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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

**BRIEF IN OPPOSITION TO RESPONDENT’S MOTION FOR
PROTECTIVE ORDER**

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 Protective Order.

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,¹ 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 10, 2024, Respondent filed a “Motion for Protective Order, Sanctions, and Injunctive Relief” (“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,

¹ 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.

and, on September 24, 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 September 30, 2024, the Borough filed a verified response in opposition to Respondent’s Motion. On October 3, 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 twelve (12) 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 on issues not properly before this Court, 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 3, 2024 (12 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 and denied.

B. Respondent seeks relief not provided for 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 a protective order, sanctions and injunctive relief on issues 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.

While the appeal before this Court only involves the Borough's appeal of the OOR's final order granting access to certain records protected by the attorney-client privilege in relation to Respondent's May 17, 2023 RTKL request, the Motion, as reflected in Respondent's supporting brief, goes far beyond the limited issue in this statutory appeal. Specifically, Respondent alleges that (1) the Borough is “harassing” and “intimidating” him, *see* Respondent's Brief in Support of Motion (“Brief”) at 6-7; (2) the Borough has violated its social media policy, *id.* at 7-10; (3) the Borough has not formally acknowledged a legal hold notice sent by Respondent, other than

through a phone call with the Borough's Solicitor, *id.* at 10; (4) additional records exist, *id.* at 5-6; and (5) the Borough has "fabricated" claims of the attorney-client privilege. At best, only the last issue concerning the attorney-client privilege is potentially relevant to the Borough's appeal, as Items 1-4 do not in any way impact whether the records at issue are wholly privileged.

Even if Items 1-4 *were* properly before this Court, Respondent has waived these issues by failing to raise them to 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, Respondent failed to raise or preserve his claims (if relevant) that Borough is "harassing" and "intimidating" him, that it violated its social media policy, that it did not "formally" acknowledge a request for a legal hold or that the Borough has not conducted a sufficient search for records as Respondent does not point to anywhere within the certified record as to where such issues were purportedly raised to the OOR. Thus, such issues are waived.

Additionally, Respondent cites Pa.R.Civ.P. 4012 as a basis for issuing a protective order. First, the "Pennsylvania Rules of Civil Procedure do not apply to statutory appeals, such as an appeal under the RTKL." *See Borough of W. Easton v. Mezzacappa*, 74 A.3d 417, 420 (Pa. Commw. 2013). Second, this rule is part of the rules pertaining to discovery and can only be filed by "a party or ... person from whom discovery or deposition is sought." Pa.R.Civ.P. 4012(a). Here, neither party has (or even could) seek discovery in this statutory appeal, and, as a result, Respondent is not "a party or ... person from whom discovery or deposition is sought" for purposes of Pa.R.Civ.P. 4012(a). Finally, Respondent must show "good cause" for seeking a protective order, and, as discussed in further detail below, Respondent has not made such a showing. For these reasons, Respondent's Motion must be denied.

C. Respondent's request for a protective order and sanctions with respect to the Borough's assertion of the attorney-client privilege is not justified by law or fact.

To the extent, *arguendo*, that Respondent claims that the Borough has “fabricated ... privilege claims” or somehow “tampered” with records, the Borough notes that Respondent has not provided any legal basis for the issuance of a protective order whatsoever. Notwithstanding the lack of any legal support, Respondent baldly suggests that the Borough, in some unknown fashion, “fabricated” claims that the attorney-client privilege attaches to confidential communications with the Borough's Solicitor in which legal advice was sought or provided. *See* Brief at 4-5. While such an argument as to whether the privilege applies is relevant to the Borough's appeal, it does not, however, form the basis for a protective order, especially where the Borough is preserving records responsive to the Request during the pendency of this appeal.

In terms of Respondent's claim that evidence was “tampered,” it appears that Respondent is suggesting that an email that is not responsive to his Request should have been provided. First, to the extent that Respondent believed that this email is responsive, he should have raised this issue before the OOR, and, by not doing so, he has waived this issue. *See Crocco, supra*. Second, even if, for the sake of argument, this email was responsive, it itself is not subject to public access under the attorney-client privilege. To the extent that Respondent wished to challenge whether this email is responsive or privileged, he could have filed an appeal to this Court; however, he has not timely done so. Based on the foregoing, Respondent has not demonstrated good cause for a protective order.

D. Respondent's request for a protective order and sanctions with respect to a purported inadequate search is not properly before this Court and is not justified by law or fact.

Respondent argues that additional records exist in response to his Request. *See* Brief at 5-6. Again, Respondent does not point to any legal basis for a protective order on this point.

Nevertheless, to the extent that Respondent believed that the OOR erred in any way, Respondent had the ability to file an appeal of the OOR's final determination. By failing to do so, Respondent has not preserved the question of whether any additional records exist before this Court.

Even if this argument were raised properly before this Court, Respondent appears to argue that the Borough's extensive search for records through Drivelocker was somehow in error and an "attempt to obstruct access to records..." *See* Brief at 6. If anything, the Borough's use of Drivelocker to search for all responsive records was in accordance with the Borough's duty to conduct a good faith search for records. *See* 65 P.S. § 67.901. Based on the foregoing, Respondent has not demonstrated good cause for a protective order.

E. Respondent's request for a protective order and sanctions due to "harassment and intimidation tactics" is not properly before this Court and is not justified by law or fact.

Respondent argues that he is somehow being harassed and intimidated by the Borough, *see* Brief at 6-7, and, again, provides no legal support for a protective order. In factual support, Respondent points to a purported 2022 communication from the Borough's Mayor. *See id.* at 6. Notably, that alleged communication was made prior to the instant Request, and, as a result, is completely irrelevant as to the Borough's appeal.

Respondent also takes issue with factual information posted by the Borough on its website concerning the financial impact of Respondent's onslaught of lengthy RTKL requests spanning several years. First, the content of information on the Borough website has nothing to do with the sole legal question at issue – are the records at issue wholly subject to the attorney-client privilege – and is wholly outside the confines of the Borough's statutory appeal. *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). Second, even if relevant, much of the information posted on the Borough website concerns Respondent's numerous *other* RTKL requests and appeals, rather the Request at issue here.

Finally, Respondent complains that the Borough's Mayor has "made derogatory statements about Respondent on social media" during unidentified times and related to unidentified topics. Quite simply, regardless of the truth of such an assertion, Respondent has not in any way demonstrated how such alleged comments impact whether the records at issue in this statutory appeal are subject to public access in whole or in part. Based on the foregoing, Respondent has not demonstrated good cause for a protective order.

F. Respondent's request for a protective order and sanctions due to a purported violation of the Borough's social media policy is not properly before this Court and is not justified by law or fact.

Respondent spends much of his Brief arguing that the Borough violated its social media policy. *See* Brief at 7-10; *id.* at 17-18. However, regardless of whether the Borough purportedly violated its own social media policy, such an assertion has absolutely nothing to do with the records at issue and is completely outside the ballpark of the Borough's statutory appeal of the OOR's final determination. Respondent raises absolutely no legal justification for seeking a protective order as it pertains to the Borough's social media policy. To the extent that Respondent believes that the Borough violated its own social media policy, he has a remedy: the ballot box. Based on the foregoing, Respondent has not demonstrated good cause for a protective order.

G. Respondent's request for a protective order and sanctions due to a purported failure to "formally" acknowledge a request for a legal hold is not properly before this Court and is not justified by law or fact.

Notwithstanding the fact that Respondent acknowledges that he *personally spoke with the Borough's Solicitor* concerning his request for the Borough to preserve records he requested,

Respondent complains that he did not receive a “formal acknowledgement” of his request for a legal hold. *See* Brief at 10. Respondent’s argument – devoid of any legal support – is simply frivolous, as, despite the lack of any “formal” acknowledgement, he allegedly personally spoke with the Borough’s Solicitor on this issue. Although the lack of a “formal” acknowledgement is outside the confines of this matter, the Borough continues to maintain the records at issue in this matter during the pendency of this litigation. Based on the foregoing, Respondent has not demonstrated good cause for a protective order.

H. Respondent has not established that the Borough has acted in bad faith.

Built of a mountain of speculation and innuendo, Respondent appears to argue that the Borough has acted in bad faith. *See* Brief at 12-15. As his basis, Respondent argues that 65 P.S. § 67.1305(a) permits court’s to award attorney’s fees and court costs where an agency acts in bad faith; however, 65 P.S. § 67.1305(a) only involves the imposition of a \$1,500 maximum civil penalty, rather than award of attorney’s fees and costs. While 65 P.S. § 67.1304 permits the imposition of attorney’s fees and costs, this statute (1) was not raised by Respondent; and (2) does not apply to Respondent as a *pro se* litigant. *See Anand v. Office of Att’y Gen.*, 309 A.3d 169, No. 663 C.D. 2022 (Pa. Commw. Nov. 20, 2023) (unpublished), *appeal denied* 320 A.3d 669 (Pa. 2024).

Second, this issue is not properly before this Court because Respondent has not filed a timely appeal of the OOR’s final determination under review. To the extent that Respondent wished to argue that the Borough acted in bad faith, he could have filed an appeal; however, he has not done so within the statutory period under 65 P.S. § 67.1302(a). Accordingly, his argument concerning bad faith has been waived.

Even if this Court needs to consider Respondent's argument, the Borough has not in any way acted in bad faith. Under the RTKL, proof of bad faith requires "an abnegation of mandatory duties by an agency, see *Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corrs.*, 243 A.3d 19, 25 (Pa. 2020), and, here, Respondent has not pointed to any mandatory duties that the Borough has failed to perform. "[W]hen an agency has shown some diligence to respond to a request and nondisclosure is due to a genuine and nonfrivolous belief that documents have been provided, are unavailable, or are not subject to disclosure," courts have declined to impose penalties for purported "bad faith" conduct." See *Brunermer v. Apollo Borough*, 307 A.3d 170, No. 746 C.D. 2022 (Pa. Commw. Oct. 19, 2023) (unreported) (citing *Office of the Dist. Att'y of Philadelphia v. Bagwell*, 155 A.3d 1119, 1140 n.20 (Pa. Commw. 2017), *appeal denied* 317 A.3d 523 (Pa. 2024)). Here, while Respondent disagrees with the Borough's assertion that records at issue are privileged, the Borough has diligently responded to the Request and Requester's appeal to the OOR and has asserted a genuine and nonfrivolous argument that the attorney-client privilege applies. Accordingly, no bad faith penalties or sanctions are appropriate.

I. Respondent has not demonstrated that injunctive relief is appropriate.

Respondent also seeks injunctive relief seeking to enjoin the Borough from "making public statements or social media posts that disparage Respondent or mispresent his action" and from "[v]iolating [the Borough's] own policies and legal obligations."² See Brief at 16-17; *id.* at 21-21. Respondent's request for injunctive relief suffers from two fatal defects. First, it seeks relief under Pa.R.Civ.P. 1531 that is not available in this statutory appeal because the Rules of Civil Procedure do not apply. See *Borough of W. Easton, supra*. Second, even if, *arguendo*, injunctive relief is available as a remedy, the issues raised by Respondent in his Motion and Brief have absolutely

² The Borough notes that Respondent's Motion omits a proposed order required by N208.3(a).

nothing to do with the narrow scope of the Borough's statutory appeal as to whether the records at issue are privileged in whole or in part. Accordingly, Respondent's request for injunctive relief should be denied.

IV. CONCLUSION.

For the foregoing reasons, the Borough respectfully asks this Honorable Court to deny Respondent's Motion for Protective Order, Sanctions, and Injunctive Relief.

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,

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Dated: October 10, 2024

BOROUGH OF BATH,	:	IN THE COURT OF COMMON PLEAS
Petitioner,	:	NORTHAMPTON COUNTY,
	:	PENNSYLVANIA
v.	:	CIVIL DIVISION
MICHAEL LONG,	:	
Respondent.	:	NO. C-48-CV-2023-10559

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 Protective Order, Sanctions, and Injunctive Relief on the person listed below via First Class Mail:

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



J. Chadwick Schnee, Esq.