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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 SUPPORT OF MOTION FOR LEAVE TO  
SUPPLEMENT THE RECORD AND FOR IN-CAMERA REVIEW  
(INCLUDING METADATA CONFIRMATION)**

AND NOW COMES Respondent, **Michael Long** (“Respondent”), by and through the undersigned, respectfully submits this **Brief in Support of his Motion for Leave to Supplement the Record and for In-Camera Review (Including Metadata Confirmation)**. Pursuant to **Pennsylvania Rule of Judicial Administration 1971** and any applicable local rules, Respondent seeks (1) **leave to supplement the record** with newly discovered evidence and (2) an **in-camera inspection** of withheld communications—including **metadata**—to resolve significant factual contradictions and determine whether the Borough of Bath (“Borough”) has legitimately invoked **attorney-client privilege** under the Pennsylvania Right-to-Know Law (“RTKL”).

## I. INTRODUCTION

1. This matter arises under the **Pennsylvania Right-to-Know Law** (“RTKL”), **65 Pa. Stat. & Cons. Stat. Ann. §§ 67.101–.3104** (West 2023), a statute designed to ensure government transparency and accountability. *See Heavens v. Pa. Dep’t of Env’t Prot.*, 65 A.3d 1069, 1073 (Pa. Commw. Ct. 2013). On **May 17, 2023**, Respondent submitted a comprehensive RTKL request to the Borough seeking, among other things, communications regarding **Council member Mark Saginario’s** resignation, a vacated council seat, and related employment matters.
2. In its **June 23, 2023**, Final Response (Exhibit A, Reproduced Record (“R.R.”) at 7–10), the Borough stated it had conducted a “thorough” search and identified **only three non-privileged emails** plus an Employee Earnings Report, withholding a few emails under **attorney-client privilege**. Over time, however, the Borough’s story evolved significantly.
  - (a) **Initial Disclosure** (6/23/2023): Three non-privileged emails:
    - i. “12\_6\_21 Meeting of Council” (dated 12/02/2021)
    - ii. “January 2022 Regular & Reorganization Meeting” (dated 12/29/2021)
    - iii. “March Meeting Minutes” (dated 04/04/2022)
  - (b) **Post-Appeal Disclosures** (Exhibit D, Exemption Log dated 10/04/2023):

2. The Borough's exemption log subsequently revealed **20 previously undisclosed privileged emails**, including multiple communications predating the Borough's initial response.
3. This belated disclosure of **20 privileged emails**—after the OOR appeal commenced—represents a drastic increase from the Borough's initial stance that only a small number of privileged communications existed. Such a **substantial evolution** in the Borough's position contradicts its claim of having already performed a thorough search. It raises doubts as to whether the Borough has fully met its burden under the RTKL to establish the legitimacy of its privilege assertions.
4. Central to these credibility concerns is "**Record #5**," identified in the Borough's October 4, 2023, exemption log (Exhibit D, R.R. at 14). The Borough asserts that on **October 3, 2021**, it sought legal advice regarding the prospective resignation of Council member Saginario. Yet, the newly obtained **Sarginario Affidavit** (Exhibit E, Saginario Aff. ¶¶ 4–6, 8, R.R. at 22), dated **November 3, 2024**, establishes that **no Borough official** knew of Mr. Saginario's impending resignation before **October 4, 2021**. This **factual impossibility** not only vitiates the Borough's privilege claim for Record #5 but also calls into question the accuracy of the Borough's other privilege claims under similarly questionable circumstances.
5. In light of the **Borough's evolving narrative**, factual contradictions, and the direct challenge posed by the Saginario Affidavit, the Borough's affidavits and

logs can no longer be accepted at face value. **De novo** review empowers this Court to supplement the record with this new, critical evidence, *see Bowling v. Office of Open Records*, 75 A.3d 453, 466 n.14 (Pa. 2013), and **in-camera review** is crucial to verify whether the Borough’s privilege claims are in fact legitimate, *see Office of the Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2015) (en banc).

## II. FACTUAL AND PROCEDURAL BACKGROUND

6. On **May 17, 2023**, Respondent requested communications and records regarding Council member Saginario’s resignation, potential vacancy procedures, and related employment matters. The Borough’s **June 23, 2023**, Final Response (Exhibit A, R.R. at 7–10) withheld only a few emails under attorney-client privilege, claiming “no other responsive records” existed.
7. Following Respondent’s appeal to the **Office of Open Records** (“OOR”), the Borough **significantly changed** its prior statements.
  - (a) **New Privileged Emails:** The Borough’s “thorough search” allegedly missed **20** privileged emails, later revealed in the **October 4, 2023**, exemption log (Exhibit D, R.R. at 14). Many of these communications predate the Borough’s initial response.
  - (b) **Revisions to Sworn Statements:** Borough Manager Flynn and Solicitor Kratz repeatedly amended their affidavits, disclosing more previously unknown emails and “correcting” earlier sworn statements.

(c) **Contradiction of Earlier Completeness:** Despite insisting it had already found all relevant records, the Borough “discovered” a substantial set of privileged communications, contradicting its own claims of a thorough search.

8. By **October 4, 2023**, the Borough produced its updated exemption log, featuring “**Record #5**” dated **October 3, 2021**, which supposedly sought legal advice about Council member Saginario’s “prospective resignation.” Yet, the **Saginario Affidavit** (Exhibit E), dated **November 3, 2024**, confirms that he did not inform Borough officials of any resignation before **October 4, 2021**. This **impossibility** undermines the Borough’s privilege rationale for Record #5 and raises doubts about all the Borough’s privilege claims resting on similarly untested premises.

### III. STANDARD OF REVIEW

9. This Court conducts a **de novo** review of OOR determinations and may accept evidence that was not presented below. *See* 65 Pa. Stat. & Cons. Stat. Ann. § 67.1301(a); *Bowling*, 75 A.3d at 466 n.14. Under **65 Pa. Stat. & Cons. Stat. Ann. § 67.708(a)(1)**, the Borough bears the burden of proving any claimed exemption by a **preponderance of the evidence**. Conclusory affidavits, especially when contradicted by newly discovered facts, fail to satisfy this burden. *See Heavens*, 65 A.3d at 1074; *McGowan v. Pa. Dep’t of Env’t Prot.*, 103 A.3d 374, 381 (Pa. Commw. Ct. 2014).
10. To justify **attorney-client privilege**, an agency must demonstrate that:

- (a) The asserted holder of the privilege is or sought to become a client,
- (b) The communication was made to or by a licensed attorney,
- (c) The communication relates to a fact of which the attorney was informed by the client, in confidence, for obtaining legal advice, and
- (d) The privilege has not been waived.

*See Dages v. Carbon Cnty.*, 44 A.3d 89, 92 (Pa. Commw. Ct. 2012). This privilege “operates in a two-way fashion,” protecting both client-to-attorney and attorney-to-client exchanges made for legal advice. *See Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011).

11. **In-camera review** is warranted where factual disputes regarding privilege exist.

*See Office of the Governor v. Davis*, 122 A.3d 1185, 1193–94 (Pa. Commw. Ct. 2015) (en banc). Because the RTKL is remedial, courts interpret any privilege or exemption narrowly to avoid thwarting its aim of government transparency. *See Pa. State Police v. McGill*, 83 A.3d 476, 479 (Pa. Commw. Ct. 2014).

#### **IV. ARGUMENT**

##### **A. THE BOROUGH’S SHIFTING NARRATIVE UNDERCUTS ITS PRIVILEGE CLAIMS**

12. The RTKL obligates agencies to provide “**detailed, non-conclusory explanations**” for each exemption. *Office of Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013). The Borough’s **significant changes** to its affidavits

and the late disclosure of 20 privileged emails—absent from its initial “thorough” search—expose inconsistencies:

**(a) Initial vs. Post-Appeal Search**

After insisting it withheld only a few emails, the Borough ultimately admitted to withholding 20 additional privileged communications—all falling squarely within the original RTK request’s scope.

**(b) Revising Sworn Testimony**

Manager Flynn and Solicitor Kratz “corrected” earlier statements, revealing a comprehensive set of newly discovered privileged emails.

**(c) Credibility and Completeness Concerns**

Such revisions contradict the Borough’s original claim of completeness, suggesting the Borough’s affidavits cannot be taken at face value.

13. These shifting narratives fail the Borough’s burden of offering a consistent, evidence-based rationale for withholding each communication under attorney-client privilege. *See* 65 Pa. Stat. & Cons. Stat. Ann. § 67.708(a)(1). Courts are compelled to scrutinize an agency’s evolving stance, lest the RTKL’s purpose be circumvented by incomplete or contradictory disclosures. *See McGill*, 83 A.3d at 479.

**B. THE FACTUAL IMPOSSIBILITY OF RECORD #5 DEMANDS  
HEIGHTENED SCRUTINY**

14. “Record #5,” dated **October 3, 2021**, purports to seek legal advice about Council member Saginario’s resignation. However, the **Saginario Affidavit** affirms that no one in the Borough knew of this resignation before **October 4, 2021**. *See* Saginario Aff. ¶¶ 4–6, 8 (Exhibit E). This **factual impossibility** destroys the fundamental premise for legal counsel on October 3—an event the Borough now admits did not occur until a day later. *See Dages*, 44 A.3d at 92–93 (privilege requires a valid factual predicate).

15. If an agency’s privilege claim rests on an event proven never to have existed at the claimed time, the entire privilege assertion fails. *See id.* Moreover, the existence of such an impossibility erodes confidence in the Borough’s entire exemption log: if Record #5’s date-based justification is untrue, other withheld communications may similarly be rooted in erroneous or shifting factual premises.

### **C. METADATA REVIEW IS CRUCIAL FOR TIMING AND AUTHORSHIP DISPUTES**

16. **Metadata**—including timestamps, revision histories, email headers, and authorship logs—is essential to validate the creation date and authenticity of withheld communications. *See Office of Open Records v. Center Twp.*, 95 A.3d 354, 370 (Pa. Commw. Ct. 2014). Here, metadata can:

(a) **Confirm Exact Dates**

Prove whether Record #5 truly predates the Borough’s awareness of Saginario’s resignation.

**(b) Identify Authorship**

Establish if Manager Flynn or another Borough official created or circulated the withheld communications, aligning with or contradicting sworn statements.

**(c) Assess Alterations**

Reveal any modifications or forwarding that might explain discrepancies in the Borough's evolving narrative.

**D. THE BOROUGH FAILS TO MEET ITS RTKL BURDEN**

17. Under the RTKL, an agency must show—by a preponderance of the evidence—that each withheld record is legitimately privileged. *See* 65 Pa. Stat. & Cons. Stat. Ann. § 67.708(a)(1). Because the RTKL is remedial, any claimed privilege must be strictly construed. *See Heavens*, 65 A.3d at 1074. The Borough's contradictory affidavits and the factual impossibility of Record #5 collectively illustrate a failure to meet this standard.

18. In essence, the Borough's arguments rest on an evolving narrative that contradicts fundamental facts. Where a key piece of evidence (Record #5) is proven impossible, the Court cannot rely on the Borough's broader claims of attorney-client privilege without further scrutiny.

**E. IN-CAMERA REVIEW ENSURES GOVERNMENT TRANSPARENCY**

19. **In-camera review** is a recognized judicial safeguard to confirm an agency's privilege claim, especially amid factual conflicts. *See Davis*, 122 A.3d at 1194.

Here, such review will:

(a) **Resolve Contradictions**

A neutral inspection of withheld communications, including metadata, can verify or refute the Borough's privilege assertions.

(b) **Protect the RTKL's Core Aims**

Examining the withheld documents prevents an over-broad privilege claim from thwarting the RTKL's transparency mandate.

(c) **Foster Public Trust**

Given the Borough's shifting accounts and belated disclosures, an in-camera review reassures both this Court and the public that only truly privileged material is withheld.

**F. ANTICIPATED COUNTERARGUMENTS**

20. The Borough may argue:

(a) **Contradictions Are Minor**

However, the timeline impossibility for Record #5 is not minor; it is a direct contradiction that invalidates the very basis of the Borough's privilege claim.

(b) **Saginario Affidavit Is Self-Serving**

Unless the Borough produces contradictory sworn evidence, the Affidavit remains unrefuted, demonstrating that the Borough's reliance on October 3, 2021, is factually unsupportable.

(c) **Administrative Burden**

The slight burden of in-camera review—including metadata—is outweighed by the RTKL's mandate for transparent government operations.

*Heavens*, 65 A.3d at 1074.

No such arguments negate the need for this Court's thorough scrutiny of withheld communications.

## V. CONCLUSION

21. The Borough's **evolving narrative**, new disclosure of **20 privileged emails post-appeal**, and the **factual impossibility** of "Record #5" collectively undermine the Borough's attorney-client privilege claims under the RTKL. Respondent respectfully submits that:

- (a) **Supplementation** of the record with the **Saginario Affidavit** and any related materials is warranted under the Court's **de novo** review authority (*Bowling*, 75 A.3d at 466 n.14);
- (b) **In-camera review (including metadata)** is essential to verify the Borough's privilege claims and ensure that no improper withholding obstructs the RTKL's purpose of governmental transparency (*Davis*, 122 A.3d at 1194);

(c) **Such relief** is critical for safeguarding the integrity of the RTKL process and confirming whether the Borough has met its burden of proof under 65 Pa. Stat. & Cons. Stat. Ann. § 67.708(a)(1).

**WHEREFORE, Respondent Michael Long respectfully requests this Honorable Court to:**

1. **Grant Leave to Supplement the Record** with the **Saginario Affidavit** (Exhibit E, dated November 3, 2024) and any newly discovered materials;
2. **Order In-Camera Review (Including Metadata Confirmation)** of all withheld communications, especially Record #5, to ascertain the veracity of the Borough's privilege claims and identify any segregable, non-privileged information; and
3. **Grant Such Other and Further Relief** as this Court deems just and proper.

Respectfully submitted,

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

/s/ Michael Long  
**Michael Long**  
220 Creek Road  
Bath, PA 18014  
(610) 507-3721  
Michael.Long479@gmail.com

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 **Respondent's Brief in Support of Motion for Leave to Supplement the Record and for In-Camera Review (Including Metadata Confirmation)** was served via email upon:

**J. Chadwick Schnee, Esq.**  
Schnee Legal Services, LLC  
74 E. Main St. #648  
Lititz, PA 17543  
[chadwick@schneelegal.com](mailto: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

# Exhibit A



## *Borough of Bath*

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*121 South Walnut Street, Bath, PA 18014  
Phone: 610-837-6525 Fax: 610-837-8989*

Friday, June 23, 2023

**VIA EMAIL ONLY**

Mr. Michael Long  
220 Creek Road  
Bath, PA 18014

**RE: Right to Know Request #20.2023**

Dear Mr. Long,

As you know, I am an Open Records Officer for the Borough of Bath (the "Borough"). As you also know, I am the Manager for the Borough. On May 17, 2023, the Borough received your Right-to-Know Request dated May 17, 2023 ("RTK Request #20.2023").

As to the first part of RTK Request #20.2023 seeking:

"All communications, including but not limited to emails, memos, notes, and text messages, between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and James Kratz, from September 20, 2021, to May 15, 2022, regarding:

- The resignation of Mark Saginario
- The vacated council seat following Mark Saginario's resignation
- The appointment of Emmanuel Mirabito to the council seat
- Borough policy on a vacated council seat
- Any potential employment, position benefits, compensation for Fiorella Mirabito
- Advertisement of any new position within the Borough
- The resignation of Marena Rasmus
- Clerk positions within the Borough
- The hiring of any individual for a clerk position within the Borough
- Borough policy on hiring for new positions
- Any public announcement regarding the above topics [ . . . ]"

RTK Request #20.2023 further states:

*"Bath, History Nestled With Friendship"*

“Please note that this request includes any relevant communications that are not covered by attorney-client privilege. Under the RTKL, attorney-client privilege does not apply to factual information or data, the application of law to fact, or legal strategy, among other things.”

The first part of RTK Request #20.2023 is denied in part and granted in part. RTK Request #20.2023 relative to: “All communications, ..., memos, notes, and text messages ...” is denied per RTKL Section 705 because no such records exist. Also, as to your statement that you are not seeking attorney-client privileged communications, but you claim to define the scope of attorney-client privilege, your claim as to the scope of attorney-client privilege is erroneous. For your information, as to emails from Solicitor Kratz to me, the Mayor and/or members of Council regarding Solicitor Kratz’s legal advice regarding the resignation of Mark Saginario from Council, the vacated Council seat following Mark Saginario’s resignation, the appointment of Emmanuel Mirabito to the Council seat and the process to appoint a person to a vacated Council are privileged per attorney-client privilege and not subject to access per RTKL Section 102 (definitions of “privilege” and “public record”). Thus, RTK Request #20.2023 is denied as to said emails for that reason. Further, based upon my review of the relevant time frame, Solicitor Kratz did not provide any privileged or non-privileged emails regarding any potential employment, position benefits, compensation for Fiorella Mirabito, advertisement of any new position within the Borough, resignation of Marena Rasmus, clerk positions within the Borough, hiring of any individual for a clerk position with the Borough, Borough policy on hiring for new positions or any public announcements regarding the foregoing. Thus, with respect to the foregoing, RTK Request #20.2023 is denied per RTKL Section 705 for said non-existent emails.

That said, RTK Request #20.2023 is granted to the following attached emails between Bradford Flynn, Fiorella Mirabito, Michele Ehr Gott, Phyllis Andrews, Barry Fenstermaker, and James Kratz from the timeframe specified between September 20, 2021, to May 15, 2022:

- **Attachment ‘A’** – ‘12\_6\_21 Meeting of Council’ email dated 12/02/2021. Additionally, Resolution #2021-012 is a responsive record contained within the Council packet associated with the email dated 12/02/2021 and it is enclosed marked as Attachment ‘A’ - 1
- **Attachment ‘B’** – ‘January 2022 Regular & Reorganization Meeting’ email dated 12/29/2021. Additionally, councilman’s Mark A. Saginario resignation letter, and a letter of interest to fill councilman’s Saginario’s seat was included with the Council packet associated with the email dated 12/29/2021. These documents are enclosed as Attachment ‘B’ - 1, and Attachment ‘B’ - 2.
- **Attachment ‘C’** – ‘March Meeting Minutes’ email dated 04/04/2022.

As to the second part of RTK Request #20.2023 seeking:

“A list of all employees hired by the Borough of Bath outside of the Public Works Department since January 1, 2022. For each employee, please provide the following information:

- Full name
- Position title
- Date of hire
- Department
- Full-time or part-time status
- Salary or hourly wage
- Any additional compensation or benefits

Please note that personal identifying information such as home address, personal phone numbers, and social security numbers can be redacted for privacy reasons.

Please provide these records in electronic format. If any of these requests are denied, please cite each specific exemption you believe justifies the refusal to release the information and notify me of appeal procedures available under the law.”

The second part of RTK Request #20.2023 is denied in part and granted in part. RTK Request #20.2023 is denied per RTKL Section 705 because no such list or list containing the alleged public records exists. The Borough is not required to create such list or such list to contain the alleged public records that you seek. That said, RTK Request #20.2023 is granted to the Employee Earnings Reports for any hired Borough personnel from January 1, 2022, to April 30, 2023 (see **Attachment ‘D’**). Redaction, pursuant to RTKL Section 706, was necessary to redact home addresses, dates of birth, and social security numbers of employees pursuant to Section 708(b)(6)(i)(A). The Employee Earnings Report is what the Borough has and is responsive to the second part of RTKL Request #20.2023.


Subject to the penalties of 18 Pa.C.S. Section 4904, I certify that the facts set forth above on behalf of the Borough are true and correct to the best of my knowledge, information, and belief.

Mr. Long  
June 23, 2023  
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You have a right to appeal the above denials in writing to: Office of Open Records, 333 Market St., 16<sup>th</sup> Floor, Harrisburg, PA 17101-2234. Appeals can also be filed online at the Office of Open Records, website, <https://www.openrecords.pa.gov>.

If you choose to file an appeal, you must do so within 15 business days of the mailing of this letter. See 65 P.S. § 67.1101. The mailing date of this letter is June 23, 2023. Please note that a copy of your original Right-to-Know requests, the Borough's extension notice, and this letter should be included when filing an appeal. The RTKL also requires that you state the reasons why the alleged record is a public record under the RTKL, and you must address each of the reasons the Borough denies your Requests. More information about how to file an appeal under the RTKL is available at the Office of Open Records website, <https://www.openrecords.pa.gov>.

Sincerely,



Bradford T. Flynn, Borough Manager  
Borough of Bath

encls  
cc: James F. Kratz, Solicitor

# Exhibit B



Please note that this request includes any relevant communications that are not covered by attorney-client privilege. Under the RTKL, attorney-client privilege does not apply to factual information or data, the application of law to fact, or legal strategy, among other things.”

8. I will refer to the above referenced part of the Right-to-Know Law request, dated May 17, 2023, as “RTKL Request”.

9. Mr. Long’s above statement in is RTKL Request regarding the scope of attorney-client privileged communications is erroneous.

10. The attorney-client privilege has the purpose of fostering the free and open exchange of relevant information between the lawyer and the client. Gillard v. AIG insurance Company, 15 A.3d 44 (Pa. Supreme 2011).

11. To establish the attorney-client privilege, the person claiming it must demonstrate:

- (1) The asserted holder of the privilege is or sought to become a client.
- (2) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
- (3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
- (4) The privilege has been claimed and is not waived by the client.

Office of the Governor v. Davis, Jr., 122 A.3d 1185 (Pa. Cmwlth. 2015)(citing Nationwide Mutula Insurance Company v. Fleming, 924 A.2d 1259 (Pa. Super. 2007), *affirmed by an equally divided court*, 992 A.2d 65 (Pa. Supreme 2010).

12. The attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice. Gillard, supra.

13. The holder of the privilege is the client or person seeking to become the client. Office of the Governor, supra.

14. Here, the holder of the privilege is the Borough of Bath (the “Borough”) and the Borough has not waived the privilege.

15. Bradford T. Flynn (“Flynn”) is an Open Records Officer for the Borough.

16. Flynn is also the Manager for the Borough.

17. On or around June 23, 2023, Flynn, in his capacity as a Borough Open Records Officer, asked me to review several potentially responsive emails that he located via his search on the Borough's server for emails between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and me from September 20, 2021, to May 15, 2022, regarding the subject matters identified in the RTKL Request.

18. Based on my review of the potentially responsive emails that Flynn located via his search on the Borough's server, I identified only my email of December 3, 2021, from me to former Borough employee Marena Rasmus with copy to me, Borough Engineer Madison, Mayor Fiorella Mirabito and all Council members at that time (including, but not limited to, Michele Ehrgott, Phyllis Andrews, and Barry Fenstermaker) (the "JFK Email of 12-3-21") as containing my legal advice regarding several parts of proposed Resolution #2021-012 including, but not limited to, Article 2.7(f) of proposed Resolution #2021-012.

19. Article 2.7 of proposed Resolution #2021-012 relates to the process to appoint a person to a vacated Council seat. Thus, Article 2.7(f) of proposed Resolution #2021-012 relates to the process to appoint a person to a vacated Council seat. Because of that, my legal advice in the JFK Email of 12-3-21 regarding Article 2.7(f) of proposed Resolution #2021-012 relates to the appointment of a person to a vacated Council seat and, therefore, it related to the prospective appointment of Emmanuel Mirabito to the Council seat that was imminently being vacated by former Councilmember Mark Saginario.

20. The JFK Email of 12-3-21 falls within the "between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, **and** James Kratz, from September 20, 2021, to May 15, 2022" stated in Mr. Long's RTKL Request. Emphasis added.

21. The JFK Email of 12-3-21 was made to representatives of my client, the Borough, for purposes of providing legal advice, outside the presence of strangers, in response to a communication from Flynn, outside the presence of strangers, for an opinion of law regarding any part of proposed Resolution #2021-012 and not for the purpose of committing a crime or tort.

22. The JFK Email of 12-3-21 is protected by the attorney-client privilege. Office of the Governor, supra; Gillard, supra.

23. On or around June 23, 2023, I also stated to Flynn that, as a precautionary measure, he should note in the Borough's letter of June 23, 2023, to Mr. Long that emails from me to Flynn, Mayor Fiorella Mirabito and/or members of Council regarding my legal advice regarding the resignation of Mark Saginario from Council, the vacated Council seat following Mark Saginario's resignation, the appointment of Emmanuel Mirabito to the Council seat and the process to appoint a person to Council seat are attorney-client privileged and not subject to access per RTKL Section 102 (definitions of "privilege" and "public record").

24. I stated "and/or" to Flynn because (a) the JFK Email of 12-3-21 which falls within the "between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, **and** James Kratz" but also (b) I had/have the following email exchange for legal advice that does not fall within "between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, **and** James Kratz":

(a) Email exchange in October 2021 (the "Email Exchange in October 2021") with Flynn and Council President Ehrgott regarding their request for legal advice regarding the resignation of then Councilmember Mark Saginario, the vacated Council seat following Mark Saginario's resignation and the general process to appoint a Council person. The prospective appointment of Emmanuel Mirabito to the Council seat was not a part of this email exchange. The legal advice that I provided via the JFK Email of 12-3-21 related to the prospective appointment of Emmanuel Mirabito because it related to the prospective appointment of any person to a vacated Council seat.

25. The Email Exchange in October 2021 was made to representatives of my client, the Borough, for purposes of providing legal advice, outside the presence of strangers, in response to emails from Flynn and Council President Ehrgott, outside the presence of strangers, for an opinion of law and legal assistance regarding the resignation of then Councilmember Mark Saginario, the vacated Council seat following Mark Saginario's resignation and the general process to appoint a Council person and not for the purpose of committing a crime or tort.

26. The Email Exchange in October 2021 is protected by the attorney-client privilege. Office of the Governor, supra; Gillard, supra.

27. I stated “and/or” to Flynn as stated in paragraph 24 above because I desired that Flynn inform Mr. Long that I did provide legal advice on the topics covered by the Email Exchange in October 2021 so Mr. Long is aware that Flynn and/or Council President Ehrgott were aware of my legal advice so Mr. Long may possibly find that he does not need to make another right-to-know law request on that topic/time period.

28. On or around June 23, 2023, I also searched my email records for the Borough and did not find any other email exchanges regarding Mr. Long’s other subject matters during the relevant time frame so I informed Flynn that I didn’t have other attorney-client privileged emails to note for Mr. Long.

29. In preparing this Affidavit, I performed another search to ensure my initial search was correct and I located the following email exchanges:

(a) Email exchange on April 21, 2022 (the “JFK 4-21-22 Email Exchange #1”), between Flynn and me wherein Flynn sought legal opinions regarding the prospective employment of Fiorella Mirabito as a part-time office clerk of the Borough and form of compensation and where I provided legal advice in response to same.

(b) Email exchange on April 21, 2022 (the “JFK 4-21-22 Email Exchange #2”), between Council President Ehrgott and me wherein Council President Ehrgott sought legal opinion regarding the prospective employment of Fiorella Mirabito as a part-time office clerk of the Borough and where I provided legal advice in response to same.

30. The JFK 4-21-22 Email Exchange #1 was made to a representative of my client, the Borough, for purposes of providing legal advice, outside the presence of strangers, in response to a communication from Flynn, outside the presence of strangers, for opinion of laws regarding the prospective employment of Fiorella Mirabito as a part-time office clerk of the Borough and form of compensation.

31. The JFK 4-21-22 Email Exchange #1 is protected by the attorney-client privilege. Office of the Governor, supra; Gillard, supra.

32. The “JFK 4-21-22 Email Exchange #2” was made to a representative of my client, the Borough, for purposes of providing legal advice, outside the presence of strangers, in response to a communication from Council President Ehrgott, outside the presence of strangers, for an opinion of law regarding the prospective employment of Fiorella Mirabito as a part-time office clerk of the Borough.

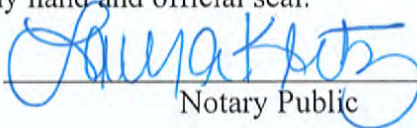
33. The JFK 4-21-22 Email Exchange #2 is protected by the attorney-client privilege. Office of the Governor, supra; Gillard, supra.

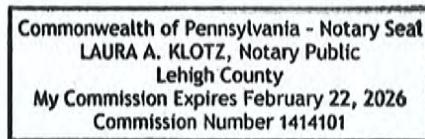
34. While the JFK 4-21-22 Email Exchange #1 and JFK 4-21-22 Email Exchange #2 each fall outside of Mr. Long's "between Bradford Flynn, Fiorella Mirabito, Michele Ehr Gott, Phyllis Andrews, Barry Fenstermaker, and [Solicitor Kratz]" designation via his RTKL Request and are attorney-client privileged, I am informing Mr. Long of the existence of the JFK 4-21-22 Email Exchange #1 and JFK 4-21-22 Email Exchange #2 so Mr. Long is aware that Flynn and Council President Ehr Gott were aware of the legal advice that I provided so Mr. Long may possibly find that he does not need to make another right-to-know law request on those topics/time period.

  
\_\_\_\_\_  
JAMES F. KRATZ, ESQ.

On this, the 24<sup>th</sup> day of July, 2023, before me a Notary Public in and for the Commonwealth of Pennsylvania, the undersigned officer, personally appeared JAMES F. KRATZ, ESQ., known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official seal.

  
\_\_\_\_\_  
Notary Public



# Exhibit C



Please note that this request includes any relevant communications that are not covered by attorney-client privilege. Under the RTKL, attorney-client privilege does not apply to factual information or data, the application of law to fact, or legal strategy, among other things.”

8. I will refer to the above referenced part of the Right-to-Know Law request, dated May 17, 2023, as “RTKL Request”.

9. Mr. Long’s above statement in is RTKL Request regarding the scope of attorney-client privileged communications is erroneous.

10. The attorney-client privilege has the purpose of fostering the free and open exchange of relevant information between the lawyer and the client. Gillard v. AIG insurance Company, 15 A.3d 44 (Pa. Supreme 2011).

11. To establish the attorney-client privilege, the person claiming it must demonstrate:

- (1) The asserted holder of the privilege is or sought to become a client.
- (2) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
- (3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
- (4) The privilege has been claimed and is not waived by the client.

Office of the Governor v. Davis, Jr., 122 A.3d 1185 (Pa. Cmwlth. 2015)(citing Nationwide Mutula Insurance Company v. Fleming, 924 A.2d 1259 (Pa. Super. 2007), *affirmed by an equally divided court*, 992 A.2d 65 (Pa. Supreme 2010).

12. The attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice. Gillard, supra.

13. The holder of the privilege is the client or person seeking to become the client. Office of the Governor, supra.

14. Here, the holder of the privilege is the Borough of Bath (the “Borough”) and the Borough has not waived the privilege.

15. Bradford T. Flynn (“Flynn”) is an Open Records Officer for the Borough.

16. Flynn is also the Manager for the Borough.

17. On or around June 23, 2023, Flynn, in his capacity as a Borough Open Records Officer, asked me to review several potentially responsive emails that he located via his search on the Borough's server for emails between Bradford Flynn, Fiorella Mirabito, Michele Ehrgott, Phyllis Andrews, Barry Fenstermaker, and me from September 20, 2021, to May 15, 2022, regarding the subject matters identified in the RTKL Request.

18. Based on my review of the potentially responsive emails that Flynn located via his search on the Borough's server, I identified only my email of December 3, 2021, from me to former Borough employee Marena Rasmus with copy to **Flynn**, Borough Engineer Madison, **Borough employee Lamparter**, Mayor Fiorella Mirabito and all Council members at that time (including, but not limited to, Michele Ehrgott, Phyllis Andrews, and Barry Fenstermaker) (the "JFK Email of 12-3-21") as containing my legal advice regarding several parts of proposed Resolution #2021-012 including, but not limited to, Article 2.7(f) of proposed Resolution #2021-012.

19. Article 2.7 of proposed Resolution #2021-012 relates to the process to appoint a person to a vacated Council seat. Thus, Article 2.7(f) of proposed Resolution #2021-012 relates to the process to appoint a person to a vacated Council seat. Thus, my legal advice in the JFK Email of 12-3-21 related to the process to appoint a person to a vacated Council seat. Also, while my Affidavit of July 24, 2023, states that "[b]ecause of that, my legal advice in the JFK Email of 12-3-21 regarding Article 2.7(f) of proposed Resolution #2021-012 ..., ..., ... related to the prospective appointment of Emmanuel Mirabito to the Council seat that was imminently being vacated by former Councilmember Mark Saginario[]", after further review, that statement is not correct because it was not until the January 2022 Regular & Reorganization Meeting email dated 12/29/2021 (Attachment 'B' to Bath's final response letter dated June 23, 2023, addressed to Mr. Long which response letter is attached hereto as Exhibit "C" which response letter included (a) then Councilmember Mark Saginario's resignation letter dated December 31, 2021 (Attachment 'B-1' to Exhibit "C" attached hereto) and (b) the Emmanuel Mirabito letter of interest dated December 13, 2021 (Attachment 'B-2' to Exhibit "C" attached hereto)) that I became aware of the possibility of Council possibly appointing Emmanuel Mirabito to the Council seat that was imminently being vacated by former Councilmember Mark Saginario and I was not asked

**to provide a legal opinion regarding the prospective appointment of Emmanuel Mirabito to said Council seat.**

20. The JFK Email of 12-3-21 falls within the “between Bradford Flynn, Fiorella Mirabito, Michele Ehrigott, Phyllis Andrews, Barry Fenstermaker, **and** James Kratz, from September 20, 2021, to May 15, 2022” stated in Mr. Long’s RTKL Request. Emphasis added.

21. The JFK Email of 12-3-21 was made to representatives of my client, the Borough, for purposes of providing legal advice, outside the presence of strangers, in response to a communication from **Borough employee Marena Rasmus**, outside the presence of strangers, for an opinion of law regarding any part of proposed Resolution #2021-012 and not for the purpose of committing a crime or tort.

22. The JFK Email of 12-3-21 is protected by the attorney-client privilege. Office of the Governor, supra; Gillard, supra; see also, RTKL Sections 102 (definitions of “privilege” and “public record”), 305(a)(2) and 506(c)(2).

23. **In response to Office of Open Records Appeal Officer Kelly Isenberg’s request of September 26, 2023, for the Borough to provide an Exemption Log, attached hereto as Exhibit “A” is the Borough’s Exemption Log.**

24. **I prepared the Borough’s Exemption Log and I have actual knowledge of the records identified in the Borough’s Exemption Log.**

25. **The JFK Email of 12-3-21 is identified as Record Number 1 on the Borough’s Exemption Log. See Exhibit “A”.**

26. On or around June 23, 2023, I also stated to Flynn that, as a precautionary measure, he should note in the Borough’s letter of June 23, 2023, to Mr. Long that emails from me to Flynn, Mayor Fiorella Mirabito and/or members of Council regarding my legal advice regarding the resignation of Mark Saginario from Council, the vacated Council seat following Mark Saginario’s resignation, the appointment of Emmanuel Mirabito to the Council seat<sup>1</sup> and the process to appoint a person to Council seat are attorney-client privileged and not subject to access per RTKL Section 102 (definitions of “privilege” and “public record”).

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<sup>1</sup> On or around June 23, 2023, I mistakenly included the topic of the appointment of Emmanuel Mirabito to Council as I was not asked to provide a legal opinion regarding the appointment of Emmanuel Mirabito to Council and re-reviewing the content of the attorney-client privileged emails identified on the Borough Exemption Log made me realize that.

27. I stated “and/or” to Flynn (**as referenced in paragraph 26 above**) because (a) the JFK Email of 12-3-21 which falls within the “between Bradford Flynn, Fiorella Mirabito, Michele Ehr Gott, Phyllis Andrews, Barry Fenstermaker, **and** James Kratz” but also (b) I had/have the following email exchange for legal advice that does not fall within “between Bradford Flynn, Fiorella Mirabito, Michele Ehr Gott, Phyllis Andrews, Barry Fenstermaker, **and** James Kratz”:

(a) Email exchange in October 2021 (the “Email Exchange in October 2021”) with Flynn and Council President Ehr Gott regarding their request for legal advice regarding the resignation of then Councilmember Mark Saginario, the vacated Council seat following Mark Saginario’s resignation and the general process to appoint a Council person. The prospective appointment of Emmanuel Mirabito to the Council seat was not a part of this email exchange **and it was not part of the JFK Email of 12-3-21 either. As stated in paragraph 19 above, I was not asked to provide a legal opinion regarding the prospective appointment of Emmanuel Mirabito to said Council seat.**

28. **The Email Exchange in October 2021 is comprised of the emails identified as Record Numbers 2 thru 12 on the Borough’s Exemption Log attached hereto as Exhibit “A”.**

29. The Email Exchange in October 2021 was made **by and** to representatives of my client, the Borough, for purposes of **the Borough seeking and my providing legal advice to the Borough**, outside the presence of strangers, in response to emails from Flynn and Council President Ehr Gott, outside the presence of strangers, for an opinion of law and legal assistance regarding the resignation of then Councilmember Mark Saginario, the vacated Council seat following Mark Saginario’s resignation and the general process to appoint a Council person and not for the purpose of committing a crime or tort.

30. The Email Exchange in October 2021 is protected by the attorney-client privilege. **Office of the Governor, supra; Gillard, supra; see also, RTKL Sections 102 (definitions of “privilege” and “public record”), 305(a)(2) and 506(c)(2).**

31. I stated “and/or” to Flynn as stated in paragraph 26 above because I desired that Flynn inform Mr. Long that I did provide legal advice on the topics covered by the Email Exchange in October 2021 so Mr. Long is aware that Flynn **and** Council President Ehr Gott were

aware of my legal advice so Mr. Long may possibly find that he does not need to make another right-to-know law request on that topic/time period.

32. On or around June 23, 2023, I also searched my email records for the Borough and did not find any other email exchanges regarding Mr. Long's other subject matters during the relevant time frame so I informed Flynn that I didn't have other attorney-client privileged emails to note for Mr. Long.

33. In preparing **my Affidavit of July 24, 2023**, I performed another search to ensure my initial search was correct and I located the following email exchanges:

(a) Email exchange on April 21, 2022 (the "JFK 4-21-22 Email Exchange #1"), between Flynn and me wherein Flynn sought legal opinions regarding the prospective employment of Fiorella Mirabito as a part-time office clerk of the Borough and form of compensation and where I provided legal advice in response to same.

(b) Email exchange on April 21, 2022 (the "JFK 4-21-22 Email Exchange #2"), between Council President Ehr Gott and me wherein Council President Ehr Gott sought legal opinion regarding the prospective employment of Fiorella Mirabito as a part-time office clerk of the Borough and where I provided legal advice in response to same.

34. The JFK 4-21-22 Email Exchange #1 was made **by and** to a representative of my client, the Borough, for purposes of **the Borough seeking and my providing legal advice to the Borough**, outside the presence of strangers, in response to a communication from Flynn, outside the presence of strangers, for opinion of laws regarding the prospective employment of Fiorella Mirabito as a part-time office clerk of the Borough and form of compensation, **and not for the purpose of committing a crime or tort.**

35. **In my Affidavit of July 24, 2023, I inadvertently forgot to mention that the JFK 4-21-22 Email Exchange #1 was not made for the purpose of committing a crime or tort.**

36. The JFK 4-21-22 Email Exchange #1 is protected by the attorney-client privilege. **Office of the Governor, supra; Gillard, supra; see also, RTKL Sections 102 (definitions of "privilege" and "public record"), 305(a)(2) and 506(c)(2).**

37. **The JFK 4-21-22 Email Exchange #1 is identified as Record Numbers 13 thru 15 on the Borough's Exemption Log attached hereto as Exhibit "A".**

38. The “JFK 4-21-22 Email Exchange #2” was made by and to a representative of my client, the Borough, for purposes of the Borough seeking and my providing legal advice to the Borough, outside the presence of strangers, in response to a communication from Council President Ehr Gott, outside the presence of strangers, for an opinion of law regarding the prospective employment of Fiorella Mirabito as a part-time office clerk of the Borough, and not for the purpose of committing a crime or tort.

39. In my Affidavit of July 24, 2023, I inadvertently forgot to mention that the JFK 4-21-22 Email Exchange #2 was not made for the purpose of committing a crime or tort.

40. The JFK 4-21-22 Email Exchange #2 is identified as Record Numbers 16 thru 18 on the Borough’s Exemption Log attached hereto as Exhibit “A”.

41. The JFK 4-21-22 Email Exchange #2 is protected by the attorney-client privilege. Office of the Governor, supra; Gillard, supra; see also, RTKL Sections 102 (definitions of “privilege” and “public record”), 305(a)(2) and 506(c)(2).

42. While the JFK 4-21-22 Email Exchange #1 and JFK 4-21-22 Email Exchange #2 each fall outside of Mr. Long’s “between Bradford Flynn, Fiorella Mirabito, Michele Ehr Gott, Phyllis Andrews, Barry Fenstermaker, and [Solicitor Kratz]” designation via his RTKL Request and are attorney-client privileged, I informed Mr. Long of the existence of the JFK 4-21-22 Email Exchange #1 and JFK 4-21-22 Email Exchange #2 via my Affidavit of July 24, 2023, so Mr. Long is aware that Flynn and Council President Ehr Gott were aware of the legal advice that I provided so Mr. Long may possibly find that he does not need to make another right-to-know law request on those topics/time period.

43. In preparing this Affidavit, I gathered the emails identified as Record Numbers 1 thru 18 and, in doing so, I located the following attorney-client privileged email exchange that relates to the JFK Email of 12-3-21:

(a) Email exchange on December 6, 2021 (the “12-6-21 Email Exchange”) between Flynn and me wherein Flynn sought follow up legal advice to the legal advice that I provided via the JFK Email of 12-3-21 regarding Article 2.7(f) of proposed Resolution #2021-012.

44. The 12-6-21 Email Exchange was made by and to a representative of my client, the Borough, for purposes of the Borough seeking and my providing legal advice to

the Borough, outside the presence of strangers, in response to Flynn's email of 12-6-21, outside the presence of strangers, for follow up legal advice regarding the JFK Email of 12-3-21 regarding Article 2.7(f) of proposed Resolution #2021-012 and not for the purpose of committing a crime or tort.

45. The 12-6-21 Email Exchange is comprised of the emails identified as Record Numbers 19 and 20 on the Borough's Exemption Log attached hereto as Exhibit "A".

46. The 12-6-21 Email Exchange is protected by the attorney-client privilege. Office of the Governor, *supra*; Gillard, *supra*; see also, RTKL Sections 102 (definitions of "privilege" and "public record"), 305(a)(2) and 506(c)(2).

47. Via the Borough's final response dated June 23, 2023, addressed (and provided) to Mr. Long, the Borough provided Attachment 'D' to Mr. Long in response to the second part of his RTKL Request which was "[a] list of all employees hired by the Borough of Bath outside of Public Works Department since January 1, 2022 ..."

48. Attachment 'D' to the Borough's final response dated June 23, 2023, is the Employee Earnings Reports for Michael Kovach, Fiorella Mirabito and David Smith (who were hired by the Borough during the period January 1, 2022, to April 30, 2023) but with redactions that Mr. Flynn stated are the respective home address, social security number and date of birth for Michael Kovach, Fiorella Mirabito and David Smith that were redacted per RTKL Sections 706 and 708(b)(6)(i)(A).

49. Because the copy of Attachment 'D' attached to Mr. Long's appeal filed with the Office of Open Records on July 13, 2023, is not a true and correct copy of Attachment 'D' attached to the Borough's final response dated June 23, 2023, attached hereto as Exhibit "B" is a true and correct copy of Attachment 'D' that was attached to the Borough's final response dated June 23, 2023, addressed (and provided) to Mr. Long. For example, on page 6 of 8 of the copy that Mr. Long filed with the Office of Open Records, it states "Red# 83 SMITH, CAVIC". That is incorrect and may have been caused by software that Mr. Long uses. As you'll see, on page 6 of 8 of Attachment 'D' attached to the Borough's final response dated June 23, 2023, it states "Rcd # 83 SMITH, DAVID".

50. Attached hereto as Exhibit "C" is a true and correct copy of the Borough's final response dated June 23, 2023, addressed (and provided) to Mr. Long. See Attachmetn 'D' in Exhibit "C".

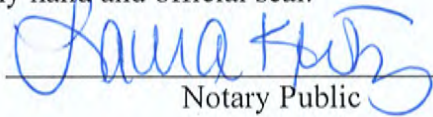
51. I have reviewed the Borough's unredacted copy of Attachment 'D' and, after comparing it to the redacted copy of Attachment 'D' attached to the Borough's final response dated June 23, 2023, Mr. Flynn did only redact the respective home address, social security number and date of birth for Michael Kovach, Fiorella Mirabito and David Smith per RTKL Sections 706 and 708(b)(6)(i)(A) on Attachment 'D' attached to the Borough's final response dated June 23, 2023, addressed (and provided) to Mr. Long.

52. The redacted copy of Attachment 'D' to the Borough's final response dated June 23, 2023 is identified as Record Number 21 on the Borough's Exemption Log because of the redactions made by Flynn as discussed above.

  
\_\_\_\_\_  
JAMES F. KRATZ, ESQ.

On this, the 4<sup>th</sup> day of October, 2023, before me a Notary Public in and for the Commonwealth of Pennsylvania, the undersigned officer, personally appeared JAMES F. KRATZ, ESQ., known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official seal.

  
\_\_\_\_\_  
Notary Public

Commonwealth of Pennsylvania - Notary Seal  
LAURA A. KLOTZ, Notary Public  
Lehigh County  
My Commission Expires February 22, 2026  
Commission Number 1414101

# Exhibit D

# Exhibit “A” – Exemption Log

**Records of Borough of Bath  
OOR Dkt. No. AP 2023-1598**

Record Number	Date of Record	Type of Record	Author of Record	Recipient(s) of Record	General description of subject matter	Legal Basis for Exclusion
1	12-3-21	Email with 5 attachments	Borough Solicitor	Borough employee, Borough Manager, Borough Engineer, Borough employee, Borough Mayor, and all 7 Borough Council members	Legal advice regarding Article 2.7(f) of proposed Resolution #2021-012 (process to appoint a person to a vacated Council seat) and legal advice regarding other unrelated documents	Attorney-client privilege per <u>Office of the Governor v. Davis, Jr. and Gillard v. AIG Insurance Company</u> ; RTKL Sections 102 (definitions of “public record” and “privilege”) and 305(a)(2).
2	10-19-21 at 1:46 PM	Email with 1 attachment	Borough Solicitor	Borough Council President and Borough Manager	Legal advice in response to verbal question from Borough Council President regarding prospective resignation of Councilmember Mark Saginario, prospective vacated Council seat and general process to appoint a person to vacated Council seat.	Same as above.

**OOR Dkt. No. AP 2023-1598**  
**Exhibit “A” – Borough of Bath Exemption Log**

<b>Record Number</b>	<b>Date of Record</b>	<b>Type of Record</b>	<b>Author of Record</b>	<b>Recipient(s) of Record</b>	<b>General description of subject matter</b>	<b>Legal Basis for Exclusion</b>
3	10-19-21 at 1:52 PM	Email	Borough Manager	Borough Solicitor and Borough Council President	Legal advice regarding prospective resignation of Councilmember Mark Saginario, prospective vacated Council seat and general process to appoint a person to vacated Council seat.	Attorney-client privilege per <u>Office of the Governor v. Davis, Jr.</u> and <u>Gillard v. AIG Insurance Company</u> ; RTKL Sections 102 (definitions of “public record” and “privilege”) and 305(a)(2).
4	10-19-21 at 2:06 PM	Email	Borough Solicitor	Borough Manager and Borough Council President	Same as above.	Same as above.
5	10-3-21 at 3:38 PM	Email	Borough Council President	Borough Solicitor and Borough Manager	Same as above.	Same as above.

**OOR Dkt. No. AP 2023-1598**  
**Exhibit “A” – Borough of Bath Exemption Log**

<b>Record Number</b>	<b>Date of Record</b>	<b>Type of Record</b>	<b>Author of Record</b>	<b>Recipient(s) of Record</b>	<b>General description of subject matter</b>	<b>Legal Basis for Exclusion</b>
6	10-19-21 at 4:55 PM	Email	Borough Manager	Borough Solicitor and Borough Council President	Legal advice regarding prospective resignation of Councilmember Mark Saginario, prospective vacated Council seat and general process to appoint a person to vacated Council seat.	Attorney-client privilege per <u>Office of the Governor v. Davis, Jr.</u> and <u>Gillard v. AIG Insurance Company</u> ; RTKL Sections 102 (definitions of “public record” and “privilege”) and 305(a)(2).
7	10-19-21 at 5:11 PM	Email	Borough Council President	Borough Solicitor and Borough Manager	Same as above.	Same as above.
8	10-19-21 at 5:12 PM	Email	Borough Council President	Borough Solicitor and Borough Manager	Same as above.	Same as above.

**OOR Dkt. No. AP 2023-1598**  
**Exhibit “A” – Borough of Bath Exemption Log**

<b>Record Number</b>	<b>Date of Record</b>	<b>Type of Record</b>	<b>Author of Record</b>	<b>Recipient(s) of Record</b>	<b>General description of subject matter</b>	<b>Legal Basis for Exclusion</b>
9	10-19-21 at 5:18 PM	Email	Borough Manager	Borough Solicitor and Borough Council President	Legal advice regarding prospective resignation of Councilmember Mark Saginario, prospective vacated Council seat and general process to appoint a person to vacated Council seat.	Attorney-client privilege per <u>Office of the Governor v.</u> <u>Davis, Jr.</u> and <u>Gillard v. AIG</u> <u>Insurance Company</u> ; RTKL Sections 102 (definitions of “public record” and “privilege”) and 305(a)(2).
10	10-19-21 at 6:57 PM	Email with 1 attachment	Borough Solicitor	Borough Manager and Borough Council President	Same as above.	Same as above.
11	10-19-21 at 7:04 PM	Email	Borough Council President	Borough Solicitor and Borough Manager	Same as above.	Same as above.
12	10-19-21 at 7:10 PM	Email	Borough Solicitor	Borough Council President and Borough Manager	Same as above.	Same as above.

**OOR Dkt. No. AP 2023-1598**  
**Exhibit “A” – Borough of Bath Exemption Log**

<b>Record Number</b>	<b>Date of Record</b>	<b>Type of Record</b>	<b>Author of Record</b>	<b>Recipient(s) of Record</b>	<b>General description of subject matter</b>	<b>Legal Basis for Exclusion</b>
13	4-21-22 at 2:29 PM	Email	Borough Manager	Borough Solicitor	Legal advice regarding the prospective employment of Fiorella Mirabito as a part-time office clerk for the Borough and form of compensation.	Attorney-client privilege per <u>Office of the Governor v. Davis, Jr.</u> and <u>Gillard v. AIG Insurance Company</u> ; RTKL Sections 102 (definitions of “public record” and “privilege”) and 305(a)(2).
14	4-21-22 at 2:59 PM	Email	Borough Solicitor	Borough Manager	Same as above.	Same as above.
15	4-21-22 at 3:26 PM	Email	Borough Manager	Borough Solicitor	Same as above.	Same as above.
16	4-21-22 at 12:53 PM	Email	Borough Council President	Borough Solicitor	Legal advice regarding the prospective employment of Fiorella Mirabito as a part-time office clerk for the Borough	Same as above.

**OOR Dkt. No. AP 2023-1598**  
**Exhibit “A” – Borough of Bath Exemption Log**

<b>Record Number</b>	<b>Date of Record</b>	<b>Type of Record</b>	<b>Author of Record</b>	<b>Recipient(s) of Record</b>	<b>General description of subject matter</b>	<b>Legal Basis for Exclusion</b>
17	4-21-22 at 2:16 PM	Email	Borough Solicitor	Borough Council President	Legal advice regarding the prospective employment of Fiorella Mirabito as a part-time office clerk for the Borough.	Attorney-client privilege per <u>Office of the Governor v. Davis, Jr.</u> and <u>Gillard v. AIG Insurance Company</u> ; RTKL Sections 102 (definitions of “public record” and “privilege”) and 305(a)(2).
18	4-21-22 at 3:18 PM	Email	Borough Council President	Borough Solicitor	Same as above.	Same as above.
19	12-6-21 at 11:26 AM	Email	Borough Manager	Borough Solicitor	Seeking follow up legal advice regarding legal advice given regarding Article 2.7(f) of proposed Resolution #2021-012.	Attorney-client privilege per <u>Office of the Governor v. Davis, Jr.</u> and <u>Gillard v. AIG Insurance Company</u> ; RTKL Sections 102 (definitions of “public record” and “privilege”) and 305(a)(2).

**OOR Dkt. No. AP 2023-1598**  
**Exhibit “A” – Borough of Bath Exemption Log**

<b>Record Number</b>	<b>Date of Record</b>	<b>Type of Record</b>	<b>Author of Record</b>	<b>Recipient(s) of Record</b>	<b>General description of subject matter</b>	<b>Legal Basis for Exclusion</b>
20	12-6-21 at 11:36 AM	Email	Borough Solicitor	Borough Manager	Legal advice regarding legal advice given regarding Article 2.7(f) of proposed Resolution #2021-012.	Attorney-client privilege per <u>Office of the Governor v. Davis, Jr. and Gillard v. AIG Insurance Company</u> ; RTKL Sections 102 (definitions of “public record” and “privilege”) and 305(a)(2).
21	Created 5-26-23 at 4:16 PM but partially redacted prior to 6-23-23.	Attachment ‘D’ to 6-23-23 Bath Final Response to Mr. Long.	Initially created by Borough Bookkeeper but the partial redactions made by Borough Manager	Mr. Long and Borough Solicitor received partially redacted Attachment ‘D’ to 6-23-23 Bath Final Response to Mr. Long.	Attachment ‘D’ was/is the earnings reports for 1-1-22 to 4-30-23 for Michael Kovach, Fiorella Mirabito and David Smith with their respective home address, birth date and social security number redacted.	The respective home address, respective birth date and respective social security number for Michael Kovach, Fiorella Mirabito and David Smith were redacted per RTKL Sections 706 and 708(b)(6)(i)(A).

# Exhibit E

## **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 3<sup>rd</sup> day of November, 2024.

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