



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
JIM HALE AND THE <i>GETTYSBURG</i>	:
<i>TIMES,</i>	:
Requester	:
	: Docket No: AP 2016-0642
v.	:
	:
BOROUGH OF GETTYSBURG,	:
Respondent	:

INTRODUCTION

Jim Hale and the *Gettysburg Times* (collectively, the “Requester”) submitted a request (“Request”) to the Borough of Gettysburg (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a report and other records related to alleged police misconduct. The Borough partially denied the Request, arguing, among other reasons, that the records relate to a noncriminal investigation. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part and denied in part**, and the Borough is required to take further action as directed.

FACTUAL BACKGROUND

On February 24, 2016, the Request was filed, seeking:

- [1.] Entire report by Robert McNeilly and Neva Stotler on arrest of Derek Twyman
- [2.] Policy recommendations of McNeilly and Stotler’s report

- [3.] Non-personnel portions of McNeilly and Stotler's report
- [4.] Contract between [B]orough and McNeilly and Stotler, including price and any description of expectations and/or scope of work
- [5.] Any non-disclosure or similar agreement presented to [B]orough council members in connection with McNeilly and Stotler's report

On March 1, 2016, the Borough invoked a thirty-day extension to respond to the Request. *See* 65 P.S. § 67.902. On March 30, 2016, the Borough denied Items 1-3 of the Request, stating the records are personnel records, 65 P.S. § 67.708(b)(7), and reflect the Borough's internal, predecisional deliberations, 65 P.S. § 67.708(b)(10). In addition, the Borough argued that the requested records are related to a criminal and noncriminal investigation, 65 P.S. § 67.708(b)(16)-(17). The Borough also claimed that the records responsive to Items 1-3 of the Request are subject to the attorney-client privilege, the attorney-work product doctrine, and the self-critical evaluation privilege. The Borough partially granted access to records responsive to Item 4 of the Request by redacting information the Borough claims is related to a noncriminal investigation. Finally, the Borough denied access to records responsive to Item 5 of the Request, stating they are related to a noncriminal investigation and are subject to the attorney-client privilege.

On April 5, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On April 26, 2016, the Borough submitted a position statement reiterating its grounds for denial. The Borough explains that the Request relates to a Borough police officer's use of a Taser while making an arrest, the police officer's body-cam footage of which "was released to

the media following the subject's criminal trial for resisting arrest charges" and was subsequently posted to YouTube.com. In order to review the incident and address the Borough's potential liability, "the Borough engaged independent investigators in order to provide a comprehensive review and report to the Borough of the incident, with recommendations relative to the implementation or modification of internal Police Department policies and procedures with respect to matters of potential liability." In support of its position, the Borough submitted the affidavits of Gretchen Love, Esq., the Borough's special labor and employment counsel, and Charles Gable, the Borough Manager.

On May 13, 2016, the OOR ordered the Borough to submit the withheld records for *in camera* review. On May 25, 2016, the Borough submitted copies of the responsive records for *in camera* review.

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law 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." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request" and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a

hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the OOR conducted *in camera* review of the withheld records, and has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Borough is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Similarly, the burden of proof in claiming a privilege from disclosure is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011), *aff'd in part* 65 A.3d 361 (Pa. 2013); *Pa. Dep't of Transp. v. Drack*, 42 A.3d 355, 364 (Pa. Commw. Ct. 2012) (“[T]he RTKL places an evidentiary burden upon agencies seeking to deny access to records even when a privilege is involved”); *In re: Subpoena No. 22*, 709 A.2d 385 (Pa. Super. Ct. 1998). Preponderance of the evidence has been defined as “such

proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The OOR has jurisdiction to consider the Requester’s appeal

The Borough argues that the Stotler Report and the McNeilly report relate to a criminal investigation. 65 P.S. § 67.708(b)(16). Section 708(b)(16) of the RTKL exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation.” *Id.* Section 503(d)(2) of the RTKL states that “[t]he district attorney of a county shall designate one or more appeals officers to hear appeals . . . relating to access to criminal investigative record in possession of a local agency of that county.” 65 P.S. § 67.503(d)(2). Section 503(d)(2) adds that “[t]he appeals officer . . . shall determine if the record requested is a criminal investigative record.” *Id.* As a result, the OOR routinely holds that it lacks jurisdiction over appeals involving criminal investigative records held by law enforcement agencies and dismisses or transfers appeals when records are alleged to be criminal investigative records in the possession of those agencies.

While the Borough claims that the reports contain information derived from criminal investigative records, the Borough also acknowledges that the independent investigators did not conduct a criminal investigation themselves. Further, there is no evidence that the responsive records themselves contain any investigatory material related to a criminal act. *See Levy v. Senate of Pa.*, 94 A.3d 436, 448 (Pa. Commw. Ct. 2014) (“To the extent the documents reference and arguably ‘relate’ to a criminal investigation conducted by another agency, the records themselves do not contain any investigatory material”). Therefore, there is no evidence that

these records are or can be records of a criminal investigation. *See Yakim v. Municipality of Monroeville*, OOR Dkt. 2014-1978, 2015 PA O.O.R.D. LEXIS 41. Accordingly, the OOR has jurisdiction to consider the appeal.

2. Portions of the Stotler Report are exempt under the attorney-work product doctrine and the attorney-client privilege

The Borough claims that the Stotler Report is protected by privilege. The RTKL defines “privilege” as “[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth.” 65 P.S. § 67.102. The OOR gives paramount respect to both the attorney-client privilege and the attorney-work product doctrine and recognizes the importance of guarding both.

In order for the attorney-client privilege to apply, an agency must demonstrate that: 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; and 4) the privilege has been claimed and is not waived by the client. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). An agency may not rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to withhold records”). Instead, the agency must establish the first three prongs of the privilege for it to apply. *See Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014); *see also Office of*

the Governor v. Davis, 122 A.3d 1185 (Pa. Commw. Ct. 2015). However, once the agency has done so, the requester has the burden of proving that the agency waived the privilege. *Bagwell*, 103 A.3d at 420-21.

The attorney-work product doctrine, on the other hand, prohibits disclosure “of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. The Pennsylvania Supreme Court has explained that the attorney-work product doctrine “manifests a particular concern with matters arising in anticipation of litigation.” *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011) (citing *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001) and stating that “[t]he ‘work product rule’ is closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation”); see also *Heavens v. Pa. Dep’t of Env’tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) (“[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked”).

Here, the Borough argues that the Stotler Report constitutes Ms. Stotler’s “mental impressions, conclusions, opinions, summaries, legal research or legal theories.” The Borough provides the statement made under the penalty of perjury of Attorney Love, who attests as follows:

14. On February 1, 2016, the letter-report prepared by Attorney Stotler and the investigative report prepared by Mr. McNeilly were provided to the Borough. ... [Attorney] Stotler’s report summarized her observations and conclusions, including conclusions regarding the department policies and practices and matters pertaining to potential liability.

....

16. Attorney Stotler's letter-report is an attorney-client privileged communication that has not been waived by the Borough. Attorney Stotler's report is also attorney work product pursuant to Pa.R.Civ.P. 4003.3, as it contains her mental impressions, conclusions, opinions, memoranda, notes, summaries and legal theories.

Under the RTKL, a statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Borough acted in bad faith, "the averments in [the statement] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based upon the evidence provided and an *in camera* review of the record at issue, the Borough has established that the Stotler Report is largely protected from disclosure by the attorney-work product doctrine and/or the attorney-client privilege. *See* 65 P.S. § 67.305(a).

However, the Stotler Report also contains factual information related to methodology of the review process and the conduct of Borough police officers. The attorney-client privilege and the attorney work product doctrine do not apply to records or parts of records containing general or factual information through which no legal advice is sought, and the records do not reveal any information that is protected by the attorney-client privilege or the attorney-work product doctrine. *See Scarcella v. City of Sunbury*, OOR Dkt. AP 2015-2895, 2016 P.A.O.O.R.D. LEXIS 450 (holding that the factual content of a report prepared for an attorney and withheld under the attorney-client privilege and attorney-work product doctrine was subject to public access); *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (privilege extends only to communications and not to underlying facts); *Philadelphia v. Westinghouse Electric Corp.*, 2015

F. Supp. 830, 831 (E.D. Pa. 1962) (the protection of the privilege only extends to communications and not to facts). As the Borough also claims that the Stotler Report is also exempt from disclosure because it is a record related to a noncriminal investigation, the factual findings included in the Stotler Report will be addressed below.

3. Portions of the McNeilly Report, Stotler Report, and Stotler Scope of Work are records of a noncriminal investigation

The Borough identifies the McNeilly Report (Index Items 1-2), the Stotler Report (Index Item 3) and Stotler Scope of Work (Index Item 4) as responsive to the Request and argues that these records are exempt from disclosure because they relate to a noncriminal investigation conducted by the Borough.¹ *See* 65 P.S. § 67.708(b)(17). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a criminal or noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). In *Chawaga v. Pa. Dep’t of Public Welfare*, the Commonwealth Court held that a performance audit was not part of the Department’s legislatively granted fact-finding and investigative powers, and that the audit was ancillary to the Department’s public assistance services. 91 A.3d 257, 259 (Pa. Commw. Ct. 2014). The Court noted that “[a] contrary determination of an

¹ Section V(E)(13) of the OOR Procedural Guidelines provides, among other things, that “[r]eferences to specific records submitted for in camera inspection, or the contents of such records, in the Final Determination will be ... by reference to generic descriptions or characterizations as set forth in the in camera inspection index or, if the in camera inspection index provides an insufficient description of the records, a generic description or characterization of the *in camera* records themselves.” *See Heintzelman v. Pa. Dep’t of Cmty. & Econ. Dev.*, No. 512 C.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 644, *9-10 n.8 (Pa. Commw. Ct. 2014) (advising that “when records are reviewed *in camera* below, we respectfully remind fact-finders ... to include more robust analysis in support of their determinations”); *Office of the Governor v. Davis*, 122 A.3d 1185 (Pa. Commw. Ct. 2015) (remanding an appeal where the OOR conducted *in camera* review of withheld records to “explain how each exemption applies to each record with reference to the Bates-labels” to allow the court to “assess whether OOR committed legal or factual error, or applied the exemptions in accordance with decisional law”).

‘official probe’ would craft a gaping exemption, under which any governmental information-gathering could be shielded from disclosure.” *Id.*

An *in camera* review of the responsive reports confirms the following description of the records provided by the Borough:

Mr. McNeilly’s report reflects: (1) interviews with Borough Police Department members; (2) recommended Police Department system changes with regard to (a) use of force reports, (b) citizen complaints, (c) performance evaluations, (d) early intervention systems; and (3) overall remedial recommendations. Attorney Stotler’s opinion letter analyzes matters related to potential liability and recommendations and strategies relative to ... Borough Police Department policies and procedures.

The Borough also submitted affidavits describing the contents of the withheld reports. Attorney Love attests, in pertinent part:

14. On February 1, 2016, the letter-report prepared by Attorney Stotler and the investigative report prepared by Mr. McNeilly were provided to the Borough. As part of his investigation, Mr. McNeilly made observations regarding the police department’s policies, supervision, internal review of complaints and reports, and performance evaluation. These observations not only reflect Mr. McNeilly’s thoughts and conclusions about individual officers but also provide a systematic overview of accountability measures. This thorough analysis of the Department’s system illuminated areas where improvement is required. Ms. Stotler’s report summarized her observations and conclusions, including conclusions regarding the department policies and practices and matters pertaining to potential liability.

a. The Borough conducted a noncriminal investigation with respect to its internal review of the Borough police officer’s actions

The Borough claims that it derives “legislative granted fact-finding powers” from the Borough Code, 8 Pa.C.S. §§ 101-3501. Under the Borough Code, a borough council has the authority to “establish a police department” as one of its statutorily granted powers. 8 Pa.C.S. § 1121(a). Once a borough establishes a police department by ordinance, the borough council is specifically empowered to appoint police officers, and to “remove, suspend or reduce in rank any police officer” subject to relevant civil service requirements under the Borough Code, 8 Pa.C.S.

§ 1121(a)(1)-(2). The operation of a police department represents a core borough function once that department is created, and a borough council's authority to create a police department and hire officers, by necessary implication, includes the power to investigate alleged misconduct by borough police officers during the performance of their official duties. *See Jewish Home of Eastern Pa. v. Pa. Dep't of Health*, OOR Dkt. AP 2014-0892, 2015 PA O.O.R.D. LEXIS 1813 (holding that an agency had the authority to conduct an investigation into discrimination complaints against its employees). Thus, the Borough's power to investigate alleged police misconduct during the performance of their duties is derived from their "legislatively-granted fact-finding powers" to create a police department and remove, suspend or reduce the rank of any police officer.

b. The Borough conducted an official probe to review the conduct of a Borough police officer

Even though the Borough has the authority to conduct an investigation into misconduct of its police officers during the performance of their duties, in order for this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. *See Pa. Dep't of Health*, 4 A.3d at 810-11. To constitute "a systematic or searching inquiry" or "a detailed examination," the investigation cannot be a "one time inquiry" and must instead involve "comprehensive, repeated," and "regular" examinations or inspections. *Chawaga*, 91 A.3d at 259.

Here, the Borough hired outside counsel and a consultant—Attorney Stotler and Mr. McNeilly, respectively—to collect evidence regarding the police officer's actions, review the compliance of the police officer and supervisors with Police Department policy, and evaluate the appropriateness of the officer's and supervisors' conduct ("Police Officer Conduct Review"). Because the Police Officer Conduct Review involved both the review of the police officer's

actions, interviews of witnesses, and a review of the officer's and Police Department's compliance with internal policies and best practices with respect to the incident, the inquiry was more a review of a specific incident than the performance audit at issue in *Chawaga*. While not all fact-gathering constitutes an investigation, *see Chawaga*, 91 A.3d at 259, the Borough undertook a noncriminal investigation pursuant to its official statutory duties to determine whether its police officers and Police Department acted appropriately with respect to an incident involving the use of force and to determine whether official discipline was warranted. *See Katz v. Lower Merion Twp.*, OOR Dkt. AP 2015-0749, 2015 PA O.O.R.D. LEXIS 872. Therefore, the Police Officer Conduct Review included in the McNeilly Report is an official probe as defined in the noncriminal investigation exemption.

Furthermore, the Police Officer Conduct Review implicates the policy underlying the noncriminal investigative records exemption; namely, that the release of the requested records would deter future compliance with internal Borough investigations, reveal potentially unsubstantiated accusations or statements, or cause individuals providing information to Borough investigators to fear retaliation or embarrassment. *See Pa. Dep't of Health*, 4 A.3d at 811; *Pa. Pub. Util. Comm'n v. Seder*, 106 A.3d 193, 201 (Pa. Commw. Ct. 2014) (noting that the release of records related to a noncriminal investigation could lead to less cooperation due to fear of retaliation or public embarrassment); *Pa. Pub. Util. Comm'n v. Gilbert*, 40 A.3d 755, 761 (Pa. Commw. Ct. 2012) (noting that revealing records related to safety inspections could lead to less cooperation during investigations and impair the effectiveness of the investigation); *but see Chawaga*, 91 A.3d at 259 (noting that the transparency performance audits conducted under Generally Accepted Government Auditing Standards discourage financial abuses by businesses under government contract).

c. The portions of the McNeilly Report and Stotler Report summarizing the findings of the Police Officer Conduct Review were created as part of a noncriminal investigation

Section 708(b)(17) of the RTKL exempts from disclosure “[i]nvestigative materials, notes, correspondence and reports.” 65 P.S. § 67.708(b)(17)(ii); *see also Piccone v. Pa. State Bd. of Medicine*, 2011 Pa. Commw. Unpub. LEXIS 682, *11 (Pa. Commw. Ct. 2011) (holding that criminal records obtained by an agency during a noncriminal investigation are records of a noncriminal investigation). Based on the evidence submitted and an *in camera* review of the withheld records, the Borough has met its burden to prove that the portion of the McNeilly Report that summarizes evidence, witness statements, and recommendations arising directly from the Police Officer Conduct Review was created as the result of a noncriminal investigation, as well as a similar evidence summary in the Stotler Report.

d. The names of witnesses contained in the Stotler Scope of Work (Index Item 4) are related to a noncriminal investigation

With regard to the redactions made to records responsive to the Stotler Scope of Work (Index Item 4), Mr. Gable attests that the Borough “redact[ed] ... the names of two witnesses to be interviewed by Attorney Stotler and McNeilly.” An *in camera* review of the records reveals that the individuals identified in the letter were interviewed as part of the noncriminal investigation. As a result, the Borough may withhold the witness names contained in the Stotler Scope of Work (Index Item 4). *See FHA Holding Co. v. Pa. Dep’t of Insurance*, OOR Dkt. AP 2014-0800, 2014 PA O.O.R.D. LEXIS 749 (holding that witness statements are exempt from disclosure).

e. The Police Department Policy Review and Confidentiality Agreements do not meet the definition of a noncriminal investigation under the RTKL

The evidence submitted by the Borough also demonstrates that Mr. McNeilly conducted a global review of Police Department policies and compliance with best practices, and recommended the use of proposed internal policies appended to his report (“Police Department Policy Review”). In *Chawaga*, the Commonwealth Court held that a performance audit was not part of the Department’s legislatively granted fact-finding and investigative powers, and that the audit was ancillary to the Department’s public assistance services. *Id.* The Court noted that “[a] contrary interpretation of an ‘official probe’ would craft a gaping exemption, under which any governmental information-gathering could be shielded from disclosure.” *Id.* Similarly, the Lackawanna County Court of Common Pleas held that an agency failed to meet its burden of proof when the records did not relate to the “official duties” of the agency and it was not established that the investigation that occurred was more than a “one-time inquiry.” *Lackawanna County Government Study Commission v. The Scranton Times, L.P.*, No. 14-CV-4427, 2014 WL 5930128 (Lack. Com. Pl. Nov. 14, 2014) (citing *Chawaga*). Pursuant to *Chawaga*, “[n]ot all agency fact-finding constitutes a ‘noncriminal investigation’ subject to the protections of the RTKL.” *Hopey v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2014-1739, 2014 PA O.O.R.D. LEXIS 1318; *see also Katz v. Lower Merion Sch. Dist.*, OOR Dkt. AP 2014-1572, 2014 PA O.O.R.D. LEXIS 1338.

The portions of the McNeilly Report related to internal policy compliance review, the conclusions related to the recommendations for Police Department wide policy changes, and the proposed Police Department internal policies are not records of a noncriminal investigation. Here, like in *Chawaga*, the Borough’s review of the effectiveness of internal Police Department policies is ancillary to the overall function and operation of the Borough and is more akin to a

performance audit of Police Department operations. The Police Department Policy Review is not investigatory in nature and is not subject to withholding under the noncriminal investigation exemption. These documents exist for purposes independent of the investigation, are not investigative in nature, and do not contain any investigatory material. *See generally Levy v. Senate of Pa.*, 94 A.3d 436, 448 (Pa. Commw. Ct.) (“To the extent the documents reference and arguably ‘relate to’ a criminal investigation, the records themselves do not contain any investigatory material”). Therefore, the portions of the McNeilly Report related to internal policy compliance review, the conclusions related to the recommendations for Police Department wide policy changes, and the proposed Police Department internal policies are not exempt from disclosure. *See* 65 P.S. § 67.708(a)(1).

4. The portions of the McNeilly Report consisting of a Police Department Policy Review do not reflect the Borough’s internal, predecisional deliberations, do not contain personnel information and are not protected under the attorney work-product doctrine

The Borough also argues that the portions of the McNeilly Report consisting of a Police Department Policy Review are not subject to public access because they reflect the internal, predecisional deliberations of the Borough and is protected by the attorney-work product doctrine.

a. The Police Department Policy Review is not subject to withholding under the internal, predecisional deliberations exemption

Section 708(b)(10) of the RTKL exempts from disclosure records reflecting:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of 5 action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). An agency must show three (3) elements to substantiate this exception: (1) the deliberations reflected are “internal” to the agency; (2) the deliberations reflected are predecisional, i.e., before a decision on an action; and (3) the contents are deliberative in character, i.e., pertaining to proposed action and/or policy-making. *See Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Commw. Ct. 2013); *Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011); *Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *Sansoni v. Pa. Hous. Fin. Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *Kyle v. Pa. Dep’t of Comm. & Econ. Dev.*, OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310. Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 385-386 (Pa. Commw. Ct. 2014).

The OOR has conducted an *in camera* review of the McNeilly Report’s Police Department Policy Review. Although the report was prepared by Mr. McNeilly, it is noted that communications with a contractor to perform services for an agency are internal to an agency and may be exempted from disclosure under Section 708(b)(10)(i)(A). *See Frey v. Del. Valley Reg. Planning Comm’n.*, OOR Dkt. AP 2011-1175, 2011 PA O.O.R.D. LEXIS 974. Thus, the Police Department Policy Review and attached policies remained internal to the Borough.

The Police Department Policy Review and proposed policies are also predecisional as the report contained policy recommendations and internal regulations to be reviewed by Borough counsel. And lastly, the proposed Police Department policies are deliberative in nature as they relate to a future course of action with respect to the internal operations and policies of the Police Department.

However, as the Police Department Policy Review and proposed policies were presented to all Borough council members, the issue becomes whether they are otherwise subject to public disclosure. Section 708(b)(10)(ii) states that “[a] record that is not otherwise exempt from access under [the RTKL] and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 [relating to open meetings] shall be a public record.” 65 P.S. § 67.708(b)(10)(ii). Accordingly, two requirements must be met for a record to be subject to public disclosure: 1) it must be presented to a quorum of the Borough Council; and 2) it must be presented for the Borough Council’s deliberation. Here, the proposed policies are deliberative in nature and were circulated among a quorum of Borough Council members. Attorney Love attests that the McNeilly Report was presented to the Borough Council and was the subject of deliberation. As a result, the Police Department Policy Review and proposed policies are not exempt under Section 708(b)(10) of the RKTL.

b. The McNeilly Report’s Police Department Policy Review and proposed internal policies are not personnel records

The Borough contends that the McNeilly Report’s Police Department Policy Review constitute personnel records exempt under Section 708(b)(7) of the RTKL. Section 708(b)(7) exempts from public disclosure “records relating to an agency employee[;]” including “(ii) [a] performance rating or review[;]” “(iii) [t]he result of a civil service test...[;]” “(vii) [w]ritten criticisms of an employee[; and]” “(viii) [i]nformation regarding discipline, demotion or discharge contained in a personnel file....” 65 P.S. §§ 67.708(b)(7)(ii)-(iii); 65 P.S. §§ 67.708(b)(7)(vii)-(viii). Based upon the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *See Bowling*, 990 A.2d at 824; *Gingrich v. Pa. Game Comm’n*, No. 1254 CD. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 (Pa. Commw. Ct. 2012) (“The RTKL must be construed to maximize access to government records”). However, as

previously discussed, the McNeilly Report's Police Department Policy Review consisted of a review of the effectiveness of internal Police Department policies is does not contain any information related to the Police Officer Conduct Review or other employee specific information that would be included in an employee's personnel file. As a result, the McNeilly Report's Police Department Policy Review is not exempt under Section 708(b)(7) of the RCTL. See 65 P.S. § 67.708(a)(1).

c. The McNeilly Report's Police Department Policy Review and proposed internal policies are not protected by the attorney work-product doctrine

As stated above, the attorney-work product doctrine prohibits disclosure “of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3.

While the McNeilly Report was not created by an attorney, the Commonwealth Court previously addressed the issue of expert reports prepared in anticipation of litigation in the context of a RCTL request, albeit in a non-binding memorandum opinion:

Case law has recognized that the primary purpose of Pa. R.C.P. No. 4003.5 is to avoid unfair surprise to an adversary concerning the facts and substance of an expert's proposed testimony. *Expressway 95 Business Center, LP v. Bucks County Board of Assessment*, 921 A.2d 70 (Pa. Cmwlth. 2007). Given this limited purpose, we do not believe that Pa. R.C.P. No. 4003.5 should be so expansively construed and applied as to vitiate the work product doctrine recognized in Section 102 of the [RCTL] and elaborated upon in Pa. R.C.P. No. 4003.3, as the doctrine relates to disclosure of “mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.”

Rittenhouse v. Board of Supervisors of Lower Milford Twp., 41 A.3d 975 (Pa. Commw. Ct. 2012). Attorney Love attests that:

4. On or about October 16, 2015, The Gettysburg Times published an article regarding the Taser incident because Twyman was acquitted on October 15, 2015 of criminal charges of resisting arrest during the May 12, 2015 incident.

5. On or about October 21, 2015, Fox43.com published an article regarding the Taser incident and the acquittal of Twyman. The article stated that “Twyman “is seeking an attorney to represent him in a possible civil lawsuit against Officer Folster and the Gettysburg Police Department[.]”

....

7. I reviewed the October 16 and October 21 articles and the body worn camera video which was uploaded to Youtube.com on or around October 15, 2015, and provided legal advice to the Borough regarding personnel-related liability. I recommended that the Borough hire third-party investigators to independently review and investigate the May 12, 2015 incident.

The OOR has reviewed the arguments and evidence presented by the parties and conducted an *in camera* review of the McNeilly Report’s Police Department Policy Review. Based on its *in camera* review, the Police Department Policy Review is not protected by Pa.R.C.P. No. 4003.5 as it does not contain Mr. McNeilly’s opinion related to “mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics” in anticipation of litigation. Further, Mr. McNeilly was retained by the Borough upon the recommendation of Attorney Love and was not hired by Attorney Love, Attorney Stotler, or the Borough Solicitor. Instead, with respect to the Police Department Policy Review and proposed policies, these portions of the document reflect Mr. McNeilly’s professional opinion of how the Police Department could function more effectively. These sections do not set forth Mr. McNeilly’s opinion with respect to the success of any pending or foreseeable litigation.² As a result, the Police Department Policy Review and proposed policies are not protected from disclosure under Pa.R.C.P. 4003.3, and are required to be disclosed.

Following an *in camera* review, the portions of the McNeilly Report incorporated in the Police Department Policy Review are as follows and are subject to disclosure:

² While the Borough claims that the proposed policies are also protected by the self-critical analysis privilege, that privilege is not recognized by Courts in the Commonwealth of Pennsylvania and will not be addressed for purposes of this final determination. *Van Hine v. Dep’t of State*, 856 A.2d 204, 212 (Pa. Commw. Ct. 2004) (noting that “[t]he self-critical analysis privilege remains largely undefined and has not generally been recognized”).

- Bates No. 1:
- Bates No. 2 (except for the first paragraph, sentences 2-5; the second paragraph, section headings I-III; and the final paragraph in its entirety);
- Bates No. 7-41 bolded recommendations numbers 1-5, 7-12, 14, 18-30, 35, 37-41, 43-58, 60-64, 66-74, 75 (the first sentence of the recommendation), and 76-78;
- Bates No. 15, fifth paragraph (except the first and last sentence);
- Bates No. 16, first paragraph;
- Bates No. 17, first full paragraph;
- Bates No. 18, last sentence beginning at the bottom of the page;
- Bates No. 19, first two lines at the top of the page;
- Bates No. 20, last sentence of the first paragraph following the first header;
- Bates No. 23, second full paragraph beginning “However” (except for the first sentence);
- Bates No. 25, the first and second heading appearing at the bottom of the page and the first paragraph following the headings;
- Bates No. 26, the first paragraph and third paragraph (first two sentences) following Recommendation 36, the heading appearing at the bottom of the page and the first paragraph following the header;
- Bates No. 27, the first two paragraphs (except for the second sentence of the first paragraph) following recommendation 40, the second paragraph (except for the second sentence) following Recommendation 41, and the bulleted paragraphs following Recommendation 42;
- Bates No. 28, first header and following three paragraphs (except for the second sentence of the second paragraph) and the first paragraph following Recommendation 45;
- Bates No. 29;
- Bates No. 32, first paragraph following Recommendation 52, the first paragraph following Recommendation 53 (except for the second to fourth sentence), and the first paragraph following Recommendation 55 (except for the second sentence);

- Bates No. 40, last paragraph beginning at the bottom of the page (except for the first two sentences);
- Bates No. 41, first two lines;
- McNeilly Report Section IV, Bates No. 43-45 and including recommendations 79-83 (except for the final paragraph of Bates No. 43);
- McNeilly Report, Section V (except for Bates No. 48, Recommendations 6, 13, 15, 17, 42, and 65; Bates No. 51 (the second and third sentence of recommendation 75, and Recommendation 16; Bates No. 55 (Recommendations 31-34, 36 and 59); and
- The proposed internal policy manual located at Bates No. 56-119.

5. The Confidentiality Agreements (Index Item 5) are subject to public access

The Borough also claims that the Confidentiality Agreements are subject to withholding under the attorney-client privilege. Mr. Gable describes these records as follows:

22. On or around February 2 and 3, 2016, Solicitor Eastman and Attorney Love provided me with legal advice regarding maintaining confidentiality of the substance of the information contained in the reports. Accordingly, I maintained both reports confidentiality and a copy of the report was made available in my office for the Borough Council and the Mayor ... to review. Borough Council members and the Mayor signed a confidentiality acknowledgement prior to reviewing the reports in my office. I prepared the confidentiality acknowledgment in consideration of the advice provided to me by Solicitor Eastman and Attorney Love that the contents of the reports and the reports themselves were confidential.

However, the evidence submitted by the Borough does not demonstrate that the Confidentiality Agreements are communications between an attorney and client or that the records contain any investigative information. Instead, it appears that the Borough Manager followed the advice of counsel to ensure that those reviewing the Reports understood the sensitive nature of the information contained therein. An *in camera* review confirms that Index Item 5 consists of seven signed agreements stating that the individuals will not disclose information that the

Borough considers privileged information. As a result, the records contained in Index Item 5 are subject to public access.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the Borough is required to provide the foregoing records within thirty days. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Adams County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 10, 2016

/s/ Benjamin A. Lorah

APPEALS OFFICER
BENJAMIN A. LORAH, ESQ.

Sent to: Jim Hale (via e-mail only);
Harold Eastman, Jr., Esq. (via e-mail only);
Sara Stull (via e-mail only)

³ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).