

BOROUGH OF BATH,
Petitioner,

v.

MICHAEL LONG,
Respondent.

: IN THE COURT OF COMMON PLEAS
NORTHAMPTON COUNTY,
:
PENNSYLVANIA
CIVIL DIVISION
:

NO. No. C-48-CV-2024-01039
:

**RESPONDENT’S MOTION FOR RECONSIDERATION OF ORDER
DENYING MOTION FOR APPOINTMENT OF COURT EXPERTS**

AND NOW, comes Respondent, Michael Long, pro se, and respectfully moves this Honorable Court to reconsider its Order dated October 23, 2024, denying Respondent's Motion for Appointment of Court Experts. In support thereof, Respondent avers as follows:

INTRODUCTION

1. On October 23, 2024, this Court denied Respondent's Motion for Appointment of Court Experts, concluding that expert assistance would "constitute an investigation of additional issues that were not raised before the OOR."
2. Respondent respectfully seeks reconsideration because the Court's ruling overlooks that:
 - a. **Expert assistance is necessary to verify the authenticity and integrity of records within the existing OOR record, over which attorney-client privilege is claimed.**

- b. **Issues concerning missing and potentially altered records were raised during the OOR proceedings and are part of the factual record developed before it.**
 - c. **Newly discovered evidence further demonstrates the impossibility of certain claimed privileged communications, necessitating expert analysis.**
3. The appointment of a **Digital Forensics Expert** and a **Forensic Accountant** is essential to assist the Court in making informed legal determinations based on an accurate and complete record.

LEGAL STANDARD FOR RECONSIDERATION

4. A motion for reconsideration is appropriate where the court has overlooked or misapprehended significant facts or controlling legal principles. *Moore v. Moore*, 634 A.2d 163, 166 (Pa. 1993); *Commonwealth v. Morris*, 771 A.2d 721, 735 (Pa. 2001).
5. Reconsideration is warranted when new evidence, not previously available, would compel a different result. *Hutchison v. Luddy*, 611 A.2d 1280, 1288 (Pa. Super. Ct. 1992).
6. Courts must reconsider orders where evidence suggests possible fraud or misrepresentation. *Leone v. Commonwealth*, 885 A.2d 76, 81 (Pa. Cmwlth. 2005).

ARGUMENT

I. Expert Assistance Is Necessary to Verify the Authenticity and Integrity of the Existing Record

7. Recent case law demonstrates the critical role of expert analysis in determining the authenticity and integrity of digital records, particularly in cases involving claims of privilege. In *In re Rutter's Data Sec. Breach Litig.*, No. 1:20-CV-382, 2021 U.S. Dist. LEXIS 136220 (M.D. Pa. July 22, 2021), the court ordered production of a forensic

report, rejecting claims of attorney-client privilege and work product protection.

Similarly, in *Carlson v. Jerousek*, 68 N.E.3d 520 (Ill. App. Ct. 2016), the court emphasized the importance of expert testimony in cases involving complex digital evidence.

8. The *Rutter's* decision emphasizes the need for a clear demonstration that the primary purpose of an investigation is for legal advice, not merely a business necessity. This principle applies directly to the Borough's claims of privilege in the present case.

9. A **Digital Forensics Expert** is essential to:

- a. **Examine the metadata and authenticity of disputed emails**, determining whether they were fabricated, misdated, or altered.
- b. **Assess the integrity of email chains**, including missing emails which may demonstrate a waiver of attorney-client privilege.
- c. **Verify whether the Borough's electronic records have been improperly altered or are incomplete.**
- d. **Provide the Court with a technical analysis of the Borough's search methodology**, directly addressing the adequacy of their efforts to locate and disclose responsive records.

10. A **Forensic Accountant** is necessary to:

- a. **Review and assess the Borough's financial records related to RTKL requests and legal expenses.**
- b. **Identify discrepancies or potential misrepresentations in the Borough's financial disclosures.**

- c. **Determine whether assertions of privilege were used to conceal financial misconduct.**
 - d. **Analyze the complex nature of the financial records**, including multiple account reclassifications and modifications, to assist the Court in understanding potential irregularities.
11. The need for these experts is further supported by evidence presented in the OOR certified record, specifically **OOB Exhibit 25**, which reveals:
- a. **Undisclosed DriveLocker Invoices:** Despite a \$50,000 state grant for IT expenses, related invoices were never provided, although they were responsive to a records request. This suggests potential misuse or concealment of grant funds.
 - b. **Inconsistent Financial Records:** The Borough initially claimed QuickBooks audit trails could not be generated, but later provided reports extracted from that same system. This contradiction suggests potential manipulation of financial data.
 - c. **Discrepancies in Dates and Payments:** The Borough's legal privilege log asserts confidential communications about hiring the mayor occurred on April 21, 2022, but payroll records show the mayor started on April 1, 2022. This date discrepancy raises questions about the accuracy of financial records and potential backdating.

II. Issues Concerning Record Authenticity Were Raised Before the OOR

12. Throughout the OOR proceedings, Respondent raised concerns about missing communications and potential alterations to records provided by the Borough. (OOB Record, Exhibits 3, 14, and 25).

13. Respondent argued that missing emails indicated a potential waiver of attorney-client privilege, as they may have contained disclosures of privileged conversations to third parties. (OOR Record, Exhibits 14 and 17).

14. Specifically, Respondent noted that an email chain provided by the Borough was missing an email from Borough Manager Bradford Flynn, which is referenced within the existing emails. This missing email could show Mr. Flynn waiving privilege by disclosing conversations, thereby impacting the validity of the Borough's privilege claims. (OOR Record, Exhibits 3 and 14).

15. These concerns were part of the factual record developed before the OOR and are directly relevant to the appeal before this Court.

III. The Borough Solicitor's Contradictory Affidavits Undermine the Reliability of the Record

16. The Borough's solicitor, James F. Kratz, Esq., submitted an initial affidavit dated July 24, 2023, and a revised affidavit dated October 4, 2023, containing substantial corrections and acknowledgments of errors. (OOR Record, Exhibits 8 and 20).

17. The corrections pertain to the content and timing of attorney-client privileged communications, including admissions of "inadvertent errors" and retractions of previous statements.

18. Given that the Borough had the opportunity to correct errors previously, any remaining discrepancies suggest that the affidavits cannot be accepted as fact by this Court and require de novo review.

IV. Newly Discovered Evidence Demonstrates the Impossibility of Claimed Privileged Communications

19. After the OOR record closed, Respondent obtained a sworn affidavit from former Council-member Mark Saginario, dated September 3, 2024, stating that he did not inform any Borough officials of his resignation prior to October 4, 2021. (Attached hereto as **Exhibit A**).
20. The Borough's Exemption Log lists an email dated October 3, 2021 (Record Number 5), claiming attorney-client privilege regarding "prospective resignation of Council-member Mark Saginario."
21. It is impossible for the Borough to have discussed Mr. Saginario's prospective resignation on October 3, 2021, when he asserts he did not inform anyone until October 4, 2021.
22. This new evidence not only shows an impossible privilege claim but also supports the issues raised within the OOR certified record, necessitating expert analysis to determine the validity of the Borough's privilege claims.
23. The contradiction and impossibility created by this new evidence further demonstrate that the affidavits provided by the Borough are inaccurate and cannot be accepted as fact, requiring de novo review by this Court.

V. The Benefits of Expert Analysis Significantly Outweigh the Costs

24. While there may be costs associated with expert analysis, the benefits of ensuring a complete and accurate record significantly outweigh these costs, especially given the serious concerns about record authenticity and privilege claims.
25. The potential risks of not appointing experts include:
 - a. **Unjust outcomes based on incomplete or manipulated records.**
 - b. **Erosion of public trust if the integrity of the records is not properly scrutinized.**

- c. **Failure to uncover potential fraud or misrepresentation** that may have significant legal and financial implications for the Borough and its residents.

26. The complex nature of the financial records in question, including multiple account reclassifications and modifications, requires expert analysis to fully understand and interpret. Without this expertise, the Court may be unable to make fully informed decisions on critical issues of public interest and governmental transparency.

VI. Appointment of Experts Will Not Introduce New Issues

27. The appointment of experts is not an attempt to investigate new issues but is necessary to verify the authenticity and integrity of the existing record upon which the Court must base its legal determinations.

28. Expert assistance will provide the Court with factual analysis essential for resolving issues raised before the OOR and now on appeal. The experts would only be analyzing existing evidence within the certified record, not investigating new facts or expanding the scope of the appeal.

29. This approach aligns with the principle established in *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013), which allows for the supplementation of the record in appeals from OOR determinations when justice so requires.

VII. Evidence of Bad Faith by the Borough

30. **OOR Exhibit 25** provides compelling evidence of the Borough's bad faith conduct throughout this case, demonstrating a continued pattern of disregard for the Right-to-Know Law:

- a. **Failure to Maintain Good Faith in Fulfilling Search Obligations:** The Borough failed to meet its good faith search obligations under 65 P.S. § 67.901

and the standards set in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161 (Pa. Cmwlt. Ct. 2018).

- b. **Absence of Evidence Supporting the Adequacy of the Search:** The Borough's affidavit merely describes a supposed search procedure without providing corroborating material, falling short of the evidentiary standard established in *Hodges v. Pa. Department of Health*, 29 A.3d 1190 (Pa. Cmwlt. 2011).
- c. **Insufficient Evidence for Asserting Attorney-Client Privilege:** The Borough failed to present sufficient evidence as mandated in 65 P.S. § 67.708(a)(1) that the attorney-client privilege applies to the records in question.
- d. **Generic Repetition Undermining Claimed Privilege:** The Borough's log of privileged communications duplicates generic justification language across multiple unrelated discussions, contradicting the basic presumption of openness upheld by the RTKL.
- e. **Insufficient and Lacking Records Exemption Log:** The Borough's exemption log had multiple notable deficiencies, inconsistent with the standard Open Records rules requiring thorough substantiation of exemptions.
- f. **Misuse of Exemptions Without Proper Consideration of Segregability:** The Borough overlooked the need to assess whether records eligible for full or partial access based on segregability were among the requested materials.

31. These instances of bad faith conduct, as detailed in **OOR Exhibit 25**, further demonstrate the need for expert analysis to ensure a complete and accurate disclosure of records.

CONCLUSION

WHEREFORE, Respondent respectfully requests this Honorable Court to:

1. **Reconsider its Order dated October 23, 2024, denying Respondent's Motion for Appointment of Court Experts;**
2. **Appoint a qualified Digital Forensics Expert and a Forensic Accountant to assist the Court in evaluating the authenticity and integrity of the records within the existing OOR record;**
3. **Permit supplementation of the record to include the newly discovered affidavit of former Council-member Mark Saginario (Exhibit A);**
4. **Grant such other relief as this Court deems just and proper.**

Respectfully submitted,



/s/ Michael Long

Michael Long, Pro Se

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Dated: November 5, 2024

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Reconsideration was served upon the following counsel of record on this 5th day of November, 2024, via email::

J. Chadwick Schnee, Esq.
Schnee Legal Services, LLC
74 E. Main St. #648
Lititz, PA 17543
chadwick@schneelegal.com

A handwritten signature in black ink, appearing to be 'M Long', with a long horizontal stroke extending to the right.

/s/ Michael Long
Michael Long
November 5, 2024

Exhibit

A

DECLARATION OF MARK SAGINARIO

I, **Mark Saginario**, hereby declare and state as follows:

1. I make this declaration based upon personal knowledge of the facts and circumstances described herein.
2. On September 29, 2021, I submitted my resume to the Borough of Tatamy for consideration for a full-time borough manager position.
3. Between September 30, 2021, and October 2, 2021, I participated in several interviews for the aforementioned position.
4. On Sunday, October 3, 2021, I was offered the appointment as Borough Manager of Tatamy, with the understanding that I would need to attend their Monday, October 4, 2021 council meeting for formal hiring.
5. On October 4, 2021, I attended the Tatamy Borough Council meeting and accepted council's appointment for the position of Borough Manager.
6. Following the Tatamy meeting, I attended the Bath Borough Council meeting, arriving during executive session, where I announced to the full council, the solicitor, and borough manager my immediate resignation.
7. The basis for my immediate resignation was twofold:
 - a. My new employment schedule would make it impossible to commit to Bath borough business due to conflicting meeting schedules;
 - b. The potential conflict of interest as both municipalities might compete for similar funding or grants.

8. I did not discuss my change of employment with any Bath borough officials prior to the October 4 meeting.
9. After my resignation, my only subsequent interactions with Bath Borough were:
 - a. Submitting a formal resignation letter;
 - b. Receiving one phone call from the borough manager requesting I amend my resignation date to December 31, 2021, for accounting purposes.
10. I did not attend any council meetings after October 4, 2021, as a council member.
11. My borough email access was terminated within approximately two weeks of my verbal resignation.
12. I have no knowledge of any discussions regarding the appointment of my replacement on the council.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 3rd day of November, 2024.


Mark Saginario (Nov 3, 2024 20:30 EST)

Mark Saginario