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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 \_

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## **RESPONDENT’S BRIEF IN OPPOSITION TO PETITION FOR REVIEW**

**AND NOW COMES** Respondent, **Michael Long** (“Respondent”), **having filed a Motion for Leave to Supplement the Record** that uncovers **material factual contradictions** and **demonstrably false statements** within the Borough of Bath’s (“Borough”) **sham privilege assertions**. Respondent hereby **vehemently** opposes the Borough’s Petition for Review of the Office of Open Records’ (“OOR”) Final Determination, and in doing so emphasizes the **detailed** factual record and **irrefutable** timeline evidence, all of which show that multiple withheld communications are not only **improperly labeled** as privileged, but also **could not** have existed as the Borough claims.

1. The Borough's Petition constitutes a **transparent** and **cynical** effort to evade its obligations under the Right-to-Know Law ("RTKL")—marked by **misrepresentations**, **willful** misinterpretations of law, and an **egregious** disregard for government transparency.
2. Specifically, the Borough has:
  - a. **Grossly** misapplied the "automatic stay" under 65 P.S. § 67.1302(b) to argue the OOR was **powerless** to finalize its determination, thus **nullifying** the administrative agency's statutorily mandated function;
  - b. Asserted **baseless** privilege claims by **misconstruing** *Upjohn Co. v. United States*, 449 U.S. 383 (1981), in an attempt to **bury purely factual material** within "privileged" emails; and
  - c. Exhibited a **shifting narrative** via **contradictory affidavits** that reveal newly "discovered" emails—beyond just "Record #5"—suggesting an orchestrated pattern of RTKL violations and potential bad faith under 65 P.S. §§ 67.1304(a)(1), 67.1305(a).
3. Because these tactics **subvert** the RTKL's remedial purpose and **annihilate** the credibility of the Borough's entire position, Respondent respectfully requests this Court to **deny** the Borough's Petition for Review, **affirm** the OOR's Final Determination, **order** comprehensive metadata authentication, and grant further relief as justice demands.

## I. INTRODUCTION

4. On May 17, 2023, Respondent submitted a **detailed** RTKL request seeking Borough emails and records related to:
  - a. The resignation of Council member Saginario,
  - b. The resulting council vacancy procedures,
  - c. Additional hiring/policy matters in the Borough.
5. From the outset, the Borough has acted in a **deliberately obstructive** manner. It **underproduced** records, citing **attorney-client privilege** with minimal specificity, while claiming it had conducted a “thorough” search—a **claim now proven false** by the Borough’s own belated disclosures and contradictory sworn statements.
6. During OOR proceedings, the Borough:
  - a. **Altered** sworn testimony in multiple iterations,
  - b. **Concealed** new withheld emails until forced to reveal them,
  - c. Provided **shifting** rationales for claiming privilege,
  - d. **Misread** 65 P.S. § 67.1302(b) to suggest the OOR’s adjudicative power was frozen.
7. The OOR correctly concluded that **purely factual content** cannot remain withheld simply by labeling it “privileged,” especially given **temporal impossibilities** in the Borough’s timeline.

8. This Court should not permit the Borough’s desperate attempt to expand attorney-client privilege and misconstrue the RTKL’s automatic stay. The Final Determination is consistent with Pennsylvania law’s narrow construction of exemptions, *Pa. Pub. Util. Comm’n v. Nase*, 302 A.3d 264, 269 (Pa. Cmwlth. 2023), and the RTKL’s overarching goal of government transparency.

## II. STATEMENT OF THE STANDARD OF REVIEW

9. This Court exercises plenary, de novo review over the OOR’s final determinations in RTKL matters. *Township of Worcester v. Office of Open Records*, 129 A.3d 44, 49 n.2 (Pa. Commw. Ct. 2016); *Dep’t of Corr. v. Fiorillo*, (Pa. Cmwlth., No. 1117 C.D. 2016, filed May 1, 2017)

10. Acting as the “Chapter 13” reviewing court, this Court may:

- a. Make independent factual findings,
- b. Substitute its own legal conclusions,
- c. Consider supplemental evidence.

*Office of Governor v. Davis*, 122 A.3d 1185, 1190 (Pa. Commw. Ct. 2015) (en banc); *Bowling v. Off. of Open Recs.*, 990 A.2d 813, 820 (Pa. Commw. Ct. 2010); *McKelvey v. Office of Attorney Gen.*, 172 A.3d 122, 124 n.5 (Pa. Cmwlth. 2017).

11. The Borough bears the burden of demonstrating—by a preponderance of evidence—that each withheld record is legitimately exempt and that it complied

with RTKL procedural requirements. 65 P.S. § 67.708(a)(1); *Anand v. Commonwealth*, 293 A.3d 803, 814-15 (Pa. Cmwlth. 2023).

### III. PROCEDURAL HISTORY & JURISDICTION

#### 12. Initial RTKL Request (May 17, 2023)

Respondent’s request encompassed communications regarding:

- a. Councilmember Saginario’s resignation timeline,
- b.
- c. The resulting vacancy procedures,
- d. Potential Borough hiring/policy issues.

#### 13. Borough’s “Thorough” Search (June 23, 2023)

The Borough initially **certified** that it found only three non-privileged emails plus an earnings report. It withheld all others—though unspecified—under attorney-client privilege, and **attested** no additional responsive records existed.

#### 14. Appeal to OOR

Upon appeal, Respondent challenged the sufficiency of the search. The Borough:

- a. Produced **contradictory** affidavits,
- b. “Discovered” new withheld emails each time it revised sworn statements,
- c. Provided **no** coherent explanation for its earlier false certifications.

#### 15. Original Response:

- a. Dated **June 23, 2023**,
- b. Claimed “only three” emails existed,

- c. Alleged a “thorough” search had been completed.

**16. Flynn Attestation (July 24, 2023):**

- a. Denied existence of “Mirabito” emails,
- b. Reaffirmed the thoroughness of search,
- c. Omitted mention of newly “found” records.

**17. Kratz Affidavit & Exemption Log (October 4, 2023):**

- a. **Suddenly** identified multiple withheld emails (Records #3–4, #13–15),
- b. Contradicted prior sworn statements,
- c. Offered no explanation for the prior denial of these records.

**18. Factual Impossibility:**

“Record #5,” purportedly dated **October 3, 2021**, claims to seek “legal advice” about a prospective resignation. Yet **Council member Saginario’s sworn Declaration** confirms no official knew of any resignation until **October 4**, thus **rendering** the Borough’s claim an impossibility.

19. The OOR’s **January 12, 2024**, Final Determination recognized the necessity of disclosing purely factual information and that the Borough had **overreached** in its privilege claims. The Borough now petitions for review, citing 65 P.S. § 67.1302(b) and *Upjohn* as justification.

20. **Jurisdiction:** This Court, under the RTKL, serves as the “Chapter 13” reviewing court. *Twp. of Worcester*, 129 A.3d at 49 n.2. Its review is de novo, with broad scope to examine additional evidence.

#### IV. STATEMENT OF QUESTIONS INVOLVED

21. Does the “automatic stay” in 65 P.S. § 67.1302(b) merely **delay** forced release of records or **eliminate** the OOR’s power to finalize its determination?

**Suggested Answer: No:** It merely delays release; it does not cripple the OOR’s adjudicatory role.

22. Do the Borough’s **shifting affidavits**—exemplified by newly disclosed emails (#3–4, #13–15) and the temporal impossibility of “Record #5”—**invalidate** its privilege assertions and necessitate **metadata authentication** of all withheld communications?

**Suggested Answer:** Absolutely; the repeated contradictions demand forensic review.

23. Do the Borough’s **repeated late disclosures, contradictory statements, and false certifications** rise to **bad faith** under 65 P.S. §§ 67.1304(a)(1) & 67.1305(a)?

**Suggested Answer:** Yes; such a pattern far exceeds mere oversight.

24. Does *Upjohn* preserve the discoverability of **purely factual information**, even if embedded in attorney-client emails referencing a publicly known procedure like *Resolution #2021-012*?

**Suggested Answer:** Yes; *Upjohn* does not shield objective facts.

#### V. SUMMARY OF ARGUMENT

25. The Borough’s Petition is **unavailing** for four reasons:

- a. **Automatic Stay:** The stay in § 67.1302(b) halts release, not the OOR’s final adjudication. *Donahue v. City of Hazleton*, 301 A.3d 484 (Pa. Commw. Ct. 2023).
- b. **Shifting Narratives & Contradictory Affidavits:** Each time the Borough revised its statements, it revealed previously undisclosed emails (#3–4, #13–15), undermining all credibility.
- c. **Metadata Authentication:** Standard in camera review cannot resolve blatant timeline conflicts (e.g., “Record #5’s” October 3 date). Forensic verification is indispensable.
- d. **Bad Faith & Overbroad Privilege:** *Upjohn* does not swallow facts, and the Borough's repeated, belated disclosures strongly suggest bad faith under 65 P.S. §§ 67.1304(a)(1) & 67.1305(a). *Furthermore, the Borough's attempt to invoke Vartan is a further example of their flawed legal reasoning.*

## **VI. ARGUMENT**

### **A. THE BOROUGH’S SYSTEMATIC RTKL VIOLATIONS REQUIRE COMPREHENSIVE RELIEF**

#### **26. Serial Misrepresentations & Shifting Affidavits**

- a. **June 23, 2023:** Claimed only three emails existed, “thorough search” done.
- b. **July 24, 2023:** Flynn attestation still denies certain Mirabito emails.

- c. **October 4, 2023:** Kratz affidavit reveals new withheld records (#3–4, #13–15), reversing earlier sworn statements with no explanation.

**27. Factually Impossible “Record #5”**

- a. Borough claims “legal advice” on October 3, 2021, re “prospective resignation.”
- b. **Saginario Declaration:** No official could have known until October 4.
- c. An email seeking advice for a future event that was not known is a **temporal impossibility**—destroying any credibility in the Borough’s privilege log.

**28. Defective Privilege Process**

- a. Incomplete or misleading privilege logs,
- b. Inadequate initial search,
- c. Retroactive labeling of newly found emails as privileged,

Conclusory affidavits that cannot withstand scrutiny under RTKL’s narrow-exemption principle. *Heavens v. Pa. Dep’t of Env’t Prot.*, 65 A.3d 1069, 1074 (Pa. Commw. Ct. 2013).

**B. THE AUTOMATIC STAY DOES NOT NULLIFY THE OOR’S AUTHORITY**

**29. 65 P.S. § 67.1302(b) Limits Forced Release Only**

The Borough erroneously claims the OOR was “powerless” once it appealed. *Donahue*, 301 A.3d at 492, clarifies the stay defers document disclosure, not the OOR’s final determination.

### **30. No Prejudice**

Because no records could be forced out during litigation, the Borough suffered no harm from the OOR's determination. *Bowling v. Off. of Open Recs.*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010).

## **C. MULTIPLE CONTRADICTIONS DEMAND METADATA**

### **AUTHENTICATION**

#### **31. Need for Forensic Verification**

- a. In camera review alone cannot detect manipulated timestamps or altered recipients. *Commonwealth v. Koch*, 106 A.3d 705, 712 (Pa. 2014).
- b. The Borough's repeated changes to sworn statements for withheld records #3–4, #5, #13–15 mandate verifying creation dates, authors, recipients, and modification logs.

#### **32. Legal Precedent**

Where an agency's privilege claims show "material inconsistencies," metadata analysis is warranted. *Office of Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2015).

#### **33. Borough's Failure of Proof**

Under 65 P.S. § 67.708(a)(1), the Borough must prove each claim of privilege by a preponderance of evidence. Contradictory affidavits, "impossible" dates, and newly discovered emails cannot meet that threshold.

## **D. UPJOHN DOES NOT SHIELD FACTUAL DATA**

### **34. Facts vs. Privileged Advice**

*Upjohn* (449 U.S. at 395–96) keeps genuine legal counsel confidential but **explicitly** states that underlying factual material remains discoverable.

### **35. No Blanket Exemption for Public Procedures**

The Borough’s attempt to hide references to *Resolution #2021-012*, a publicly known vacancy process, belies the RTKL’s maximum-access principle. *Twp. of Worcester*, 129 A.3d at 60.

## **E. THE BOROUGH’S ACTIONS INDICATE POTENTIAL BAD FAITH**

### **36. Pattern of Late Disclosures & Inconsistent Narratives**

Belated “discoveries” of withheld emails after earlier denials reflect more than mere oversight. *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161, 1175–76 (Pa. Commw. Ct. 2018).

### **37. Statutory Bad Faith Grounds**

- a. 65 P.S. § 67.1304(a)(1): Willful concealment of a public record,
- b. 65 P.S. § 67.1305(a): Denial through unreasonable interpretation.

Inconsistent sworn statements, newly “found” records, and contradictory privilege logs strongly support a bad faith determination. *Brunermer v. Apollo Borough*, (Pa. Cmwlth., No. 661 C.D. 2021, filed July 28, 2022).

## **F. THE BOROUGH'S MISGUIDED RELIANCE ON *VARTAN***

38. **The Borough's Attempt to Distract:** The Borough, in a desperate attempt to obfuscate the core issues, attempts to misdirect this Court by claiming the OOR improperly relied on *Commonwealth v. Vartan*, 733 A.2d 1258 (Pa. 1999).
39. **Vartan's Irrelevance:** *Vartan* has absolutely no bearing on this case. *Vartan* concerned 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).
40. **No Deliberative Process Claim:** The Borough never raised 65 P.S. § 67.708(b)(10)(i) or the deliberative process privilege as a basis for withholding the emails at issue. Therefore, *Vartan* is completely irrelevant to the present dispute.
41. **A Red Herring:** The Borough's attempt to invoke *Vartan* is nothing more than a red herring, designed to distract from the fact that they have no legitimate basis for withholding purely factual information.
42. **Focus on the Real Issue:** The real issue is not the deliberative process privilege, but the Borough's attempt to misuse the attorney-client privilege to shield discoverable facts.

## VII. CONCLUSION

The Borough's Petition for Review is fundamentally flawed. Section 1302(b) stays forced release, not the OOR's adjudicative function. The Borough's serial revelations of withheld emails—including "Record #5," which is factually impossible—necessitate metadata authentication to confirm creation/modification dates and ensure purely factual

data is not being unlawfully withheld. *Upjohn* plainly affirms that underlying facts remain disclosable. Given these repeated falsehoods and the Borough's *misguided attempt to invoke Vartan*, the Borough's conduct suggests bad faith under 65 P.S. §§ 67.1304(a)(1) & 67.1305(a) *Pa. Pub. Util. Comm'n v. Nase*, 302 A.3d 264, 269 (Pa. Cmwlth. 2023).

### **PRAYER FOR RELIEF**

**WHEREFORE**, in view of the Borough's contradictory affidavits, belated disclosures of withheld emails (#3–4, #5, #13–15), **demonstrably false** statements about the resignation timeline, and erroneous claims regarding both the “automatic stay” and *Upjohn*, **Respondent Michael Long** respectfully requests that this Honorable Court:

1. **DENY** the Borough's Petition for Review **in its entirety**;
2. **AFFIRM** the OOR's Final Determination Upon Reconsideration, compelling the Borough to **segregate and disclose** all non-privileged factual information;
3. **GRANT** Respondent's **Motion for Leave to Supplement the Record** (including the sworn Saginario Declaration) confirming the **factual impossibility** of “Record #5”;
4. **ORDER** a **comprehensive in camera review and metadata authentication** of **all** withheld communications (records #3–4, #5, #13–15, etc.) to verify creation dates, authors, recipients, and any modifications;
5. **DETERMINE** the Borough's repeated misstatements, shifting justifications, and belated disclosures constitute **bad faith** under 65 P.S. §§ 67.1304(a)(1) & 67.1305(a), and impose civil penalties or sanctions as warranted;

6. **AWARD** such other and further relief as this Court deems **just and proper** to uphold the RTKL's remedial objective of **maximum government transparency**.

Respectfully submitted,

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/s/ Michael Long

**Michael Long**

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Dated: December 23, 2024

## CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2024, a true and correct copy of the foregoing **Brief in Opposition** was served via email upon:

**J. Chadwick Schnee, Esq.**  
Schnee Legal Services, LLC  
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A handwritten signature in black ink, appearing to be 'M Long', with a long horizontal line extending to the right.

/s/ Michael Long  
Michael Long