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BOROUGH OF BATH, Petitioner,	:	IN THE COURT OF COMMON PLEAS
	:	NORTHAMPTON COUNTY,
	:	PENNSYLVANIA
v.	:	CIVIL DIVISION
MICHAEL LONG, Respondent.	:	
	:	NO. C-48-CV-2024-01039

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**BRIEF IN OPPOSITION TO RESPONDENT’S MOTION FOR  
APPOINTMENT OF EXPERTS**

AND NOW COMES Petitioner Borough of Bath (“Petitioner” or “Borough”), who, by and through its undersigned legal counsel, files, in accordance with N211(c), this Brief in Opposition to Respondent’s Motion for Appointment of Experts.

**I. STATEMENT OF FACTS.**

This matter arises under the Pennsylvania Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.* On May 17, 2023, Respondent Michael Long (“Requester” or “Respondent”), *pro se*, filed a RTKL request (“Request”) to the Borough, seeking certain alleged public records. The Borough partially granted responsive public records, and the Requester filed a statutory appeal to the Office of Open Records (“OOR”) per the RTKL. Following proceedings before an OOR Appeals Officer, on November 3, 2023, the OOR Appeals Officer issued a final determination in the matter of *Michael Long v. Bath Borough*, OOR Dkt. AP 2023-1598 that, in relevant part, impermissibly (1) refashioned the Request so it seeks certain additional alleged public records not covered by the actual Request, (2) required the Borough to conduct a supplemental search for

additional alleged public records, and (3) required the Borough to provide the “factual material” within identified confidential communications protected by the attorney-client privilege.

On November 17, 2023, the Borough filed a Petition for Reconsideration with the OOR, arguing that the OOR erred in (1) impermissibly refashioning the Request to seek certain alleged public records between less than the entire group of listed persons; (2) potentially granting access to such potential records other than emails; and (3) potentially granting access to part(s) of identified records that would reveal attorney-client privileged communications.

The OOR issued a final order partially granting reconsideration of its Final Determination in response to the Borough’s Petition for Reconsideration,<sup>1</sup> and, on January 12, 2024, the OOR issued a Final Determination Upon Reconsideration in the matter docketed as *Long v. Bath Borough*, OOR Dkt. AP 2023-1598R that no longer refashioned the Request to cover certain alleged public records not covered by the actual Request or a supplemental search but required the Borough “to review the records and email attachments claimed to be protected by the attorney-client privilege to determine whether they contain non-exempt factual information...” On February 9, 2024, per the RTKL, the Borough filed the instant statutory appeal of the Final Determination Upon Reconsideration to this Court, docketed here at *Borough of Bath v. Michael Long*, C-48-CV-2024-01039.

On September 12, 2024, Respondent filed a “Motion for Appointment of Court Experts” (“Motion”). During a September 24, 2024 conference before the Honorable Jennifer R. Sletvold, the parties agreed that the instant motion could be decided on the briefs, and, on September 24,

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<sup>1</sup> The Borough filed appeals of the OOR’s Final Determination and of its final order partially granting reconsideration, which were docketed before this Court at *Borough of Bath v. Michael Long*, C-48-CV-2023-09734 and *Borough of Bath v. Michael Long*, C-48-CV-2023-10559. By order dated August 28, 2024, the Honorable Abraham P. Kassis issued an order dismissing these appeals as moot.

2024, Judge Sletvold issued an order providing that “All current outstanding motions shall be submitted on brief[s] on the October 15, 2024 argument list.”

On October 3, 2024, the Borough filed a verified response in opposition to Respondent’s Motion. On October 4, 2024, Respondent filed a Praecipe for Argument under N211, and along with a supporting brief.

## **II. STATEMENT OF THE QUESTIONS INVOLVED.**

A. Where N211 provides that briefs be filed at least twenty (20) days before argument and Respondent filed his brief eleven (11) days before argument, should Respondent’s Motion be dismissed for failure to comply with N211?

**SUGGESTED ANSWER:** Yes.

B. Where the Motion seeks relief not permitted under the RTKL, should Respondent’s Motion be denied?

**SUGGESTED ANSWER:** Yes.

## **III. ARGUMENT.**

This matter is a statutory appeal from a final determination of the OOR under the RTKL. As a statutory appeal under the RTKL, the PA Rules of Civil Procedure do not apply. *See Borough of W. Easton v. Mezzacappa*, 74 A.3d 417, 420 (Pa. Commw. 2013) (“The Pennsylvania Rules of Civil Procedure do not apply to statutory appeals, such as an appeal under the RTKL”); *Allegheny Cnty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1033 (Pa. Commw. 2011). Similarly, the PA Rules of Appellate Procedure also do not apply to statutory appeals under the RTKL. *See* Pa.R.A.P. 103; *see Chambersburg Area Sch. Dist. v. Dorsey*, No. 2012-849 (C.P. Franklin May 18, 2012) (Walsh, J.) (noting, in the context of a Right-to-Know Law appeal, that neither the PA Rules of Civil Procedure nor the PA Rules of Appellate Procedure apply), *aff’d* 97 A.3d 1281 (Pa. Commw. 2014).

**A. Respondent's brief was not timely filed and should not be considered.**

Under N211(c), parties must file a brief “at least twenty (20) days before the date set for argument,” and, here, argument is scheduled to occur on October 15, 2024. Although Judge Sletvold's September 27, 2024 order required the parties to file a praecipe to list cases for argument, the order did not permit Respondent to file a brief outside of the deadline imposed by N211(c). As Respondent waited until October 4, 2024 (11 days before the October 15, 2024 argument), Respondent has not complied with NC211(c), which has resulted in prejudice to the Borough as a result of having to respond to Respondent's Brief without appropriate time to do so. For this reason, Respondent's Motion should not be considered.

**B. Respondent seeks relief not provided under the RTKL on issues not properly before this Court.**

The simple and limited issue before this Court by virtue of the Borough's Petition for Review is whether the specific records at issue are wholly protected from public access under the attorney-client privilege. Notwithstanding this, Respondent's Motion seeks the appointment of a forensic accountant and a digital forensic specialist, apparently in connection with different RTKL requests and other matters not before this Court. Because Respondent's Motion is wholly irrelevant as to the limited question of whether the instant records constitute public records and seeks relief that is not provided for under the RTKL, the instant Motion must be denied.

The request at issue in this matter is a May 17, 2023 RTKL request; however, in Respondent's brief, he appears to seek relief related to a September 27, 2022 request. *See* Brief of Respondent at 2, ¶8. Additionally, while Respondent's brief makes a variety of unsubstantiated claims concerning alleged financial improprieties and other issues, *see id.* at 2-5, none of these allegations have anything to do with whether the specific records at issue are wholly subject to the attorney-client privilege under the RTKL. At best, Respondent argues that an email chain “was

missing an email;” however, this email was not responsive to Respondent’s May 17, 2023 RTKL request, and is protected from public access under the attorney-client privilege. Regardless of Respondent’s odd claims that there are “suspicious activities associated with” a file provided by the Borough, the simple fact is that this email is not responsive and is privileged – the relief sought by Respondent (an appointment of an expert to “access the integrity of the provided documents and the potential presence of malicious code”) quite simply has nothing to do with whether the specific records at issue are wholly subject to the attorney-client privilege under the RTKL.

Respondent argues in his Brief that additional records should exist. *See* Respondent’s Brief at 6-8. However, to the extent that Respondent has even preserved this issue by failing to raise it before the Office of Open Records, Respondent has not filed an appeal as to this issue. Accordingly, the question of whether additional records exist is not proper before this Court.

Similarly, Respondent argues that the crime-fraud exception to the attorney-client privilege applies. While such an argument at least addresses whether the attorney-client privilege applies, Respondent waived this issue by not presenting it before the OOR. *See Crocco v. Pennsylvania Dep’t of Health*, 214 A.3d 316, 321 (Pa. Commw. 2019) (stating that requesters waive “arguments that are not raised in” appeals or “raised to the fact-finder,” the OOR, and holding that an issue raised “*after* OOR issued its Final Determination” was waived). Here, because Respondent failed to raise or preserve the crime-fraud exception to the attorney-client privilege, this issue has been waived.

Even if, *arguendo*, the question of the crime-fraud exception was properly submitted before this Court, the crime-fraud exception requires either a “crime” or a “fraud,” *see Nadler v. Warner Company*, 184 A. 3, 5 (Pa. 1936), and Respondent points to neither. Instead, Respondent argues that “*if* a pattern of financial misconduct or wrongdoing” is subsequently revealed *after* the

appointment of forensic experts, then the future results of such attenuated investigations could potentially “provide a basis for invoking the exception and compelling disclosure.” *See* Brief of Respondent at 12. In other words, Respondent asks this Court to engage in a wild goose chase to determine whether Respondent’s illusory suggestions of conduct that he admits may not have occurred, may have occurred. There is simply no reason to advance such specious claims.

Although Respondent does not seek sanctions in his Motion, Respondent, in his supporting brief, alleges that sanctions should be imposed because the Borough has somehow purportedly acted in bad faith. First, Respondent has not provided any legal authority for the imposition of sanctions against the Borough. Second, Respondent has not identified how the Borough has purportedly acted in bad faith. While the Borough has exercised its statutory ability to file an appeal to this Court in accordance with 65 P.S. § 67.1302 in order to adjudicate whether the underlying records are wholly subject to the attorney-client privilege, the filing of an appeal as to a nonfrivolous legal issue cannot form the basis of a finding of bad faith.

In short, Respondent provides absolutely no factual or legal basis for the appointment of experts in this RTKL matter. While a court may expand the record on appeal through its plenary scope of review, *see Bowling v. Office of Open Records*, 75 A.3d 453, 477 (Pa. 2013), this is the Borough’s appeal, and the Borough has not asked for the evidentiary record to be expanded. Accordingly, because the legal issue in this matter is limited solely to the question of whether certain communications are wholly subject to the attorney-client privilege, this Court should deny the instant Motion because it seeks to expand this limited issue into a far-reaching investigation on conduct alleged by Respondent in connection with different RTKL requests he previously made to the Borough and Respondent’s unsubstantiated claims alleging financial improprieties of the Borough. *See generally Lawless v. Jubelier*, 789 A.2d 820, 827-28 (Pa. Commw. 2002) (providing

that courts should not intervene in matters committed to another branch of government acting within its scope of constitutional authority under the political question doctrine).

Nothing within the RTKL authorizes a court to appoint experts on irrelevant and speculative issues, and, to the Borough's knowledge, no court has ever appointed an expert in a RTKL matter under either the current or 1957 version of the RTKL. As explained in *Bowling*, Chapter 11 of the RTKL provides that an evidentiary hearing is developed before the OOR as the initial factfinder and that all issues must be raised before the factfinder closes the evidentiary record. If an appeal is filed, the OOR creates a certified record of the proceedings before it, which, in the instant matter, has been provided to this Court. Based on the certified record (or, if rare circumstances justify supplementing the evidentiary record further), courts typically decide appeals on the legal issues before it through briefing and/or argument. What Long seeks here is to completely deviate from that process by attempting to raise his alleged issues from previously RTKL requests that he made to the Borough which requests were administered by the Borough per the RTKL and are not before this Court.

#### **IV. CONCLUSION.**

For the foregoing reasons, the Borough respectfully asks this Honorable Court to deny Respondent's Motion for Appointment of Experts.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

SCHNEE LEGAL SERVICES, LLC



By: \_\_\_\_\_

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Dated: October 10, 2024

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	:	PENNSYLVANIA
v.	:	CIVIL DIVISION
MICHAEL LONG,	:	
Respondent.	:	NO. C-48-CV-2023-10559

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**CERTIFICATE OF SERVICE**

I, J. Chadwick Schnee, Esq., certify that, on this 10th day of October, 2024, I have served a true and correct copy of the attached Brief in Opposition to Respondent’s Motion for Leave to Appeal *Nunc Pro Tunc* on the person listed below via First Class Mail:

Michael Long  
220 Creek Road  
Bath, PA 18014  
*Respondent, pro se*



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J. Chadwick Schnee, Esq.