any additional information" related to electricity billing for the Borough, fails to identify a scope or timeframe and therefore, is insufficiently specific. 65 P.S. §67.703; *Pa. Dep't of Educ.*, 119 A.3d at 1125.

h. Subject: ... Planning Studies and Surveys

Please provide the following information:

1. Any reports related to traffic studies on Creek Road and/or Old Forge Drive regarding potential Bathwick LLC Development Plans.
2. Any planning studies or surveys related to stormwater management, housing, parks and open space guidelines, mass transit, community facilities, population and business development that were conducted in relation to the potential development plans of Bathwick LLC.

The Borough identified vehicle trip data that was copied from the Institute of Transportation Engineers Trip Generation Manual 10th Edition (the “ITE Trip Generation Report”) and submitted by the applicant for the proposed Bathwick LLC Development plans, which the Borough argues is subject to the U.S. Copyright Act. The Borough also identified the initial and revised stormwater management plans and management reports prepared by the applicant’s engineer, which the Borough also argues is protected by copyright because they are “original works of authorship of [the] applicant’s engineer.” The Borough granted access to these records by inspection of the Bathwick Land Development File. The Borough relies on *Ali v. Philadelphia City Plan. Comm’n*, 125 A.3d 92, 99–100 (Pa. Commw. Ct. 2015), in support of its position and Mr. Bradford’s attestations in the May 5, 2023, final response.

The Requester argues that the fact that a document is copyrighted does not automatically exempt it from disclosure under the RTKL and, also, that it is in the public interest to have the information to understand the planning and development process. The Requester further asserts that the public interest in the requested documents qualifies as a circumstance that would permit the use of copyrighted material under the Fair Use Doctrine. Finally, the Requester asserts that the Copyright Act does not absolve the Borough from providing copies.

The federal Copyright Act precludes the reproduction of any copyrighted works without the consent of the copyright holder. 17 U.S.C. §§ 106, 501. In *Ali v. Philadelphia City Planning Commission*, the Commonwealth Court held that the Copyright Act does not “exempt [] materials from disclosure under the RTKL”; instead, it “limits the level of access to a public record only with respect to duplication, not inspection.” 125 A.3d 92, 101-05 (Pa. Commw. Ct. 2015). As in this matter, the dispute does not involve the public nature of the records, rather access to the records. In *Ali*, the Commonwealth Court further explained:

Because we lack jurisdiction under federal law to resolve the question of whether a local agency's disclosure of copyrighted material pursuant to the RTKL without the owner's consent constitutes infringement under the Copyright Act, where a local agency has refused to duplicate a public record in response to a RTKL request by invoking the Copyright Act, our review must be confined to determining whether the local agency has met its burden of proving facts sufficient to show that forced duplication of copyrighted material under the RTKL implicates rights and potential liabilities arising under the Copyright Act that can only be resolved by the federal courts.

... we hold that where a local agency invokes the Copyright Act as a basis to limit access to a public record to inspection only, the absence of consent by the copyright owner to duplication in response to a RTKL request should be presumed.

125 A.3d at 104-05.

Regarding the Requester's argument that the Fair Use Doctrine should apply to the responsive records, the statute provides:

Notwithstanding the provisions of sections 106 and 106A [17 USCS §§ 106 and 106A], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. 17 U.S.C. §107.

Here, the Requester has not presented any evidence to satisfy the requirements set forth in 17 U.S.C. §107, that would warrant the application of the Fair Use Doctrine. Furthermore, the OOR has previously determined, in accordance with the Commonwealth Court's holding in *Ali*, that

ordering an agency to rely on the Fair Use Doctrine could subject it to substantial fines if a federal court were to disagree with the OOR's assessment later. *Ali*, 125 A.3d at 102 (“All the while, the local agency is expending taxpayer dollars in costs and attorney’s fees to defend itself in an infringement action occasioned not by its own assessment of the risk and subsequent voluntary disclosure, but by forced disclosure of the OOR or this Court”).

While the Borough’s evidence on the claimed copyright materials could be more detailed, a review of the Institution of Transportation Engineers (“ITE”) website shows that the trip data materials provided by the Bathwick Development applicants is part of a software system and user manual that may only be obtained through the purchase of a license from the ITE, such that a reasonable inference may be drawn that the materials are protected by copyright.¹⁹ However, with respect to the initial and revised stormwater management plans and management reports, the Borough’s evidence only indicates that they “appear to be original works of authorship of the applicant’s engineer” and “there’s a *likelihood* that they are protected...” by copyright. In addition, the evidence does not demonstrate that the Borough attempted to contact the alleged holder of the copyright to ascertain whether permission to copy would be granted. As compared to, e.g., *Arena v. Gwynedd Twp.*, OOR Dkt. AP 2021-0506, 2021 PA O.O.R.D. LEXIS 806, wherein the OOR concluded that evidence that building plans “were produced by a structural engineering firm ... and bear the seal of a professional engineer” and “[t]he engineer’s handwritten signature appears over the seal, along with the handwritten date ...,” the Borough’s evidence here is conclusory and fails to prove the required legal elements to demonstrate that the stormwater plan documents are protected by the Copyright Act. Under the RTKL, a sworn statement may serve as sufficient

¹⁹ See <https://www.ite.org/technical-resources/topics/trip-and-parking-generation/> (last accessed September 15, 2023). We note that the propriety of the land use applicant’s copying of the materials for use in the development application is beyond the purview of the RTKL, the OOR declines to direct the Borough to duplicate documents that are more likely than not protected by the Copyright Act.

evidentiary support to withhold requested records, *Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909; however, “a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (en banc); *see also West Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) (“The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions”) (internal cites omitted). Accordingly, the Borough has not proven that the responsive stormwater plans may only be accessed by inspection under the federal Copyright Act.

i. Subject: ... Borough ... Solid Waste and Recycling Fund ... since its inception in 2020, as well as the Borough’s policy regarding charge-offs of delinquent accounts in this fund.

Please provide the following information:

1. A complete financial breakdown of the Solid Waste and Recycling Fund since its inception in 2020 till Current, including[:]

- a. Revenue and expense details for each fiscal year.
- b. The audit trail associated with excess revenue generated from the amount of funds generated versus expenses related to sanitation between 2017-2019.
- c. The amount of any charge-offs since 2020 to the current date.
- d. The length of time these accounts were delinquent prior to write-off.

2. The Borough['] ... policy regarding charge-offs of delinquent accounts in the Solid Waste and Recycling Fund, including:

- a. The criteria for writing off these accounts.
- b. The process for residents to have their accounts written off.
- c. Whether residences with written-off accounts are still provided with sanitation services and, if so, under what conditions.

Regarding number 1.a of subpart *i.*, the Borough partially denied this portion of the Request, by providing copies of the “Budget versus Actual and Profit & Loss reports” for the Municipal Solid Waste Fund for fiscal year[] 2022 and the first quarter of 2023. Regarding the

remaining relevant timeframe, 2020 to 2021, the Borough denied this portion of the Request, arguing that because the solid waste and recycling fund was commingled with the Borough's general fund through 2021, a search for responsive records would be "a massive undertaking" that would consist of at least 80 hours of the Borough Manager's work hours and 80 hours of another employee's work hours and such an undertaking would materially affect those individual's employment obligations to the Borough. Therefore, the Borough argues that 1.a of subpart *i*. is overly broad and burdensome. In support of the Borough's argument, the Borough relies on Mr. Flynn's attestations in the May 5, 2023, final response. Mr. Flynn attested, the following:

The Borough has maintained a solid waste and recycling program since March 6, 1978, by Ordinance No. 1978-323. Since that time, the solid waste and recycling fund to operate that program was co-mingled with the Borough's General Fund until I recommended to Council that it be a separate fund and I was able to implement my recommendation after Council approved it. Thus, before I started as the Manager in 2015 and up thru 2021, the solid waste and recycling fund to operate that program was co-mingled with the Borough's General Fund. During that time, the Borough's practice was to combine property tax payments with solid waste bill payments in one bank account. These many thousands of transactions over 2020 and 2021 would take a massive undertaking to separate tax payments from solid waste bill payments to understand the full picture of the solid waste fund. I estimate such an undertaking would take 80 hours of my personnel time and 80 hours of other personnel time which would materially adversely impact the Borough because we would not be performing our existing job responsibilities and, therefore, not fulfilling our existing job responsibilities for the Borough. Thus, with respect to the part of the request for 2020 and 2021, said request is denied because it is overly broad and overly burdensome....

Migration of the funds began sometime in 2019 through 2020.... As of 2022, the solid waste fund was officially transferred into its own account, with its own accounting 'company', much like the general fund.... For example, in prior years 2020 and 2021, if the Borough Solicitor worked on solid waste contracting issues, you would have to examine general fund general ledger line 404.31 'Legal Fees' (outside of any general ledger lines associated with sanitation) then review individual invoices to see what matter number is associated with sanitation contracting. If there were any other outside general ledgers used for solid waste fund reasons, you would have to research those line items and pull invoices individually. So, I think you can understand the difficulty with tracking expenses and revenues associated with the solid waste fund as previously managed before my time.

Because the Borough provided two categories of financial reports containing information responsive to number 1.a of subpart *i.*, the specificity analysis for this portion of the Request is limited to revenue and expense details for the Solid Waste and Recycling Funds for fiscal years 2020 and 2021, which language satisfies the three-part legal test announced in *Pa. Dep't of Educ.* However, the Borough's evidence details the difficulties that would have to be addressed in order to compile the requested records for the remaining two fiscal years, based on the manner in which the Borough formerly commingled the responsive records in the Borough General Fund and with the Borough tax payments. Regarding the Borough's argument that the search would be overly burdensome, the Commonwealth Court in *Legere* opined:

A requestor cannot control how an agency catalogues or organizes such files. As such, an agency's failure to maintain the files in a way necessary to meet its obligations under the RTKL should not be held against the requestor. To so hold would permit an agency to avoid its obligations under the RTKL simply by failing to orderly maintain its records. The fact that DEP does not catalogue or otherwise organize Section 208 determination letters or corresponding orders in a way that permits them to be easily located, does not render the request overbroad.

50 A.3d 260, 265. Furthermore, the Commonwealth Court in *Keystone Nursing* explained that the actual context of the request is central in deciding whether a request is sufficiently specific. 2020 Pa. Commw. Unpub. LEXIS 8, *54-55. The context of 1.a of subpart *i.* supplies sufficiently limiting parameters to guide the Borough in its search and seeks records that the Borough is statutorily required to maintain. The fact that the search may be burdensome is not determinative of whether 1.a of subpart *h.* is sufficiently specific under 65 P.S. § 67.703.

The Borough denied numbers 1.b, 1.c, 1.d, 2.a, 2.b, and 2.c, of subpart *i.* arguing that no responsive records exist. In response to a request for records, "an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]" 65 P.S. §

67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court concluded that:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.... After obtaining potentially responsive records, an agency has the duty to review the record and assess their public nature under ... the RTKL.

185 A.3d at 1171-72 (*Uniontown Newspapers I*), *aff’d*, 243 A.3d 19 (Pa. 2020) (*Uniontown Newspapers II*). Additionally, the Commonwealth Court has held that an open records officer’s inquiry of agency members may constitute a “good faith effort” to locate records, stating that open records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access). Furthermore, in *Uniontown Newspapers II*, the Supreme Court “reject[ed] DOC’s contention [that] the open records officer fulfills his or her obligation simply by relying on the representations of others without inquiring as to what investigation was made and without reviewing the records upon which the individual responding to the request relied.” 243 A.3d 19 at 28.

The Borough again relies on Mr. Flynn’s attestations provided in the May 5, 2023 final response. Regarding, numbers 1.b, 1.c, 1.d, 2.a, 2.b, and 2.c, of subpart *i.*, Mr. Flynn attested for

each response, “it is denied per RTKL Section 705 because no such records exist.” When claiming the non-existence of records, an agency must show that it has conducted a search reasonably calculated to uncover all relevant documents; an agency may do so by providing relatively detailed and non-conclusory affidavits submitted in good faith by officials or employees with knowledge of the records and the search for the records. *See Burr v. Pa. Dep’t of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access). Further, regarding the non-existence of records, an agency has the burden of proving that a record does not exist and “it may satisfy its burden of proof . . . with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192; *Moore*, 992 A.2d at 909 (search of records and sworn and unsworn affidavits that documents were not in agency’s possession are enough to satisfy burden of demonstrating nonexistence).

More recently, in *Pennsylvania Department of Health v. Mahon*, the Commonwealth Court discussed the evidence required to establish the absence of records, quoting its previous decision in *Hodges*. 283 A.3d 929, 936 (Pa. Commw. Ct. 2022); *see also Campbell v. Pa. Interscholastic Athletic Ass’n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a “more likely than not” inquiry). It should be noted, however, that the holding of the Commonwealth Court in *Mahon* does not appear to establish a bright-line rule by stating that when there is evidence that a record does not exist, “[i]t is questionable to what degree

additional detail and explanation are necessary to establish the nonexistence of a record...” 283 A.3d at 936. With respect to numbers 1.b, 1.c, 1.d, 2.a, 2.b, and 2.c, of subpart *i.*, we recognize that Mr. Flynn is the Borough’s Open Records Officer and, as set forth above, he has attested to the less than efficient former accounting system operated by the Borough for the waste and recycling funds, however, the Borough’s evidence is devoid of a single fact regarding what records were searched and what Borough departments or personnel were queried about the existence of records. Therefore, the Borough has not met its burden of proving that records responsive to numbers 1.b, 1.c, 1.d, 2.a, 2.b, and 2.c, of subpart *i.*, do not exist. *See Hodges*, 29 A.3d at 1192; *see also Mahon and SpotlightPA v. Lackawanna Cnty.*, OOR Dkt. AP 2023-1526, 2023 PA O.O.R.D. LEXIS 1730; *Snyder v. Allegheny Cnty. Airport Auth. and Pittsburgh Int’l Airport*, OOR Dkt. AP 2023-1716, 2023 PA O.O.R.D. LEXIS 1919.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part, and dismissed as moot in part**, and the Borough is required to conduct a good faith search for responsive electric bills (#1, subpart *g.*), stormwater plans (#2, subpart *h.*), and to all records responsive to subpart *i.*, within thirty days. This Final Determination is binding on all parties. If no additional records are located as a result of its search, the Borough shall provide an attestation or sworn affidavit to the Requester confirming same. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Delaware 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 as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and

should not be named as a party.²⁰ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 22, 2023

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent via E-File Portal to: Michael Long; James Kratz, Esq.; Bradford Flynn

²⁰ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).