

COPY

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION - LAW

BOROUGH OF BATH,

Plaintiff,

vs.

MICHAEL LONG,

Defendant.

No.: C-48-CV-2024-1039


FILED

JUN 24 2025
11:42am
HOLLY RUGGIERO
CLERK OF COURT
CIVIL/PROTHONOTARY

ORDER OF COURT

AND NOW, this 24th day of June, 2025, upon consideration of the papers submitted by counsel and the arguments presented thereon, it is hereby **ORDERED** that Borough of Bath's Appeal of the January 12, 2024 Final Determination Upon Reconsideration Issued by the Pennsylvania Office of Open Records at OOR DKT. AP 2023-1598R is **DENIED**.

BY THE COURT:



BRIAN J. PANELLA
JUDGE



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OPINION OF THE COURT

This matter has come before the Court pursuant to Appellant Borough of Bath's ("the Borough") February 9, 2024, appeal of the Final Determination Upon Reconsideration issued by the Office of Open Records ("OOR") on January 12, 2024. The Court heard oral argument on January 14, 2025. This matter is now ready for disposition.

FACTUAL AND PROCEDURAL HISTORY

The Court hereby incorporates by reference the "Factual and Procedural History" set forth in this Court's April 14, 2025, Opinion and Order addressing Respondent Michael Long's ("Respondent") Motion for Leave to Supplement the Record and for In-Camera Review. A copy of the April 14, 2025 Opinion and Order are attached hereto as "Exhibit A".

DISCUSSION

A. The Borough's Argument

The sole question raised in the Borough's Petition for Review is whether alleged attorney-client privileged emails and attachments identified on the Borough's privilege log are wholly protected by attorney-client privilege or whether the Borough must, in accordance with

the OOR's Final Determination, "review the records and email attachments claimed to be protected by the attorney-client privilege to determine whether they contain non-exempt factual information and provide records redacted as set forth in this Final Determination". See "Final Determination Upon Reconsideration" at 38-39. The Borough's overall argument on appeal is whether revealing "factual information" contained within the emails and attachments would impermissibly reveal the content of privileged communications.

B. Analysis

I. Legal Standard

Pursuant to *Bowling v. Off. of Open Recs.*, 75 A.3d 453, 474 (Pa. 2013), ". . . under the RTKL the Chapter 13 courts¹ are the ultimate finders of fact and [these Courts] are to conduct full *de novo* reviews of appeals from decisions made by RTKL appeals officers, allowing for the adoption of the appeals officer's factual findings and legal conclusions when appropriate." See also 65 P.S. §§ 67.101 *et. seq.* ("RTKL"). Further, the scope of review of OOR determinations is "broad" and/or "plenary" and the Chapter 13 courts "must be able to expand the record—or direct that it be expanded by the mechanism of remand to the appeals officer—as needed to fulfill their statutory function." *Id.* at 476.

II. The OOR's Final Determination Upon Reconsideration Was Appropriate.

The Borough asserts that the email communications and attachments at issue are wholly protected from disclosure on the basis of attorney-client privilege. The Borough argues that it should not be required to "review the records and email attachments claimed to be protected by the attorney-client privilege to determine whether they contain non-exempt factual information

¹ Appeals of OOR determinations are decided by either the Commonwealth Court or the Court of Common Pleas, which are referred to as "Chapter 13 courts," in reference to the chapter of the RTKL in which their relevant duties are discussed. 75 A.3d at 458.

and provide records redacted” pursuant to the Final Determination Upon Reconsideration by the OOR. The Court disagrees with the Borough.

The attorney-client privilege “attaches to the communication itself, not to the facts communicated.” *Andritz Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 632 (M.D. Pa. 1997).

Facts gathered by counsel in the course of investigating a claim or preparing for trial are not privileged and must be divulged if requested in the course of proper discovery. The inclusion of such information in documents prepared by, or circulated to, counsel does not render them inviolate on grounds of privilege... What are protected in most instances, however, are the communications themselves. Documents sent to or prepared by counsel incorporating such information for the purpose of obtaining or giving legal advice, planning trial strategy, etc. are protected from compelled disclosure. To the extent that purely factual material can be extracted from privileged documents without divulging privileged communications, such information is obtainable.

Id. at 632-33. As ordered by the OOR in its Final Determination Upon Reconsideration, the Borough must be required to disclose factual information contained within the emails and attachments at issue.

The Court agrees with the Borough to the extent that it is not required to disclose factual information that would necessarily disclose privileged communications “made for the express purpose of obtaining or giving legal advice.” *Id.* at 633. However, this is not what the OOR ordered. The OOR ordered the Borough to “review the records and email attachments claimed to be protected by the attorney-client privilege to determine whether they contain non-exempt factual information and provide records redacted.” *See* “Final Determination Upon Reconsideration” at 38-39.

Based on this Court’s reading of the Final Determination, the Borough is merely ordered to review the records claimed to be privileged for “non-exempt factual information”. The OOR

did not require disclosure of any specific information or amount of information. This Court will not require the same.

At this time, all the Borough has to do is reexamine the records and extract any “purely factual information”. *Id.* at 633. Certainly, if the Borough is unable find a single item of factual information that cannot be disclosed without disclosing privileged communications, then the Borough may turn over nothing. While the Court review’s the OOR’s Final Determination Upon Reconsideration *de novo*, the Court finds that the holding of the Final Determination was appropriate.

To be clear, the Borough is in no way being ordered to provide information that would not normally be necessary to provide in any Right-to-Know Request. The Borough must simply re-review the documents and determine if there is any factual information that would not be protected by attorney-client privilege.

CONCLUSION

For the foregoing reasons, the Borough’s Appeal of the January 12, 2024 Final Determination Upon Reconsideration Issued by the Pennsylvania Office of Open Records at OOR DKT. AP 2023-1598R is **DENIED**.

BY THE COURT:



**BRIAN J. PANELLA
JUDGE**

EXHIBIT A

EDIT 1/9/25
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**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION - LAW**

BOROUGH OF BATH,

Plaintiff,

vs.

MICHAEL LONG,

Defendant.

No.: C-48-CV-2024-1039

FILED
2025 APR 14 P 2:41
COURT OF COMMON PLEAS
CIVIL DIVISION
NORTHAMPTON COUNTY, PA

OPINION OF THE COURT

This matter has come before the Court pursuant to Respondent Michael Long’s (“Respondent”) Motion for Leave to Supplement the Record and for In-Camera Review filed on December 23, 2024. Plaintiff Borough of Bath (“the Borough”) filed a brief in opposition on January 9, 2025. The Court heard oral argument on January 14, 2025. This matter is now ready for disposition.

FACTUAL AND PROCEDURAL HISTORY

This matter arises under the Pennsylvania Right-to-Know Law (“RTKL”). 65 P.S. §§ 67.101 *et. seq.* On May 17, 2023, Respondent, pro se, filed a RTKL request to the Borough seeking certain alleged public records. The Borough partially turned over responsive public records and Respondent filed a statutory appeal to the Office of Open Records (“OOR”).

Following a proceeding in front of an OOR Appeals Officer, a final determination was issued on November 3, 2023 in favor of Respondent. The Borough filed a Petition for Reconsideration of the OOR Appeals Officer’s decision on November 17, 2023. On January 12, 2024, the OOR issued a Final Determination Upon Reconsideration which only partially

modified the prior determination. The Final Determination by the OOR directed the Borough to “review the records and email attachments claimed to be protected by the attorney-client privilege to determine whether they contain non-exempt factual information and provide records redacted as set forth in this Final Determination”. *See* Exhibit A at 38-39 (“Final Determination Upon Reconsideration”).

On February 9, 2024, the Borough filed the instant statutory appeal of the Final Determination upon Reconsideration. The sole question raised in the Borough’s Petition for Review is whether the alleged attorney-client privileged emails and email attachments identified on the Borough’s privilege log are wholly protected by attorney-client privilege or whether the Borough must turn over emails in accordance with the OOR’s Final Determination. The Borough’s overall argument on appeal is whether revealing “factual information” contained within the emails and attachments would impermissibly reveal the content of privileged communications.

In connection with this appeal, Respondent has filed several unsuccessful motions. On September 10, 2024, Respondent filed a Motion of Protective Order, Sanctions, and Injunctive Relief, and on September 12, 2024, filed a Motion for Appointment of Court Experts. On October 23, 2024, the Court denied Respondent’s motions. On November 5, 2024, Respondent filed for reconsideration of such denials. Included in the Motion for Reconsideration was a request to supplement the record with a Declaration of Mark Saginario, dated November 3, 2024. The Court denied reconsideration on November 12, 2024.

The Borough filed a Motion for Sanctions on November 6, 2024, which was granted by the Court on December 9, 2024 based on Respondent’s “frivolous, vexatious, and bad faith filing.” Additionally, on September 24, 2024, the Court issued an order stating that “this matter

shall be decided on the certified record developed by the Office of Open Records.” On December 23, 2024, Respondent filed the instant Motion to Supplement the Record and for In-Camera Review.

DISCUSSION

A. Respondent’s Argument

Respondent seeks to supplement the record with an Affidavit by Mark Saginario (“the Affidavit”), dated November 3, 2024. Defendant believes that the Affidavit would contradict the Borough’s claim that it has thoroughly searched all emails for non-privileged and discoverable information.¹ Respondent argues that the Affidavit would vitiate the Borough’s claim of privilege as to certain emails and would call into question the accuracy of the Borough’s other privilege claims. Respondent specifically points to Record 5 which the Borough withheld due to claims of privilege. It is Respondent’s position that the Court should supplement the record with this new, critical information. Further, Respondent requests that the Court conduct an in-camera review and metadata inspection of all withheld emails referenced in the Borough’s exemption logs including, but not limited to, Record 5 and Records 13–15 in order to make its own determination of privilege.²

B. The Borough’s Argument

The Borough argues that Respondent’s motion is barred by previous orders of Court. First, the Borough points to the Order dated November 12, 2024 which denied Respondent’s Motion for Reconsideration. In that motion, Respondent sought to introduce the Affidavit into

¹ For additional context, the Final Determination upon Reconsideration Order issued by the OOR required the Borough to review the records and emails they claimed to be protected by the attorney-client privilege to determine whether they contain non-exempt factual information.

² Respondent is particularly concerned with Record 13-15 because such records were initially not disclosed by the Borough and then subsequently disclosed at a later date.

the record. Therefore, according to the Borough, Respondent's request to supplement the record with the Affidavit has already been denied. Second, Respondent has been sanctioned for his baseless and repeated motions to supplement the record. The Borough also points to the Order dated September 24, 2024, stating that the instant appeal would be decided upon the record made by the OOR.

The Borough requests that Respondent be sanctioned again for filing the instant motion. The Borough points to the Court's December 9, 2024 Order wherein sanctions were imposed on Respondent for prior frivolous, vexatious, and bad faith filings. The December 9, 2024 Order also allows for the Borough to seek additional sanctions if Respondent continues to file dilatory motions. It is the Borough's position that the instant motion is again dilatory in nature and without legal support. In fact, the Borough points to several purported "legal citations" in Respondent's brief that were either non-existent or misrepresented.

In addition to the instant motion being barred by prior orders of court, the Borough also argues that the motion is legally meritless. With respect to Record 5, the Affidavit is irrelevant because it does not contradict any of the Borough's claims of privilege.³ With respect to Records 13-15, the Borough submits that Respondent has not justified the need for an in-camera review of such records other than his claim that they were disclosed late.

³ Respondent submits that the Affidavit shows that the Borough could not have discussed Mark Saginario impending resignation on October 3, 2021 (the date that the Borough labeled an email discussing the resignation) because, according to Saginario's Affidavit, no Borough official knew of his resignation until October 4, 2021. However, the Borough submits that it has misdated the email and that the email was in fact sent on October 19, 2021.

C. Analysis

i. The Pennsylvania Right-to-Know Law

The Pennsylvania Right-to-Know Law, which became effective on January 1, 2009, provides for access to public records in Pennsylvania. 65 P.S. §§ 67.101 *et. seq.* The RTKL law significantly broadened access to public records. *See Bowling v. Off. of Open Recs.*, 75 A.3d 453, 457 (Pa. 2013). The RTKL provides that each public agency must appoint an “open-records officer” who issues the agency's interim and final determinations on requests for access to public records. The officer also provides a written description of the requested record(s) and, in the event of a denial, the specific reasons for the denial. *Id.* (citing 65 P.S. §§ 67.502, 903(2)). Of central significance to the instant case, the RTKL also established a new Commonwealth agency, the Office of Open Records (“OOR”), within the Department of Community and Economic Development. *Id.* When a requestor is denied access to a record and that denial is challenged by the requestor, the OOR assigns appeals officers to review the challenges. *Id.* (citing 65 P.S. §§ 67.503(a) and 67.1310(a)(5)).

Appeals from final determinations of these agencies are not heard by the OOR but by the appeals officer designated by the public agency subject to the records request. *Id.* Decisions of OOR appeals officers are final orders and no further administrative appeal is provided for in the RTKL. *Id.* at 457-58. OOR final orders are reviewable upon a petition for review to the Court of Common Pleas when the matter arises from a determination made by a local agency (“Chapter 13 court”).⁴ *Id.* at 458. The RTKL requires Chapter 13 courts to render decisions that “contain

⁴ The Court of Common Pleas is referred to as a “Chapter 13 court” in reference to the chapter of the RTKL in which their relevant duties are discussed.

findings of fact and conclusions of law based upon the evidence as a whole.” *Id.* (citations omitted).

ii. Scope of Review

Section 67.1303 of the RTKL governs the scope of the record on appeal from an OOR determination:

(b) Record on appeal.--The record before a court shall consist of the request, the agency's response, the appeal filed under section 1101,2 the hearing transcript, if any, and the final written determination of the appeals officer.

65 P.S. § 67.1303(b). The RTKL appears to limit this Court’s permissible scope of review.⁵

However, the Court in *Bowling* clarified the scope of review:

Here, we have held that Chapter 13 courts exercise a full de novo standard of review over determinations made by the appeals officers. Accordingly, it would follow that the scope of review must also be “broad” or plenary; indeed, as the Chapter 13 courts serve as fact-finders, it would also follow that these courts must be able to expand the record—or direct that it be expanded by the mechanism of remand to the appeals officer—as needed to fulfill their statutory function.

Bowling, 75 A.3d at 476. Accordingly, this Court has the authority to expand the record beyond the certified record of the OOR and consider any other relevant documents.

In this case, while supplementation of the OOR record may be necessary at a later time, the Affidavit in question is not relevant to any disputed issues. As clarified by the Borough, the email that the Affidavit purports to contradict was in fact sent on October 19, 2021 and not on October 3, 2021. The Affidavit therefore would not contradict any emails sent between the Borough and its counsel. Nevertheless, the issue on appeal is whether the allegedly privileged emails identified on the Borough’s privilege log are wholly protected by attorney-client

⁵ “‘Scope of review’ refers to the confines within which an appellate court must conduct its examination, i.e., the ‘what’ that the appellate court is permitted to examine.” *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711, 728 (Pa. 2012).

privilege. An Affidavit that purports to contradict any statements made within such emails would not be relevant to the issue of attorney-client privilege. The Court declines to grant Respondent leave to supplement the record.

iii. In-Camera Review

“In camera review in certain circumstances is both available and helpful to [reviewing courts] in deciding RTKL matters.” *Couloumbis v. Senate of Pennsylvania*, 300 A.3d 1093, 1106 (Pa. Cmwlth. 2023) “In camera review is appropriate to assess claims of privilege and predecisional deliberations.” *Twp. of Worcester v. Off. of Open Recs.*, 129 A.3d 44, 60 (Pa. Cmwlth. 2016). “[R]eview of an index or ‘privilege log’ of withheld records may be proper in determining whether records are exempt from disclosure.” *Id.* (citing *Heavens v. Dep’t of Envtl. Prot.*, 65 A.3d 1069 (Pa. Cmwlth. 2013)). However, “where an agency sufficiently explains the basis for non-disclosure through attestation, privilege log, or both, in camera review is not necessary.” *Couloumbis*, 300 A.3d at 1106 (citations omitted) (finding that the public agency’s privilege log did not provide sufficient information for the court to conclude that the redactions were appropriately made pursuant to both the attorney-client and work product privileges). Conclusory affidavits in support of a claimed exception to disclosure, standing alone, are insufficient to prove records are exempt. *Twp. of Worcester*, 129 A.3d at 60 (citations omitted).

In this case, the Borough provided a detailed privilege log setting forth the general nature of the withheld emails and its basis for non-disclosure. The Borough does not simply claim that emails are privileged without providing an explanation. However, at this stage, the Court cannot and is not deciding the overall merits of the Borough’s appeal. It may be necessary at a later time to review the alleged privileged records in-camera to determine whether revealing “factual information” contained within the emails and attachments would impermissibly reveal the

content of privileged communications as claimed by the Borough. Therefore, the Court is denying Respondent's request for in-camera review without prejudice as this request is premature.

iv. The Borough's Request for Sanctions

Pa.R.C.P. 1023.1(c) provides:

(c) The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, motion, or other paper. By signing, filing, submitting, or later advocating such a document, the attorney or pro se party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law...

Pa.R.C.P. 1023.1(c). Further, Rule 1023.1(d) states that "[i]f, after notice and a reasonable opportunity to respond, the court determines that subdivision (c) has been violated, the court may...impose an appropriate sanction upon any attorneys, law firms and parties that have violated subdivision (c) or are responsible for the violation." Pa.R.C.P. 1023.1(d). Pa.R.C.P. 1023.4(a)(1) also limits sanctions to "that which is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."

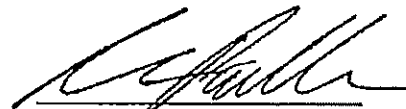
In this case, the Court finds that sanctions against Respondent are not warranted. While the Court ultimately finds that the Affidavit is not relevant to the instant dispute, Respondent had a proper legal basis to request supplementation of the record. Further, while sanctions were previously imposed related to a different motion by Respondent, the merits of a prior motion

have no relation to the merits of the instant motion. The Court does not find that the instant motion was frivolous, intended to harass, or intended to cause delay.

CONCLUSION

For the foregoing reasons, the Respondent's Motion for Leave to Supplement the Record is **DENIED** and Respondent's Motion for In-Camera Review is **DENIED WITHOUT PREJUDICE**. Further, The Borough's request for sanctions against Respondent is **DENIED**. An order consistent with this decision is attached.

BY THE COURT:



**BRIAN J. PANELLA
JUDGE**