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

BRIEF IN SUPPORT OF PETITION FOR REVIEW

AND NOW COMES Petitioner Borough of Bath ("Petitioner" or "Borough"), who, by and through its undersigned legal counsel, files, in accordance this Court's September 24, 2024 Order, this Brief in Support of Petition for Review.

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[[2]] 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 May 13, 2024, Respondent filed a "Motion for Leave to File Appeal Nunc Pro Tunc Due to Court Error to Dismiss Petitioner's Appeal for Lack of Jurisdiction." On September 24, 2024, the Honorable Jennifer R. Sletvold issued an order providing that "within 30 days from an

[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.

[2] These records (emails and email attachments, as the case may be) are identified via the Borough's privilege log submitted to the OOR in response to the OOR's request for same in OOR Dkt. AP 2023-1598 (now known as OOR Dkt. AP 2023-1598R).

order disposing of Respondent's Motion for Leave to Appeal Nunc Pro Tunc, Petitioner shall file a brief in support of its Petition for Review." On October 23, 2024, the Honorable John M. Morganelli issued an order denying Respondent's Motion.

II. STATEMENT OF THE QUESTIONS INVOLVED.

A. Did the OOR lack the ability to order the release of records where appeals of its final determination were pending?

SUGGESTED ANSWER: Yes.

B. Should the final determination be reversed or vacated where it orders the Borough to review and produce the factual information from within attorney-client privileged communications?

SUGGESTED ANSWER: Yes.

III. ARGUMENT.

A. The final determination should be reversed or vacated where the OOR lacked the ability to order the release of records while appeals were pending.

At the time the OOR issued the underlying Final Determination Upon Reconsideration, the OOR lacked the ability to order the release of records. Specifically, the OOR issued the Final Determination Upon Reconsideration on January 12, 2024. *See* Final Determination Upon Reconsideration at 39. As of January 12, 2024, the Borough had two appeals of the final order pending, docketed before this Court at *Borough of Bath v. Michael Long*, C-48-CV-2023-09734 (which challenged the original Final Determination) and *Borough of Bath v. Michael Long*, C-

48-CV-2023-10559 (which challenged the order partially granting and partially denying reconsideration).

The RTKL "imposes an 'automatic stay' upon the filing of an appeal to a final determination." *See Office of Open Records v. Center Twp.*, 95 A.3d 354, 364 (Pa. Commw. 2014). That "stay [of] the release of documents [remains in effect] until a decision [by a Chapter 13 court] is issued." *See* 65 P.S. § 67.1302(b); *Donahue v. City of Hazleton*, 301 A.3d 484 (Pa. Commw. 2023) ("Pursuant to Section 1302(b) of the RTKL, an appeal of a final determination to common pleas stays any ordered disclosure pending a decision of that court, 65 P.S. § 67.1302(b)").

Here, because an appeal of the original final determination and an appeal of the order purporting to partially deny reconsideration were pending at the time the January 12, 2024 Final Determination Upon Reconsideration was issued, "the release of the documents" was automatically stayed under 65 P.S. § 67.1302(b). As a result of the automatic stay, the OOR could only take one action at the time the Final Determination Upon Reconsideration was issued: issue an order denying the appeal as a result of the stay because the OOR lacked the ability to order the release of any documents while the Borough's appeals were pending. Accordingly, the OOR's Final Determination Upon Reconsideration should be reversed or vacated to the extent that it ordered the release of any records.

B. In the alternative, the final determination should be reversed or vacated where the OOR ordered the Borough to review and produce factual information from the identified attorney-client privileged communications.

In the Final Determination Upon Reconsideration, the OOR agreed with the Borough that the Borough established that the identified emails sent privately between the Borough's Solicitor and Borough employees or officials for the purpose of seeking or providing legal advice are protected by the attorney-client privilege. *See* Final Determination Upon Reconsideration at 31-32. Where the OOR erred, however, is in holding that – based on the Requester's unsworn, threadbare assertion – portions of emails containing "information that does not discuss the contents of the legal advice sought or provided" and attachments are public "if they are purely factual information." *Id*. at 32 (citing *Pa. Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1124 (Pa. Commw. 2015) ("*Bagwell*"), *Commw. v. Vartan*, 733 A.2d 1258 (Pa. 1999) ("*Vartan*") and *Upjohn Co. v. United States*, 449 U.S. 383 (1981) ("*Upjohn*").

Vartan, however, does not involve the attorney-client privilege at all. Instead, *Vartan* involved the assertion of the "deliberative process privilege" – a privilege that has since been codified within 65 P.S. § 67.708(b)(10)(i) of the RTKL *See Off. of Governor v. Scolforo*, 65 A.3d 1095, 1102 (Pa. Commw. 2013). Here, the Borough did not raise either 65 P.S. § 67.708(b)(10)(i) or the deliberative process privilege as a basis for withholding the privileged emails at issue, and, as a result, *Vartan* has no relevance to the present dispute.

With respect to *Upjohn*, this case involved the enforcement of a federal summons against a corporation concerning communications made by employees to the corporation's general counsel during an investigation conducted by the corporation's general counsel. *See generally* 449 U.S. at 387-89. In *Upjohn*, the U.S. Supreme Court held that the attorney-client privilege

protects disclosure of any part of a privileged communication; however, underlying facts may be discoverable outside of the privileged communication. As explained by the Court,

> "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and **a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?'** but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."

Id. at 395-96 (quoting *Philadelphia v. Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (E.D. Pa. 1962)) (emphasis via bold typeface added).

In other words, *Upjohn* did not hold that all factual content from an attorney-client privileged communication is not privileged; rather, *Upjohn* held that facts from an attorney-client privileged communication are privileged because the entire communication is privileged even if existing facts are potentially discoverable *outside* of a privileged communication. *Id*. For specific example, in *Upjohn*, the Court pointed out that the IRS was free to question the employees who communicated with Upjohn's general counsel and outside counsel about possible facts but the IRS was not entitled to the facts from Upjohn's attorney-client privileged internal investigation including, but not limited to, the questionnaires the identified employees completed as part of Upjohn's general counsel's and outside counsel's investigation. *Upjohn*, 449 U.S. at 396. In no way did *Upjohn* provide that factual content from an attorney-client privileged communication is accessible because it is not protected by the privilege. Rather, *Upjohn* held that the entire attorney-client privileged communication is privileged.

While *Bagwell* involved the accessibility of communications under the RTKL, it did not involve the question of whether purportedly factual content within otherwise privileged communications is subject to public access via the RTKL. Instead, *Bagwell* merely referenced *Upjohn* and *Vartan* in dicta, and, accordingly, should not be given any weight here.

While "purely factual" information is potentially discoverable, it is only accessible where such information can be divulged without revealing privileged communications. *See Andritz Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 632-33 (M.D. Pa. 1997). Where facts are contained within "documents sent to or prepared by counsel … for the purpose of obtaining or giving legal advice, planning trial strategy, etc.," the communications containing such facts "are protected from compelled disclosure." *Id*. at 633; *see*, *e.g.*, *United States ex rel. Lord v. NAPA Mgmt. Servs. Corp.*, No. CV 3:13-2940, 2019 WL 5829535, at *14 (M.D. Pa. Nov. 7, 2019).

In the present case, the records at issue here, as stated by the OOR, all involve attorney-client privileged communications with the Borough Solicitor concerning the resignation of an individual from Borough Council, the vacancy in that office and the appointment process for filling the vacancy on Borough Council. *See* Final Determination Upon Reconsideration at 25-29. In addition, two email exchanges involved the provision of a legal opinion concerning prospective employment of an individual of a part-time office clerk. *Id*. at 30. Like *Upjohn*, the Borough Solicitor exchanged communications with his client (through its employees and officials) who sought legal advice that the Solicitor provided. As a result, per *Upjohn*, the entirety of the attorney-client privileged communications at issue here are privileged. *Upjohn*, *supra*; *see also United States ex rel. Lord*, *supra*; 42 Pa.C.S. §§ 5916 and 5928.

The only evidence submitted to the OOR was that provided by the Borough in the form of testimonial affidavits and an exemption log. While the OOR asked the Borough to provide an exemption log during the course of the appeal, the OOR did not in any way ask the Borough to address whether the emails at issue contain "purely" factual material, and, instead, found that the Borough was required to disclose such material without first giving the Borough any notice that such a question was at issue in this matter. Had the Borough been provided with any notice that

the question of whether any "purely" factual information in the communications at was before the OOR, the Borough would, of course, have supplemented the record with additional information addressing the issue.

Instead, because the Requester – without having submitted any evidence on the question – baldly asserted that the emails at issue contained purely factual information, the OOR granted access to such information. However, the OOR erred as a matter of law. Per the U.S. Supreme Court's decision in *Upjohn*, the entirety of the attorney-client privileged communications at issue here are privileged. *See Upjohn*, *supra*; *see also United States ex rel. Lord*, *supra*; 42 Pa.C.S. §§ 5916 and 5928

IV. CONCLUSION.

For the foregoing reasons, the Borough respectfully asks this Honorable Court to enter an order that:

(a) reverses or vacates the OOR's January 12, 2024 Final Determination Upon Reconsideration to the extent that it requires the Borough to take any further action; and

(b) grants the Borough whatever additional relief this Court deems appropriate.

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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CERTIFICATE OF SERVICE

I, J. Chadwick Schnee, Esq., certify that, on this 22nd day of November, 2024, I have served a true and correct copy of the attached Brief in Support of Petition for Review to the person listed below via First Class Mail:

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