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

**MOTION TO SUBSTITUTE RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR REVIEW**

I. INTRODUCTION

1. AND NOW COMES Respondent, Michael Long, pro se, and respectfully moves this Honorable Court for leave to substitute the attached revised "Respondent's Brief in Opposition to Petition for Review" for the version filed on December 24, 2024.

II. BASIS FOR MOTION

2. Due to a clerical error, Respondent inadvertently filed an earlier draft of the brief on December 24, 2024. The attached revised brief [Exhibit A] is intended to replace the previously filed version.

3. The revised brief contains the same core arguments and legal positions as the original but presents them in a more streamlined and focused manner. The revised brief also incorporates additional case law and addresses the Borough's response more directly.
4. Respondent acknowledges the Court's concerns about the length and complexity of filings and has taken steps to ensure the revised brief is more concise and targeted.
5. The substitution of the revised brief will not prejudice the Borough, as the core arguments remain the same. *Furthermore, the substitution of the revised brief will not cause any delay or disruption to the proceedings, as the Borough has already been served with the revised brief and has ample time to respond.*

III. ARGUMENT

6. **Clerical Error:** Respondent inadvertently filed an earlier draft of the brief due to a clerical error. This was not an attempt to change the arguments or to relitigate any issues.
7. **Consistent Arguments:** The core arguments and legal positions in the revised brief are identical to those in the original brief. The revised brief simply presents these arguments in a more organized and focused manner.
8. **Improved Presentation:** The revised brief is more streamlined and targeted, making it easier for the Court to understand the core message.

9. **No Prejudice to the Borough:** The Borough has already been served with the revised brief, and the substitution will not prejudice their ability to respond.

IV. RELIEF REQUESTED

WHEREFORE, based on the preceding arguments, we request that this Honorable Court:

1. GRANT Respondent's Motion to Substitute the attached revised "Respondent's Brief in Opposition to Petition for Review" for the version filed on December 24, 2024.
2. ACCEPT the revised brief as the operative document in this matter.
3. GRANT such other and further relief as this Court deems just and proper.

Respectfully submitted,

/s/ Michael Long
Michael Long
220 Creek Road
Bath, PA 18014
(610) 507-3721
Michael.Long479@gmail.com
Dated: December 25, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of December 2024, a true and correct copy of the foregoing Motion to Substitute Respondent's Brief in Opposition to Petition for Review was served upon the following counsel of record via email:

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

/s/ Michael Long
Michael Long

Exhibit

A

BOROUGH OF BATH,
Petitioner,

v.

MICHAEL LONG,
Respondent.

: IN THE COURT OF COMMON PLEAS
NORTHAMPTON COUNTY,

:
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:

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

RESPONDENT’S BRIEF IN OPPOSITION TO PETITION FOR REVIEW

AND NOW COMES Respondent, Michael Long, confronting the Borough of Bath's egregious abuse of the legal process, and respectfully but firmly requesting that this Court reject a petition founded on misrepresentations, contrived timelines, and attempts to conceal discoverable truths. *While the Court has denied the previous motion relating to experts, the factual evidence that has been presented speaks for itself and demonstrates the Borough has not been truthful.*

II. KEY ISSUES AT STAKE

1. This appeal raises three fundamental questions:
 - a. The “Automatic Stay”: Does a stay during an appeal under the RTKL mean the OOR loses its power to finalize a decision, or does it simply pause the

release of documents? We argue it's the latter, with OOR still able to finalize a decision.

- b. The Borough's Shifting Narrative: Can a government agency repeatedly change its story about which documents exist and what they contain without damaging its credibility? Here, we will show the Borough repeatedly revised its sworn testimony and withheld records, undermining its claim to have conducted a "thorough search."
- c. The Misuse of "Privilege": Can a government agency withhold purely factual information simply by labeling it "privileged," even when the Borough's own timeline makes its claims impossible? We contend the answer is no. The Borough's claims are based on an improper interpretation of legal precedents.

III. STANDARD OF REVIEW

- 2. This Court's review of the OOR's final determination is *de novo*, meaning the Court can re-examine the case independently, make its own findings of fact, and even consider additional evidence.
- 3. The Borough bears the burden to prove why any documents should be withheld. *Pa. State Police v. McGill*, 83 A.3d 476, 479 (Pa. Cmwlth. 2014). This burden must be satisfied by a preponderance of evidence, which is tantamount to "a more likely than not inquiry." *Del. Cty. v. Schaefer*, 45 A.3d 1149, 1156 (Pa. Cmwlth. 2012).

4. Furthermore, the RTKL is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions” and “exemptions from disclosure must be narrowly construed”. *Pa. Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1122 (Pa. Cmwlth. 2015), *Anand v. Commonwealth*, 293 A.3d 803, 814-15 (Pa. Cmwlth. 2023).

IV. FACTUAL BACKGROUND

5. On May 17, 2023, the Respondent requested emails and records relating to a council member’s resignation, the resulting vacancy procedures, and related policy matters.
6. On June 23, 2023, the Borough claimed it had only three relevant, non-privileged emails and an earnings report, withholding the remaining records under a vague claim of “attorney-client privilege”. (See OOR Ex. 1 p. 007)
7. Upon appealing to the OOR, the Respondent exposed the Borough's incomplete search by demonstrating that the Borough produced contradictory statements under oath, repeatedly "discovered" new withheld emails each time it was challenged and offered no credible explanation as to the Borough's earlier certifications.
8. One of the emails, “Record #5,” (See OOR Ex. 15 p. 013) supposedly dated October 3, 2021, asked for “legal advice” about a resignation. However, it’s not until October 4, 2021, did any official become aware that a resignation was even a

possibility. This makes the Borough's claim of "privileged" advice impossible on the face of it.

9. On January 12, 2024, the OOR determined that factual information was improperly withheld, and that the Borough had overreached in claiming privilege, *believing that the Borough's timeline was truthful*. The Borough now petitions this Court to overturn the OOR's decision.

V. ARGUMENT

10. **The "Automatic Stay" Does Not Suspend the OOR's Power:** The Borough argues the automatic stay in the RTKL renders the OOR powerless. *The Borough misconstrues the 'automatic stay,' arguing it eliminates the OOR's authority to adjudicate when, in fact, it only pauses the release of documents as Donahue v. City of Hazleton established. The Borough's position would nullify the OOR's ability to act at all which is not supported in law.*

11. **A Pattern of Deception: Shifting Explanations and Contradictory Testimony:**
The Borough's narrative has consistently shifted, with "newly discovered" withheld emails appearing each time it was challenged, undermining the Borough's claims of a thorough search. *Initially, as evidenced by their June 23rd response (See OOR Exhibit 1, page 007), the Borough claimed only three emails existed. However, the July 24, 2023, Affidavit (See OOR Exhibit 4, page 013) revealed additional sets of emails, contradicting their initial assertion. A subsequent October 4th affidavit (See OOR Exhibit 15 page 004) showed yet more*

'newly discovered' communications. This pattern strongly indicates a deliberate effort to conceal information, not a mere oversight. In Mr. Flynn's attestation (See OOR Ex. 4 p. 013) he stated that there were no emails about Mayor Mirabito, yet Exhibit C shows that these emails did, in fact, exist. These types of contradictions show why the court should not trust any of the Borough's claims.

12. Borough's Failure to Address Key Issues: The Borough's brief is conspicuously absent of an explanation for the multitude of issues brought up in the original request.

- a. *The Borough's brief fails to address the shifting narratives that have been presented, along with the contradictory sworn statements. No explanation is given for this inconsistent behavior.*
- b. *The Borough's brief fails to mention any of the factual impossibilities that have been presented. They do not deny the impossibility of Record #5's date. They do not explain or respond to why this is an issue. The Borough's omission speaks volumes.*
- c. *The Borough's brief does not address the metadata concerns that have been presented. They offer no reason why the Court should not conduct this review, which demonstrates that they are attempting to hide something.*

13. Both In-Camera Review and Metadata Authentication Are Essential: Due to the Borough's deliberate inconsistencies, and especially the impossibility of the "Record #5" date, a *basic* in-camera review will not resolve these discrepancies.

14. *As the Borough itself has failed to provide an explanation, a metadata review is not only warranted but is required for this Court to be able to verify the truth and ensure the Borough's compliance with law. The OOR's ruling was made assuming the Borough's timeline was true, which the Saginario Declaration now shows was false, meaning the court should take additional measures to verify the record.* Furthermore, this Court's denial of the request for a forensic metadata review does not alter the Borough's burden of proof to show that their documents are authentic, and their lack of a response to these questions makes a metadata analysis all the more necessary. The need is not for my benefit, but for this courts in order to have a truthful record of what occurred.

15. This Court must conduct a thorough in-camera review of all withheld emails and, importantly, must order a forensic metadata review to authenticate the documents. This is necessary to verify document creation dates, authorship, recipients, and any modifications that may have been made.

16. *Commonwealth v. Koch*, 106 A.3d 705 (Pa. 2014) establishes that in-camera review alone cannot detect manipulated timestamps or altered recipients. A forensic metadata review is crucial to uncovering these sorts of issues. *In some instances, in camera review may be the only way that [the factfinder] can assess, in a meaningful fashion, whether an agency has met its burden of proving that a document is privileged by a preponderance of the evidence.* *Off. of Open Recs. v. Cntr. Twp.*, 95 A.3d 354, 369 (Pa. Cmwlt. 2014). Furthermore, in *Twp. of*

Worcester v. Off. of Open Recs., 129 A.3d 44, 60 (Pa. Cmwlth. 2016), this Court explicitly said that a “review of a privilege log may be proper in determining whether records are exempt from disclosure”. Given the many inconsistencies, it is very clear a more in-depth review is required.

17. **Upjohn Does Not Shield Factual Material:** The Borough’s reliance on *Upjohn* is misplaced. *The Borough mistakenly argues Upjohn protects factual information.*

18. *However, Upjohn protects advice, and not the underlying facts themselves. We are not seeking to discover the Borough's legal counsel, we are simply trying to discover the facts that led to them. In other words, the Borough has failed to explain why the information is in any way legally privileged, beyond citing the existence of attorney-client privilege. Their assertion is that any fact discussed with counsel is undiscoverable. This would allow all facts to be hidden, as long as an attorney is involved.*

19. The attorney-client privilege “does not extend to business advice or protect clients from factual investigations.” *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 52 n. 8 (2011) (citing *Upjohn Co. v. U.S.*, 449 U.S. 383, 395-96 (1981)). *Furthermore, an agency may not refuse to disclose any relevant fact within its knowledge because they have incorporated a statement of such fact into its communication with its attorney. Upjohn Co. v. U.S.*, 449 U.S. 383, 396 (1981).

20. **Bad Faith is Evident:** The late disclosures, inconsistent explanations, and repeated factual contradictions all suggest that the Borough is acting in bad faith.

21. *In the RTKL context, "intent to wrongfully withhold disclosure is not required for a finding of bad faith and an agency's failure to provide an adequate response to a request may be the basis for such a finding. Brunermer v. Apollo Borough, (Pa. Cmwlth., No. 661 C.D. 2021, filed July 28, 2022).* The reviewing court (either the trial court or this Court) has the exclusive authority to make a finding of bad faith *Brunermer v. Apollo Borough, (Pa. Cmwlth., No. 661 C.D. 2021, filed July 28, 2022).*

22. **The Borough's Irrelevant Vartan Argument:** *The Borough concedes that the deliberative process privilege that Vartan concerns is not at issue in this case. Vartan is therefore completely irrelevant and is nothing more than a distraction from the Borough's clear attempt to withhold purely factual, discoverable information. The deliberative process privilege does not apply to factual information. Office of the Governor v. Wanner, (Pa. Cmwlth. 2020).*

VI. CONCLUSION

23. The Borough has made a series of missteps, all of which point to a troubling disregard for the RTKL and public access to information.

24. The Borough's brief does not challenge any of the factual discrepancies that have been presented but rather focuses on misinterpretations of procedural issues.

25. We respectfully ask this court to enforce the OOR's decision, *which rightly saw through the Borough's unsubstantiated and contradictory claims, while operating under inaccurate assumptions.*

26. Only in doing so can government transparency be served. To that end, it is imperative that this Court conduct both an in-camera review of all withheld records and a forensic metadata review for authentication to determine whether the Borough is being truthful in its claims of privilege.

27. *This Court must "liberally construe the RTKL to effectuate its purpose of promoting 'access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions.'" Levy v. Senate of Pa., 65 A.3d 361, 381 (Pa. 2013). Furthermore, consistent with the RTKL's goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be construed narrowly. Pa. Dep't of Educ. v. Bagwell, 114 A.3d 1113, 1122 (Pa. Cmwlth. 2015).*

VII. PRAYER FOR RELIEF

WHEREFORE, based on the preceding arguments, we request that this Honorable Court:

1. **DENY** the Borough's Petition for Review in its entirety;
2. **AFFIRM** the OOR's Final Determination, compelling the Borough to release non-privileged factual information;
3. **GRANT** the Respondent's Motion for Leave to Supplement the Record, including the sworn statement confirming that the "Record #5" date is impossible;

4. **ORDER A COMPREHENSIVE IN-CAMERA REVIEW OF ALL WITHHELD COMMUNICATIONS (records #3–4, #5, #13–15, etc.) AND METADATA AUTHENTICATION** to verify creation dates, authors, recipients, and any modifications, in order to determine whether the Borough has made valid claims of attorney-client privilege;
5. **DETERMINE** that the Borough acted in bad faith and impose all appropriate penalties and sanctions under *65 P.S. § 67.1305(a)*;
6. **AWARD** such other and further relief as the Court deems just and proper to uphold the RTKL’s goal of maximum transparency.

Respectfully submitted,

/s/ Michael Long
Michael Long
220 Creek Road
Bath, PA 18014
(610) 507-3721
Michael.Long479@gmail.com
Dated: December 24, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 25th 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
74 E. Main St. #648
Lititz, PA 17543
chadwick@schneelegal.com

/s/ Michael Long
Michael Long