IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

MATTHEW E MURRAY

vs.

UPPER POTTSGROVE TOWNSHIP

NO. 2025-18276

NOTICE TO DEFEND – CIVIL

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

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LAWYER REFERENCE SERVICE
MONTGOMERY BAR ASSOCIATION
100 West Airy Street (REAR)
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IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

MATTHEW E MURRAY vs. UPPER POTTSGROVE TOWNSHIP	NO. 2025-18276

CIVIL COVER SHEET

State Rule 205.5 requires this form be attached to any document commencing an action in the Montgomery County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: Ariel Shapell, Esq., ID: 330409

Self-Represented (Pro Se) Litigant ☐

Class Action Suit ☐ Yes ☒ No

MDJ Appeal ☐ Yes ☒ No

Money Damages Requested ☐

Commencement of Action:

Complaint

Amount in Controversy:

Case Type and Code

Miscellaneous:

Other

Other: CIVIL COMPLAINT

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Counsel for Plaintiff

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

MATTHEW E. MURRAY, *Plaintiff* vs. UPPER POTTSGROVE TOWNSHIP, *Defendant.*	:	Docket No. _____ CIVIL DIVISION

COMPLAINT

NATURE OF THE ACTION

1. Defendant Upper Pottsgrove Township (the "Township"), through its Board of Commissioners (the "Board"), brought a meritless Strategic Lawsuit Against Public Participation ("SLAPP" lawsuit) against Plaintiff Matthew E. Murray in retaliation for his constitutionally protected advocacy challenging the Board's efforts to unlawfully develop a 36-acre property, the Thomas Smola Farm (the "Smola Farm"), that the Township purchased in 2008 for the purpose of preserving it as open space.

2. Mr. Murray used records he obtained from the Township through Right-to-Know Law ("RTKL") requests to inform his advocacy in the press, on social media, at Board meetings, and through litigation to stop the Board from unlawfully developing a municipal complex on the Smola Farm, which was public protected land. On February 7, 2023, Mr. Murray and Nathaniel Guest filed a lawsuit against the Township and its Commissioners, alleging that the Board was violating the Pennsylvania Open Space Act by seeking to develop the Smola Farm. Mr. Murray used contracts, ordinances, checks, and other information he received through his RTKL requests to prove his case at trial. On October 18, 2024, the Montgomery County Court of Common Pleas ruled for Mr. Murray, holding that the Township's planned development would violate the Act.

3. Less than three months later, the Board filed a lawsuit (the "RTKL Case") based on Mr. Murray's engagement in protected public expression, seeking an injunction prohibiting Mr. Murray from filing future RTKL requests with the Township.

4. On June 2, 2025, the Court of Common Pleas of Montgomery County dismissed the Board's RTKL Case, holding that the Board had no legal basis on which to state a claim for the unprecedented relief it had requested.

5. The Board's RTKL Case constituted a SLAPP lawsuit under Pennsylvania's Anti-SLAPP law, 42 Pa.C.S.A. §§ 8340.11-8340.18, because: (1) it was based on Mr. Murray's engagement in protected public expression; and (2) it failed to state a claim for relief.

6. Mr. Murray brings this action under 42 Pa.C.S.A. § 8320.1 seeking attorneys' fees incurred defending himself against the RTKL Case.

JURISDICTION AND VENUE

7. This Court has original jurisdiction over this action pursuant to 42 Pa.C.S. § 931(a).

8. Venue is proper in this Court, as the cause of action arises within the boundaries of Montgomery County (the "County"), Pennsylvania, and Defendant Upper Pottsgrove Township may be served in the County. Pa. R. Civ. P. 1006(a).

PARTIES

9. Plaintiff Matthew E. Murray is an adult individual over the age of eighteen who resides in the Township at 1530 Aspen Drive, Pottstown, Montgomery County, Pennsylvania 19464.

10. Defendant Upper Pottsgrove Township is a First Class Township. Its principal address is 1409 Farmington Avenue, Pottstown, Montgomery County, Pennsylvania 19464.

STATEMENT OF FACTS

Mr. Murray's Advocacy Against the Township's Unlawful Development of the Smola Farm

11. Mr. Murray is a dedicated advocate for the preservation of his Township's protected public land, including a tract known as the Smola Farm.

12. The Township purchased the Smola Farm in 2008 using proceeds from, and debt secured by, a tax Township citizens approved by referendum in 2006 in accordance with the Pennsylvania Open Space Act, 32 P.S. §§ 5001-5013 (the "Open Space Act" or the "Act").

13. The Open Space Act was enacted for the purpose of "preserv[ing] open space and to meet needs for recreation, amenity, and conservation of natural resources, including farm land, forests, and a pure and adequate water supply." 32 P.S. § 5001. Local government units can impose taxes under the Act to raise revenues to purchase property. 32 P.S. § 5007.1. But such property may only be used to achieve limited, preservation-oriented purposes. 32 P.S. § 5005.

14. Thomas Smola owned the tract, which his family had farmed since the mid-nineteenth century.

15. Upon information and belief, Mr. Smola sold his family's farm to the Township based on Township leadership's assurances that the land would not be developed.

16. But in 2020, the Board began developing plans to build a municipal complex on the Smola Farm. The Board passed a resolution on August 15, 2022, to empower the Board president to make decisions necessary for the development of the complex.

17. Concerned that building the complex on the Smola Farm would violate the Open Space Act and contradict Mr. Smola's wishes, Mr. Murray began a campaign of public advocacy against the Board's planned development of the Smola Farm:

a. He voiced his concerns at public Board of Commissioners and Open Space and Recreation Board meetings. The development of the Smola Farm was a regular topic of discussion and voting at Board meetings, which are executive proceedings. *See, e.g.,* Upper Pottsgrove Township Board Meeting Minutes, January 27, 2025, https://uptownship.org/wp-content/uploads/2025/03/BOC-2025-01-27.pdf (last viewed Jul. 9, 2025) ("There was discussion on the budget and spending on litigations and the proposed municipal complex."); Board Meeting Minutes, March 18, 2024, https://uptownship.org/wp-content/uploads/2024/04/BOC-2024-03-18.docx (last viewed Jul. 9, 2025) (noting that Commissioner Read "expressed his concern that residents should beware of the misinformation about the current municipal complex site selection"); Board Meeting Minutes, January 17, 2023, https://uptownship.org/wp-content/uploads/2023/03/BOC-2023-01-17.pdf (last viewed Jul. 9, 2025) (noting several public comments regarding the Smola Farm development, including a suggestion that the Township "stop all work on Smola open space until a judge rules on the legality of building on open space").

b. He spoke with reporters, *see, e.g.,* Bo Koltnow, *Montgomery County man who won case over preserved open space continues fighting legal battles,* WFMZ (Mar. 18, 2025), https://www.wfmz.com/news/area/southeastern-pa/upper-montgomery-county/montgomery-county-man-who-won-case-over-preserved-open-space-continues-fighting-legal-battles/article_2a79da9e-0433-11f0-984f-07dc679e1af6.html (last viewed Jul. 7, 2025), and he endorsed an editorial in *The Mercury* criticizing the Board's unlawful development plans, *see* Kate Harper, *Guest column: Upper Pottsgrove moves ahead on construction on the Smola Farm despite citizens' pleas*, POTTSTOWN MERCURY (Apr. 8, 2024), https://www.pottsmerc.com/2024/04/08/guest-column-upper-pottsgrove-moves-ahead-on-construction-on-the-smola-farm-despite-citizens-pleas/ (last viewed Jul. 8, 2025).

c. He engaged with other Township residents through dozens of social media posts and comments regarding the Smola Farm. *See, e.g.,* October 18, 2024 Facebook Post by Matt Murray, https://www.facebook.com/photo/?fbid=1685929388645013&set=gm.2582260131958774&idorvanity=171732209678257 (last viewed Jul. 7, 2025) (including an image with text reading "[f]iscally irresponsible that any elected official would choose to spend $800 thousand dollars of taxpayer money prior to finding out if it was even legal to build on any property, including Smola Farm.").

d. Beginning on September 29, 2022, he began filing RTKL requests with the Township seeking information about the development of the Smola Farm. Mr. Murray used the information gleaned from the RTKL responses to further his other

advocacy. Additionally, Mr. Murray's RTKL requests demonstrated to the Board that their unlawful conduct was being monitored and disapproved of.

e. On February 7, 2023, Mr. Murray and Nathaniel Guest filed a civil action in the Montgomery County Court of Common Pleas against the Township and each of its Commissioners, alleging that their plans to develop the Smola Farm violated the Open Space Act (the "Smola Case"). *See* Complaint at 4-6, *Matthew Murray, et al. v. Trace Slinkerd, et al.*, No. 2023-02216 (Mont. Co. Ct. Com. Pl. Feb. 7, 2023), attached as "Exhibit A"; *id.* at 6-7 (additionally alleging a violation of the Environmental Rights Amendment to the Pennsylvania Constitution, Pa. Const. Art. I, § 27).

18. The Township's attempt to develop the Smola Farm, which was the basis for Mr. Murray's RTKL requests, has generated considerable community concern. A GoFundMe organized by Mr. Murray to "Save Smola Farm" has raised $27,372 from 149 donations as of July 3, 2025.[1] Similarly, a "Save Smola Farm" Facebook page has attracted 249 followers as of the same date.[2] The development of the Smola Farm has also been the subject of legitimate news interest, as evidenced by the numerous articles that have been published on the issue in multiple news outlets.[3]

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[1] *SAVE SMOLA FARM*, GOFUNDME, (Mar. 5, 2023) https://www.gofundme.com/f/save-smola-farm.

[2] *Save Smola Farm*, FACEBOOK, https://www.facebook.com/people/Save-Smola-Farm/100090583104008/.

[3] *See, e.g.,* Bo Koltnow, *Montgomery County man who won case over preserved open space continues fighting legal battles,* WFMZ (Mar. 18, 2025), https://www.wfmz.com/news/area/southeastern-pa/upper-montgomery-county/montgomery-county-man-who-won-case-over-preserved-open-space-continues-fighting-legal-battles/article_2a79da9e-0433-11f0-984f-07dc679e1af6.html (last viewed Apr. 10, 2025).
Evan Brandt, *UPDATED: Upper Pottsgrove seeks halt to Right to Know requests by activist,* POTTSTOWN MERCURY (Jan. 13, 2025) https://www.pottsmerc.com/2025/01/11/upper-pottsgrove-seeks-halt-to-right-to-know-requests-by-activist/, Hank Llewellyn, Don Read, and Trace Slinkerd, *Guest column: Upper Pottsgrove officials respond to op-ed on municipal building,* POTTSTOWN MERCURY (May 26, 2024), https://www.pottsmerc.com/2024/05/26/upper-pottsgrove-officials-respond-to-op-ed-on-municipal-building-project/, Kate Harper, *Guest column: Upper Pottsgrove moves ahead on construction on the Smola Farm despite citizens' pleas,* POTTSTOWN MERCURY (Apr. 8, 2024) https://www.pottsmerc.com/2024/04/08/guest-column-upper-pottsgrove-moves-ahead-on-construction-on-the-smola-farm-despite-citizens-pleas/, Frank Kummer, *Judge rules in*

19. On October 18, 2024, the Montgomery County Court of Common Pleas ruled "that the Smola Farm was subject to the open-space restrictions imposed by the Open Space Lands Act and that the proposed construction would violate those restrictions." Opinion at 5, *Matthew Murray, et. al. v. Trace Slinkerd, et. al.*, No. 2023-02216 at 1 (Mont. Co. Ct. Com. Pl. Jun. 13, 2025), attached as "Exhibit B." The Court granted Mr. Murray's requested "declaratory and injunctive relief against construction of the municipal complex on the Smola Farm." *Id.* The Township's appeal of the Court's ruling is pending.

20. The documents the Township produced in response to Mr. Murray's RTKL requests played an essential role in Mr. Murray's ability to successfully prosecute the Smola Case.

21. Mr. Murray's October 26, 2022, RTKL request yielded a check for the purchase price of the Smola Farm. The check, which was drawn on the Township's Open Space Fund, was used by Mr. Murray as an exhibit at trial and was cited by the trial court in its 1925(b) opinion as evidence that the Smola Farm "purchase payment was made from an account containing … commingled funds, which included open-space tax revenues." Ex. B at 17.

22. In all, 10 of the 21 exhibits included on Mr. Murray's list of exhibits for trial included documents produced in response to Mr. Murray's RTKL requests. *See* Plaintiffs' List of Exhibits for Trial on 10/9/2024 to 10/10/2024, attached as "Exhibit C."

The Township's SLAPP Suit Seeking to Prevent Mr. Murray from Filing RTKL Requests

23. On January 9, 2025, the Township filed a civil action in the Montgomery County Court of Common Pleas (the "RTKL Case").

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favor of Montco residents opposed to using farm for municipal complex, PHILADELPHIA INQUIRER (Oct. 21, 2024), https://www.inquirer.com/news/pennsylvania/upper-pottsgrove-township-smola-farm-ruling-20241021.html.

24. The lawsuit alleged that Mr. Murray's filing of RTKL requests for documents from the Township constituted abuse of process and wrongful use of civil proceedings. *See* Complaint at 6-8, *Upper Pottsgrove Township v. Matthew Murray*, No. 2025-00481 (Mont. Co. Ct. Com. Pl. Jan. 9, 2025), attached as "Exhibit D."

25. The Township sought a permanent injunction barring Mr. Murray from filing any further RTKL requests on the Township. *Id.* at 9.

26. Prior to filing the RTKL Case, the Township was aware that Section 506 of the RTKL, not a civil action for injunctive relief, was the exclusive remedy for allegedly disruptive RTKL requests.

27. In an October 24, 2024 Final Determination, the Office of Open Records granted Mr. Murray's appeal of a RTKL request and explained that "Section 506(a) of the RTKL provides that '[a]n agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.'" Final Determination at 4, *Matt Murray, Requester, v. Upper Pottsgrove Township, Respondent*, Docket No. AP 2024-2523 (Oct. 24, 2024) (quoting 65 P.S. § 67.506(a)), attached as "Exhibit E." The Office of Open Records held that "the Township has not demonstrated that the instant Request is repetitive and burdensome." *Id.* at 5.

28. Additionally, Township solicitor, Eric C. Frey, admitted at oral argument on the preliminary objections on June 2, 2025, that prior to filing the RTKL Case, "the Office of Open Records informed us [] that they only have the ability under the law to stop right-to-know requests if they are repetitive and unduly burdensome." Transcript of Oral Argument on Motions in Limine at 8-9, *Upper Pottsgrove Township v. Matthew Murray*, No. 2025-00481 (Mont. Co. Ct. Com. Pl. Jun. 2, 2025), attached as "Exhibit F."

29. The Township's purpose in filing the RTKL Case was to punish Mr. Murray for his successful advocacy against the development of the Smola Farm and to make it more difficult for him to engage in such advocacy in the future.

30. The Township issued a press release concurrent with its filing of the RTKL Case entitled "Upper Pottsgrove Township Files Legal Action Against Matthew E. Murray Over Right-to-Know Law Abuse." *See* January 9, 2025 Press Release, attached as "Exhibit G."

31. Mr. Murray sought immunity under section 8340.15 in the RTKL Case through his January 17, 2025 Response of Defendant Matthew E. Murray in the Nature of a Motion to Dismiss the Petition of Plaintiff Upper Pottsgrove Township for Preliminary and Final Injunction and Asserting a Motion Under the Pennsylvania SLAPP Law, attached as "Exhibit H," his February 3, 2024 Defendant Matthew E. Murray's Preliminary Objections to the Complaint, attached as "Exhibit I," and his counsel's March 27, 2025 letter titled Request to Schedule an Anti-SLAPP Hearing in *Upper Pottsgrove Township v. Matthew E. Murray*, No. 2025-00481, attached as "Exhibit J."

32. However, Judge Saltz declined to rule on Mr. Murray's section 8340.15 immunity claims. *See* April 8, 2025 Email from Melody Infantolino, Judicial Assistant to Judge Saltz, to Plaintiff's counsel, attached as "Exhibit K" ("Per the Judge … relief [under section 8340.15] cannot be sought through Preliminary objections").

33. At a January 22, 2025, hearing to consider the Township's Petition for Preliminary and Final Injunction, the Honorable Judge Jeffrey S. Saltz denied the Township's requested preliminary relief, holding that the Township had failed to "establish a clear right to relief." Transcript of Hearing on Petition for Preliminary and Final Injunction at 25, *Upper Pottsgrove*

Township v. Matthew Murray, No. 2025-00481 (Mont. Co. Ct. Com. Pl. Jan. 22, 2025), attached as "Exhibit L."

34. Noting that the RTKL protected government agencies from "disruptive requests" by allowing these entities to deny repetitive requests by a single requestor for the same records that place an unreasonable burden on the agency, *id.* at 23-24, the Court held that the Township had offered no legal basis for its request to bar Mr. Murray from filing his non-disruptive requests on the Township, *id.* at 25.

35. On February 27, 2025, the American Civil Liberties Union of Pennsylvania (the "ACLU-PA") sent a letter to Township solicitor Eric C. Frey informing him that the Township's lawsuit was "meritless" and that it "seeks to silence Mr. Murray in retaliation for his successful litigation and advocacy challenging the Township's unlawful attempts to develop the Smola Farm open space." *See* ACLU-PA Letter to Eric C. Frey at 1, February 27, 2025, attached as "Exhibit M." The letter "urge[d] the Township to immediately withdraw its RTKL Lawsuit or we will seek all remedies available under the Pennsylvania Anti-SLAPP statute." *Id.*

36. Despite the Court's holding that the Township had failed to establish any legal basis for its cause of action or the sweeping relief it requested and the ACLU-PA's letter, the Township continued to litigate the case.

37. On June 2, 2025, Judge Saltz sustained Mr. Murray's preliminary objections in the RTKL Case, holding that the Township had failed to establish a right to relief, and dismissed the case. *See* Order at 1, *Upper Pottsgrove Township v. Matthew E. Murray*, No. 2025-00481 (Mont. Co. Ct. Com. Pl. Jun. 2, 2025), attached as "Exhibit N"; *see also* Exhibit F at 15-16 (adhering to the Court's ruling at the preliminary injunction hearing that the "township was not entitled to

injunctive relief … based under Section 506 [and Section 1308] of the right-to-know law.") The Court did not make a determination on immunity under 42 Pa.C.S.A. § 8340.15.

38. The Township did not file a notice of appeal in the RTKL Case prior to the 30-day appeal deadline.

COUNTS

COUNT I
(Violation of Pennsylvania's Anti-SLAPP Law, 42 Pa.C.S.A. § 8320.1)

39. 42 Pa.C.S.A. § 8320.1 provides that "[a] person has a cause of action if, in a previous cause of action based on protected public expression: (1) the person would have prevailed on a ground under section 8340.15 (relating to grant of immunity); but (2) the court did not make a determination on immunity under section 8340.15."

40. The Township's RTKL Case was based on Mr. Murray's protected public expression because it sought to punish him for his advocacy and restrict his ability to engage in future advocacy. Mr. Murray's RTKL requests impressed on the Board that he was monitoring their unlawful attempts to develop the Smola Farm. Additionally, Mr. Murray used the records produced by the Township in his advocacy in the press, at Board meetings, online, and in litigation in the Smola Case.

41. Mr. Murray's advocacy against the Township's development of the Smola Farm, including his submission of RTKL requests to the Township and subsequent use of the records he obtained at trial, constituted an exercise, on a "matter of public concern," of his rights to freedom of speech and petition under the United States and Pennsylvania constitutions.

42. Mr. Murray's advocacy also constituted communication on an issue under consideration or review in an executive proceeding.

43. The Township's RTKL Case was not filed for the purpose of enforcing a law, regulation, or ordinance.

44. The Township's RTKL Case failed to state a cause of action upon which relief could be granted.

45. Accordingly, Mr. Murray was immune from liability in the RTKL Case under Section 8340.15.

46. Additionally, the Court in the RTKL Case did not make a determination on immunity under section 8340.15

PRAYER FOR RELIEF

WHERFORE, for all of the foregoing reasons, Plaintiff requests the following relief:

1. Attorney fees, court costs and expenses of litigation in the RTKL Case.

2. Such other relief as the Court may deem just and appropriate.

Dated: July 15, 2025

Respectfully submitted,

/s/ Ariel Shapell

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Counsel for the Plaintiff

VERIFICATION

I, Matthew E. Murray, hereby state that the averments contained in the foregoing pleadings are true and correct to the best of my personal knowledge, information, and belief, and that I understand that the statements therein are made subject to the penalties of 18 Pa.C.S. 4904, relating to unsworn falsification to authorities.

Dated: 7-15-2025

Matthew E. Murray

Exhibit A

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

MATTHEW E MURRAY

vs.

TRACE SLINKERD PRESIDENT

NO. 2023-02216

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IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

MATTHEW E MURRAY

vs.

TRACE SLINKERD PRESIDENT

NO. 2023-02216

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Name of Plaintiff/Appellant's Attorney: CATHERINE M HARPER, Esq., ID: 34568

Self-Represented (Pro Se) Litigant [ ]

Class Action Suit [ ] Yes [X] No

MDJ Appeal [ ] Yes [X] No

Money Damages Requested [X]

Commencement of Action:

Complaint

Amount in Controversy:

More than $50,000

Case Type and Code

Miscellaneous:

Declaratory Judgment

Other:

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Attorney for Plaintiffs

MATTHEW E. MURRAY 1530 Aspen Drive Pottstown, PA 19464	: IN THE COURT OF COMMON PLEAS : OF MONTGOMERY COUNTY : CIVIL DIVISION - EQUITY
and	: NO.
NATHANIEL C. GUEST 1682 Farmington Avenue Pottstown, PA 19464 Plaintiffs v.	
TRACE SLINKERD, PRESIDENT c/o Upper Pottsgrove Township Building 1409 Farmington Avenue Pottstown, PA 19464-1829	
AND	
CATHY PARETTI, COMMISSIONER c/o Upper Pottsgrove Township Building 1409 Farmington Avenue Pottstown, PA 19464-1829	
AND	
HANK LLEWELLYN, COMMISSIONER c/o Upper Pottsgrove Township Building 1409 Farmington Avenue Pottstown, PA 19464-1829	
AND	
DON READ, COMMISSIONER c/o Upper Pottsgrove Township Building 1409 Farmington Avenue Pottstown, PA 19464-1829	

AND :
:
DAVE WALDT, COMMISSIONER :
c/o Upper Pottsgrove Township Building :
1409 Farmington Avenue :
Pottstown, PA 19464-1829 :
:
AND :
:
UPPER POTTSGROVE TOWNSHIP :
1409 Farmington Avenue :
Pottstown, PA 19464-1829 :
Defendants :

NOTICE TO DEFEND

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Attorney for Plaintiffs

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AND :
:
DAVE WALDT, COMMISSIONER :
c/o Upper Pottsgrove Township Building :
1409 Farmington Avenue :
Pottstown, PA 19464-1829 :
:
AND :
:
UPPER POTTSGROVE TOWNSHIP :
1409 Farmington Avenue :
Pottstown, PA 19464-1829 :
Defendants :

COMPLAINT FOR DECLARATORY JUDGMENT AND IN EQUITY

I. STATEMENT OF THE FACTS

1. The Plaintiffs are adult citizens and taxpayers of Upper Pottsgrove Township. Matthew E. Murray resides at 1530 Aspen Drive, Pottstown, Montgomery County, Pennsylvania 19464, and Nathaniel C. Guest resides at 1682 Farmington Avenue, Pottstown, Montgomery County, Pennsylvania 19464.

2. The Defendants, Trace Slinkerd, Cathy Paretti, Hank Llewellyn, Don Read, and Dave Waldt, are all Commissioners of Upper Pottsgrove Township, duly elected to serve in local government. The Township building is located at 1409 Farmington Avenue, Pottstown, Montgomery County, Pennsylvania 19464-1829.

3. By Resolution No. 749, on August 15, 2022, the Upper Pottsgrove Township Board of Commissioners knowingly selected 370 Evans Road, the Smola Farm, as the site of its new municipal complex for "administrative, police, road and maintenance facilities of the Township," and authorized a "credit to the open space fund," for "the amount determined to represent the value of the ground to be used for the Township Municipal Building," despite the

land having been purchased with Open Space Tax funds and dedicated to public open space use. See Resolution No. 749, attached hereto as Exhibit A.

4. On October 17, 2022, in response to a request from the Board of Commissioners, Township Solicitor Eric C. Frey, of the law firm of Dischell, Bartle, Dooley, in Lansdale, issued a legal opinion in response to arguments made by the Open Space Committee of the Township, that a certain parcel of Township open space known as the "Smola Farm," could be used for the construction of a new municipal complex.

5. The Board of Commissioners is currently in the process of expending thousands of taxpayer dollars on engineering and architectural consultants in order to construct a new Township Municipal Complex on the Smola Farm, land purchased pursuant to the Township's Open Space Tax Ordinance, and prized by the Township Open Space Committee and citizens as permanently preserved open space.

6. By deed dated December 30, 2008 and recorded in the Montgomery County Office for Recorder of Deeds at Deed Book 5719, Pages 104-108, the Commissioners of Upper Pottsgrove Township at that time, purchased Lot #2 on a Plan of Subdivision prepared for Thomas Smola for $450,000.

7. An Agreement of Sale dated November 17, 2008 provided for the purchase of Lot #2, a portion of the 44-acre Smola Farm by Upper Pottsgrove Township for $450,000 "with the intent to utilize the premises for Township open space."

8. The parties made the sale on December 30, 2008 and the seller retained an 8-acre tract and the balance was sold to Upper Pottsgrove Township as preserved Open Space.

9. The Plan of Minor Subdivision approved by Upper Pottsgrove Township and signed by the Commissioners and Thomas Smola at settlement at the time identified 36.470 acres located on Moyer Road near its intersection with Farmington Avenue and the property to be

purchased (Lot #2) as follows: "Lot #2 is to be used for public open space subject to the requirements of Montgomery County's Green Fields/Green Towns Program (County Open Space Program)."

10. In 2006, by referendum, the citizens of Upper Pottsgrove Township had approved a tax on themselves via Ordinance No. 406, to pay for the preservation of open space in accordance with the Pennsylvania Open Space Act, 32 P.S. Section 5001 et. seq.

11. Monies from the Upper Pottsgrove Township Open Space Tax were used to purchase the Smola Farm, funded by borrowing 2.5 million dollars via Ordinance No. 425 on June 2, 2008.

12. In addition to the purchase of the Smola Farm with funds generated by the open space tax, Upper Pottsgrove has long identified the land as part of its "permanently preserved open space" in its Open Space Plan adopted April 2, 2020. The land is identified as "Smola Open Space, West Moyer Road, passive, 35.2 acres of public permanently protected land."

13. On November 9, 2022, the Upper Pottsgrove Commissioners, Defendants herein, hired a civil engineering firm to help design a new $5.5 million dollar municipal building to be built on the Smola Farm open space.

COUNT I
MURRAY AND GUEST V. UPPER POTTSGROVE COMMISSIONERS
DECLARATORY JUDGMENT

14. Paragraphs 1 through 13 are incorporated herein as fully as though set forth verbatim.

15. Use of the Smola Farm, permanently protected open space, for the construction of a new municipal complex, instead of preservation as open space, violates the Pennsylvania Open Space Lands Act, 32 P.S. §5001 et. seq.

16. Upper Pottsgrove Township may not use land acquired with its local open space tax under Open Space Lands Act for a construction project or the development of the piece as these uses would violate the Open Space Lands Act, which provides the appropriate purposes for use of the open space tax money in §5005 and construction and/or development with buildings and associated parking lots, stormwater facilities, and manicured lawns is not a permitted use. 32 P.S. §5005.

17. The Upper Pottsgrove Township Board of Commissioners did not follow the Open Space Lands Act with respect to the "termination or disposition of open space property interests," in §5010, even if it is determined that that section is applicable to the construction of a municipal complex on lands permanently preserved as open space under the Act. 32 P.S. §5010.

18. The Upper Pottsgrove Board of Commissioners has also violated the Pennsylvania Donated or Dedicated Property Act, 53. P.S. §§3381-3386, in moving forward with plans to build a municipal complex on permanently preserved open space.

19. Upper Pottsgrove Township Board of Commissioners has not followed the process laid out in the Donated or Dedicated Property Act, which requires that all such lands be used for the purpose for which they were originally dedicated except as modified by an Orphans' Court Order, and further requires that land or property of equal value be substituted for the land dedicated to a public open space use to use the land for development.

20. Upper Pottsgrove Township Commissioners, Defendants herein, have not sought Orphans' Court approval or offered to permanently preserve replacement lands, and are, instead, spending taxpayer dollars to construct a municipal complex on land that the Township itself has dedicated to permanent preservation as open space.

WHEREFORE, the Plaintiffs respectfully pray this Honorable Court will declare the Upper Pottsgrove Commissioners in violation of the Pennsylvania Open Space Lands Act law

and the Donated or Dedicated Property Act law as a result of their expenditure of taxpayer funds to plan and construct a municipal complex on the permanently preserved Smola Farm, purchased with Upper Pottsgrove Open Space tax monies and dedicated to permanent preservation by Upper Pottsgrove Township.

COUNT II
EQUITY

21. Paragraphs 1 through 20 are incorporated herein as fully as though set forth verbatim.

22. The Upper Pottsgrove Board of Commissioners, Defendants herein, have defied, and continue to defy the requirements of the Pennsylvania Open Space Lands Act, the Donated or Dedicated Property Act, the Township's stated intentions regarding the permanent preservation of the Smola Farm as open space, and the wishes of the taxpayers who are still paying the Upper Pottsgrove Township Open Space Tax and its own citizens, represented by the Plaintiffs herein.

23. The taxpayer citizens and community environment of Upper Pottsgrove Township will be permanently harmed if the Board of Commissioners of Upper Pottsgrove Township is permitted to plan and build a municipal complex on land designated as a permanently preserved open space site.

24. Some funds generated by the Open Space tax may be used to "maintain" open space land purchased with tax money.

25. The actions of the Upper Pottsgrove Commissioners also violate Article I, Section 127 of the Constitution of Pennsylvania which provides, "The people have a right to clean air, pure water and to the preservation of the natural, scenic, historic and esthetic values of the

environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come..."

WHEREFORE, Plaintiffs herein respectfully request that this Honorable Court will enter an Order permanently enjoining the use of the Smola Farm for the construction of a municipal complex, and will award the Plaintiffs herein attorneys' fees to reimburse them for their efforts to maintain the Smola Farm as permanently protected open space.

Respectfully submitted,

Date: 2.7.2023

By: _____

Catherine M. Harper, Esquire
Attorney I.D. 34568
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P.O. Box 7544
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email: charper@timoneyknox.com
Attorney for Plaintiffs

VERIFICATION

I, Matthew E. Murray, verify that the statements set forth in the forgoing Complaint are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A., Section 4904 relating to unsworn falsification to authorities.

Matthew E. Murray

Dated: 2-7-2023

RESOLUTION NO. 749

A RESOLUTION REGARDING THE USE OF PROCEEDS FROM UPPER POTTSGROVE WASTEWATER MANAGEMENT SYSTEM, SELECTION OF SITE FOR TOWNSHIP MUNICIPAL BUILDING, CREDIT TO THE OPEN SPACE FUND, SELECTION OF ARCHITECT AND DESIGN FOR TOWNSHIP MUNICIPAL BUILDING, AND AUTHORIZING ACTION BY PRESIDENT OF BOARD OF COMMISSIONERS TO EFFECTUATE THE SAME

WHEREAS, the Upper Pottsgrove Township Board of Commissioners sold the Upper Pottsgrove Wastewater Management System on or about April 20, 2020, which sale closed on June 30, 2022; and

WHEREAS, the Board adopted Resolution No. 747 on July 18, 2022, regarding the use of the proceeds from the sale of the Township Wastewater Management System; and

WHEREAS, the Board desires to further authorize the use of the proceeds for the development of a Township Municipal Building and to authorize all action to be taken to utilize the proceeds for such purpose.

NOW, THEREFORE, BE IT HEREBY RESOLVED, by the Board of Commissioners of Upper Pottsgrove Township, Montgomery County, Pennsylvania, as follows.

Section 1. Selection of site for Township Municipal Building

The Board of Commissioners selects the tract located at 370 Evans Road, parcel number 60-00-02089-01-1, as the site of the Township Municipal Building designed to house and support the administrative, police and road and maintenance facilities of the Township.

Section 2. Credit to Open Space Fund

The Board of Commissioners authorizes a credit to the open space fund with the amount determined to represent the value of the ground to be used for the Township Municipal Building against the debt repayment structure which was outlined in item (I)(e) of Resolution 747

Section 3. Selection of Architect

The Board of Commissioners hereby selects Alloys as the chief architect and as the primary project manager for the construction of the Township Municipal Building.

Section 4. Design of Township Municipal Building

The Board of Commissioners hereby selects the general design of the Township Municipal Building as presented by Alloys with adjustments considered by the Board as appropriate with the current cost target of $5.5 million.

EXHIBIT A

Section 5. Authorization

The Board of Commissioners hereby authorizes the president of the Board or a person duly appointed by the President of the Board to make decisions and to execute documents related to the construction and completion of the Township Municipal Building as may be required during the design and completion of the same. The President of the Board may request further Board approval of such items he or she feels better suited for Board level decisions or at the recommendation of the Township solicitor.

RESOLVED AND ADOPTED, this 15th day of August, 2022.

UPPER POTTSGROVE TOWNSHIP
BOARD OF COMMISSIONERS

By: _____
Tr[illegible]e Slinkerd, President

ATTEST:
Jeannie DiSante, Township Secretary

Exhibit B

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL DIVISION - LAW

MURRAY, MATTHEW	:	NO. 2023-02216
	:	
v.	:	
	:	294 CD 2025
SLINKERD, TRACE PRESIDENT	:	

OPINION

SALTZ, J. **June 13, 2025**

I. HISTORY OF THE CASE

This case raises issues under a statute commonly known as the Open Space Lands Act, 32 P.S. §§ 5001-5013 ("Act"). The Act is intended to "clarify and broaden the existing methods by which the Commonwealth and its local government units may preserve land in or acquire land for open space uses." Act § 1, 32 P.S. § 5001. In 2006, pursuant to the Act, the citizens of Upper Pottsgrove Township, a township of the first class ("the Township"), voted by public referendum to impose upon themselves a new earned income tax to raise revenue for the acquisition and preservation of open-space land. In 2008, using funds from the account established for the revenues from the open-space tax, including funds borrowed by the Township on a pledge of its open-space tax revenues, the Township purchased a tract of land known as the Thomas Smola Farm ("Smola Farm"). The Township designated the land to be preserved as open space.

More recently, however, the Township Commissioners determined that the Township needs a new municipal building complex and identified the Smola Farm as the site for the new complex. In this suit by two residents and taxpayers of the Township, the Court, after a nonjury trial, concluded that the Township's construction plans would violate its statutory obligation to use open-space tax revenues solely for the acquisition and preservation of open-space lands and

related uses. The Court therefore enjoined the Township from proceeding with the planned construction. The Township and its Commissioners have appealed to the Commonwealth Court, prompting this Opinion.

Most of the historical facts underlying this matter are not in dispute. As authorized by the voter referendum held in November 2006 pursuant to the Act, the Township has collected an open-space tax of 0.25% on earned income, currently generating approximately $555,000 per year. (Stip. ¶¶ 1-2;[1] Ex. P-1.) The Township held revenues from the tax in an Open Space Fund and it purchased several tracts of land with these tax revenues. During 2007, the Township also added to the Open Space Fund $360,000 in *general* tax revenues, transferred from the Township's Capital Fund.

On June 2, 2008, the Township enacted Ordinance No. 425, authorizing the issuance of debt to borrow $2,500,000 in Guaranteed Open Space Revenue Notes Series of 2008 ("the 2008 Notes"). (Stip. ¶ 5.)[2] The 2008 Notes were specifically described as funding certain capital projects including "[t]he conservation and protection of open spaces, forests, woodlands, farmlands, park lands, undeveloped lands adjoining park or recreation sites, scenic areas and sites of historic, geologic or botanic interests through fee simple purchase or acquisition of development rights." (Stip. ¶ 6; Ex. P-20, Ord. No. 425, p. 2.) The Ordinance provided that to secure repayment of the 2008 Notes, the Township primarily pledged revenues from the open-space earned income tax; in the case of a deficiency, the Township secondarily pledged its full faith and credit. (Ex. P-20, Ord. No. 425, § 7; Ex. P-3.) The Ordinance further provided that periodic payments of interest and portions of the principal would be made on the 2008 Notes in

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[1] Citations to "Stip" refer to the Stipulation of Agreed Facts submitted by counsel.

[2] The bond offering also included borrowing $500,000 for the sewer fund.

accordance with an amortization schedule. (Ex. P-20, Ord. No. 425, § 4.) In that regard, the Ordinance recited that "the Township expects the revenues received from the Open Space Tax . . . will be sufficient to pay the debt service of the 2008 Open Space Notes." (Ex. P-20, Ord. No. 425, p. 2.)

Pursuant to the Ordinance, the 2008 Notes were issued. The proceeds, in the amount of $2,500,000, were deposited in the Township's Open Space Fund. (Tr. 10/9/24, at 52.) During the years that the 2008 Notes were outstanding (until they were refinanced in 2013, as set forth below), the periodic payments under the amortization schedule were paid from the Open Space Fund, which included open-space tax revenues. (Tr., 10/9/24, at 21, 27, 87-88.) As the Township itself has acknowledged: "Some installment payments on the 2008 Note were made *after* the Smola tract was purchased, using open space tax revenue." (Br. in Supp. of Defs.' Post-Trial Mots. at 7.)

Also during 2008, the Township prepared to purchase the Smola Farm from Thomas Smola. Mr. Smola's property consisted of a farmhouse and related buildings and approximately 36 acres of open agricultural land, divided by a public street. On December 1, 2008, the Township approved a subdivision plan, subdividing the farmhouse and buildings from the open land. The approved subdivision plan was recorded. In the Notes to the Subdivision Plan, item 9 read: "Lot #2 [i.e., the property to be purchased by the Township] is to be used for public open space subject to the requirements of Montgomery County's Green Fields/Green Towns Program (County Open Space program)." (Ex. P-5.) In fact, however, for reasons that are not clear, the property was never included in Montgomery County's Green Fields/Green Towns program. (Tr., 10/9/25, at 215.)

Closing on the purchase of the Smola Farm was held on December 30, 2008. The Deed to the Township recited a purchase price of $450,000 and made express reference to the Subdivision Plan. (D-1.) The check delivered at closing was drawn on the Township's Open Space Fund. (Ex. P-7.)[3]

In 2010, the Township agreed to the placement of a cellphone tower on the Smola Farm. The tower was erected on the edge of the property, occupying approximately 2,100 square feet. There was no significant public outcry or protest over this use of the property. Except for the cell tower, the Smola Farm has been used solely for farming and has remained open space. (Tr., 10/9/24, at 47-48, 98.)

In 2013, the Township refinanced its debt obligations under the 2008 Notes. Those Notes were refinanced by a new bond issue — General Obligation Bonds, Series of 2013 ("the 2013 Notes"). To secure repayment of the 2013 Notes, the Township pledged its general revenues. The 2013 Notes were not specifically secured by open-space tax revenues. (Ex. D-13.)

In 2020, the Township adopted an updated Open Space Plan, which included designations of both permanently protected and temporarily protected land. The Smola Farm was designated as "Permanently Protected Land." (Ex. P-9, p. 25, fig. 3.1.)

Subsequently, the Township began exploring potential sites for the construction of a new municipal building complex. The Township Commissioners ultimately identified the Smola Farm as the best location for the complex. As planned, the complex would consist of multiple buildings, comprising Township offices, a police station, and a public works building, including a salt shed and a garage for the storage of heavy equipment and supplies, together with

[3] The check was in the amount of $418,277.79. Presumably the difference between that figure and the $450,000 purchase price had been previously deposited as a down payment or perhaps reflected adjustments made at closing. The record is silent on this point.

associated parking lots. The proposed complex, including the buildings, parking lots, and stormwater management facilities, would occupy approximately 3.5 acres of the Smola Farm, including 1.2 paved acres.[4] (Tr., 10/11/24, at 8-9, 29-30.)[5]

On February 7, 2023, Plaintiffs Matthew E. Murray and Nathaniel C. Guest, residents and taxpayers of the Township, commenced this action against the Township and its Commissioners by the filing of a Complaint, alleging that the proposed construction would violate both the Open Space Lands Act and 53 P.S. §§ 3381-3386, known as the Donated or Dedicated Property Act.[6] The Complaint sought a declaration to that effect, together with an injunction against construction of the municipal complex at the Smola Farm. Nonjury trial was held on October 9 and 11, 2024. Prior to trial, at the Court's direction, the parties filed a Stipulation of Agreed Facts ("Stip."), which the Court approved and adopted.

The Court issued its Decision on October 18, 2024. It determined that the Smola Farm was subject to the open-space restrictions imposed by the Open Space Lands Act and that the proposed construction would violate those restrictions. It therefore ruled that Plaintiffs were entitled to declaratory and injunctive relief against construction of the municipal complex on the Smola Farm. Having made that determination, the Court found it unnecessary to reach the Plaintiffs' alternative claim under the Donated or Dedicated Property Act. Finally, the Decision

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[4] In its Decision, this Court found that the complex would occupy approximately 3.2 acres (Decision, Finding No. 17), but it appears from the evidence that the correct figure is 3.5. The discrepancy is immaterial.

[5] The plan also provides for the installation of a trail system on remaining open space. Plaintiffs apparently have no objection to this portion of the plan.

[6] Plaintiffs' Complaint also made a passing reference to the Pennsylvania Environmental Rights Amendment, Pa. Const. art. I, § 27.

denied Plaintiffs' request for modification of the Deed to the Smola Farm by addition of an express restriction on development and also denied their request for attorney fees.

On October 28, 2024, the Township and its Commissioners filed Defendants' Post-Trial Motions. After briefing and oral argument, the Court entered an Order on February 18, 2025, denying the Post-Trial Motions and entering judgment in favor of Plaintiffs for the following relief:

> 1. The Court **DECLARES** that the property designated by the Township as the Smola Farm is subject to the restrictions and limitations of Act No. 1967-442 (Jan. 19, 1967), as amended by Act No. 1996-153 (Dec. 18, 1996), 32 P.S. §§ 5001-5013, commonly known as the Open Space Lands Act, and may be used only for purposes consistent with that Act.
>
> 2. Defendant Upper Pottsgrove Township and all persons acting under the authority of the Township, including its Commissioners, are **ENJOINED** from proceeding with the solicitation or acceptance of bids for the construction of the proposed municipal complex on the Smola Farm and from otherwise proceeding with the construction or installation of the proposed municipal complex on the Smola Farm.

On February 26, 2025, Defendants filed a timely Notice of Appeal to the Commonwealth Court, and on March 5, 2025, they filed a timely Concise Statement of Matters Complained of on Appeal ("Concise Statement").

II. DISCUSSION

A. Overview of the Open Space Lands Act

The Act was originally passed in 1967, Act No. 1967-442 (Jan. 19, 1967), and has been amended on several occasions. The provisions of the Act that are most pertinent to this case are set forth below.

Section 1 of the Act states its legislative purpose:

> It is the purpose of this act to clarify and broaden the existing methods by which the Commonwealth and its local government units may *preserve* land in or

> acquire land for open space uses. The Legislature finds that it is important to *preserve* open space and to meet needs for recreation, amenity, and conservation of natural resources, including farm land, forests, and a pure and adequate water supply. The acquisition and resale of property interests authorized by this act are hereby declared to be for the public benefit, for the advancement of the public health, safety, morals and general welfare of the citizens of the Commonwealth, and for the promotion of sound land development by *preserving* suitable open space and concentrating more dense development in nearby areas.

32 P.S. § 5001 (emphasis added). Section 2(1) of the Act defines "[o]pen space benefits" as follows:

> The benefits to the citizens of the Commonwealth and its local government units which result from the *preservation or restriction of the use* of selected predominantly undeveloped open spaces or areas, including but not limited to: (i) the protection and conservation of water resources and watersheds, by appropriate means, including but not limited to preserving the natural cover, preventing floods and soil erosion, protecting water quality and replenishing surface and ground water supplies; (ii) the protection and conservation of forests and land being used to produce timber crops; (iii) the protection and conservation of farmland; (iv) the protection of existing or planned park, recreation or conservation sites; (v) the protection and conservation of natural or scenic resources, including but not limited to soils, beaches, streams, flood plains, steep slopes or marshes; (vi) the protection of scenic areas for public visual enjoyment from public rights of way; (vii) the preservation of sites of historic, geologic or botanic interest; (viii) the promotion of sound, cohesive, and efficient land development by preserving open spaces between communities.

Id. § 5002(1) (emphasis added). Consistent with these provisions, section 5 of the Act, in stating the purposes for which property may be acquired under the Act, repeatedly uses the terms "protect" and "conserve." *Id.* § 5005(a)(1)-(8), (c).

As originally passed, the Act applied to acquisitions of real property only by the Commonwealth and by counties. *See* Act No. 1967-442, § 5 (Jan. 19, 1967) (enacting 32 P.S. § 5005). As part of extensive amendments passed in 1996, the scope of the Act was expanded to cover acquisitions by a "local government unit." Act No. 1996-153, sec. 1 (Dec. 18, 1996) (amending Act § 5(c), 32 P.S. § 5005(c)). That term was defined to include "a municipal corporation as defined in 1 Pa. C.S. § 1991," *id.*, sec. 1 (amending Act § 2(5), 32 P.S. § 5002(5)),

which includes an incorporated "township," Statutory Construction Act of 1972, § 1991, 1 Pa. C.S. § 1991.[7]

Section 7.1 of the Act addresses how a local government unit may raise revenue for the acquisition of property under the Act. 32 P.S. § 5007.1. The local government unit must first conduct a referendum of its voters to authorize a new tax dedicated to the acquisition and preservation of open space. *See* Act § 7.1(a.3), 32 P.S. § 5007.1(a.3).[8] In this case, as noted above, the voters of the Township passed a referendum authorizing a 0.25% earned income tax in November of 2006.[9]

Once the referendum is passed, the use of revenues obtained from the new tax is strictly limited. As the Act stood at the time of the referendum in this case, section 7.1(a) provided: "Revenue from the levy shall be used to retire the indebtedness incurred in purchasing interests in real property or in making additional acquisitions of real property for the purpose of securing an open space benefit or benefits under the provisions of this act . . . ." Act No. 1996-153, sec. 2 (Dec. 18, 1996) (adding 32 P.S. § 5007.1(a)). Shortly after the referendum in this case, section 7.1(a) was amended to add a further permitted use of the tax revenues: "Revenue from the levy may also be used for transactional fees that are incidental to acquisitions made in accordance with this act, including, but not limited to, costs of appraisals, legal services, title searches,

[7] The statutory definition of "municipal corporation" was subsequently added directly to the language of section 2 of the Act. Act No. 2006-4, sec. 1 (Feb. 2, 2006) (adding § 2(5.1), 32 P.S. § 5007(5.1)).

[8] At the time of the referendum in this case, the statutory provision requiring a referendum was in section 7.1(a), 32 P.S. § 5007.1(a); *see* Act No. 1996-153, sec. 2 (Dec. 18, 1996) (adding section 7.1). The provision was redesignated as section 7.1(a.3) by the 2013 amendments. Act No. 2013-115, sec. 1 (Dec. 13, 2013).

[9] In 2013, section 7.1 was further amended to provide that when the voters have approved a referendum to impose an open-space tax, that tax may be repealed only by a new voter referendum held no sooner than five years after the approval of the tax. Act No. 2013-115, sec. 1 (Dec. 13, 2013) (adding § 7.1(a.3), (a.4), 32 P.S. § 5007.1(a.3), (a.4)).

document preparation, title insurance, closing fees and survey costs." Act No. 2006-154, sec. 1 (Nov. 29, 2006) (amending 32 P.S. § 5007.1(a)).[10]

The Act also addresses disposition by a local government unit of property acquired under the Act, depending on whether or not the acquired interest in the property was a fee simple interest. For property acquired other than in fee simple, section 10(b) of the Act provides an elaborate procedure that a local government unit must follow if it "determines that it is essential

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[10] Section 7.1(a) has been further amended though legislation passed after the issuance of the 2008 Notes and the purchase of the Smola Farm. As currently in effect, the permitted uses are as follows:

> Revenue from the levy may only be used for the following:
>
> (1) to retire the indebtedness incurred in purchasing interests in real property or in making additional acquisitions of real property for the purpose of securing an open space benefit or benefits under the provisions of this act . . . ;
>
> (2) for transactional fees that are incidental to acquisitions made in accordance with this act, including, but not limited to, costs of appraisals, legal services, title searches, document preparation, title insurance, closing fees and survey costs;
>
> (3) for expenses necessary to prepare the resource, recreation or land use plan required under section 3; or
>
> (4)(i) annually, up to 25% of any accumulated balance of the fund from the levy authorized by referendum, to develop, improve, design, engineer and maintain property acquired for an open space benefit or benefits; or
>
> (ii) alternatively, for purposes of allocation, the local government unit may create a maintenance fund into which the local government unit may deposit in an amount up to 25% of the annual revenue from the levy authorized by referendum, to develop, improve, design, engineer and maintain property acquired for an open space benefit or benefits.

32 P.S. § 5007.1(a).

At trial, the Township suggested that it is permitted to "develop" the Smola Farm pursuant to the amended provisions of section 7.1(a)(4), even though in context those provisions permit only development consistent with the "open space benefit or benefits" for which the property had been originally acquired. In any event, the Township does not appear to be pressing this argument in its Concise Statement — perhaps because the cost of installing the municipal complex at the Smola Farm would far exceed 25% of the Township's open-space tax revenues. (Tr. 10/9/24, at 189 (Township has already spent approximately $800,000 on engineering costs for the municipal complex).)

for the orderly development of an area to terminate or sell open space property interests acquired under this act other than property held in fee simple." 32 P.S. § 5010(b). The required procedure includes approval by the planning commission serving the municipality, a tender of the property back to the party from whom it was acquired for the same purchase price, and a new public referendum to approve the disposition of the property.

Very different requirements apply to property acquired in fee simple. Under the 1996 amendments that expanded the scope of the Act to include local government units, section 7 of the Act, titled "Property Acquired in Fee Simple," provided in part:

> If the owner of the interests in real property to be acquired pursuant to the provisions of this act prefers to have the Commonwealth or the local government unit acquire the property in fee simple, the Commonwealth or the local government unit shall be required to acquire the property in fee simple. All real property acquired in fee simple by the Commonwealth . . . *or by a local government unit*, under the provisions of this act, shall be offered for resale publicly in the manner provided by law within two years of the date of acquisition, subject to restrictive covenants or easements limiting the land to such open space uses as may be specified [pursuant to other provisions of the Act].

Act No. 1996-153, sec. 1 (amending 32 P.S. § 5007) (emphasis added). In February 2006, however, the General Assembly further amended section 7 to delete the language "or by a local government unit" as italicized in the above quotation. As a result of this amendment, the requirement of section 7 to offer for resale land acquired in fee simple two years after acquisition applies only to acquisitions by the Commonwealth. Since the amendment, the Act has had no provision expressly governing disposition by a local government unit of property acquired in fee simple.

B. The Act Prohibits Development, Inconsistent with Open-Space Benefits, of Property Acquired Under the Act.

As the above overview makes clear, the language of the Act does not *explicitly* prohibit a municipality from developing property that it acquired under the Act in a manner inconsistent with the open-space purposes for which it was acquired. Rather, the focus of the Act is to prescribe the manner in which property is to be acquired for open-space purposes, including how the acquisition is to be financed. *See, e.g.*, *Pennsbury Vill. Assocs., LLC v. McIntyre*, 11 A.3d 906, 911 n.5 (Pa. 2011) ("The Open Space Lands Act provides a mechanism for funding open space land acquisition and preservation."). Nevertheless, a review of the statute as a whole makes clear the legislative intent that when a government unit acquires land for open-space purposes under the Act, it may not use the land for contrary purposes.

As quoted above, the Act makes repeated references to the "preservation," "conservation," and "protection" of land acquired under the Act. Further, it provides for a voter referendum to permit a new source of municipal revenue, but that revenue is restricted in its use. Section 7.1(a) of the Act restricts the use of such tax revenues to the acquisition and preservation of land for open-space benefits and related uses. If a municipality could acquire land by using this open-space tax revenue, but then decide to develop the land for another purpose, it would betray the bargain that the elected representatives made with the public — i.e., if you the public are willing to be taxed an additional amount in order to acquire and preserve open space in our community, then we the elected representatives will use the tax revenues solely for that limited purpose.

In addition, the Act has express restrictions regarding the future disposition of real property acquired as open space. In the case of an acquisition in fee simple, section 7 requires

the Commonwealth (and, until the 2006 amendments, a local government unit[11]) after two years to offer the property publicly for resale, subject to restrictive covenants or easements to preserve the open-space character of the land. 32 P.S. § 5007, *discussed supra*, p. 10. Under section 10, if the interest acquired is other than fee simple, there are specific conditions that must be met before the Commonwealth or a local government unit may "terminate . . . open space property interests." 32 P.S. § 5010, *discussed supra*, pp. 9-10. Both provisions make clear that the government may not simply proceed on its own with development inconsistent with the open-space purposes for which the property was acquired. If it were free to do so, then the requirements of sections 7 and 10 would be optional — a result contrary to the statutory language.[12]

In short, both the purpose and the operation of the Act make clear that when open-space land is acquired pursuant to the Act, it may not then be developed except in a manner consistent with the "open space benefits" for which it was acquired.

C. The Township Acquired the Smola Farm Pursuant to the Act and Therefore Holds the Land Subject to the Restrictions of the Act.

The Township's principal argument in this case has been that it did not acquire the Smola Farm with funds raised under the Act and that its ownership of the Smola Farm is therefore not subject to the restrictions of the Act. The Court rejected this argument on three separate and independent bases, any one of which is sufficient to hold that the restrictions of the Act must be

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[11] *See supra*, p. 10.

[12] Further reinforcing the binding nature of the open-space restrictions in the Act is the amendment to section 7.1 enacted in 2013, providing that an open-space tax adopted by voter referendum may not be repealed except by a new voter referendum held at least five years later. *See supra*, note 9; *see also Mezzacappa v. Northampton Cnty.*, No. 40 MAP 2024, 2025 WL 1197381, at *16 (Pa. Apr. 25, 2025) (amendment to a statute may cast a light on pre-amendment legislative intent).

observed. First, the pledge of open-space tax funds to secure the financing for the purchase of the Smola Farm is sufficient, in itself, to subject the purchase to the restrictions of the Act. Second, the use of open-space tax funds to partially "retire" the indebtedness incurred in that financing subjects the property to the Act. And third, the cash actually paid to purchase the property included revenues from the open-space tax. The discussion below addresses the first and second grounds together and then separately addresses the third ground.

1. The financing of the purchase of the Smola Farm through the pledge of open-space tax revenues and the use of such revenues to partially retire the indebtedness under the 2008 Notes were sufficient to subject the purchase to the restrictions of the Act.

The Township asserts that the funds used to purchase the Smola Farm consisted of proceeds realized from the sale of the 2008 Notes. As discussed above, those bonds were secured primarily by a pledge of the Township's revenues obtained from the open-space earned income tax adopted pursuant to the Act. In addition, open-space tax revenues were used to make the periodic installment payments of principal and interest required under the 2008 Notes, as the Township itself admits. *See supra*, p. 3. The Township's contention that these uses of open-space tax revenues are not sufficient to subject the purchase to the restrictions of the Act is inconsistent with both the language and the purpose of the statute.

As quoted above, section 7.1(a) of the Act included, as a permitted use of the revenues from an open-space tax, "to *retire the indebtedness incurred in purchasing interests in real property* or in making additional acquisitions of real property for the purpose of securing an open space benefit or benefits under the provisions of this act." 32 P.S. § 5007.1(a) (emphasis added). In this case, the Township borrowed funds, through issuance of the 2008 Notes, expressly for the purpose of "conservation and protection of open spaces." (Stip. ¶ 6; Ex. P-20, Ord. No. 425, p.

2.) As the primary security for the repayment of the 2008 Notes, the Township pledged the revenues raised from the open-space tax. This use of the tax revenues was permitted by section 7.1(a): the proceeds of the 2008 Notes were expressly stated to be used for open-space purposes, and the open-space tax revenues were thus made available to "retire" the indebtedness under the 2008 Notes.

Indeed, the Township cannot argue to the contrary. If the pledge of the open-space tax revenues was not a use of those revenues under the above-quoted provision of section 7.1(a), then under what provision of the Act was the Township authorized to make the pledge? Except for the "retirement" provision, the pledge of tax revenues does not qualify under any other provision of section 7.1(a) or any other section of the Act. Since the Township cannot and does not assert that its pledge of the tax revenues was not legally authorized — an assertion that would certainly have been shocking to bond counsel — and since the Township cannot point to any other provision of section 7.1(a) that fits this transaction, it follows that the pledge was made pursuant to the "retirement" provision of section 7.1(a). As the pledge to secure the 2008 Notes was made pursuant to the Act, the use of the proceeds to purchase the Smola Farm was likewise pursuant to and subject to the Act.[13]

Not only were the tax revenues pledged, but they were actually used to partially "retire" the 2008 Notes through the installment payments of principal and interest — until the refinancing in 2013. The Township's argument that these installment payments are irrelevant because they were made subsequent to the purchase of the Smola Farm is mere sophistry. *Any* use of funds "to retire the indebtedness incurred in purchasing . . . real property," Act § 7.1(a), 32

[13] This analysis applies regardless of whether one applies the version of section 7.1(a) in effect at the time of the Township referendum, the amendments enacted later in 2016, or the current version after the subsequent amendments, *see supra*, note 10.

P.S. § 5007.1(a), occurs *by definition* after the property has been purchased. The Township's argument would thus read the "retirement" provision of section 7.1(a) out of the statute. Further, the intent to use open-space tax revenues to fund the installment payments was not some afterthought that did not exist at the time of the purchase. Rather, it was the Township's plan from the start. Well before the purchase, the Township expressly stated its intention to use "revenues received from the Open Space Tax . . . to pay the debt service of the 2008 Open Space Notes." (Ex. P-20, Ord. No. 425, p. 2.) Plaintiffs' reliance on the use of such revenues to pay down the 2008 Notes is not, as the Township has argued, an attempt to restrict the Smola Farm "retroactively."

Instead, it is the Township that has attempted to retroactively recast the nature of the Smola Farm purchase. It argues that the purchase was not subject to the Act because, *five years later*, the balance of the indebtedness under the 2008 Notes was paid off not by open-space tax revenues but rather by the proceeds of the 2013 Notes. But at the time that the 2008 Notes were issued, the primary source of repayment was the open-space tax revenues. There was no obligation for the Township to refinance the indebtedness in 2013, and there is no evidence that such a refinancing was even foreseen by the Township authorities in 2008. Thus, when the 2008 Notes were issued, the proceeds could be used only for purposes authorized by the Act, and properties acquired with the proceeds were therefore plainly subject to the restrictions of the Act. That was still the case on December 30, 2008, when proceeds were used to purchase the Smola Farm. Nothing in the Act supports the argument that those restrictions vanished once the initial collateral was replaced in a new financing. The fact that the Township ultimately found another source of repayment did not retroactively release the Smola Farm from the statutory restrictions under which it was acquired.

This conclusion is reinforced by a simple hypothetical. Suppose that the Township had not refinanced the 2008 Notes and had not found another source of repayment. In that case, the Township would have been bound to continue making periodic payments of principal and interest from the open-space tax revenues, pursuant to the terms of the 2008 Notes, until the time of maturity, at which point the indebtedness under the 2008 Notes would have been fully "retired." That obligation subjected the Smola Farm to the restrictions of the Act from the moment of purchase. And once subject to those restrictions, the land was not freed of them when the Township found itself able, five years later, to refinance the 2008 Notes. The Township cannot point to any provision of the Act that supports such a result, which is plainly contrary to the stated legislative purpose.

In summary, by financing the purchase of the Smola Farm through a pledge of open-space tax revenues, and by partially satisfying that financing with open-space tax revenues, the Township "used" those revenues pursuant to section 7.1(a) of the Act and thereby subjected the property to the restrictions of the Act.

2. The funds paid from the Township's Open Space Fund to purchase the Smola Farm included open-space tax revenues.

a. The evidence shows that open-space tax revenues were in the Open Space Fund at the time of the purchase.

The Township contends that the purchase funds paid for the Smola Farm at the closing on December 30, 2008, consisted solely of proceeds from the 2008 Notes and/or general revenues that had been transferred into the Open Space Fund the previous year. Even if this contention were supported by the evidence, it would not free the Smola Farm from the restrictions of the Act, as the use of the open-space tax revenues to secure and to pay down the 2008 Notes was sufficient to subject the property to the Act, as the above discussion demonstrates. But in any

event, the evidence does not support the Township's factual assertion that no open-space tax revenues were included in the original purchase funds.

There is no dispute that from the inception of the open-space tax through the time of the purchase of the Smola Farm, funds were deposited into the Open Space Fund from three sources: (1) revenues from the open-space tax; (2) the transfer of $360,000 from general revenues in 2007, *see supra*, p. 2; and (3) the proceeds of the 2008 Notes. There is also no dispute that the check paid at closing on the Smola Farm was drawn on the Township's Open Space Fund. (Ex. P-7.) Thus, the purchase payment was made from an account containing these commingled funds, which included open-space tax revenues.

According to the Township, the evidence affirmatively eliminates the possibility that the purchase funds included open-space tax revenues because, it argues, by the time of the Smola Farm purchase, all of the tax revenues in the Open Space Fund had already been exhausted from the prior purchases of other properties. In support, it relies on a trial exhibit, Exhibit D-2, titled Upper Pottsgrove Funding Open Space Acquisitions, showing the use of funds in the Open Space Fund for purchases from April 26, 2007, up to and including the Smola Farm purchase on December 30, 2008. The Court spent much time reviewing Exhibit D-2 and concluded that it shows no such thing.

What Exhibit D-2 does show is that the Township's purchases from the Open Space Fund totaled $518,000 in 2007 and $1,593,500 in 2008 (including $450,000 for the Smola Farm). During those two years, the Open Space Fund received, in addition to open-space tax revenues, $360,000 in general tax revenues during 2007 and $2,500,000 from the 2008 Notes in 2008. It is thus clear that the Open Space Fund had cash from multiple sources during this period. But neither Exhibit D-2 nor any other evidence shows which dollars from which sources went to

purchase which properties. The Township simply *assumes* that the open-space tax revenues in the Open Space Fund were fully expended before any dollars from the other two sources were used. There is no basis in the record for that assumption.

Among other flaws, the assumption simply ignores the fact that open-space tax revenues continued to flow into the Open Space Fund over the course of 2008. Remarkably, the Township specifically denies that the Open Space Fund received *any* open-space tax revenue during 2008: "[T]he record demonstrates that there were no deposits of open space tax revenue into the open space fund in the year that the Smola property was purchased by the Township." (Reply Br. of Upper Pottsgrove Twp. in Supp. of Post-Trial Mots. at 2.)[14] This bald assertion is flatly contracted by the Township's own exhibit — the audited Township Financial Report for 2008. (Ex. D-12.) On page 14 of that Report, titled "Statement of Revenues, Expenditures and Changes in Fund Balances," the line item for Revenues – Taxes – Earned income under the column Open Space Fund reads: "$315,969" — not zero. Even without this definitive refutation, the Township's assertion would be suspect, since applicable law required employers within a taxing jurisdiction to deduct any local earned income tax from their employees' paychecks and to remit the deducted taxes to the local tax officer on a quarterly basis. *See* Local Tax Enabling Act § 13(IV)(b), 53 P.S. § 6913(IV)(b).[15] Thus, even if one accepts the Township's assumption that tax revenues from 2007 had been exhausted by purchases prior to the Smola Farm purchase, there is no reason to assume further that the $315,969 in open-space tax revenues

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[14] The Township's Reply Brief does not cite any record evidence to support this statement.

[15] The version of this statutory provision in effect during 2008 was subsequently repealed effective June 30, 2012. Act of July 2, 2008, Act No. 2008-32, sec. 40(2). The current version appears as section 512 of the Local Tax Enabling Act, 53 P.S. § 6924.512.

received during 2008 were likewise exhausted (or for some reason held back) before the Smola Farm purchase.[16]

Perplexed by what appeared to be the Township's misplaced reliance on Exhibit D-2, the Court asked counsel for the Township at oral argument on its Post-Trial Motions to walk through the exhibit step by step, to explain how it could lead to the conclusion that no open-space tax revenues were in the Open Space Fund at the time of the Smola Farm purchase. To the Court's consternation, counsel for the Township stated that he was not familiar with Exhibit D-2 and was not able to explain how it supported the Township's insistence that all open-space tax revenues had been expended by that time — this despite its repeated assertion that the showing made by the exhibit was "unrefuted." (Defs.' Post-Trial Mots. ¶ 2; Br. in Supp. of Defs.' Post-Trial Mots. at 3.) The Court was thus deprived of the benefit of an explanation by the Township, if it had one, of its own purportedly dispositive trial exhibit.[17]

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[16] In the "Discussion" portion of its Decision (not in the Findings of Fact), the Court stated: "[I]t is immaterial that *open-space tax revenues were not devoted directly to the payment of the purchase price for the Smola Farm*, but rather were used to secure the repayment of the debt incurred for the acquisition." (Decision at 7 (emphasis added).) The Township has mischaracterized the italicized portion of this sentence, without context, as a factual finding by the Court rejecting the Plaintiffs' assertion that payment included open-space tax revenues. (Reply Br. of Upper Pottsgrove Twp. in Supp. of Post-Trial Mots. at 2.) In context, the quoted sentence appeared in the course of the Court's explanation why "the arguments put forward by the Township are not persuasive." (Decision at 7.) The Court was rejecting as "immaterial" *the Township's contention* that open-space tax revenues were not included in the payment, because those tax revenues were admittedly used to secure the indebtedness under the 2008 Notes in any event. The quoted sentence was not a finding of fact adopting the Township's interpretation of the evidence, but rather a legal conclusion that the outcome of this case did not turn on that factual issue.

[17] Unfortunately, the Township has not seen fit to order the transcript of oral argument on its Post-Trial Motions, even though the argument addressed issues that are raised on appeal. When the Court became aware that the transcript had not been requested, it issued an Order of April 29, 2025, directing that Defendants had one week to request the preparation of a transcript. As of the filing of this Opinion, counsel for Defendants still has not done so. If the Commonwealth Court agrees that a transcript should have been included in the record on appeal, it may "take such action as it deems appropriate." Pa. R. App. P. 1911(d); *see Commonwealth v. Geatti*, 35 A.3d 798, 800 (Pa. Cmwlth. 2011) ("[T]he failure by an appellant to insure that the original record certified for appeal contains sufficient information to conduct a proper review constitutes a waiver of the issues sought to be examined.").

b. The Township cannot place upon Plaintiffs the impossible burden of proving that the specific dollars withdrawn from commingled cash in the Open Space Fund to purchase the Smola Farm were open-space tax revenues.

Unable to show that it did not use open-space tax revenues in the purchase of the Smola Farm, the Township alternatively argues that the burden of proof was on the Plaintiffs to show not only that open-space tax revenues were in the Open Space Fund but also that the cash withdrawn from the Fund to pay for the purchase consisted of open-space tax revenues, rather than revenue from other sources. But just as the Township's commingling of cash in the Open Space Fund prevented the Township from proving the non-use of open-space funds, it likewise made it impossible for the Plaintiffs to prove the opposite. It would be fundamentally unfair for the Township, by the commingling of cash, to deprive the Plaintiffs of the ability to establish the source of funds used in purchasing the Smola Farm and then fault the Plaintiffs for a failure of proof. Rather, the Township must accept the consequences of its decision to commingle cash in the Open Space Fund.

In a different context — equitable distribution of marital assets in a divorce — our Superior Court has repeatedly held that a spouse who commingles marital assets with personal assets must accept the evidentiary consequences of having made it impossible to trace specific funds in a single account. For example, in *Busse v. Busse*, 921 A.2d 1248 (Pa. Super. 2007), the husband consolidated the proceeds of a pension, which he claimed to be a pre-marital asset, with various marital funds. "He conceded he could not identify the alleged non-marital funds from the consolidated funds." *Id.* at 1257. The husband challenged the finding of a master that the commingled funds were a marital asset, but the Superior Court upheld the finding because the "pre-marital funds cannot be traced due to the commingling with marital funds." *Id.; see*

Verholek v. Verholek, 741 A.2d 792, 797 (Pa. Super. 1999) ("[O]nce non-marital property is combined and co-mingled with marital property, it loses its identity as non-marital property and takes on the status of marital property.").

Other courts, in a variety of contexts, have rejected efforts to rule against a party for failure to prove a fact that the opposing party made impossible to prove. *Westinghouse Electric & Manufacturing Co. v. Wagner Electric & Manufacturing Co.*, 225 U.S. 604 (1912), was a claim by Westinghouse against Wagner for infringement of its patent. Wagner's product, while it included Westinghouse's patented invention, also incorporated other components of Wagner's own design. Wagner argued that Westinghouse could not prove what portion of Wagner's profits were attributable to Wagner's infringement rather than the improvements it had made. Westinghouse, in response, argued that it was entitled to recover all of Wagner's profit, "because of the fact that the defendant had inextricably commingled and confused the parts composing it." *Id.* at 618. The lower courts agreed with Wagner and awarded Westinghouse only nominal damages. But the United States Supreme Court reversed, holding that the burden of proving apportionment of profits fell on Wagner, because it was Wagner's modification of Westinghouse's invention that made its profits "impossible of accurate or approximate apportionment." *Id.* at 622. The Court explained: "If then the burden of separation is cast on the defendant, it is one which justly should be borne by him, as he wrought the confusion." *Id.*

The Supreme Court relied upon *Westinghouse* in its subsequent decision in *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251 (1916), a trademark infringement case between two shoe manufacturers. The defendant had sold shoes under a mark deceptively similar to the trademark of the plaintiff, but the defendant argued that plaintiff had failed to show what portion of defendant's profits were attributable to the infringement rather than the quality of

its shoes. The trial court, agreeing with the defendant, awarded only nominal damages, but the Court of Appeals reversed and the Supreme Court affirmed the appellate decision: "[A] sufficient reason for not requiring complainant in the present case to make an apportionment between the profits attributable to defendant's use of the offending mark and those attributable to the intrinsic merit of defendant's shoes is that such an apportionment is inherently impossible." *Id.* at 261.

This principle is not limited to equitable distribution and infringement cases. *Siedlecki v. Powell*, 245 S.E.2d 417 (N.C. App. 1978), was a claim for breach of a contract to deliver shares of stock in a corporation to the plaintiff on a specified date. The plaintiff sought damages for the value of the stock that the defendant had failed to deliver. As of the required date of delivery, however, the corporation, controlled by the defendant, was not maintaining books and records sufficient to enable a determination of the value of its stock. As a result, the trial court awarded damages based on the ascertainable value of the stock as of a later date. The Court of Appeals affirmed, explaining: "[I]t would be unconscionable to apply the rule for measurement of damages urged upon us by defendant. To do so would impose upon plaintiff a burden of proof made impossible by defendants' deliberate conduct relating to their accounting procedures." *Id.* at 420.

The principle of these cases applies as well to the present matter. The Township indisputably purchased the Smola Farm with cash in the Open Space Fund. But by commingling cash in its Open Space Fund, the Township made it impossible to prove the source of the specific funds paid at closing. Having done so, the Township cannot argue for the rejection of Plaintiffs' claims based on the impossibility of such proof. It is sufficient for Plaintiffs to show that the

purchase was made from the Open Space Fund and that the Township had commingled open-space tax revenues with other cash in that Fund. Plaintiffs clearly met that burden.

D. Construction of the Proposed Municipal Complex on the Smola Farm Would Not Be Consistent with the Open-Space Restrictions Under the Act.

This Court did not hold that the Act prohibits *all* development or improvements on the Smola Farm. Rather, the Act prohibits development inconsistent with the open-space benefits as defined in section 2(1) of the Act, 32 P.S. § 5002(1). That very definition refers to "*predominantly* undeveloped open spaces or areas," *id.* (emphasis added), making clear that land need not be *completely* undeveloped in order to qualify for protection under the Act. Indeed, during closing argument at trial, the Court pressed Plaintiffs' counsel on whether construction of the municipal complex would still leave the Smola Farm "predominantly undeveloped." (Tr., 10/11/24, at 41-42.)

Upon consideration of all the evidence, the Court answered that question in the negative. As noted above, the proposed complex, including the buildings, parking lots, and stormwater management facilities, would occupy approximately 3.5 acres of the Smola Farm, including 1.2 paved acres. It would include an administration building, a police building, and a public works building. That last building would incorporate a salt shed, a garage for public works vehicles, a storage tank for washing the vehicles, and a backup generator. (Tr., 10/11/24, at 8-9, 29-30.) The public works portion of the complex, in particular, would be wholly out of character with the open-space status of the Smola Farm as it currently exists. The complex would not be a single inconspicuous building blending in with the agricultural landscape. Rather, it would include multiple buildings and public works vehicles with a garage and other storage facilities.

Plaintiff Guest testified credibly and eloquently to the impact that construction of the municipal complex would have on the Smola Farm:

> Q. What are the open space benefits that are currently provided by the Smola farm?
>
> A. So of the eight benefits enumerated by the Open Space Tax Act that go to detail those that are set out in their legislative intent [in Act § 5(a)(1)-(8), 32 P.S. § 5005(a)(1)-(8)], every one of them is represented by the Smola farm. So preservation — I'm not going to go through all eight. . . But the preservation and protection and conservation of water resources, farmland, forests, the open space between communities, preservation of natural and scenic resources, and the preservation of scenic vistas. Every one of those is represented by that parcel.
>
> Q And do you think that the construction of a $6 million municipal complex would harm those open space benefits?
>
> A. Every one of those open space benefits would be impacted negatively by the proposed construction.
>
> Q. Can you explain why you believe that.
>
> A. Well, you can go through each one of them to understand that the work to build the building, the presence of that building and all the other — the infrastructure required for its construction, operation, and maintenance will have an impact on that land. It impacts the water resources, it impacts the scenic views, it impacts the natural and scenic resources, it impacts the farmland, and it impacts the woods. [Tr., 10/9/24, at 106-07.]

The Township's argument that the complex would occupy only 3.5 acres of a 36-acre property misconceives the meaning of "predominantly." In context, this term is not strictly quantitative but also qualitative. Both the statement of legislative purpose and the definition of "open space benefits" in sections 1 and 2(1) of the Act, 32 P.S. §§ 5001, 5002(1), make clear that the permissibility of development depends on the character of the development, not just the percentage of acreage that it would occupy. If the term were merely quantitative, it would permit the installation of, say, a junkyard on open space, so long as a "predominant" percentage of the property remained undeveloped.

On the basis of the evidence, the Court found as a fact that "the construction and operation of the municipal complex would substantially detract from and materially impair the open-space benefits of the Smola Farm in a manner inconsistent with the intent under which the property was acquired." (Decision, Finding No. 19.) That finding is amply supported in the record.

E. Subsequent Events Have Not Deprived the Smola Farm of Its Open-Space Status.

1. The open-space status is not terminable at will.

The Township argues that even if the Smola Farm is subject to the restrictions of the Act, that status can be terminated by the Township Commissioners at will. This extraordinary interpretation of the Act would mean that after the citizens of the Township had authorized a special tax for the limited purpose of acquiring and maintaining land for open-space purposes, the Township could use the tax revenues to purchase land, purportedly to be maintained as open space, and then terminate its protected status a year later — or even a day later. Such a result would be plainly contrary to the intent of the voters in authorizing the tax and, indeed, to the intent of the Act itself. After all, section 1 of the Act states the legislative intent not just to "acquire" land for open-space purposes but also to "preserve" it as such. 32 P.S. § 5001.

It is true that as a general rule, a Board of Commissioners may override *its own* prior action by modifying or repealing a prior ordinance passed by the Commissioners. *See, e.g.*, First Class Township Code § 3301-A(a), 53 P.S. § 58301-A(a) ("The board of commissioners may amend, repeal or revise existing ordinances by the enactment of subsequent ordinances."). But that power of the Commissioners does not extend to overriding the action of the Township's voters.

To support its position, the Township cites section 10(b) of the Act, which provides an elaborate procedure under which a local government unit may "terminate or sell open space property interests acquired under this act *other than property held in fee simple*." 32 P.S. § 5010(b) (emphasis added). The Township argues that there is currently no analogous provision for the termination by a local government unit of open-space interests acquired *in* fee simple, such as the Smola Farm. The Township therefore concludes that it can terminate such interests at will. The argument is a plain *non sequitur*. It is just as likely, if not more so, that the absence of an analogous provision means that there are *no procedures* that would allow the Township to terminate the open-space status of the Smola Farm. The Township dismisses this interpretation, contending that it would result in the protection of the Smola Farm in perpetuity. But that is exactly what the Township stated in 2020, when its Open Space Plan recognized the Smola Farm as "permanently protected." (Ex. P-9, p. 25, fig. 3.1.)

It is, ultimately, unclear why the General Assembly provided that the procedure for terminating the open-space status of a property under section 10(b) does not apply to "property held in fee simple." It may be that the General Assembly assumed that the property would be resold with restrictions to preserve its open-space character, as section 7 required — until that requirement was amended in 2006 to be limited to property acquired by the Commonwealth. *See supra*, p. 10. The Court suspects that the deletion of locally owned property from section 7, without enacting a substitute provision for the disposition of fee-simple property interests, may have been a legislative drafting oversight. Regardless of the reason, the fact remains that nothing in the Act authorizes the Commissioners to terminate the restrictions imposed on a property acquired in fee simple with revenues from an open-space tax approved by the voters.

2. The installation of a cellphone tower on the Smola Farm in 2010 did not terminate its open-space status.

The Township also cites the fact that in 2010, it permitted a cellphone tower to be installed at a corner of the Smola Farm, but it is difficult to see how this fact bolsters the Township's position. The record does not reveal why neither the present Plaintiffs nor any other member of the public protested this development. It may have been considered *de minimis*, as its footprint on the property was only 2,100 square feet — minuscule as compared to the 3.5 acres that the proposed municipal complex would occupy. There is no showing that the cell tower wholly deprived the Smola Farm of its open-space character, such that there is nothing further worth preserving. Regardless whether the installation of the cellphone tower was a violation of the open-space restrictions on the Smola Farm, any such violation did not open the door to a subsequent development of more than three acres to install a multi-building complex that would significantly alter the nature of the property.

F. The Court Was Not Required to Reach the Merits of Plaintiffs' Claim Under the Donated or Dedicated Property Act.

The Court, having ruled in Plaintiffs' favor under the Open Space Lands Act, found it unnecessary to reach their alternative claim under the Donated or Dedicated Property Act. The Township argues that this conclusion was erroneous. (Concise Statement ¶ 14.) The argument is contrary to the fundamental principle of law that a court should take care to avoid deciding legal issues that are not necessary to the outcome of the case. "It is well established that a judicial determination that is unnecessary to decide an actual dispute constitutes an advisory opinion and has no legal effect." *Borough of Marcus Hook v. Pa. Mun. Ret. Bd.*, 720 A.2d 803, 804 (Pa. Cmwlth. 1998).

In this case, where the Court held that the Open Space Lands Act entitled Plaintiffs to the declaratory and injunctive relief that they sought in their Complaint, a determination of their alternative claim under the Donated or Dedicated Property Act would have been unnecessary and purely advisory.[18]

III. CONCLUSION

The citizens of Upper Providence Township voted to tax themselves in order to enable the Township to acquire and preserve open-space land. In using those tax revenues to acquire the Smola Farm — whether by direct payment at the time of purchase, by a pledge to secure indebtedness, or by payments in partial retirement of the indebtedness (or by all three) — the Township became duty bound to preserve the open-space character of that property. Construction of the proposed municipal complex on the Smola Farm would violate the Township's obligations under the Act. Accordingly, the Court granted Plaintiffs declaratory and injunctive relief to preserve the Township's pact with its voters over the use of open-space tax funds.

BY THE COURT:

JEFFREY S. SALTZ, J.

[18] It is true that the Court, in ruling for Plaintiffs under the Open Space Lands Act, denied their request for a modification of the Deed to the Smola Farm and for attorneys' fees, but such relief also would not have been available under the Donated or Dedicated Property Act in any event.

The same analysis applies to Plaintiffs' reliance on the Environmental Rights Amendment. *See supra*, note 6.

Exhibit C

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MATTHEW E. MURRAY and NATHANIEL C. GUEST Plaintiffs	: IN THE COURT OF COMMON PLEAS : OF MONTGOMERY COUNTY : CIVIL DIVISION - EQUITY
v.	: NO. 2023-02216
TRACE SLINKERD, PRESIDENT; CATHY PARETTI, COMMISSIONER; HANK LLEWELLYN, COMMISSIONER; DON READ, COMMISSIONER; DAVE WALDT, COMMISSIONER; and UPPER POTTSGROVE TOWNSHIP Defendants	:

PLAINTIFFS' LIST OF EXHIBITS
FOR TRIAL ON 10/9/2024 TO 10/10/2024

P-1 Upper Pottsgrove Township Herald (Vol. 1 Issue 2 (2006)) announcing the open space tax referendum.

P-2 Upper Pottsgrove Township Commissioners' Minutes of June 2, 2008.

P-3 Pottstown Mercury Proof of Publication June 13, 2008 regarding the open space tax referendum.

P-4 Ordinance No. 425 Upper Pottsgrove Township which authorized incurring electoral debt for the 2008 project which consisted, in part, of "the conservation and protection of open spaces, forests, woodlands, farmlands, parklands, undeveloped lands adjoining park or recreation sites, scenic areas, and sites of historic, geologic or botanic interests through fee simple purchase or acquisition of development rights," for monies used to purchase the Smola Farm.

P-5 Thomas Smola Subdivision Plan (separating his house from the farm property to be acquired for open space purposes) and identifying the land as "public open space."

P-6 The Smola Farm Agreement of Sale with Upper Pottsgrove Township.

P-7 A check dated December 30, 2008 for the purchase price of the Smola Farm to Penn Title Company for $418,277.79 drawn from the Upper Pottsgrove Township Open Space Fund.

P-8 Upper Pottsgrove Township's EIT Tax Ordinance amended December 27, 2006 showing the enacted .25% earned income tax "for the purpose of retiring indebtedness and purchasing interests in real estate and for making additional acquisitions of real estate for the purposes of securing open space pursuant to the Open Space Lands Act, Act 153 of 1996, 32 P.S. § 5001 *et seq.*"

P-9 The 2020 Upper Pottsgrove Township Open Space Plan naming the Smola Farm as "public permanently protected land," and showing the Upper Pottsgrove Township Open Space and Trails Map indicating that the Smola Farm is "Township open space."

P-10 DCED Application for grant applications in excess of $1 million dollars for the construction of a municipal complex on the Smola Farm.

P-11 Schematic design for the new municipal complex.

P-12 AIA Document B101-2017 for the new municipal complex.

P-13 Photograph (bulldozers at the Smola Farm).

P-14 October 30, 2023 response from Township of Upper Pottsgrove to a right-to-know request regarding fund balances, including the open space tax fund.

P-15 Upper Pottsgrove Township Resolution 749 whereby the Upper Pottsgrove Township Commissioners selected the Smola Farm as the site of the new municipal complex and "authorizes a credit to the Open Space Fund with the amount to be determined to represent the value of ground to be used for the Township municipal building against the debt repayment structure which was outlined in Item (1)(e) of Resolution 747."

P-16 Defendants' Answers to Interrogatories.

P-17 Site Improvement Plans for the Upper Pottsgrove municipal building as of July 2024.

P-18 Upper Pottsgrove Township appraisal of the Smola Farm dated 10.11.2007 prior to the purchase "for the purpose of the Township obtaining 40 acres of this ground for preserved open space."

P-19 Deed dated December 30, 2008 between Thomas Smola and the Township of Upper Pottsgrove referencing the Subdivision Plan.

P-20 Upper Pottsgrove Guaranteed Open Space Revenue Notes, 2008 Series, Bond Documents.

P-21 Plaintiffs' Attorneys' Fees.

Exhibit D

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

UPPER POTTSGROVE TOWNSHIP

vs.

MATTHEW E MURRAY

NO. 2025-00481

NOTICE TO DEFEND – CIVIL

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LAWYER REFERENCE SERVICE
MONTGOMERY BAR ASSOCIATION
100 West Airy Street (REAR)
NORRISTOWN, PA

19404-0268 (610) 279-9660, EXTENSION 201

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

UPPER POTTSGROVE TOWNSHIP vs. MATTHEW E MURRAY	NO. 2025-00481

CIVIL COVER SHEET

State Rule 205.5 requires this form be attached to any document commencing an action in the Montgomery County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: ERIC C FREY, Esq., ID: 76051

Self-Represented (Pro Se) Litigant [ ]

Class Action Suit [ ] Yes [X] No

MDJ Appeal [ ] Yes [X] No

Money Damages Requested [ ]

Commencement of Action:

Complaint

Amount in Controversy:

Case Type and Code

Miscellaneous:

Other

Other: CIVIL COMPLAINT

DISCHELL, BARTLE & DOOLEY, P.C.
BY: Eric C. Frey, Esquire
Attorney ID #76051
224 King Street
Pottstown, PA 19464
(610) 323-3306
Solicitor for Plaintiff, Upper Pottsgrove Township

UPPER POTTGROVE TOWNSHIP **1409 Farmington Avenue** **Pottstown, PA 19464**	:	**COURT OF COMMON PLEAS** **MONTGOMERY COUNTY, PA** **CIVIL ACTION**
Plaintiff	:	
v.	:	
	:	**NO:**
MATTHEW E. MURRAY **1530 Aspen Drive** **Pottstown, PA 19464**	:	
Defendant	:	

CIVIL COMPLAINT

Plaintiff, Upper Pottsgrove Township, by and through its Solicitor, Eric C. Frey, Esquire, of Dischell, Bartle & Dooley, P.C., hereby files the following complaint against Defendant, Matthew E. Murray, and in support thereof avers the following:

Jurisdiction and Venue

1. Subject to the authority set out in 42 Pa.C.S. §931(a), this Court has jurisdiction over this matter and personal jurisdiction over the Defendant.

2. Subject to the authority set out in in 231 Pa. Code Rule 1006, venue resides with the Court of Common Pleas of Montgomery County as Defendant may be served and the cause of action arose in Montgomery County.

Parties to the Action

3. Upper Pottsgrove Township, a municipal entity, is a First Class Township, organized pursuant to the provisions of the First Class Township Code of Pennsylvania with its principal

address at 1409 Farmington Avenue, Pottstown, Montgomery County, Pennsylvania 19464 (the "Township").

4. Defendant, Matthew E. Murray, is an adult individual over eighteen (18) years of age residing at 1530 Aspen Drive, Pottstown, Montgomery County, Pennsylvania 19464.

Introduction

5. The Township is compelled to bring this action for abuse of process and wrongful use of civil process in order to protect its rights and its taxpayer resources, and seeks a permanent and preliminary injunction enjoining Defendant from continuing to file under the Right to Know Law.

6. Defendant, with an apparent desire to hamper the Township's financial and professional resources, has filed an excessive number of discovery requests, submitted under the Right to Know Law, 65 Pa.C.S. §101 et seq. (the "RTKL"), which require the Township's immediate attention. Currently, the ever growing list of Defendant's RTKL applications (the "RTK Requests") sit at one hundred (100) requests since 2022. It must be noted that a number of the RTK Requests are derivative in nature and seek substantially similar information as to the information found in prior RTK Requests.

7. Defendant's RTK Requests have been rightfully denied on at least eight (8) occasions (the "RTK Denials"). Defendant has appealed the RTK Denials to the Pennsylvania Office of Open Records (the "OOR"), and lost all but one (1) of those appeals. Despite these losses, Defendant continues to file RTK Requests which further harm the Township and its citizens financially through the diversion of the Township's limited resources.

8. In just a two year period, from October if 2022 to October 2024, Respondent's excessive RTK Requests have cost the Township and its residents, in addition to Township staff time and resources, more than Fifty-Five Thousand Dollars ($55,000.00) in legal costs alone.

9. Currently, the Township is in the midst of a contentious litigation matter, in which Defendant is a named plaintiff, regarding the Township's plans to relocate and build a new Township municipal building (the "Municipal Litigation").

10. Defendant has utilized the RTK Requests as a discovery tool in the Municipal Litigation.

11. Defendant has utilized the RTKL process to monopolize the resources of the Township; as follows:

a. Township staff has had to expend substantial time and resources to timely address the Defendant's RTK requests;

b. Township has had to utilize its solicitor, at great expense to the Township, to process Defendant's RTK requests.

c. Township has, on several occasions, had to utilize its outside IT consultant, at great expense to the Township, to process Defendant's RTK requests.

12. Despite the excessive amount of RTK Requests being submitted by Defendant, the Township properly and timely processed the same. Defendant, however, has failed to retrieve a number of the requested documents from the Township.

13. There are at least six (6) matters in which the Township has processed Defendant's RTK Request and Defendant has failed to pick up the responsive documents compiled by the Township (the "Outstanding Documents").

14. In each of these six (6) matters which Defendant has failed to retrieve from the Township, Defendant owes fees and costs to the Township (the "Outstanding Fees", and collectively with the Outstanding Documents, the "Outstanding Requests"); as follows:

a. Murray #91 - $6.00;

b. Murray #92 - $25.50;

c. Murray #96 - $23.00;

d. Murray #98 - $1.75;

e. Murray #99 - $9.50; and

f. Murray #100 - $1.00.

15. Despite multiple notices for the Outstanding Requests, Defendant has failed or refused to either pick up the Outstanding Documents or pay the Outstanding Fees due to the Township.

16. Despite multiple notices that Defendant would not be able to obtain any further documents related to any future RTK Request until the Outstanding Requests were satisfied, Defendant continues to issue new RTK Requests to the Township.

17. Pursuant to the RTKL, the Township, upon receipt of an RTKL request, is required to process that request regardless of the status of past due fees. The Township's only recourse is to refuse the delivery of future documents until all current and past due fees are paid. Accordingly, the Township must continue to expend staff time, consultant time, and copying fees to process any new RTK Request submitted by Defendant.

18. The provisions under the RTKL do not provide any potential relief for the Township or its citizens to protect from Defendant's continued misuse of the RTKL. As a result, the Township is forced to bring this action for abuse of process against Defendant to protect the rights, financial funds and the professional resources of the Township and its citizens, and herein seeks both a preliminary and permanent injunction stopping Defendant's continued abuse of the RTKL.

COUNT I
Abuse of Process

19. The Township incorporates by reference paragraphs 1 through 18 of this Complaint.

20. Defendant, by filing the excessive and often redundant RTK Requests, is intentionally using the RTKL legal process as a strategy to hamper and damage the financial and professional resources of the Township and its citizens.

21. The Township and its citizens have suffered, and will continue to suffer, substantial expense and drain of resource due to Defendant filing approximately one hundred (100) RTKL Requests which is a clear abuse of the RTKL.

22. Defendant is using the legal process of filing RTKL Requests with the Township, and appeals with the OOR, as a tactical weapon to financially damage the Township and consume its professional resources so that the Township cannot adequately complete its other obligations, which includes the Municipal Litigation filed by Defendant.

23. Defendant has perverted the RTKL process in an effort to punish the Township for defending itself in the Municipal Litigation.

24. Of the eight (8) final determinations the OOR made on Defendant's appeals, all but one (1) of the OOR proceedings have been determined in favor of the Township.

25. Defendant has shown that he has no desire to actually obtain the records by his failure to retrieve documents prepared by the Township in response to at least the six (6) of his RTK Requests.

26. The Township and its citizens have suffered, and will continue to suffer, substantial damages as a result of Defendant's abusive and retaliatory conduct of filing one hundred (100) RTK Requests and twelve (12) appeals in just two (2) years' time.

27. The filing of RTK requests to the Township has necessitated the use of substantial staff and consultant time and extensive document production, at the expense of the Township taxpayers.

28. While the RTKL was intended to ensure transparency and access to government records, it was never intended to be used as a weapon to hold hostage and financially drain a township of its limited resources or to hinder a township from engaging in the lawful purposes for which it was created.

WHEREFORE, based on the foregoing, the Township requests that this Honorable Court enter and Order on Count I: (i) finding the Defendant has and continues to commit an abuse of process through the conduct averred herein in instituting and pursuing his RTK appeals before the Office of Open Records; (ii) permanently enjoining Defendant, and anyone acting on behalf of the Defendant, from further abusive conduct; and (iii) granting such other relief as this Honorable Court deems just and appropriate.

COUNT II
Wrongful Use of Civil Proceeding

29. The Township incorporates by reference paragraphs 1 through 28 of this Complaint.

30. Defendant has initiated civil proceedings against the Township by filing abusive and retaliatory appeals with the OOR.

31. Defendant has acted in a grossly negligent manner and/or without probable cause in filing repeated RTK appeals with OOR.

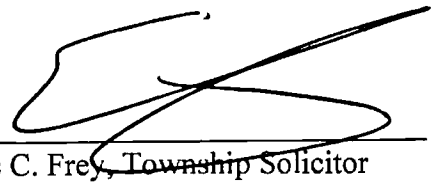
32. As evidenced above, Defendant's purpose in filing RTK Requests, and the corresponding appeals with the OOR, is not to obtain documents for clarity but to harass and retaliate against the Township.

33. The OOR has routinely dismissed or denied Defendant's appeals in favor of the Township.

WHEREFORE, based on the foregoing, the Township requests that this Honorable Court enter and Order on Count II: (i) finding Defendant has, and continues, to commit wrongful use of

civil proceedings in pursuing RTK Requests and appeals to the OOR; (ii) permanently enjoining Defendant, and anyone acting on behalf of the Defendant, from further committing such acts; and (iii) granting such other relief as this Honorable Court deems just and appropriate.

Respectfully Submitted,

BY: 

Eric C. Frey, Township Solicitor
Dischell, Bartle & Dooley, P.C.
Attorney ID #76051
224 King Street
Pottstown, PA 19464
(610) 323-3306

VERIFICATION

I, Trace Slinkerd, verify that I am the President of the Board of Commissioners for Upper Pottsgrove Township, and that I am authorized to execute this Verification on behalf of Upper Pottsgrove Township. I verify that the statements set forth in the foregoing Complaint of Plaintiff Upper Pottsgrove Township are true and correct to the best of my knowledge, information and belief. I understand that false statement herein are made subject to the penalties of 18 Pa. C.S §4904 relating to unsworn falsification to authorities.

Date: 8 Jul 25

Trace Slinkerd, President
Board of Commissioners

Exhibit E

pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
MATT MURRAY,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2024-2523**
	:	
UPPER POTTSGROVE TOWNSHIP,	:	
Respondent		

FACTUAL BACKGROUND

On August 5, 2024, Matt Murray ("Requester") submitted a request ("Request") to Upper Pottsgrove Township ("Township") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking "[a] copy of any and all invoices paid or unpaid for services rendered by the law firm Bellwoar Kelly or any of it[]s associates including Andrew Bellwoar and John Mahoney for the time period January 1[,] 2024 to August 2[,] 2024."

On September 9, 2024, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Township granted the Request, by providing records.

On September 30, 2024, the Requester appealed to the Office of Open Records ("OOR"), arguing that the Request sought invoices and the records the Township provided "were monthly

statement single line totals with no itemized detail."[1] The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 10, 2024, the Township submitted a position statement that was verified under penalty of perjury pursuant to 18 Pa.C.S. § 4904 by Michelle Reddick, the Township's manager and Open Records Officer.[2] The Township claims that because the Requester and the Township are involved in a pending civil litigation, for which Bellwoar Kelly is representing the Township, any communications between the Township and Bellwoar Kelly are protected by the attorney-client privilege. The Township also argues that the communications are protected from access under the Pennsylvania Rules of Civil Procedure, Rule 4000 *et seq.*, Depositions and Discovery. Finally, the Township argues that the pending litigation matter is subject to a case management order which required that all discovery shall be completed by March 11, 2024. In sum, the Township argues that any request for documents should be presented to the Court of Common Pleas in the context of the litigation matter, and any information that is contained on the attorney invoices are protected from disclosure under the attorney-client privilege and attorney-work product doctrine. With regard to the Request in general, the Township argues that it is unduly burdensome under Section 506 of the RTKL because the Requester has made over 95 submissions to the Township since November 2022 and, because of the repeated requests, along with the timing of this appeal, this matter has placed an undue burden on Township representative who must attend trial in the underlying litigation. *See* 65 P.S. § 67.506. The Township included a copy of a case

[2] In the position statement, the Township "notes" that the Appeal is not verified. However, the Township has not pointed to a RTKL statutory provision that requires an OOR appeal to be verified.

management order issued in *Murray, et al v. Slinkard, et al*, Montgomery Court of Common Pleas Civil Docket No. 2023-02216.

On October 10, 2024, the Requester also submitted a position statement. The Requester argues that the Township is making false assumptions by stating that the reason for the Request is "to gain insight into a legal case," because he is a taxpayer and, therefore, he has a right to know how his tax money is being spent. In addition, the Requester states that he has requested invoices in the past from the same law firm and, while they were redacted, they were invoices, not summaries.

LEGAL ANALYSIS

The Township is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Township is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. § 67.708(a)(1). 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 identity of the Requester is irrelevant

In the position statement, the Township makes note of the fact that the Requester and the Township are currently involved in a civil lawsuit. To the extent that the Township believes that the Requester's status as a party to a civil matter pending in the Court of Common Pleas involving the Township has a bearing on the OOR's determination of the instant appeal, a requester's identity

or motivation for making a request is not relevant to determining whether a record is accessible to the public under the RTKL. *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013). Under the RTKL, whether the document is accessible is based only on "whether a document is a public record, and if so, whether it falls within an exemption that allows that it not be disclosed." *Hunsicker v. Pennsylvania State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli v. Pennsylvania State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker*).

2. The Request is not repetitive or burdensome

The Township argues that the Request is repetitive, as the Requester has made similar prior requests. Section 506(a) of the RTKL provides that "[a]n agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency." 65 P.S. § 67.506(a). "Under this section ... an agency must demonstrate that (1) 'the requester has made repeated requests for th[e] same record[(s)]' and (2) 'the repeated requests have placed an unreasonable burden on the agency.'" *Pa. Office of the Governor v. Bari*, 20 A.3d 634, 645 (Pa. Commw. Ct. 2011); *see also Slate v. Pa. Dep't of Envtl. Prot.*, OOR Dkt. AP 2009-1143, 2010 PA O.O.R.D. LEXIS 97 ("A repeated request alone is not enough to satisfy § 506(a)(1)"). Repeated requests for the same records, although phrased differently, may be denied as disruptive. *See Cohen v. Pa. Dep't. of Labor & Industry*, OOR Dkt. AP 2009-0296, 2009 PA O.O.R.D. LEXIS 159; *Dougher v. Scranton Sch. Dist.*, OOR Dkt. AP 2009-0798, 2009 PA O.O.R.D. LEXIS 318 ("Slight differences in phraseology do not preclude application of [Section 506(a)]").

In *Mezzacappa v. West Easton Borough*, the OOR held that a request must be repeated more than once to constitute a "repeated request" for purposes of 65 P.S. § 67.506(a). OOR Dkt.

AP 2012-0992, 2012 PA O.O.R.D. LEXIS 967 ("Because the Borough has only established that the [r]equester has made one repeated request, rather than multiple 'repeated requests,' the OOR finds that the [r]equest was not disruptive"). The OOR's decision in *Mezzacappa* was subsequently upheld by the Northampton County Court of Common Pleas and the Commonwealth Court. *Borough of West Easton v. Mezzacappa*, No. C-48-CV-2012- 7973 (North. Com. P1. Jan. 9, 2013) ("[A] request is not disruptive when a requester [seeks] the same records only twice"), aff'd 74 A.3d 417 (Pa. Commw. Ct. 2013).

Here, the Township has not demonstrated that the instant Request is repetitive and burdensome. While the Township asserts that the "Requester has made over 95 separate [RTK] submissions to the Township since November 2022", the Township has provided no evidence regarding any burden. The Township did not submit any prior requests for similar records, and the RTKL does not limit the amount of "separate" requests a requester may make. *See* 65 P.S. § 67.1308. Accordingly, the Township has not demonstrated that the instant Request is repetitive pursuant to Section 506(a) of the RTKL, nor has the Township demonstrated that the Request is burdensome. See 65 P.S. § 67.506(a); *see also Anderson and All That Philly Jazz v. City of Phila.*, OOR Dkt. AP 2023-1840, 2023 PA O.O.R.D. LEXIS 2694. As such, the OOR declines to find that the Request is repetitive or burdensome.

3. Any underlying civil litigation is irrelevant to the appeal

The Township noted that the Requester is a plaintiff in a pending litigation against the Township related to the proposed location of a new municipal complex and Bellwoar Kelly has been hired by the Township as special counsel to represent the Township in the lawsuit. Based on this fact, the Township argues that any request for documents related to this matter must be

presented to the Court of Common Pleas in the context of the litigation and should be disposed of by application of the Pennsylvania Rules of Civil Procedure.

It undisputed that the parties to the Request and the instant appeal are involved in a civil litigation pending in the Court of Common Pleas. However, it is well settled that the existence of litigation outside of the RTKL process has no bearing on whether a request may be submitted under the RTKL. In *Office of the District Attorney of Phila. v. Bagwell*, the Commonwealth Court reviewed whether a judicial order denying discovery precluded a party from seeking the same records under the RTKL and concluded:

> Discovery conducted in a court of law and a request made under the RTKL are wholly separate processes and it is only in rare circumstances, such as the issuance of a protective order, that a judicial order or decree governing discovery in litigation will act to prevent disclosure of public information responsive to a RTKL request.

155 A.3d 1119, 1139 (Pa. Commw. Ct. 2017). Similarly, in *Chester Community Charter School v. Hardy*, the Commonwealth Court addressed whether a RTKL request was barred based on a court order staying discovery in related litigation, holding:

> It may be that requester is using the Right-to-Know Law to conduct discovery in the defamation action, which has been stayed. This result may seem unfair because Charter School is barred by the bankruptcy proceeding from doing similar discovery against the Defamation Defendants. Unfortunately for Charter School, it matters not. A requester's motive under the Right-to-Know Law has been made irrelevant by the legislature.... Charter School is an "agency." As such, it is bound by the directives of the legislature for all agencies, and whether those directives are fair or wise is beyond the court's proper field of inquiry.

38 A.3d 1079, 1089 (Pa. Commw. Ct. 2012); *see also City of Allentown v. Brenan,* 52 A.3d 451 (Pa. Commw. Ct. 2012) (holding that a judicial order denying a motion to compel discovery did not prohibit a RTKL request). A review of the case management order submitted by the Township indicates that discovery in the civil matter pending in the Court of Common Pleas closed on March 11, 2024, as stated by the Township. Nevertheless, the order is a routine case management order,

not a protective order that may possibly have had a different impact on the instant appeal. Therefore, the existence of any litigation in which the requested records may be implicated is irrelevant to a determination of whether the records are accessible under the RTKL.

4. The Township has not proven that the requested legal invoices are protected by the attorney-client privilege or attorney work-product doctrine

The Township argues that any information contained in the legal invoices would be protected by the attorney-client privilege and the attorney work-product doctrine because Bellwoar Kelly, LLP is representing the Township in a civil lawsuit involving the Requester. The Township asserts that the information contained in the legal invoices would be communications between attorney and client in regard to the civil litigation matter.

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. *Bousamra v. Excela Health,* 210 A.3d 967, 982-83 (Pa. 2019) (citing *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007), *aff'd* 992 A.2d 65 (2010)). "[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege must prove waiver under the fourth prong." *Office of the Governor v. Davis,* 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2014). An agency may not, however, 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").

In *Levy v. Senate of Pennsylvania*, the Pennsylvania Supreme Court discussed the application of the attorney-client privilege in regard to the redaction of legal invoices stating, "the determination of the applicability of the attorney-client privilege does not turn on the category of a document, such as whether it is an invoice or fee agreement. Instead, the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege." 65 A.3d 261, 373 (Pa. 2013). In determining whether the privilege applied to a particular entry in an invoice, the Court approved a "line-by-line analysis." *Id.*

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 purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation." *Bousamra v. Excela Health*, 210 A.3d 967, 976 (Pa. 2019) (internal citations omitted); *see also Heavens v. Pa. Dep't of Env't 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"). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978 (internal citation omitted), the work-product doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id.* at 979 (internal citations and quotation omitted).

With respect to the claims of privilege, the Township evidence is limited to statements of counsel in the Township's position. While the position statement is verified by Ms. Reddick, it fails to aver any facts to satisfy the legal standards to prove attorney-client privilege and attorney work-product doctrine. If the presence of exempt information is undisputed, an affidavit may be unnecessary, *see Office of the Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2014) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record); however, conclusory statements are insufficient to meet an agency's burden of proof under the RTKL. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*) ("[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records."); *see also Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) ("Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL"). As the Township is the party asserting that privileges, it bears the burden of presenting evidence to meet its burden. *See Joe v. Prison Health Svcs.*, 782 A.2d 24, 31 (Pa. Commw. Ct. 2001). Further, in *Levy*, the Court held that "the determination of the applicability of the attorney-client privilege does not turn on the category of a document, such as whether it is an invoice or fee agreement. Instead, the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege" and adopted a "line-by-line analysis" to determine whether the privilege applied to a particular entry in an invoice. *Levy*, 65 A.3d at 373. Here, the Township has not presented competent evidence to meet its burden of proving that the requested legal invoices may be withheld because they are protected by the attorney-client privilege and attorney work-product doctrine.

See, e.g., Heisey v. Penn Twp., OOR Dkt. AP 2022-1516, 2022 PA O.O.R.D. LEXIS 2133 (agency is required to prove first three prongs of the attorney-client privilege test before challenger must prove waiver) citing *Bousamra v. Excela Health*, 653 Pa. 365, 210 A.3d 967, 982-83 (2019); *see also Mission Pa., LLC v. McKelvey,* 212 A.3d 119, 129 (Pa. Commw. Ct. 2019), *appeal denied* by 223 A.3d 675 (Pa. 2020) (while "[a] preponderance of the evidence may be the lowest burden of proof...," evidence is still required "...unless the facts are uncontested or clear from the face of the RTKL request or exemption."); 65 P.S. §67.708(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Township is required to provide all responsive invoices within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Montgomery 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 according to court rules as per 65 P.S. § 67.1303, but 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] All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: October 24, 2024

/s/ Kelly C. Isenberg

KELLY C. ISENBERG, ESQ.
DEPUTY CHIEF COUNSEL

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

Sent via OOR E-File Portal to: Matt Murray; Eric Frey, Esq; Michelle Reddick, AORO

Exhibit F

IN THE COURT OF COMMON PLEAS

IN AND FOR THE COUNTY OF MONTGOMERY, PENNSYLVANIA

CIVIL DIVISION

- - -

UPPER POTTSGROVE TOWNSHIP	:	
	:	
vs.	:	NO. 2025-00481
	:	
MATTHEW E. MURRAY	:	
	:	

- - -

Oral Argument on Motions in Limine

- - -

Monday, June 2, 2025
Commencing at 11:15 a.m.

- - -

Odalys Cummins, CSR
Official Court Reporter
Montgomery County Courthouse
Courtroom G
Norristown, Pennsylvania

- - -

BEFORE: THE HONORABLE JEFFREY S. SALTZ, JUDGE

- - -

COUNSEL APPEARED AS FOLLOWS:

ERIC C. FREY, ESQUIRE
for the Plaintiff

CATHERINE M. HARPER, ESQUIRE
for the Defendant

- - - *Oral Argument* - - -

THE COURT: Good morning, everyone.

This is Upper Pottsgrove Township v. Murray, Number 2025-0481, and we are here on the defendant's preliminary objections to the complaint.

Of course I did make a preliminary ruling on certain of the legal issues raised by the preliminary objections. That was a preliminary ruling. So I am happy to hear both sides on whether I was right or wrong. We'll see how that goes.

All right. This is -- defendants are the moving party here, so I am happy to hear from you.

MS. HARPER: Thank you, Your Honor. Kate Harper on behalf of Matt Murray, who is sitting next to me. We also have Ariel Shapell from the American Civil Liberties Union, who's cocounsel in this case. I'm going to handle the argument, unless I forget something and then Ari will remind me.

Your Honor, I do think that most of the issues that are raised by these preliminary objections are the same that were raised in response to the request for a preliminary injunction. Of course I agree with your ruling on that, not granting the preliminary injunction, but basically they come down to a number of things.

The right-to-know law doesn't permit injunctions against any and all right-to-know requests. You have to deal with each request separately. In this case, this has already been adjudicated by the Office of Open Records, which is the place where it should be adjudicated first, and the Office of Open Records said, we don't grant injunctions against all future right-to-know requests. You have to deal with each one individually. And you have not proven -- there's only one case where you have a repeated request that they might tell my client not to send it again. But the township did not prove that that was the case here.

He sent a number of requests, true. They were for different things.

THE COURT: Of course the Office of Open Records doesn't have authority to issue an injunction, does it?

MS. HARPER: No. But it could have ruled that it was appropriate to do so and didn't do it.

Here's the next thing. In this case that ruling was not appealed. And it would have been appealed right here to Montgomery County Court of Common Pleas. So I think it's collateral estoppel, if

not res judicata on this particular issue.

But the law was correct in the Office of Open Records opinion, which I attached to one of my pleadings, and Your Honor was correct, as I believe on the preliminary injunction, which I also attached to one of my pleadings. It was a transcript on that, a citizen has a right to ask about public documents, to get public documents.

The right-to-know law provides a procedure or a process for doing that. He follows the process. He is allowed to ask those questions. And the right-to-know law doesn't say that if you ask too many times, sorry, we're shutting you down. You're not allowed to do that.

There is this one specific way that you can shut somebody down, and that would be for repeated requests, the same repeated request that turned into burdensome or harassment for the local government. And it didn't.

And so in each case, Your Honor, my client made a right-to-know request. Sometimes documents came that were redacted. Sometimes he got a response that the document didn't exist yet because it was a draft. Most often that was given in response to

request for plans for the municipal complex, which Your Honor is familiar with from our other case. And the township kept saying they were only drafts and they didn't have to give them. And when they finally gave them, they redacted every page -- every page.

Now, as a municipal solicitor myself --

THE COURT: How do I know this? It's not in the complaint.

MS. HARPER: It is not in the complaint.

THE COURT: We're here on preliminary objections. I'm assuming the truth of the averments in the complaint.

MS. HARPER: Well, the averments of the complaint are only that he asked for too many records too many times. Period. End of story. And that's not a reason under the right-to-know law for stopping him from asking for records.

I could sit down now, Your Honor. Probably you want me to, and that's okay.

THE COURT: No, no, no. You take the time you need.

MS. HARPER: I just want to add one more thing.

THE COURT: Yes.

MS. HARPER: We do believe -- it's not in the complaint, but here's one of the records they provided. The township is playing a game, and that's why we raised the strategic lawsuit against public participation law, because they're playing a game. They're trying to run him out. My client, as a taxpayer in Upper Pottsgrove, is actually paying both sides of this lawsuit. He's paying for me and Ari and he's paying for the township.

THE COURT: I hope he's paying a higher percentage of your bills then he is of the township's bills.

MS. HARPER: Well, when I charge him, he does pay them. That's true, Your Honor. But I'm just saying that this is so unfair, and that's why a provision exists, that if a local government is bringing lawsuits against somebody that they ought to be looked at to see whether they have a reason that is inappropriate, improper, and entitles my client to collect attorney's fees for doing it. And I think this is one such lawsuit. They already knew they didn't have a right to injunction. They knew that, and they did it anyway.

And then, when you turned them down and

very cogently explained what the right-to-know law allows and what it doesn't allow, they didn't withdraw the lawsuit. The only thing they're asking for is an injunction. That's it. They're not asking for damages. They're not asking for anything else. Not that they would be appropriate in any event.

So why are we here? I mean, that's really -- the preliminary objections.

THE COURT: I think we're here on the request for a permanent injunction --

MS. HARPER: Well --

THE COURT: -- which I have not ruled on.

MS. HARPER: You have not ruled on that, Your Honor. But the same reasoning that was applied to the preliminary injunction, where I raised the issue of the likelihood of success on the merits, and Your Honor responded to that argument, that this type of injunction is not permitted.

And they haven't produced a case showing an injunction was permitted except one where an injunction was entered by stipulation of the parties. Everybody agreed to it. That's not controlling precedent here. That doesn't prove that the

right-to-know law gives the township the basis to shut down a citizen exercising his rights. It doesn't.

So we preliminarily objected and we've also raised the issue that this is probably a slap suit, and we're entitled to some kind of a hearing on that allegation as well.

Thank you, Your Honor.

THE COURT: All right.

Mr. Frey, good morning.

MR. FREY: Good morning. Eric Frey for the township.

Your Honor, we are -- it's quite simple. This defendant submitted 100 requests in 24 months. That's nearly one a week that he submitted. And we have a small township, four staff members. It was overriding the staff keeping up with the right-to-know requests from this individual and others as well as their other duties for the township. They couldn't keep up.

And we actually went to the Office of Open Records. We discussed with them the appeals that had gone up to the Office of Open Records dealing with this defendant. There were eight of them. The township won all but one of them.

And you're right, a lot of the requests that I have issues with are the requests for plans. And what the Office of Open Records informed us is that they only have the ability under the law to stop right-to-know requests if they are repetitive and unduly burdensome. They explained to us that repetitive is very hard for them to quantify because -- this defendant would ask for plans. He would phrase it in a way saying, I would like plans that were drafted between January and February. They would get back to him and say there aren't any for these various reasons. He would appeal. We would win on appeal. The next request, I want plans that are completed in March or April. So to us they were the same request, and the same response would be they're draft plans. Under the right-to-know request, we don't have to give draft documents.

THE COURT: Am I correct that under the right-to-know law, the township once it responds to a request is not under a duty to supplement it on its own initiative?

MR. FREY: That's correct. However, in this case we did, Your Honor. When the plans were finalized -- and this is what we told the defendant

while this was going on: Once they're finalized, you will get them. And what the township did is they posted them up to the website so everybody has them. We weren't hiding anything.

The case law on why you don't give draft plans was a PennDOT case where PennDOT had two different versions of the road. They didn't want to get draft plans out because giving both versions of the road, you're going to anger this group of citizens and this group of citizens, when PennDOT knew they were only going to build one road. So until the plans were finalized, they didn't want to release them because at that point --

THE COURT: Yes. And the issue whether or not Mr. Murray was entitled to draft plans or whether the township was entitled to withhold them is not before me.

MR. FREY: Correct.

THE COURT: But when you say that Mr. Murray made a request for plans prepared during time period A and the answer is nothing final, just in draft, and the township has no obligation to supplement that when the plans are finalized -- and I give the township kudos for offering to do so anyway -- but

without an obligation, doesn't Mr. Murray have to make seriatim requests until the point that the -- that there is a final plan to be produced?

MR. FREY: If we hadn't taken a position in that once they're finalized they will be released, we --

THE COURT: But if you said that and you didn't release them, what would be Mr. Murray's remedy?

MR. FREY: He would have to do a written request. You are correct, Your Honor.

So it's our position that it was repetitive and burdensome. That's our position.

The other one is there is no adequate remedy of law here because the Office of Open Records, their hands are tied. That is their standard. And that's why we brought ourselves before the equity side of this court in that we're not solely bound by what the statute says that you have some way to give relief to the township where it's not getting relief under the law.

In addition to that, why we think these requests were malicious essentially is that on six occasions or more than six occasions, Mr. Murray submitted requests, was told that the documents were

ready, and he did not pick them up for months. They were sitting there. The work was done. All the township's efforts were there. The township's expenses were done. Documents are sitting there and they are left there for months. And every time -- so essentially what the township would do on those occasions -- Mr. Murray would submit a request. We would say, hey, these are available. You owe $5 for the copies.

He would then submit the next one, and we would say, these are ready; you can't get any until you pay the $5 for the last one and the $4 for this one. That went on for months. And they sat there, I believe, from September to January, and he finally picked them up right as this case was being filed.

So we think there's a maliciousness on his side in that he was submitting these requests without actually wanting the documents. They were just done to cost the township time and expenses. Because the law on that is that even if we have ten piled up as he submits them, we still have to process them. We can't send him a letter saying we're not processing these or spending any time with it until you pay these fees. We have to process it, give him the letter

saying they're available before -- and then not deliver any of them until he's paid the fees in full.

So we don't think we have adequate remedy of law here given the Office of Open Records position on representative and burdensome. That's why we wanted to come here and see if there was another avenue.

And, actually, it was the Office of Open Records who gave us the citations to the Dauphin County Court. They said, hey, here's another avenue you can try and look into it. They were successful up there, so we tried it here.

Thank you.

MS. HARPER: Your Honor, couple of things?

THE COURT: Yes.

MS. HARPER: If we had a hearing, my client would testify that when he went to the township building to pick up documents that were allegedly ready for pickup, he had to wait an hour while they copied the documents.

THE COURT: That is not on the record before me today.

MS. HARPER: I understand. If there

were a hearing, though, that's what he would testify to.

Secondly, and this is public knowledge, every month they were paying an engineering firm hundreds of thousands of dollars to develop plans for the municipal complex which was at issue in the other lawsuit. My client wanted to make sure that he got the plans that were being paid for. And because they kept telling him they're not ready, they're not ready, they're not ready, although they already authorized the solicitor to put bids out. That's public knowledge. That was in the record. Public. Okay. They kept telling him they're not ready.

So he had to ask every month to see what he's spending hundreds of thousands of dollars on and what are you authorizing your solicitor to bid. Where are the plans? And it took them forever.

And Your Honor is correct they don't have an obligation to produce them later. Once you make the request and they answer it, done. He has to make another request to make sure that he could get the plans, which he wanted for the trial that we had in the fall of 2024.

I would also say that the right-to-know

law has one section dealing with things like this. It's Section 506. Okay? And it says: "An agency may deny a request or access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency. A denial under this section shall not restrict the ability to request a different record."

So the law itself says you can't just deny all requests. You have to show that it was a repeated request that caused the burden. Since they're denying all the requests for the plans, we don't have them yet, we don't have them yet, we don't have them yet. They didn't even have to redact them until they were willing to release them. I can't see that that's an unreasonable burden. And I don't think those facts are in dispute, Your Honor.

THE COURT: All right.

Thank you both for your presentations.

At the hearing on the preliminary injunction, I did make a preliminary ruling that the township was not entitled to injunctive relief. And after reviewing the briefs and hearing argument, I adhere to that ruling based under Section 506 of the right-to-know law which I discussed at the prior

hearing and, in addition, based on Section 1308 of the right-to-know law, which is also raised in the papers on the preliminary injunctions.

So for those reasons, we will issue an order that the preliminary objections are sustained and the township's complaint is dismissed.

All right. Thank you.

MR. FREY: Thank you, Your Honor.

MS. HARPER: Thank you, Your Honor.

THE COURT: Thank you, everyone.

(At 11:32 a.m., the proceedings were concluded.)

- - -

C E R T I F I C A T E

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause and that this is a correct transcript of the same.

ODALYS CUMMINS, CSR
Official Court Reporter

- - -

Exhibit G

FOR IMMEDIATE RELEASE

Upper Pottsgrove Township Files Legal Action Against Matthew E. Murray Over Right-to-Know Law Abuse

Pottstown, PA – Upper Pottsgrove Township has filed a civil complaint in the Court of Common Pleas of Montgomery County, seeking legal remedies against Matthew E. Murray for the alleged abuse of the Right-to-Know Law (RTKL). The complaint outlines significant burdens imposed on township resources due to a high volume of public record requests submitted by Murray since 2022.

According to the complaint, Murray has filed approximately 100 RTKL requests, many of which are described as redundant or derivative. Despite multiple denials and failed appeals with the Pennsylvania Office of Open Records (OOR)—where the township prevailed in all but one case—Murray allegedly continues to submit new requests. The township asserts that these actions have diverted substantial staff time, legal resources, and external consultant services, leading to more than $55,000 in legal expenses over the past two years.

Key Points of the Complaint:

- Murray's RTKL requests are described as excessive, with at least eight denials by the township upheld by the OOR.
- The complaint claims Murray's use of RTKL requests has been a tactic to drain township resources in connection with ongoing litigation involving municipal building relocations.
- The township states that it has repeatedly processed Murray's requests but alleges that Murray has failed to retrieve documents for which fees remain unpaid.
- Outstanding fees from multiple requests total $66.75.

Legal Claims and Requested Relief: The township's complaint includes claims for abuse of process and wrongful use of civil proceedings. Upper Pottsgrove Township is seeking:

- A preliminary and permanent injunction to prevent further RTKL filings by Murray or those acting on his behalf.
- A court determination that Murray's actions constitute an abuse of the RTKL process.

Township's Statement: Eric C. Frey, the township's solicitor, emphasized the need for responsible and fair use of public transparency laws. "The Right-to-Know Law is designed to promote government transparency, not to be weaponized in a manner that drains public resources and disrupts municipal operations," Frey stated. "This legal action is necessary to safeguard the interests of Upper Pottsgrove Township and its taxpayers."

All Upper Pottsgrove Commissioners supported this legal action.

Next Steps: Upper Pottsgrove Township will await further proceedings in the Court of Common Pleas. Officials are committed to fulfilling all legitimate transparency obligations while protecting taxpayer funds and municipal resources from misuse.

About Upper Pottsgrove Township: Upper Pottsgrove Township, located in Montgomery County, Pennsylvania, is dedicated to serving its residents through responsible governance, community services, and maintaining public trust.

For further information, please contact: Eric C. Frey, Solicitor
Dischell, Bartle & Dooley, P.C.
Phone: (610) 323-3306

Exhibit H

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

UPPER POTTSGROVE TOWNSHIP
vs.
MURRAY, MATTHEW E

NO. 2025-00481

COVER SHEET OF RESPONDENT

Date of Filing January 17 2025 Respondent MATTHEW E. MURRAY

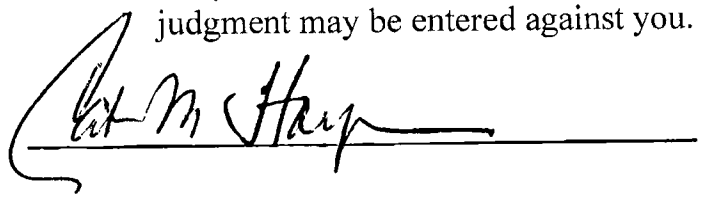
Counsel for Respondent CATHERINE M. HARPER, ESQUIRE I.D. No. 34568

Counsel's email address: CHARPER@TIMONEYKNOX.COM

Document Filed (Specify) RESPONSE OF DEFENDANT MATTHEW E. MURRAY IN THE NATURE OF A MOTION TO DISMISS THE PETITION OF PLAINTIFF UPPER POTTSGROVE TOWNSHIP FOR PRELIMINARY AND FINAL INJUNCTION AND ASSERTING A MOTION UNDER THE PENNNSYLVANIA SLAPP LAW

RULE RETURN DATE of Motion _____

You are hereby notified to file a written response within twenty (20) days from service hereof or judgment may be entered against you.



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UPPER POTTSGROVE TOWNSHIP	:	IN THE COURT OF COMMON PLEAS
	:	OF MONTGOMERY COUNTY
v.	:	CIVIL DIVISION - EQUITY
	:	
MATTHEW E. MURRAY	:	NO. 2025-00481
	:	

RESPONSE OF DEFENDANT MATTHEW E. MURRAY IN THE NATURE OF A MOTION TO DISMISS THE PETITION OF PLAINTIFF UPPER POTTSGROVE TOWNSHIP FOR PRELIMINARY AND FINAL INJUNCTION AND ASSERTING A MOTION UNDER THE PENNSYLVANIA SLAPP LAW

COMES NOW, Matthew E. Murray, by his counsel Catherine M. Harper, Esquire of the Law Firm of Timoney Knox, LLP to file this motion to dismiss the Petition for Preliminary Injunction to restrain the Defendant Matthew E. Murray from pursuing Right-to-Know Law Requests to the Township or any appeals to the Pennsylvania Office of Open Records as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted in part and denied in part. It is admitted that the Plaintiff, Upper Pottsgrove Township, is involved in litigation with the Defendant, Matthew E. Murray, at the Montgomery County Court of Common Pleas No. 2023-02216, *Matthew E. Murray v. Slinkerd, Trace, President of the Upper Pottsgrove Township Commissioners,* involving Matthew Murray's assertion that the Township's plans to build a municipal complex on the permanently preserved Smola Farm were a violation of the Open Space Lands Act, 32 P.S. §5001, *et seq.* Matt Murray is a citizen who lives in Upper Pottsgrove Township and pays taxes, including the Open Space Tax in that Township, and has, from time to time requested public records under the Pennsylvania Right-to-Know Law (RTKL), 65 P.S. §67.101 *et seq.* He has filed RTKL requests over the years for budget info, information of the new municipal complex and other items of public interest. Any characterization of the litigation is denied.

5. Denied. Each RTKL request must be considered on its own merits and the requester has the right to appeal a denial to the Office of Open Records. The RTKL does not limit a citizen's rights to seek information about public records.

6. Denied. It is specifically denied that Matt Murray made "excessive requests." It is denied that any RTKL requests cost the Township that sum in attorneys' fees but specific proof, if relevant, is requested.

7. Admitted in part and denied in part. The Township and the requester are engaged in litigation as noted above. Any characterization of that litigation is denied.

8. Denied. The Respondent as a USA citizen has exercised his rights under the United States Constitution, the Pennsylvania Constitution and the PA RTKL to question his elected local government on public policy issues. He has also, in that vein, sought information under the RTKL.

It is admitted that some of that information was used in the litigation – – because it was not provided via discovery when requested as it should have been, since these are all public records.

9. Denied. Plaintiff has paid for and picked up all documents which the Township refused to send electronically.

10. Denied. The same parties were also involved in recent case before the Pennsylvania Office of Open Records, "In The Matter Of Matt Murray, Requester v. Upper Pottsgrove Township, Respondent," Office of Open Records Docket No. AP 2024-2523. In that matter, Upper Pottsgrove Township objected that Matt Murray as a Requester of documents under the Pennsylvania Right-to-Know Law where the Township argued that the documents sought should have been sought in the litigation in the Court of Common Pleas and further, the Township argued that the Requester had made burdensome requests and the requests should be denied.

In a Final Determination issued October 24, 2024, the Office of Open Records ruled that "Here, the Township has not demonstrated that the instant Request is repetitive and burdensome. While the Township asserts that the 'Requester has made over 95 separate [RTK] submissions to the Township since November 2022,' the Township has provided no evidence regarding any burden...Accordingly, the Township has not demonstrated that the instant Request is repetitive pursuant to Section 506(a) of the RTKL, nor has the Township demonstrated that the Request is burdensome." (citations omitted). A true and correct copy of the Final Determination of the Office of Open Records in this matter is attached hereto as Exhibit A.

The Township did not appeal the Final Determination of the Office of Open Records in that case, and is therefore bound by the determinations of the Office of Open Records and collaterally estopped from challenging that decision in a separate action at this time.

11. Denied. Strict proof is demanded.

12. Denied. Strict proof is demanded.

13. Denied. This is argument and misconstrues the PA RTKL. It is denied as a conclusion of law to which no responsive pleading is required.

NEW MATTER

1. Respondent Matt Murray also asserts that this Court does not have jurisdiction over the requested relief by Upper Pottsgrove Township, inasmuch as they failed to appeal the findings of the Office of Open Records, and the Right-to-Know Law does not give the Court of Common Pleas of Montgomery County separate and collateral jurisdiction over a RTKL request unless an appeal has been taken from the Final Determination of the Office of Open Records. The Township should be collaterally estopped from challenging the Final Determination in a separate action.

2. As a matter of law, the Right-to-Know Law in Pennsylvania *presumes* that a record of a local government is a public record and available to a requester unless it is specifically exempted by some provision of the Act. Right-to-Know Law ("RTKL") Section 305, Presumption.

3. In addition, the Petition seeks action which is overly broad in seeking to ban *all* RTKL requests, and, as prior restraint on his First Amendment right, would surely violate the First Amendment to the United States Constitution as well as Article I, Section 20 of the Pennsylvania Constitution, both of which guarantee Matt Murray's right to question governmental acts, to discuss governmental acts, and to have access to the records of a government which are considered to be public records. Each RTKL request is evaluated separately under the Act. *Wawa Inc. v. Alexander J. Litwornia & Associates,* 2001 Pa. D&C December LEXIS 485 (Lehigh County Court of Common Pleas 2001).

4. The Right-to-Know Law contains a provision regarding "disruptive requests," but even that section does not apply to the Township's request to hamper a Requester's ability to request a different record than previously requested.[1] Moreover, Upper Pottsgrove Township has not pled any facts which would show any "unreasonable burden on the agency," where the courts have rejected blanket denials of their obligations under the Right-to-Know Law "merely because the Borough has a small, part-time staff, it does not follow that the Borough is unreasonably burdened" by a request for approximately 50 documents. See *Borough of West Easton v. Mezzacapa,* 74 A.3d 417 (Pa. Cmmw. Ct. 2013). The defendant herein is a much larger municipality with a full-time staff.

5. The Township's assertion that it has spent money in having its Solicitor review each and every Right-to-Know Law Request made by anyone over a period of three years and has thereby incurred legal expenses is laughable in the present case where the documents requested in Exhibit A were for legal invoices incurred by the Township in its unsuccessful attempt to violate the Open Space Lands Act by building a municipal complex on the Smola Farm. Matt Murray requested those documents because, as he explained to the Office of Open Records, he is a taxpayer and has a right to know how his tax money is being spent. When the Township finally complied and produced those attorneys' fees records, the amount spent by the Township on other litigation related to building the municipal complex on open space land totaled in excess of $216,027, certainly something the Township's residents and citizens should know, and have a right to know.

[1] Some of the "repeat" requests are for documents that the Township claims they don't have "yet," despite being plans for the new municipal complex on which they've spent hundreds of thousands of tax dollars in engineering fees but claim the plans don't yet exist. Now, the Respondent was forced to ask for the municipal complex plans several times.

6. It's obvious, since Upper Pottsgrove Township, a township of the first class which has a fully paid full time staff, is incurring the complained of expenses by choice solely to have its Solicitor look for ways to deny requests that are proper under the Right-to-Know Law. This is a cost of doing business for a local government which, under the Pennsylvania Right-to-Know Law, "*shall* provide public records in accordance with this Act." RTKL Section 302.

7. The Township has a history of using the courts to harass its citizens who have the courage to express opinions on subjects of public discourse. In the present case, this is the second lawsuit filed by Upper Pottsgrove Township against Matthew E. Murray. The prior lawsuit was an action for defamation against Matthew E. Murray and his lawyer, the undersigned counsel, for "defamation," as a result of an opinion piece which appeared in the Pottstown Mercury regarding the Police Chief sending a letter to Matthew Murray warning him not to speak out at public meetings and implying that the result could be an arrest. *Trace Slinkerd, Donald Read, Henry Lewellyn, and James H. Fisher v. Matt Murray,* Court of Common Pleas of Montgomery County No. 2024-14043. *Trace Slinkerd, Donald Read, Henry Lewellyn, and James H. Fisher v. Catherine Harper,* Court of Common Pleas of Montgomery County No. 2024-14019. Those cases have not been decided.

8. Matt Murray asserts his rights under Pennsylvania's new Anti-SLAPP Law, 42 Pa. CSA §8320.1 *et seq.* (previously 27 Pa. C.S.A. §8301 *et seq.*), passed last year and signed into law by Governor Shapiro on July 17, 2024. Matt Murray is immune from lawsuits of this kind under §8340.15 "Grant of Immunity." A "SLAPP" lawsuit is generally regarded as a "Strategic Lawsuit Against Public Participation." As noted by a commentator Thomas Wilkinson, Esquire, in Law 360, "By passing anti-SLAPP legislation, Pennsylvania lawmakers made it clear that 'It is in the public interest to encourage continued participation in matters of public significance' without threat

of 'abuse of the judicial process.'" Matt Murray asserts his rights under Pennsylvania's new Anti-SLAPP Law, and asserts that the Township's current litigation, together with the defamation lawsuit, constitute actions that he is "forced to defend against meritless claims arising from the exercise of the rights to protected public expression." Pennsylvania Anti-SLAPP Law, Section 8340..18(a), and that he is entitled to attorneys' fees and court costs.

9. The requests for information under the Pennsylvania Right-to-Know Law represent "protected public expression" under the Act. As such, he is entitled to immunity from actions such as this, as well as attorneys' fees and punitive damages.

10. This Court action, a Petition for Injunctive Relief, is, in and of itself, also a violation of the Sunshine Law. The Petitioners did not authorize the filing of this lawsuit at a public meeting and some Commissioners were unaware it had been filed until the Township issued a press release. See Exhibit B

11. The filing of this lawsuit is actionable under the PA Dragonetti Act, the "Wrongful Use of Civil Proceedings Act," 42 Pa. C.S.A. § 8351-8354, in that it, and the press release sent out by the Township, attached hereto as Exhibit B, demonstrate its intent to intimidate and silence a citizen who was successful in the litigation from defending the verdict or speaking out about it.

WHEREFORE, Respondent respectfully prays this Honorable Court will dismiss the Petition of Upper Pottsgrove Township for Preliminary and Final Injunction, and award attorneys' fees to Matt Murray under the Anti-SLAPP Law.

Respectfully submitted,

By: _____
Catherine M. Harper, Esquire
Attorney for Defendant,
Matthew E. Murray

Dated: 1/17.2024

VERIFICATION

I, Matthew E. Murray, verify that to the best of my knowledge, information and belief, the statements made herein are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Matthew E. Murray

Dated: 1-17-2025

EXHIBIT A

pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
MATT MURRAY, **Requester**	:	
	:	
v.	:	**Docket No: AP 2024-2523**
	:	
UPPER POTTSGROVE TOWNSHIP, **Respondent**	:	

FACTUAL BACKGROUND

On August 5, 2024, Matt Murray ("Requester") submitted a request ("Request") to Upper Pottsgrove Township ("Township") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking "[a] copy of any and all invoices paid or unpaid for services rendered by the law firm Bellwoar Kelly or any of it[]s associates including Andrew Bellwoar and John Mahoney for the time period January 1[,] 2024 to August 2[,] 2024."

On September 9, 2024, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Township granted the Request, by providing records.

On September 30, 2024, the Requester appealed to the Office of Open Records ("OOR"), arguing that the Request sought invoices and the records the Township provided "were monthly

statement single line totals with no itemized detail."[1] The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 10, 2024, the Township submitted a position statement that was verified under penalty of perjury pursuant to 18 Pa.C.S. § 4904 by Michelle Reddick, the Township's manager and Open Records Officer.[2] The Township claims that because the Requester and the Township are involved in a pending civil litigation, for which Bellwoar Kelly is representing the Township, any communications between the Township and Bellwoar Kelly are protected by the attorney-client privilege. The Township also argues that the communications are protected from access under the Pennsylvania Rules of Civil Procedure, Rule 4000 *et seq.*, Depositions and Discovery. Finally, the Township argues that the pending litigation matter is subject to a case management order which required that all discovery shall be completed by March 11, 2024. In sum, the Township argues that any request for documents should be presented to the Court of Common Pleas in the context of the litigation matter, and any information that is contained on the attorney invoices are protected from disclosure under the attorney-client privilege and attorney-work product doctrine. With regard to the Request in general, the Township argues that it is unduly burdensome under Section 506 of the RTKL because the Requester has made over 95 submissions to the Township since November 2022 and, because of the repeated requests, along with the timing of this appeal, this matter has placed an undue burden on Township representative who must attend trial in the underlying litigation. *See* 65 P.S. § 67.506. The Township included a copy of a case

[2] In the position statement, the Township "notes" that the Appeal is not verified. However, the Township has not pointed to a RTKL statutory provision that requires an OOR appeal to be verified.

management order issued in *Murray, et al v. Slinkard, et al*, Montgomery Court of Common Pleas Civil Docket No. 2023-02216.

On October 10, 2024, the Requester also submitted a position statement. The Requester argues that the Township is making false assumptions by stating that the reason for the Request is "to gain insight into a legal case," because he is a taxpayer and, therefore, he has a right to know how his tax money is being spent. In addition, the Requester states that he has requested invoices in the past from the same law firm and, while they were redacted, they were invoices, not summaries.

LEGAL ANALYSIS

The Township is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Township is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. § 67.708(a)(1). 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 identity of the Requester is irrelevant

In the position statement, the Township makes note of the fact that the Requester and the Township are currently involved in a civil lawsuit. To the extent that the Township believes that the Requester's status as a party to a civil matter pending in the Court of Common Pleas involving the Township has a bearing on the OOR's determination of the instant appeal, a requester's identity

or motivation for making a request is not relevant to determining whether a record is accessible to the public under the RTKL. *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013). Under the RTKL, whether the document is accessible is based only on "whether a document is a public record, and if so, whether it falls within an exemption that allows that it not be disclosed." *Hunsicker v. Pennsylvania State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli v. Pennsylvania State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker*).

2. The Request is not repetitive or burdensome

The Township argues that the Request is repetitive, as the Requester has made similar prior requests. Section 506(a) of the RTKL provides that "[a]n agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency." 65 P.S. § 67.506(a). "Under this section ... an agency must demonstrate that (1) 'the requester has made repeated requests for th[e] same record[(s)]' and (2) 'the repeated requests have placed an unreasonable burden on the agency.'" *Pa. Office of the Governor v. Bari*, 20 A.3d 634, 645 (Pa. Commw. Ct. 2011); *see also Slate v. Pa. Dep't of Envtl. Prot.*, OOR Dkt. AP 2009-1143, 2010 PA O.O.R.D. LEXIS 97 ("A repeated request alone is not enough to satisfy § 506(a)(1)"). Repeated requests for the same records, although phrased differently, may be denied as disruptive. *See Cohen v. Pa. Dep't. of Labor & Industry*, OOR Dkt. AP 2009-0296, 2009 PA O.O.R.D. LEXIS 159; *Dougher v. Scranton Sch. Dist.*, OOR Dkt. AP 2009-0798, 2009 PA O.O.R.D. LEXIS 318 ("Slight differences in phraseology do not preclude application of [Section 506(a)]").

In *Mezzacappa v. West Easton Borough*, the OOR held that a request must be repeated more than once to constitute a "repeated request" for purposes of 65 P.S. § 67.506(a). OOR Dkt.

AP 2012-0992, 2012 PA O.O.R.D. LEXIS 967 ("Because the Borough has only established that the [r]equester has made one repeated request, rather than multiple 'repeated requests,' the OOR finds that the [r]equest was not disruptive"). The OOR's decision in *Mezzacappa* was subsequently upheld by the Northampton County Court of Common Pleas and the Commonwealth Court. *Borough of West Easton v. Mezzacappa*, No. C-48-CV-2012- 7973 (North. Com. Pl. Jan. 9, 2013) ("[A] request is not disruptive when a requester [seeks] the same records only twice"), aff'd 74 A.3d 417 (Pa. Commw. Ct. 2013).

Here, the Township has not demonstrated that the instant Request is repetitive and burdensome. While the Township asserts that the "Requester has made over 95 separate [RTK] submissions to the Township since November 2022", the Township has provided no evidence regarding any burden. The Township did not submit any prior requests for similar records, and the RTKL does not limit the amount of "separate" requests a requester may make. *See* 65 P.S. § 67.1308. Accordingly, the Township has not demonstrated that the instant Request is repetitive pursuant to Section 506(a) of the RTKL, nor has the Township demonstrated that the Request is burdensome. See 65 P.S. § 67.506(a); *see also Anderson and All That Philly Jazz v. City of Phila.*, OOR Dkt. AP 2023-1840, 2023 PA O.O.R.D. LEXIS 2694. As such, the OOR declines to find that the Request is repetitive or burdensome.

3. Any underlying civil litigation is irrelevant to the appeal

The Township noted that the Requester is a plaintiff in a pending litigation against the Township related to the proposed location of a new municipal complex and Bellwoar Kelly has been hired by the Township as special counsel to represent the Township in the lawsuit. Based on this fact, the Township argues that any request for documents related to this matter must be

presented to the Court of Common Pleas in the context of the litigation and should be disposed of by application of the Pennsylvania Rules of Civil Procedure.

It undisputed that the parties to the Request and the instant appeal are involved in a civil litigation pending in the Court of Common Pleas. However, it is well settled that the existence of litigation outside of the RTKL process has no bearing on whether a request may be submitted under the RTKL. In *Office of the District Attorney of Phila. v. Bagwell*, the Commonwealth Court reviewed whether a judicial order denying discovery precluded a party from seeking the same records under the RTKL and concluded:

> Discovery conducted in a court of law and a request made under the RTKL are wholly separate processes and it is only in rare circumstances, such as the issuance of a protective order, that a judicial order or decree governing discovery in litigation will act to prevent disclosure of public information responsive to a RTKL request.

155 A.3d 1119, 1139 (Pa. Commw. Ct. 2017). Similarly, in *Chester Community Charter School v. Hardy*, the Commonwealth Court addressed whether a RTKL request was barred based on a court order staying discovery in related litigation, holding:

> It may be that requester is using the Right-to-Know Law to conduct discovery in the defamation action, which has been stayed. This result may seem unfair because Charter School is barred by the bankruptcy proceeding from doing similar discovery against the Defamation Defendants. Unfortunately for Charter School, it matters not. A requester's motive under the Right-to-Know Law has been made irrelevant by the legislature.... Charter School is an "agency." As such, it is bound by the directives of the legislature for all agencies, and whether those directives are fair or wise is beyond the court's proper field of inquiry.

38 A.3d 1079, 1089 (Pa. Commw. Ct. 2012); *see also City of Allentown v. Brenan,* 52 A.3d 451 (Pa. Commw. Ct. 2012) (holding that a judicial order denying a motion to compel discovery did not prohibit a RTKL request). A review of the case management order submitted by the Township indicates that discovery in the civil matter pending in the Court of Common Pleas closed on March 11, 2024, as stated by the Township. Nevertheless, the order is a routine case management order,

not a protective order that may possibly have had a different impact on the instant appeal. Therefore, the existence of any litigation in which the requested records may be implicated is irrelevant to a determination of whether the records are accessible under the RTKL.

4. The Township has not proven that the requested legal invoices are protected by the attorney-client privilege or attorney work-product doctrine

The Township argues that any information contained in the legal invoices would be protected by the attorney-client privilege and the attorney work-product doctrine because Bellwoar Kelly, LLP is representing the Township in a civil lawsuit involving the Requester. The Township asserts that the information contained in the legal invoices would be communications between attorney and client in regard to the civil litigation matter.

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. *Bousamra v. Excela Health,* 210 A.3d 967, 982-83 (Pa. 2019) (citing *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007), *aff'd* 992 A.2d 65 (2010)). "[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege must prove waiver under the fourth prong." *Office of the Governor v. Davis,* 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2014). An agency may not, however, 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").

In *Levy v. Senate of Pennsylvania*, the Pennsylvania Supreme Court discussed the application of the attorney-client privilege in regard to the redaction of legal invoices stating, "the determination of the applicability of the attorney-client privilege does not turn on the category of a document, such as whether it is an invoice or fee agreement. Instead, the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege." 65 A.3d 261, 373 (Pa. 2013). In determining whether the privilege applied to a particular entry in an invoice, the Court approved a "line-by-line analysis." *Id.*

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 purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation." *Bousamra v. Excela Health*, 210 A.3d 967, 976 (Pa. 2019) (internal citations omitted); *see also Heavens v. Pa. Dep't of Env't 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"). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978 (internal citation omitted), the work-product doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id.* at 979 (internal citations and quotation omitted).

With respect to the claims of privilege, the Township evidence is limited to statements of counsel in the Township's position. While the position statement is verified by Ms. Reddick, it fails to aver any facts to satisfy the legal standards to prove attorney-client privilege and attorney work-product doctrine. If the presence of exempt information is undisputed, an affidavit may be unnecessary, *see Office of the Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2014) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record); however, conclusory statements are insufficient to meet an agency's burden of proof under the RTKL. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*) ("[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records."); *see also Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) ("Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL"). As the Township is the party asserting that privileges, it bears the burden of presenting evidence to meet its burden. *See Joe v. Prison Health Svcs.*, 782 A.2d 24, 31 (Pa. Commw. Ct. 2001). Further, in *Levy*, the Court held that "the determination of the applicability of the attorney-client privilege does not turn on the category of a document, such as whether it is an invoice or fee agreement. Instead, the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege" and adopted a "line-by-line analysis" to determine whether the privilege applied to a particular entry in an invoice. *Levy*, 65 A.3d at 373. Here, the Township has not presented competent evidence to meet its burden of proving that the requested legal invoices may be withheld because they are protected by the attorney-client privilege and attorney work-product doctrine.

See, e.g., Heisey v. Penn Twp., OOR Dkt. AP 2022-1516, 2022 PA O.O.R.D. LEXIS 2133 (agency is required to prove first three prongs of the attorney-client privilege test before challenger must prove waiver) citing *Bousamra v. Excela Health*, 653 Pa. 365, 210 A.3d 967, 982-83 (2019); *see also Mission Pa., LLC v. McKelvey,* 212 A.3d 119, 129 (Pa. Commw. Ct. 2019), *appeal denied* by 223 A.3d 675 (Pa. 2020) (while "[a] preponderance of the evidence may be the lowest burden of proof...," evidence is still required "...unless the facts are uncontested or clear from the face of the RTKL request or exemption."); 65 P.S. §67.708(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Township is required to provide all responsive invoices within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Montgomery 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 according to court rules as per 65 P.S. § 67.1303, but 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] All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: October 24, 2024

/s/ Kelly C. Isenberg

KELLY C. ISENBERG, ESQ.
DEPUTY CHIEF COUNSEL

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

Sent via OOR E-File Portal to: Matt Murray; Eric Frey, Esq; Michelle Reddick, AORO

EXHIBIT B

Upper Pottsgrove seeks halt to Right to Know requests by activist

Court filing says Matthew Murray has filed 100 requests since 2022, costing the township $55,000

By **Evan Brandt** | ebrandt@pottsmerc.com | The Pottstown Mercury

UPDATED: January 11, 2025 at 11:18 AM EST

UPPER POTTSGROVE — Township officials have filed a civil complaint seeking a court injunction to prevent a man who sued to block a township complex from being built on Smola Farm from filing any more Right to Know requests.

According to the papers filed on Jan. 8 and signed by Commissioners' Chairman Trace Slinkerd, resident Matt Murray has filed 100 Right to Know requests with the township since 2022 in what the filing characterizes as "an apparent desire to hamper the township's financial and professional resources."

"Perhaps our three majority officials, Slinkerd, (Don) Read and (Hank) Llewellyn, who continue to waste taxpayer money with frivolous lawsuits, should go to the Pottstown Public Library and research the First Amendment," Murray replied when asked by The Mercury for comment about the filing.

Murray, along with resident Nathaniel Guest, filed suit against the township on Jan. 30, 2023, in an attempt to prevent the construction of a new municipal complex on the former Smola Farm off Evans Road, which the township purchased in December 2008 for $450,000 to be preserved as open space.

In October, Montgomery County Court of Common Pleas Court Judge Jeffrey Saltz sided with Murray and Guest, saying building a municipal complex on the site would violate the state's open space law. Township commissioners have indicated they intend to appeal.

In its most recent complaint, scheduled for Jan. 22 in front of the same judge, the township alleged that Murray's Right to Know requests are "a tactic to drain township resources in connection with ongoing litigation involving municipal building relocations."

It is not the only time Murray and the township have availed themselves of the legal system in regard to each other.

In May, the township filed a defamation lawsuit against Murray (but not Guest) and attorney Kate Harper in connection with an opinion column Harper wrote and which was published in April in The Mercury. In it, she characterized letters Police Chief James Fischer sent to Murray and one other resident in January 2024 as being "letters warning people not to speak out at public meetings."

The Mercury invited the commissioners to write a response, which they did in May, refuting that characterization. In a response signed by Slinkerd, Read and Llewellyn, they countered "the letter did not — as Ms. Harper falsely claims — warn against speaking out in public meetings. Rather, the letter explicitly encouraged continued participation and merely warned against continued violations of the reasonable rules of participation."

The same three commissioners subsequently voted to file the defamation suit against Murray and Harper, a suit which has already amassed more than $12,000 in legal fees.

The legal action taken regarding Murray's Right to Know request is the third time Upper Pottsgrove has gone to court with Murray. And for this one, the township took the unusual step of issuing a press release to announce it.

The release states "Murray has filed approximately 100 RTKL requests, many of which are described as redundant or derivative. Despite multiple denials and failed appeals with the Pennsylvania Office of Open Records (OOR) — where the township prevailed in all but one case — Murray allegedly continues to submit new requests. The township asserts that these actions have diverted substantial staff time, legal resources, and external consultant services, leading to more than $55,000 in legal expenses over the past two years."

The release also notes that Murray still owes $66.75 for documents he requested but has not picked up.

In the release, Township Solicitor Eric C. Frey stated that "the Right-to-Know Law is designed to promote government transparency, not to be weaponized in a manner that drains public resources and disrupts municipal operations. This legal action is necessary to safeguard the interests of Upper Pottsgrove Township and its taxpayers."

The civil complaint seeks "a preliminary and permanent injunction to prevent further RTKL filings by Murray or those acting on his behalf" and a court determination that Murray's actions constitute an abuse of the RTKL process," according to the press release.

The release also notes that "all Upper Pottsgrove Commissioners supported this legal action." When the public vote to take that action occurred is unclear. And according to one commissioner, there was no vote.

In an email to The Mercury Friday evening, Commissioner Cathy Paretti wrote: "Today Dave (Waldt) and I were notified by email about the lawsuit that is filed against Mr. Murray for filing RTKs."

She also disputed the press release state regarding unanimity among the commissioners on this matter. "Dave and I agreed that we never agreed or voted for this legal action. The press release is distributing misinformation," she wrote.

Paretti also wrote, "It was never taken to a public vote." She wrote that when she received a copy of the press release from Read, "that's the first I heard that UPT is filing the suit. "

An email asking when the public vote was taken to file the suit was sent to Read, who sent the press release to The Mercury and often warns people at township meetings not to believe "misinformation," and generated no response by Friday evening.

Exhibit I

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

UPPER POTTSGROVE TOWNSHIP VS. MURRAY, MATTHEW E	NO. 2025-00481

COVER SHEET OF MOVING PARTY

Date of Filing February 03 2025 Moving Party MATTHEW E MURRAY

Counsel for Moving Party CATHERINE M HARPER, Esq., ID: 34568

Counsel's email address: CHARPER@TIMONEYKNOX.COM

Document Filed (Specify) DEFENDANT MATTHEW E. MURRAY'S PRELIMINARY OBJECTIONS TO THE COMPLAINT

If a motion to compel discovery, state the Court-ordered Discovery Deadline: N/A
(failure to complete this space will result in the motion being stricken)

CERTIFICATIONS - Check **ONLY** if appropriate:

_____ Counsel certify that they have conferred in a good faith effort to resolve the subject discovery dispute. **(Required by Local Rule 208.2(e) on motions relating to discovery.)**

_____ Counsel for moving party certifies that the subject **civil motion** is **uncontested** by all parties involved in the case. (If checked, skip Rule to Show Cause section below.)

RULE TO SHOW CAUSE - Check **ONE** of the Choices Listed Below:

_____ Respondent is directed to show cause why the moving party is not entitled to the relief requested by filing an **answer** in the form of a **written response** at the **Office of the Prothonotary** on or before the day of 20

_____ Respondent is directed to show cause, in the form of a **written response**, why the attached Family Court Discovery Motion is not entitled to the relief requested. Rule Returnable and Argument the day of , 20__ at **1:00 p.m.** at **321 Swede Street, Norristown, PA.**

_____ Respondent is directed to file a **written response** in conformity with the Pennsylvania Rules of Civil Procedure.

_____ Rule Returnable at time of trial.

By: _____
Court Administrator

7/23

Catherine M. Harper, Esquire
Attorney I.D. 34568
Timoney Knox, LLP
400 Maryland Drive
P.O. Box 7544
Ft. Washington, PA 19034-7544
Tel: 215-646-6000
email: charper@timoneyknox.com

Attorney for Defendant

UPPER POTTSGROVE TOWNSHIP	: IN THE COURT OF COMMON PLEAS : OF MONTGOMERY COUNTY
v.	: CIVIL DIVISION - EQUITY :
MATTHEW E. MURRAY	: NO. 2025-00481 :

DEFENDANT MATTHEW E. MURRAY'S
PRELIMINARY OBJECTIONS TO THE COMPLAINT

COMES NOW, Matthew E. Murray, citizen and defendant in the above captioned matter filed by Upper Pottsgrove Township seeking an injunction and other equitable relief to prevent Matthew E. Murray from exercising his rights as a citizen of Upper Pottsgrove Township under the Pennsylvania Right-to-Know Law ("RTKL"), 65 Pa. Stat. Ann. §§ 67.101 *et seq.*, by his counsel, Catherine M. Harper, Esquire, of the law firm of Timoney Knox, LLP, and in support thereof states as follows:

I. THE COMPLAINT FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED FOR AN INJUNCTION UNDER THE RTKL

1. The Complaint seeks equitable relief in the nature of an injunction "permanently enjoining Defendant, and anyone acting on behalf of the Defendant, from...pursuing RTK Requests and appeals to the OOR [Office of Open Records]."

2. Under the Right-to-Know Law ("RTKL"), each request must be considered separately and on its merits and the Township may not ban future requests. Moreover, all records in the possession of a local agency are presumed to be public records unless specifically exempt under the RTKL or other law or protected by privilege, judicial order or decree. 65 P.S. § 67.305.

3. In the instant case, Upper Pottsgrove Township is a local government subject to the Right-to-Know Law, and has previously litigated the exact question raised in the current lawsuit before the Office of Open Records in a case taken as an appeal from a request for documents under the RTKL by Matt Murray. In that case, in the matter of *Matt Murray, Requester, v. Upper Pottsgrove Township, Respondent,* Docket No. AP 2024-2523, the Office of Open Records in a Final Determination specifically stated "Here, the Township has not demonstrated that the instant Request is repetitive and burdensome. While the Township asserts that the 'Requester has made over 95 separate [RTK] submissions to the Township since November 2022,' the Township has provided no evidence regarding any burden." See Final Determination of the Office of Open Records attached hereto as Exhibit A involving the same parties, the same questions of law and fact, and resulting in a denial of the Township's request for relief.

4. The Township did not appeal the Determination by the Office of Open Records, which was issued October 24, 2024.

5. The relief sought by Upper Pottsgrove Township is not available under the Pennsylvania Right-to-Know Law, and the Township's request for a Preliminary and Final Injunction was denied on that basis by this very Court on January 22, 2025. A copy of the Transcript and Order are attached as Exhibit B.

6. The Township, having litigated the same issue, and having lost before this Court as well as a "court" of competent jurisdiction being the Office of Open Records, is collaterally estopped from making the same argument again in this case against the citizen involved in the prior request. The Township is collaterally estopped from pursuing this case.

7. Moreover, the Complaint fails to state a claim for which relief can be granted. There is no authority for any township to get an order enjoining *future* requests for information under the Pennsylvania Right-to-Know Law.

8. Further, the First Amendment to the United States Constitution and the corresponding Amendment in the Pennsylvania Constitution grant citizens such as Matt Murray the right to seek information about their government, and any Complaint requesting such an injunction against future requests seeking information amounts to a prior restraint of a First Amendment right and should be dismissed.

WHEREFORE, the Defendant herein respectfully prays this Honorable Court will dismiss the Complaint with prejudice.

II. THE COMPLAINT FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED IN COUNTS I AND II UNDER THE RTKL.

9. The Township also alleges both "abuse of process" and "wrongful use of civil proceedings" because the Defendant has made RTKL requests. However, the Defendant has every right to make right-to-know requests. The Defendant has every right to appeal a denial of a right-to-know request to the appropriate agency, the Office of Open Records. The Defendant has every right to use documents obtained as public records from Upper Pottsgrove Township in litigation by the citizen against the Township to stop the Township from breaking the law in using land purchased with open space tax monies to construct a municipal complex instead of using the land for the preservation of open purposes. *Matthew E. Murray, et al v. Trace Slinkerd, et al,* Court of Common Pleas of Montgomery County No. 2023-02216.

10. The Complaint fails to state a claim for which relief can be granted where the Plaintiff, Upper Pottsgrove Township, as a local government agency subject to the Pennsylvania Right-to-Know Act, has an obligation to comply with Pennsylvania Law. The Complaint asserting that a citizen's rightful use of the Right-to-Know Law Act (which has been affirmed by the Office of Open Records which had jurisdiction of the appeal raising the same issue) is itself either an

"abuse of process," or "a wrongful use of civil proceeding, " should be dismissed for failing to state a claim for which relief can be granted.

11. Matt Murray has every right under the RTKL and as a citizen of Upper Pottsgrove Township and the Commonwealth of Pennsylvania and the United States of America, to exercise his First Amendment rights, and his rights under the Pennsylvania Right-to-Know Law and exercising those rights is not, as a matter of law, either an abuse of process or the wrongful use of civil proceedings.

12. Moreover, as a matter of law, the Office of Open Records did not find that multiple Right-to-Know Requests over years of time actually amounted to any "repetitive or burdensome" use of the RTKL, or violated the Right-to-Know Law. See Exhibit A attached hereto.

13. The provisions of the RTKL are mandatory on Pennsylvania's local governments. If the Township believes that a certain requested record may be denied, it has every right to do so. Thereafter, the Requester has every right to appeal the denial to the Office of Open Records for a decision. Moreover, if the Township believes the request somehow violates the RTKL, and specifically, if the requester has "made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency," 65 P.S. § 67.506(a), the Township has a right to deny a request and take an appeal to the Office of Open Records. The Request itself is neither an abuse of process nor a "wrongful use of civil proceedings." Thus, the Complaint fails to state a claim for which relief can be granted.

WHEREFORE, the Defendant Matthew E. Murray respectfully requests that this Honorable Court will dismiss the Complaint with prejudice.

III. IN THE ALTERNATIVE, DEFENDANT MATTHEW MURRAY, MOVES THIS HONORABLE COURT TO HOLD A HEARING ON DEFENDANT'S RIGHT TO IMMUNITY UNDER 42 PA. C.S.A. §8340.15, THE PENNSYLVANIA ANTI-SLAPP LAW,[1] THE UNIFORM PUBLIC EXPRESSION PROTECTION ACT.

14. If the Complaint is not dismissed as a result of the Preliminary Objections, the Defendant respectfully moves this Court pursuant to 42 Pa. C.S.A. § 8340.15 to hold a hearing (if necessary) to determine that:

(A) Matt Murray is entitled to immunity as a matter of law since making a Right-to-Know Request is "protected public expression" as a matter of law;

(B) Matt Murray is entitled to assert the immunity as a result of being a person being sued for a "protected public expression" of using the Right-to-Know Law as allowed;

(C) Matt Murray's "protected public expression" includes his advocacy against the development of the Smola Farm, land purchased with open space tax revenues as "permanently preserved," by filing litigation and speaking out "on a matter of public concern," guaranteed by the First Amendment to the U.S. Constitution, as defined in 42 Pa. C.S.A. § 8340.13; and

(D) Matt Murray is therefore entitled to immunity under § 8340.15 of the Uniform Public Expression Protection Act.

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[1] A SLAPP lawsuit has been popularly defined as a "Strategic Lawsuit Against Public Participation." Pennsylvania has anti-SLAPP legislation, 27 Pa. C.S. §§ 8340.12, *et seq.*, specifically providing for immunity in § 8340.15, "Grant of immunity. A person is immune from civil liability for a cause of action based on protected public expression if any of the following paragraphs apply: (1) The party asserting the cause of action based on protected public expression fails to: (i) establish a prima facie case as to each essential element of the cause of action; or (ii) state a cause of action upon which relief can be granted. (2) There is no genuine issue as to any material fact, and the person against whom the cause of action based on protected public expression as been asserted is entitled to judgment as a matter of law in whole or in part."

15. Since the continuation of this litigation after this Court has dismissed the Petition for Injunction against the Defendant for the lawful use of the RTKL, and after the Office of Open Records ruled that the requests did not violate the law, the Defendant requests attorneys' fees, court costs and expenses under 42 Pa. C.S.A. § 8340.18.

WHEREFORE, the Defendant pray this Honorable Court will dismiss the Complaint with prejudice and award attorneys' fees, costs and expenses.

Respectfully submitted,

Catherine M. Harper, Esquire
Attorney for Defendant, Matthew E. Murray

Dated: 2.3.2025

EXHIBIT A

pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
MATT MURRAY,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2024-2523**
	:	
UPPER POTTSGROVE TOWNSHIP,	:	
Respondent	:	

FACTUAL BACKGROUND

On August 5, 2024, Matt Murray ("Requester") submitted a request ("Request") to Upper Pottsgrove Township ("Township") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking "[a] copy of any and all invoices paid or unpaid for services rendered by the law firm Bellwoar Kelly or any of it[]s associates including Andrew Bellwoar and John Mahoney for the time period January 1[,] 2024 to August 2[,] 2024."

On September 9, 2024, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Township granted the Request, by providing records.

On September 30, 2024, the Requester appealed to the Office of Open Records ("OOR"), arguing that the Request sought invoices and the records the Township provided "were monthly

statement single line totals with no itemized detail."[1] The OOR invited both partics to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 10, 2024, the Township submitted a position statement that was verified under penalty of perjury pursuant to 18 Pa.C.S. § 4904 by Michelle Reddick, the Township's manager and Open Records Officer.[2] The Township claims that because the Requester and the Township are involved in a pending civil litigation, for which Bellwoar Kelly is representing the Township, any communications between the Township and Bellwoar Kelly are protected by the attorney-client privilege. The Township also argues that the communications are protected from access under the Pennsylvania Rules of Civil Procedure, Rule 4000 *et seq.*, Depositions and Discovery. Finally, the Township argues that the pending litigation matter is subject to a case management order which required that all discovery shall be completed by March 11, 2024. In sum, the Township argues that any request for documents should be presented to the Court of Common Pleas in the context of the litigation matter, and any information that is contained on the attorney invoices are protected from disclosure under the attorney-client privilege and attorney-work product doctrine. With regard to the Request in general, the Township argues that it is unduly burdensome under Section 506 of the RTKL because the Requester has made over 95 submissions to the Township since November 2022 and, because of the repeated requests, along with the timing of this appeal, this matter has placed an undue burden on Township representative who must attend trial in the underlying litigation. *See* 65 P.S. § 67.506. The Township included a copy of a case

[2] In the position statement, the Township "notes" that the Appeal is not verified. However, the Township has not pointed to a RTKL statutory provision that requires an OOR appeal to be verified.

management order issued in *Murray, et al v. Slinkard, et al*, Montgomery Court of Common Pleas Civil Docket No. 2023-02216.

On October 10, 2024, the Requester also submitted a position statement. The Requester argues that the Township is making false assumptions by stating that the reason for the Request is "to gain insight into a legal case," because he is a taxpayer and, therefore, he has a right to know how his tax money is being spent. In addition, the Requester states that he has requested invoices in the past from the same law firm and, while they were redacted, they were invoices, not summaries.

LEGAL ANALYSIS

The Township is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Township is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. § 67.708(a)(1). 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 identity of the Requester is irrelevant

In the position statement, the Township makes note of the fact that the Requester and the Township are currently involved in a civil lawsuit. To the extent that the Township believes that the Requester's status as a party to a civil matter pending in the Court of Common Pleas involving the Township has a bearing on the OOR's determination of the instant appeal, a requester's identity

or motivation for making a request is not relevant to determining whether a record is accessible to the public under the RTKL. *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013). Under the RTKL, whether the document is accessible is based only on "whether a document is a public record, and if so, whether it falls within an exemption that allows that it not be disclosed." *Hunsicker v. Pennsylvania State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli v. Pennsylvania State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker*).

2. The Request is not repetitive or burdensome

The Township argues that the Request is repetitive, as the Requester has made similar prior requests. Section 506(a) of the RTKL provides that "[a]n agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency." 65 P.S. § 67.506(a). "Under this section ... an agency must demonstrate that (1) 'the requester has made repeated requests for th[e] same record[(s)]' and (2) 'the repeated requests have placed an unreasonable burden on the agency.'" *Pa. Office of the Governor v. Bari*, 20 A.3d 634, 645 (Pa. Commw. Ct. 2011); *see also Slate v. Pa. Dep't of Envtl. Prot.*, OOR Dkt. AP 2009-1143, 2010 PA O.O.R.D. LEXIS 97 ("A repeated request alone is not enough to satisfy § 506(a)(1)"). Repeated requests for the same records, although phrased differently, may be denied as disruptive. *See Cohen v. Pa. Dep't. of Labor & Industry*, OOR Dkt. AP 2009-0296, 2009 PA O.O.R.D. LEXIS 159; *Dougher v. Scranton Sch. Dist.*, OOR Dkt. AP 2009-0798, 2009 PA O.O.R.D. LEXIS 318 ("Slight differences in phrascology do not preclude application of [Section 506(a)]").

In *Mezzacappa v. West Easton Borough*, the OOR held that a request must be repeated more than once to constitute a "repeated request" for purposes of 65 P.S. § 67.506(a). OOR Dkt.

AP 2012-0992, 2012 PA O.O.R.D. LEXIS 967 ("Because the Borough has only established that the [r]equester has made one repeated request, rather than multiple 'repeated requests,' the OOR finds that the [r]equest was not disruptive"). The OOR's decision in *Mezzacappa* was subsequently upheld by the Northampton County Court of Common Pleas and the Commonwealth Court. *Borough of West Easton v. Mezzacappa*, No. C-48-CV-2012- 7973 (North. Com. Pl. Jan. 9, 2013) ("[A] request is not disruptive when a requester [seeks] the same records only twice"), aff'd 74 A.3d 417 (Pa. Commw. Ct. 2013).

Here, the Township has not demonstrated that the instant Request is repetitive and burdensome. While the Township asserts that the "Requester has made over 95 separate [RTK] submissions to the Township since November 2022", the Township has provided no evidence regarding any burden. The Township did not submit any prior requests for similar records, and the RTKL does not limit the amount of "separate" requests a requester may make. *See* 65 P.S. § 67.1308. Accordingly, the Township has not demonstrated that the instant Request is repetitive pursuant to Section 506(a) of the RTKL, nor has the Township demonstrated that the Request is burdensome. See 65 P.S. § 67.506(a); *see also Anderson and All That Philly Jazz v. City of Phila.*, OOR Dkt. AP 2023-1840, 2023 PA O.O.R.D. LEXIS 2694. As such, the OOR declines to find that the Request is repetitive or burdensome.

3. Any underlying civil litigation is irrelevant to the appeal

The Township noted that the Requester is a plaintiff in a pending litigation against the Township related to the proposed location of a new municipal complex and Bellwoar Kelly has been hired by the Township as special counsel to represent the Township in the lawsuit. Based on this fact, the Township argues that any request for documents related to this matter must be

presented to the Court of Common Pleas in the context of the litigation and should be disposed of by application of the Pennsylvania Rules of Civil Procedure.

It undisputed that the parties to the Request and the instant appeal are involved in a civil litigation pending in the Court of Common Pleas. However, it is well settled that the existence of litigation outside of the RTKL process has no bearing on whether a request may be submitted under the RTKL. In *Office of the District Attorney of Phila. v. Bagwell*, the Commonwealth Court reviewed whether a judicial order denying discovery precluded a party from seeking the same records under the RTKL and concluded:

> Discovery conducted in a court of law and a request made under the RTKL are wholly separate processes and it is only in rare circumstances, such as the issuance of a protective order, that a judicial order or decree governing discovery in litigation will act to prevent disclosure of public information responsive to a RTKL request.

155 A.3d 1119, 1139 (Pa. Commw. Ct. 2017). Similarly, in *Chester Community Charter School v. Hardy*, the Commonwealth Court addressed whether a RTKL request was barred based on a court order staying discovery in related litigation, holding:

> It may be that requester is using the Right-to-Know Law to conduct discovery in the defamation action, which has been stayed. This result may seem unfair because Charter School is barred by the bankruptcy proceeding from doing similar discovery against the Defamation Defendants. Unfortunately for Charter School, it matters not. A requester's motive under the Right-to-Know Law has been made irrelevant by the legislature.... Charter School is an "agency." As such, it is bound by the directives of the legislature for all agencies, and whether those directives are fair or wise is beyond the court's proper field of inquiry.

38 A.3d 1079, 1089 (Pa. Commw. Ct. 2012); *see also City of Allentown v. Brenan,* 52 A.3d 451 (Pa. Commw. Ct. 2012) (holding that a judicial order denying a motion to compel discovery did not prohibit a RTKL request). A review of the case management order submitted by the Township indicates that discovery in the civil matter pending in the Court of Common Pleas closed on March 11, 2024, as stated by the Township. Nevertheless, the order is a routine case management order,

not a protective order that may possibly have had a different impact on the instant appeal. Therefore, the existence of any litigation in which the requested records may be implicated is irrelevant to a determination of whether the records are accessible under the RTKL.

4. The Township has not proven that the requested legal invoices are protected by the attorney-client privilege or attorney work-product doctrine

The Township argues that any information contained in the legal invoices would be protected by the attorney-client privilege and the attorney work-product doctrine because Bellwoar Kelly, LLP is representing the Township in a civil lawsuit involving the Requester. The Township asserts that the information contained in the legal invoices would be communications between attorney and client in regard to the civil litigation matter.

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. *Bousamra v. Excela Health,* 210 A.3d 967, 982-83 (Pa. 2019) (citing *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007), *aff'd* 992 A.2d 65 (2010)). "[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege must prove waiver under the fourth prong." *Office of the Governor v. Davis,* 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2014). An agency may not, however, 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").

In *Levy v. Senate of Pennsylvania*, the Pennsylvania Supreme Court discussed the application of the attorney-client privilege in regard to the redaction of legal invoices stating, "the determination of the applicability of the attorney-client privilege does not turn on the category of a document, such as whether it is an invoice or fee agreement. Instead, the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege." 65 A.3d 261, 373 (Pa. 2013). In determining whether the privilege applied to a particular entry in an invoice, the Court approved a "line-by-line analysis." *Id.*

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 purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation." *Bousamra v. Excela Health*, 210 A.3d 967, 976 (Pa. 2019) (internal citations omitted); *see also Heavens v. Pa. Dep't of Env't 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"). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978 (internal citation omitted), the work-product doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id.* at 979 (internal citations and quotation omitted).

With respect to the claims of privilege, the Township evidence is limited to statements of counsel in the Township's position. While the position statement is verified by Ms. Reddick, it fails to aver any facts to satisfy the legal standards to prove attorney-client privilege and attorney work-product doctrine. If the presence of exempt information is undisputed, an affidavit may be unnecessary, *see Office of the Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2014) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record); however, conclusory statements are insufficient to meet an agency's burden of proof under the RTKL. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*) ("[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records."); *see also Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) ("Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL"). As the Township is the party asserting that privileges, it bears the burden of presenting evidence to meet its burden. *See Joe v. Prison Health Svcs.*, 782 A.2d 24, 31 (Pa. Commw. Ct. 2001). Further, in *Levy*, the Court held that "the determination of the applicability of the attorney-client privilege does not turn on the category of a document, such as whether it is an invoice or fee agreement. Instead, the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege" and adopted a "line-by-line analysis" to determine whether the privilege applied to a particular entry in an invoice. *Levy*, 65 A.3d at 373. Here, the Township has not presented competent evidence to meet its burden of proving that the requested legal invoices may be withheld because they are protected by the attorney-client privilege and attorney work-product doctrine.

See, e.g., Heisey v. Penn Twp., OOR Dkt. AP 2022-1516, 2022 PA O.O.R.D. LEXIS 2133 (agency is required to prove first three prongs of the attorney-client privilege test before challenger must prove waiver) citing *Bousamra v. Excela Health*, 653 Pa. 365, 210 A.3d 967, 982-83 (2019); *see also Mission Pa., LLC v. McKelvey,* 212 A.3d 119, 129 (Pa. Commw. Ct. 2019), *appeal denied* by 223 A.3d 675 (Pa. 2020) (while "[a] preponderance of the evidence may be the lowest burden of proof...," evidence is still required "...unless the facts are uncontested or clear from the face of the RTKL request or exemption."); 65 P.S. §67.708(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Township is required to provide all responsive invoices within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Montgomery 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 according to court rules as per 65 P.S. § 67.1303, but 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] All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: October 24, 2024

/s/ Kelly C. Isenberg

KELLY C. ISENBERG, ESQ.
DEPUTY CHIEF COUNSEL

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

Sent via OOR E-File Portal to: Matt Murray; Eric Frey, Esq; Michelle Reddick, AORO

EXHIBIT B

IN THE COURT OF COMMON PLEAS IN AND FOR
THE COUNTY OF MONTGOMERY, PENNSYLVANIA
CIVIL DIVISION

- - -

UPPER POTTSGROVE TOWNSHIP : NO. 2025-00481
:
vs. :
:
MATTHEW E. MURRAY :

- - -

Plaintiff's Petition for
Preliminary and Final Injunction

- - -

Courtroom 12
Wednesday, January 22, 2025
Commencing at 1:05 p.m.

- - -

Norma Gerrity
Official Court Reporter
Montgomery County Courthouse
Norristown, Pennsylvania

- - -

BEFORE: THE HONORABLE JEFFREY S. SALTZ, JUDGE

- - -

COUNSEL APPEARED AS FOLLOWS:

ERIC C. FREY, ESQUIRE
for the Plaintiff

CATHERINE M. HARPER, ESQUIRE
for the Defendant

- - -

Upper Pottsgrove vs. Murray

(The following proceedings occurred in open court:)

THE COURT: Good afternoon, everyone.

MR. FREY: Good afternoon, Your Honor.

MS. HARPER: Good afternoon, Your Honor.

THE COURT: This is Upper Pottsgrove Township versus Matthew Murray, Number 2025-00481, and we are here on the township's Petition for Preliminary Injunction.

So Mr. Frey?

MR. FREY: Yes. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. FREY: We are here, we're asking for a preliminary injunction to temporarily stop the right-to-know requests being submitted by the defendant in this matter.

We can show you that he's put in numerous requests to the township over the past several years, much more than any other resident in the township, to the tune of over a hundred requests, and they drain on the staffing and financial of the township.

That's why we're asking for it. I can

go into more detail, if you want. I don't know how you want to handle it.

THE COURT: The first question that comes to mind is whether there's any precedent for an injunction of this type.

MR. FREY: I actually have a case out of Lehigh County, very similar complaint to what we filed, all the same counts.

In that court case, the court did enter an injunction on this matter. Now, I don't want to mislead the court.

What resulted there is the parties did have a joint stipulation in that matter, which resulted from the complaint and the petition for the injunction to be issued.

There is precedent. The court then adopted that as their order, and I have it here for you, if you would like.

THE COURT: I think that you've got the same circumstances?

MR. FREY: Agreed, yes.

THE COURT: I mean, is there any analysis? Is there an opinion? Is there --

MR. FREY: There is not.

THE COURT: Simply signed off on the stipulation or the agreement?

MR. FREY: Correct, yes.

THE COURT: All right. Other than that, there's no precedent?

MR. FREY: Not that I'm aware of, no.

THE COURT: Well, why don't you, why don't you tell me by offer of proof what you expect the evidence to show?

MR. FREY: So I have the township manager here, who would be my witness.

She would testify that she is the township right-to-know officer; that she was preceded by an employee who was the right-to-know officer, and because of the sheer volume of the right-to-know requests that were coming in, that employee resigned, which then she had to take over the right-to-know position.

There's been 102 right-to-know requests since November of 2022 by this defendant. In 2023 that was 55 percent of the right-to-know requests received by the whole township. In 2024 it was about 40 percent of the right-to-know requests received by the whole township.

In some weeks she's spent, she had spent over that duration 80 percent of her time responding to the defendant's right-to-know requests, and over that time, $58,000 has been spent just on the defendant's right-to-know requests, not right-to-know requests in general at the township, but just this defendant's right-to-know requests.

THE COURT: Are you allocating a portion of the township manager's salary to come up with that figure?

MR. FREY: It's probably a line item or it's probably legal. I can have her testify. It's not designated separately, but a lot of that's legal.

That's just a legal expense, not her time at all. We do not allocate or don't account for her time --

THE COURT: We're talking about out of pocket?

MR. FREY: Correct. Just so you know, what the right-to-know law allows municipalities to charge, they can't charge for staff time in compiling the documents.

They can't charge for the legal time in reviewing them to make sure you're not putting out

information which is otherwise privileged or things like that.

The only thing that they can charge for are copies. So they spend all this time, money, IT services in some instances, legal fees. They can't charge that to the requester.

In this township, there are approximately or more than 6,000 voters -- excuse me -- residents, and 4,100 voters.

And if just a handful of them did what this defendant is doing, the township would bankrupt in time and finances.

THE COURT: So they're not.

MR. FREY: They're not at this moment, correct. Further, there are several, there were several -- there were six items that the requester asked for documents dating back to, I believe, August of 2024, and on six of those items, the requester had to pay for copies.

He did not pick those up. So again that just was all part of our evidence to show that these things are just being done to harass the township. He has no desire to actually obtain those documents.

Since preparation of our documents, the

defendant has picked up those documents. I believe at the end of December, I think he went in and actually picked up those six categories.

Again, the reason that -- typically we obtain the documents. We simply e-mail them off to the requester, regardless of who it is.

In this situation, however, since money was owed, we said, once you pay the money, we'll give you the documents, and that's allowed by the right-to-know law.

In all matters, despite the fact that the six were outstanding, the right-to-know law also does not allow us not to process additional requests.

Even if he hasn't picked up six of them and they're sitting there and we know he's not going to pick them up, if he submits a new request, we still have to process and we still have to spend our time, staffing time, attorney time to review and compile the documents and then notify him that they're ready.

So simply, we have no ability to stop that. We have to do that under the right-to-know law, which is why we're here.

And on those six items, for the first one, every time he submitted a right-to-know request,

we would notify him that he owed the money and had to pick these up, so at least six times on the one he was notified to pick them up and he didn't until late December.

Additionally, Mr. Murray has appealed nine times to the Office of Open Records, so when we denied or granted him what was asked, he appealed nine times to the Office of Open Records. The township won eight of those matters.

So in only one situation did the Office of Open Records tell us we had to do something different for the requester.

Further, on I think over ten of the matters, so over ten of the 102, the requester was asking for plans for the township's proposed municipal complex.

So over the two years, he over and over again asked for plans for the township, and the township explained two things.

One, they weren't finalized, so we can't provide them to you; and two, once they are done, he'll get them and/or they'll be posted to the website so everybody will have them.

So despite that, he kept requesting them

and kept getting denied, and that was the subject of numerous appeals to the Office of Open Records. Again, in each case, the township won those appeals.

And you may recall, Your Honor, that the other thing she would testify to is that the defendant was, for a large duration of the timeframe that these requests were being sent to the township, he was a plaintiff suing the township.

So one of our issues also is that he was really weaponizing the right-to-know law and using it as discovery requests.

So while he had the right to obtain something in five days, we were subject to the Pennsylvania Rules of Civil Procedure to obtain documents from the other party.

THE COURT: I've seen many instances where a municipal entity was a party in a civil action, and the opposing party obtained documents through a right-to-know law request.

MR. FREY: It does happen, Your Honor. I'm just showing that, it's an arrow and a quiver, that this whole thing is really showing that he's weaponizing.

He's using it to harass the township.

He doesn't actually want the documents. He's just putting us through this process.

THE COURT: Well, in six percent of the time.

MR. FREY: But then also the ten requests for plans, the ten requests for the plans, he kept asking for those, even though he was told he'll get them once they're final.

The most, the two most recent requests, I think, goes to the fact also this is done for harassment and not for legitimate purposes is, I don't know if I have these in the right order, request 101 and 102 on the list of items requested is, one was a copy of the bill list for the township, and the second one was a copy of the budget adopted by the township.

Why these are harassment is that the copy of the bill list is provided to the public, copies are provided to the public at every township meeting.

His wife attends every township meeting and picks up these documents, I assume she picks them up, picks them up regularly.

So a right-to-know request isn't even required for that in that they're given to the public

at every meeting.

Secondly, the budget is posted on the website, so he can go to the website and it's there.

And that's actually a response to a right-to-know request, is that it's on the website, you're free to have it, you already have access to it.

It just shows that the issuing right-to-know request really serves no purpose in that he already has those documents.

So in a nutshell, that's what she would testify to in support of the fact that we satisfied all of these six criteria for the injunction.

Thank you.

THE COURT: Ms. Harper?

MS. HARPER: Thank you, Your Honor. It's nice to be back. I hope you feel the same way.

I filed an answer, and I did send it to chambers because of the holiday situation here.

Did you get it?

THE COURT: I did.

MS. HARPER: Great. It's in the nature of a Motion to Dismiss, and that's because the injunction that counsel --

THE COURT: Dismiss what?

MS. HARPER: The preliminary injunction.

THE COURT: All right.

MS. HARPER: Although I also think the complaint should be dismissed. I haven't gotten to filing my preliminary objections on that, because it was not served until a couple days ago; right?

So my answer to that is not due, and I will file a Motion to Dismiss when I get there.

I did this on the petition, because what he's really asking for is a preliminary injunction, which is not permitted under the law.

In order to get an injunction, he has to show a substantial likelihood of success on the merits, and he's not going to be able to win this case. I think if you look at my answer, there are several reasons why.

But the second thing is, this is also -- the right-to-know law is a first amendment right. It is a freedom of speech right. It is a freedom that belongs to every citizen making the request.

THE COURT: Are you saying that the first amendment -- what was the law before the right-to-know statute was passed?

MS. HARPER: You could stand up and ask in a public meeting, can I see the budget? You could do that.

THE COURT: But you couldn't make the kind of requests that Mr. Murray is making?

MS. HARPER: That's right, and I'll get to that. But if you read the opinion of the Office of Open Records, which I have attached to the response to the petition, it points out that every right-to-know request must be considered separately and on its merits.

And so by asking for an injunction that this citizen can't make any requests -- and, by the way, it says this citizen and anyone acting on his behalf.

So what does that mean? His wife can't file one? The folks in the room who are supporting him can't file one because they're acting on his behalf?

So it's a prior restraint on a first amendment right of people who aren't even served in this case, that this township doesn't have to comply with the state law.

The Office of Open Records points out,

you could deal with each one individually, and then you can appeal it if you don't like the way it turned out. He took advantage of the appeal practice a few times. That's true.

The Office of Open Records also said that they can't just say, you can't make any more right-to-know requests, and they said that in this case it wasn't burdensome, and that opinion is only a couple of months old.

So I think the township is collaterally estopped from making that argument before Your Honor today, because they already had a ruling, and they lost.

And they had a ruling in the place where they should have brought this action -- no offense, Your Honor -- because a right-to-know request goes on appeal to the Office of Open Records.

The Office of Open Records then makes a decision, and then you can appeal that, I believe, to the Commonwealth Court.

THE COURT: I believe to the Common Pleas Court.

MS. HARPER: Common Pleas Court. Okay. I'm sorry.

Upper Pottsgrove vs. Murray

THE COURT: I wish you were right.

MS. HARPER: Right. But, unfortunately, it's going to come to you. Okay.

But they didn't do that, and they didn't take an appeal of this decision where the Office of Open Records actually ruled on whether or not there were too many requests and too burdensome and said, no, no.

So in two ways, the opinion of the Office of Open Records is instructive in that it says, look, you've got to consider each right-to-know request separately, and the law says the documents shall be produced.

It's not, hey, maybe I can, maybe I can't. You have to produce them.

There's something in there about frivolous requests or repetitive requests or something like that, but the Office of Open Records ruled that he wasn't guilty of any of that.

Now, I can address specifically -- I did in my answer in a footnote -- the request for plans. Your Honor is familiar with the case.

My client stopped a municipal complex from being built on the Smola Farm, which was bought

with open space tax moneys.

Some of the documents we entered into evidence in that case were, in fact, obtained by a right-to-know request and not by discovery, because when we sent the discovery, the township hewed to the position that it had not used open space money.

So we went and got budgets, and we went and got documents that showed that they absolutely did use open space money to buy the Smola Farm.

The reason we kept asking for plans was, they spent $340,000 on engineers and architects for plans for this municipal complex on the Smola Farm, and they claim they don't exist.

Today counsel said that they're drafts, so we don't have to give them to you.

I think the right-to-know law would require that they ask their own agents, which would include the architects and the engineers who are being paid hundreds of thousands of dollars to create these plans, for those documents, and they didn't do it.

So my client was forced to file multiple requests, okay, you don't have them yet, you don't have them yet, you don't have them yet, you don't have them yet.

So he did request those documents more than once, because they claim they didn't exist, and the Office of Open Records agreed that they didn't have to produce them if they were in a draft format.

So he has to make requests. What else can a citizen do if he wants to know what the government is spending his money on?

He'll probably have to make a request to find out how much the government's paying to sue him here today to stop him from exercising his first amendment right to know what his government is doing with his money.

He's allowed to do that. So they have to show a substantial likelihood of success on the merits.

I think the Office of Open Records' opinion both collaterally estops, is res judicata, but also outlines that you can't do that.

You can't issue a prior restraint on right-to-know requests. You have that right as a citizen. And so why are we here?

But I don't know why we're here, and I actually think that they're claiming my client is using it as a weapon.

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This is a township that has sued this poor guy twice, once for defamation for an editorial, and now today he's to stop making requests.

THE COURT: All right. So they're only one ahead of him.

MS. HARPER: Right. Well, they've sued him twice, and he's only sued them once.

THE COURT: Thank you.

MS. HARPER: Be that as it may, the reason he doesn't go to public meetings anymore is because he got a letter from the police chief that had me, as his lawyer, saying, don't go to any more public meetings, I think they want to lead you out in handcuffs.

THE COURT: We're getting a little far afield.

MS. HARPER: We are. And I'm sorry for that. But it was alleged that my client is weaponizing the right-to-know law.

I would suggest the township should take the beam out of its own eyes on that one, because if anybody is weaponizing the court system, it's them, and not him.

So my client's here. He'll testify that

when he went to pick up those documents, he got a reminder from them, hey, we got some documents here.

He had to wait an hour because they hadn't copied them. He had to sit there in the lobby and wait an hour.

So I don't think that counsel is entirely correct that they're being overburdened by legitimate requests for public documents.

A budget is a public document. It just is. They should just say to him, go on the website.

They should say on the bill list, if it's not on the website, here it is. What's the problem? These are all public documents.

And so I think that the Petition for an Injunction should be dismissed, because there is no reason for an injunction and because they're collaterally estopped from claiming that he's abusing the system, because the Office of Open Records already ruled on that claim against this township on behalf of this requester.

Thank you, Your Honor.

THE COURT: Mr. Frey, has the township availed itself of Section 506(a) of the right-to-know law related to disruptive requests?

MR. FREY: We have, Your Honor. In many of the appeals to the Office of Open Records, we have asked them or argued to them that they were repetitive and duplicative.

THE COURT: Well, okay. Has the township denied a request submitted by Mr. Murray on the grounds that he has made repeated requests for the same records and that those repeated requests have placed an undue burden on the township?

MR. FREY: I don't believe so, Your Honor. Again, I didn't review all 102 of them.

However, on the appeal -- so we would deny them for a different reason, and if I can, I'll address the plan, and there is an exception for plans, and there's a reason for it, and case law substantiates the position.

But it is one of the exceptions to documents that you have to present, and that is, documents that are in draft form.

And while, yes, we did spend significant funds on plans for the township building, they weren't finished.

And there's case law, PennDOT plans for roadways, that's what the preeminent case is on that

one, is that you don't want to hand out draft plans, because then we're going to be in court arguing about a draft plan when it's not finalized, we're still working through DEP and things like that.

But we don't have to give them to anybody until the plans are finalized, and in this case, as soon as they were finalized, they were on the website. They went out. So they're available to everybody.

Getting to repetitive and duplicative, while it wasn't the reason we denied them, we denied them because they were draft plans, and that's why we won on those cases, we did argue that they're being duplicative and all that.

And the way the defendant got around that was essentially he had asked for final plans from January and February of 2023. There aren't any.

He then asked for final plans from March and April of 2023, and the right-to-know opinion there said, hey, it's very specific.

Unless you're asking for the exact same document for the exact same time period, they're handcuffed and they can't say it's repetitive.

So there is crafty ways the requesters

can get out of that finely interpreted, and they don't -- again, the Office of Open Records there, they're going to tell you, they're going to take the most transparent way of interpreting this, and they do.

So there's ways around beating that unduly repetitive request, and that's how it was done in this case. It was over and over and over, even though it was explained, you'll get them when they're finalized.

And also why we didn't appeal those to the Court of Common Pleas, we won the underlying case, so I don't know how we appeal an opinion that we won.

We may not have won one part of it, our argument, but we won the appeal in that we didn't have to present the plan, so we really had no decision to appeal to bring in here.

We started this action -- actually, we called the Office of Open Records and asked what our options were.

They're the ones who gave us the Lehigh County case and said, hey, this is something that's worked other places, this is the avenue.

They can only do the right-to-know. That's their jurisdiction. They can't do an

injunction. They can't do anything unless it's unduly repetitive.

It's not in this case. However, we feel it was. It was just a crafty way of draftsmanship to get around it.

THE COURT: All right.

MS. HARPER: I would just point out, Your Honor, that the opinion I attached to my response is the Office of Open Records' opinion where they said that he'd been repetitive and burdensome, and they denied that.

THE COURT: All right. I am going to assume that the township's witness will testify as Mr. Frey has represented and that her testimony will be credible.

MR. FREY: Thank you, Your Honor.

THE COURT: So assuming the facts as Mr. Frey has laid them out and without regard to any facts asserted by Ms. Harper as to what her client will testify to, I am focused on Section 506(a) of the right-to-know law, which is titled disruptive requests, and that reads:

One: An agency may deny a request or access to a record if the requester has made repeated

requests for that same record and the repeated request placed an unreasonable burden on the agency.

Two: A denial under this subsection shall not restrict the ability to request a different record.

So this section tells me two things about the intent of the legislature.

First, that if a requester abuses the process by making repeated requests for the same record, the township can simply say, no, you're done.

But it also says that a denial under that subsection shall not restrict the ability to request a different record, which means that the legislature contemplated that that same requester may go on to request different records.

Given this legislative intent as reflected in 506(a), I don't believe that the evidence proffered by the township makes out a clear right of relief to injunctive relief.

The legislature has created the remedy that is available for disruptive requests, but for a particular category of disruptive requests, and has denied the right of the township to preclude a repetitive requester from requesting new records.

So based on my reading of the statute and based on the requirement that a petitioner for preliminary injunction must establish a clear right to relief, I will deny the petition.

Thank you both.

MR. FREY: Thank you, Your Honor.

MS. HARPER: Thank you, Your Honor.

- - -

(At 1:32 p.m., the proceedings were concluded.)

- - -

C E R T I F I C A T E

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause and that this is a correct transcript of the same.

Norma Gerrity
Official Court Reporter

- - -

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL DIVISION

Upper Pottsgrove Township NO. 2025-00481

vs.

Matthew E. Murray

IN: Petition of Plaintiff Upper Pottsgrove Township for Preliminary and Final Injunction (Seq. 1)

ORDER

AND NOW, this 22nd day of January, 2025, it is hereby **ORDERED** that the above captioned matter

☐ AFTER PARTIAL HEARING ON

☐ AFTER CONFERENCE

☐ PENDING SETTLEMENT

☐ TO BE RELISTED BY COURT ADMINISTRATION

☐ TO BE RELISTED BY COURT ADMINISTRATION UPON APPLICATION OF COUNSEL

☐ TO BE RELISTED BY COURT ADMINISTRATION FOR _____ DAY(S) ON THE EQUITY EMERGENCY LIST

☐ IS GRANTED

☒ **IS DENIED FOR REASONS STATED ON THE RECORD.**

☐ IS DISMISSED AS MOOT

☐ IS WITHDRAWN

☐ OTHER:

2025-00481-0008 1/23/2025 9:12 AM # 14737856
Rcpt#Z4879058 Fee:$0.00 Order - Other
Main (Public)
MontCo Prothonotary

BY THE COURT:

JEFFREY S. SALTZ, J.

Order via Prothonotary 1/22/25
All Parties of Record
Court Administration - Civil Division
Clerk: Lisa Nowicki

CV0010
R: 1/1/2010

RULE 236 NOTICE PROVIDED ON 01/23/2025

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UPPER POTTSGROVE TOWNSHIP	:	IN THE COURT OF COMMON PLEAS
	:	OF MONTGOMERY COUNTY
v.	:	CIVIL DIVISION - EQUITY
	:	
MATTHEW E. MURRAY	:	NO. 2025-00481
	:	

DEFENDANT MATTHEW E. MURRAY'S MEMORANDUM OF LAW IN SUPPORT OF HIS PRELIMINARY OBJECTIONS TO THE COMPLAINT AND, IN THE ALTERNATIVE, MOTION FOR A HEARING ON DEFENDANT'S RIGHT TO IMMUNITY UNDER 42 PA. C.S.A. §8340.15, THE PENNSYLVANIA ANTI-SLAPP LAW

I. INTRODUCTION AND BRIEF STATEMENT OF THE CASE

Upper Pottsgrove Township, a Pennsylvania local government located in Montgomery County, Pennsylvania, has filed a lawsuit against Matthew E. Murray, one of its citizens, alleging that Matt Murray "has filed an excessive number of discovery requests submitted under the Right-to-Know Law, 65 Pa. C.S. §101 *et seq.* ("RTKL")," and "Defendant...has filed an excessive number of discovery requests submitted under the Right-to-Know Law, 65 Pa. C.S. §101 *et seq.* (the "RTKL"), which requires the Township's immediate attention," and seeking an Order "permanently enjoining Defendant and anyone acting on behalf of Defendant from further committing such acts." (See Complaint).

The Right-to-Know Law provides that any record in the possession of a Commonwealth Agency or Local Agency shall be *presumed* to be a public record unless it is protected by the privilege, exempt from disclosure under any other federal or state law or regulation or judicial order or decree or exempt under §708 of the RTKL. 68 Pa. C.S. Stat. Ann. §§ 67.305(a), 67.708.

The burden of proving that one of the Sections 708 exceptions applies belongs to the local government agency that is resisting disclosure. §67.708(a)(1). *PA State Police v. ACLU of Pennsylvania,* 300 A.3d 386, 2023 Pa. LEXIS 1116, 2023 WL 5354792.

The RTKL is likewise clear that each request must be considered on its own merits (with an appeal possible to the Office of Open Records), and that an injunction forbidding the future use by a citizen of his rights under the Pennsylvania Right-to-Know Law is inappropriate and improper and not authorized by the RTKL itself. By way of further explanation, the Office of Open Records, in response to a request from the Pennsylvania New Media Association, issued an Advisory Opinion on agency policies limiting RTKL requests on August 19, 2022, and posted that Advisory Opinion on its website. In pertinent part, that Opinion, attached hereto as Exhibit A, stated explicitly, "While Section 1308 prohibits an agency from limiting the number of *records requested* in a single request, it also follows that Section 1308 prohibits an agency from limiting the number of *record requests* that can be made. The RTKL 'is remedial legislation 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....' citing *Bowling v. Office of Open Records,* 990 A.2d 813, 824 (Pa. Commw Ct. 2010), *affirmed by* 75 A.3d 453 (Pa. [Supreme Court] 2013)."

Thus, before the Complaint in the instant matter was filed, the Pennsylvania Office of Open Records had already ruled publicly that an injunction seeking to limit a citizen's right to request records is not valid under the Pennsylvania RTKL. Nevertheless, Upper Pottsgrove filed the Complaint.[1]

[1] RTKL Section 1308, "Prohibition," reads as follows: "A policy or regulation adopted under this Act may not include any of the following (1) a limitation on the number of records which may be requested or made available for inspection or duplication and (2) a requirement to disclose the purpose or motive in requesting access to records."

II. THE COMPLAINT FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER THE PENNSYLVANIA RIGHT-TO-KNOW LAW

The Township had complained that it had received numerous requests for information under the RTKL from its citizen Matthew E. Murray, and further claimed that Matthew E. Murray was using information obtained under the RTKL Act in a lawsuit the parties are engaged in called *Matthew E. Murray and Nathaniel C. Guest, Plaintiffs v. Trace Slinkerd, President, Cathy Paretti, Commissioner, Hank Lewellyn, Commissioner, Don Read, Commissioner, Dave Waldt, Commissioner, and Upper Pottsgrove Township,* Montgomery County Court of Common Pleas No. 2023-02216. That lawsuit, filed by two citizens against the Board of Commissioners of Upper Pottsgrove Township and the Township itself, sought equitable relief to prevent them from building a municipal complex on the Smola Farm which was "permanently preserved" and purchased with open space tax revenues under the Open Space Lands Act, 32 P.S. § 5001 *et seq.*

That case was tried without a jury on October 9th and October 11th, 2024 and a decision issued shortly thereafter in favor of Plaintiffs Matthew E. Murray and Nathaniel C. Guest and against Defendant Upper Pottsgrove Township finding that the property designated by the Township as the Smola Farm is subject to the restrictions and limitations of the Open Space Lands Act and may be used only for purposes consistent with that Act and entering an injunction against the Township from proceeding with the acceptance of bids for construction of a proposed municipal complex on the Smola Farm. This action was filed January 9, 2025. Discovery was complete months previous to this filing.

Pursuant to Pennsylvania Rule of Civil Procedure 1028(a), "Preliminary objections may be filed by any party to any pleading" based upon grounds including "insufficient specificity in a pleading" and "legal insufficiency of a pleading (demurrer)." When ruling on Preliminary Objections, all material facts alleged in the challenged pleadings are admitted as true as well as all inferences reasonably drawn therefrom. Thus, even assuming that the facts stated in the Complaint

are true, the Defendant raises a demurrer claiming that even if the facts stated in the Complaint are true, the Township cannot succeed as a matter of law in getting an Order limiting future right-to-know requests from one of its citizens or enjoining that citizen "or anyone acting on his behalf" from utilizing his rights under the Pennsylvania Right-to-Know Law.

Specifically, the RTKL requires that each RTKL Request be considered individually, and the identity of the Requester is irrelevant as a matter of law. This legal analysis of the RTKL Act is laid out in a Final Determination issued by the Pennsylvania Office of Open Records in the matter of *Matt Murray, Requester v. Upper Pottsgrove Township, Respondent,* Docket No. AP 2024-2523 dated October 24, 2024. That Final Determination is attached to the Preliminary Objections to the Complaint as Exhibit A and shows that the Township, that did not appeal this ruling, is collaterally estopped from raising the same issues again, in violation of the Pennsylvania Right-to-Know Law. The Complaint thus fails to state a claim for which relief can be granted and should be dismissed.

Moreover, the Township argued that the Requester had made enough RTKL Requests that the Township found it "burdensome," but the Township was unsuccessful in proving that to the Office of Open Records. The Complaint in the instant matter makes a similar claim without following the Right-to-Knox Law which says, specifically in 65 P.S. § 67.506:

> §67.506. Requests
> (a) Disruptive Requests. –
> (1) An agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.
> (2) A denial under this subsection shall not restrict the ability to request a different record.
> 65 P.S. §67.506

Then, if the Agency denies a request on that basis, it needs to file an appeal to the Office of Open Records – not file suit in the Court of Common Pleas. The law specifically says "A denial under this subsection shall not restrict the ability to request a different record."

Thus, the Preliminary Objections of the Defendant citizen Matthew E. Murray should be sustained because the Complaint fails to state a claim for which relief can be granted, both because it is illegal under the Pennsylvania RTKL to prohibit future Right-to-Know Requests, and illegal to consider either the Requester's identity or the Requester's purposes in requesting records that are supposed to be public records.

The RTKL is clear. With regard to local agencies Section 302 specifically provides, "A local agency *shall provide* public records in accordance with this Act." The same section goes on the state a prohibition: "A local agency may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law." 65 P.S. §67.302.

As Justice Wecht explained in *PA State Police v. ACLU of Pennsylvania,* 300 A.3d, 2023 Pa. LEXIS 1116 (Pa. 2023):

> The General Assembly enacted the RTKL in 2008 in an effort to promote transparency. The RTKL provides that any 'record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record' unless protected by a privilege, exempt from disclosure under 'any other Federal or State law or regulation or judicial order or decree or exempt under section 708 of the RTKL.' The burden of proving that one of the Section 708 exceptions applies belongs to the Commonwealth agency that is resisting disclosure citing 65 P.S. §§ 67.305(a), 67,708 and 67.708(a)(1). Id. at 387.

Thus, as a matter of law, the relief requested by Upper Pottsgrove Township is illegal under the RTKL. Moreover, Upper Pottsgrove has tried to raise these issues before, and was specifically denied by the Office of Open Records with this particular Requester and this particular Township, and the Township never appealed that determination.

Further, the Office of Open Records itself has a publicly disseminated the "Advisory Opinion" attached hereto, that specifically answers the exact questions raised by Upper Pottsgrove

Township in this case and denies the local agency the right to limit the number of records requested, or to limit who may ask for public records. Advisory Opinion on agency policies limiting RTKL requests, dated August 19, 2022, attached hereto and publicly available.

The Office of Open Records found that the Township had not proven Matt Murray's requests under the RTKL were burdensome under Section 506(a) of the Right-to-Know Law that provides that "An agency may deny a request or access to a record if Requester has made repeated requests for that same records and the repeated requests have placed an unreasonable burden on the agency." 65 P.S. § 67.506(a). The Office of Open Records found that the Township had not proven its case and declined to find the requests repetitive or burdensome. See Final Determination in the matter of *Matt Murray, Requester v. Upper Pottsgrove Township, Respondent,* Docket No. AP 2024-2523 attached to Defendant Matthew E. Murray's Preliminary Objections to the Complaint. That ruling was not appealed. Thus, in addition to the Complaint herein failing to state a claim for which relief can be granted, the Township is collaterally estopped from pursuing that claim against Matt Murray.

III. THE TOWNSHIP'S LAWSUIT AGAINST MATTHEW E. MURRAY IS A CLASSIC EXAMPLE OF A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION AND IN VIOLATION OF PENNSYLVANIA'S ANTI-SLAPP LAW, 42 PA. C.S.A. §8340.12 *ET SEQ.*

It is true, as alleged in the Complaint, that Upper Pottsgrove Township and Matt Murray are involved in a lawsuit captioned *Matthew E. Murray, et al v. Upper Pottsgrove Township, et al* No. 2023-02216, in the Montgomery County Court of Common Pleas, which the Defendant herein respectfully prays this Honorable Court will take judicial notice of. In the Complaint, the Township describes it this way, "Currently, the Township is in the midst of a contentious litigation matter in which Defendant is a named plaintiff, regarding the Township's plans to relocate and build a new Township municipal building..." on a piece of property known as the Smola Farm which was purchased with open space tax revenues.

Interestingly, however, a decision was actually rendered in that case long before the current lawsuit was filed and although it is alleged that the requester "is using the legal process of filing RTKL Requests with the Township and appeals with the OOR as a tactical weapon to financially damage the Township and consume its professional resources so that the Township cannot adequately complete its other obligations, which includes the municipal litigation filed by Defendant," the underlying litigation had already been tried by the time this objection was raised.

It is therefore legally irrelevant to the Right-to-Know Request at the present time. On the other hand, this allegation does show that the Township actually is in violation of Pennsylvania's anti-SLAPP Law.

Under the Uniform Public Expression Protection Act, 42 Pa. C.S. § 8340.11 *et seq.* [the PA Anti-SLAPP Law], the lawsuit actually falls squarely within the Declaration of Policy in the enactment of the Uniform Public Expression Protection Act:

> § 8340.12 Declaration of policy.
> The General Assembly finds and declares as follows:
> (1) There has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of protected public expression.
> (2) It is in the public interest to encourage continued participation in matters of public significance. This participation should not be chilled through abuse of the judicial process.
> (3) This subchapter:
> **(i) grants immunity to those groups or parties exercising the rights to protected public expression; and**
> **(ii) awards attorney fees to parties that are forced to defend against meritless claims arising from the exercise of the rights to protected public expression.**
> (4) Broad construction of this subchapter will implement the goals under paragraphs (2) and (3).
> 42 Pa. C.S.A. §8340.12

In case there's any doubt, a "protected public expression" includes "a person's communication in a legislative, executive, judicial or administrative proceeding," "a communication on an issue under consideration or review in a legislative, executive, judicial or administrative proceeding," or "exercise on a matter of public concern of the rights of freedom of

speech or of the press, the right to assemble or petition or the right of association guaranteed by (1) the First Amendment to the Constitution of the United States or (2) Section 7 or 20 of Article I of the Constitution of Pennsylvania." 42 Pa. C.S. § 8340.13 Definitions, PA Public Expression Protection Act. The Complaint fails to state a claim for which relief can be granted and there's no doubt that Matt Murray is a citizen entitled to immunity under the law:

> §8340.15. Grant of immunity.
> A person is immune from civil liability for a cause of action based on protected public expression if any of the following paragraphs apply:
> (1) The party asserting the cause of action based on protected public expression fails to:
> (i) establish a prima facie case as to each essential element of the cause of action; or
> (ii) state a cause of action upon which relief can be granted.
> (2) There is no genuine issue as to any material fact, and the person against whom the cause of action based on protected public expression has been asserted is entitled to judgment as a matter of law in whole or in part.
> 42 Pa. C.S. §8340.15 Grant of Immunity

In light of the Township's obvious intention to chill the exercise of citizen Matt Murray's free speech rights and rights under the Pennsylvania Right-to-Know Law to access public information on matters of public importance, the Complaint should be dismissed and a hearing held to award attorneys' fees to Defendant Matt Murray.

IV. CONCLUSION

In summary, the Complaint fails to state a claim for which relief can be granted because the Pennsylvania Right-to-Know Law requires that each request be considered separately; the RTKL also requires that the identity of the Requester *not* be considered or the reasons for the requested documents *not* be considered; and because these same issues were raised by Upper Pottsgrove Township before the Office of Open Records and were found to be without merit. That decision was never appealed.

In addition, because the filing of a lawsuit of this nature against citizen Matt Murray seeking to exercise First Amendment rights, when the Township knew or should have known that the requested relief violates the Pennsylvania RTKL, this litigation is clearly a strategic lawsuit against public participation and Matt Murray is entitled to immunity under the terms of Pennsylvania's anti-SLAPP Law or Uniform Public Expression Protection Act.

The Complaint should be dismissed, with a hearing scheduled on granting Matt Murray reasonable attorneys' fees to discourage future actions of this type, and to compensate him as a public citizen, from having to defend himself in a frivolous lawsuit filed by his own elected representatives using taxes that he personally paid, to unconstitutionally restrict his rights to free speech, freedom of expression, and the use of the RTKL and the civil courts to assert rights he possesses as a citizen of Upper Pottsgrove Township and the United States of America.

Respectfully submitted,

Catherine M. Harper, Esquire
Attorney for Defendant, Matthew E. Murray

Dated: 2. 3. 2025

EXHIBIT A

pennsylvania
OFFICE OF OPEN RECORDS

August 19, 2022

Melissa Bevan Melewsky
In-house Counsel
Pennsylvania NewsMedia Association
melissam@pa-news.org

RE: Advisory Opinion on agency policies limiting RTKL requests

Dear Attorney Melewsky:

The Office of Open Records ("OOR") received your request for an advisory opinion on August 12, 2022. The OOR may issue advisory opinions pursuant to Section 1310 of the Right-to-Know Law ("RTKL"), 65 P.S. § 67.1310(a)(2). Your request for an advisory opinion is hereby **GRANTED**.

Your advisory opinion request seeks answers to the following questions:

1. **Can an agency enact a policy that limits the number of Right-to-Know Law requests that can be filed with the agency?**
2. **Does a local policy limiting the number of Right-to-Know Law requests that can be filed violate Section 1308 of the statute, 65 P.S. § 67.1308?**

Both questions are interrelated and can be answered together. Section 1308 of the RTKL prohibits agencies from adopting "[a] policy or regulation" that includes "[a] limitation on the number of records which may be requested or made available for inspection or duplication." 65 P.S. § 67.1308. The Commonwealth Court has recognized that this prohibition means that an agency is not "excused from its obligation[s]" under the RTKL "[j]ust because a request is for a large number of documents." *Pa. State Sys. Of Higher Educ. v. Ass'n of State College & Univ. Faculties*, 142 A.3d 1023 (Pa. Commw. Ct. 2016).

While Section 1308 prohibits an agency from limiting the number of *records requested* in a single request, it also follows that Section 1308 prohibits an agency from limiting the number of *record requests* that can be made. The RTKL "is remedial legislation 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), *affirmed by* 75 A.3d 453 (Pa. 2013). Due to this reason, Section 1308 should be read in a manner to maximize access to government records. Notwithstanding policy reasons, however, Section 1308 clearly prohibits an agency from prohibiting the number of records requested, as well as the number of requests made: any limitation on the number of record requests that may be made is necessarily a prohibition on the number of records requested. We are to presume that the General Assembly did not intend for an absurd or unreasonable result. 1 Pa.C.S. § 1922(1).

Section 1308 prohibits agencies from enacting policies limiting the number of records requested as well as the number of record requests. Because of the clear statutory prohibition against such a policy, it is unnecessary to evaluate any constitutional concerns.

Finally, OOR notes that any agency that promulgates a policy in violation of Section 1308 of the RTKL may be subject to court costs, attorney fees, and civil penalties. 65 P.S. §§ 67.1304-1305. The scope of those penalties would be determined by a court of competent jurisdiction.

Thank you for contacting the OOR with your request. A copy of this Advisory Opinion will be placed on the OOR website at https://www.openrecords.pa.gov/RTKL/AdvisoryOpinions.cfm.

Respectfully,

Elizabeth Wagenseller

Elizabeth Wagenseller
Executive Director

PENNSYLVANIA NewsMedia ASSOCIATION

August 12, 2022

Elizabeth Wagenseller
Executive Director
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Re: Advisory Opinion on agency policies limiting RTKL requests

Dear Ms. Wagenseller,

I am in-house counsel with the Pennsylvania NewsMedia Association (PNA), the statewide trade association representing 300 print and digital news organizations in the Commonwealth. I am reaching out on behalf of news organizations and journalists working on their behalf to request an advisory opinion from the Office of Open Records on an issue central to the media's ability to gather information under the Right-to-Know Law and report on the workings of our government.

News coverage and outreach from our members have made clear that some local agencies have enacted, or plan to enact, policies limiting the number of Right-to-Know Law requests that can be filed with an agency. One such policy was enacted by Charleroi Borough, with the policy allowing local officials to deny requests arbitrarily on a case-by-case basis, without regard to an applicable standard of law and in conflict with the Right-to-Know Law.

We believe local policies that place a limit on the number of requests under the Right-to-Know Law would be in direct conflict with the plain text of the statute. We also believe such a policy would create significant issues for journalists across the Commonwealth who routinely file open records requests as part of their First Amendment newsgathering and reporting functions. We also believe such a policy would negatively impact the public as it would directly conflict with generally applicable statewide law and create a patchwork of disparate access policies across the state.

We are not aware of any pending legal challenges on this issue before the Office of Open Records or a court of law.

Therefore, PNA respectfully requests that the OOR issue an advisory opinion on the following questions of law:

1. Can an agency enact a policy that limits the number of Right-to-Know Law requests that can be filed with the agency?

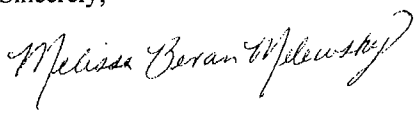
2. Does a local policy limiting the number of Right-to-Know Law requests that can be filed violate Section 1308 of the statute, 65 P.S. § 67.1308?

3899 North Front St. • Harrisburg, PA 17110 • (717) 703-3000 • Fax (717) 703-3001 • www.panewsmedia.org

We would appreciate the Office of Open Records weighing in on this issue to make the requirements and limitations of the Right-to-Know Law clear to agencies and requesters alike so that public access law remains uniform and consistent across the Commonwealth.

I can be contacted at melissam@pa-news.org or (717) 703-3048, and I thank you for your time and consideration of this important matter.

Sincerely,



Melissa Bevan Melewsky
In-house Counsel
Pennsylvania NewsMedia Association

CC: Brad Simpson, President PNA

Exhibit J

March 27, 2025

Honorable Jeffrey S. Saltz, Judge
Montgomery County
Court of Common Pleas
P.O. Box 311
Norristown, PA 19404-0311

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Pennsylvania

Eastern Region Office
PO Box 60173
Philadelphia, PA 19102
215-592-1513 T
267-573-3054 F

Central Region Office
PO Box 11761
Harrisburg, PA 17108
717-238-2258 T
717-236-6895 F

Western Region Office
PO Box 23058
Pittsburgh, PA 15222
412-681-7736 T
412-345-1255 F

Re: Request to Schedule an Anti-SLAPP Hearing in *Upper Pottsgrove Township v. Matthew E. Murray,* No. 2025-00481

Dear Judge Saltz:

We respectfully request that the Court schedule a hearing on Defendant Matthew Murray's anti-SLAPP motion. Mr. Murray filed a motion under Pennsylvania's anti-SLAPP law, 42 Pa.C.S.A. § 8340.11 *et seq*., in his Preliminary Objections to the Complaint, docketed February 3, 2025. The motion stated that "[i]f the Complaint is not dismissed as a result of the Preliminary Objections, the Defendant respectfully moves this Court pursuant to 42 Pa.C.S.A. § 8340.15 to hold a hearing…" Defendant Matthew E. Murray's Preliminary Objections to the Complaint at ¶14, *Upper Pottsgrove Township v. Matthew E. Murray*, No. 2025-00481 (Mont. Co. Ct. Com. Pl. Feb. 3, 2025).

While we recognize that Mr. Murray's preliminary objections are still pending before the Court, we respectfully request that the Court hold the anti-SLAPP hearing prior to issuing a decision on the preliminary objections. The parties have conferred and have identified the following dates and times at which both parties are available for a hearing: Monday, April 21st before noon, Tuesday, April 22nd before noon, and Tuesday, April 29th all day.

Regards,

Ariel Shapell

Sara Rose, Esquire
Attorney I.D. 204936
Ariel Shapell, Esquire
Attorney I.D. 330409
American Civil Liberties
Union of Pennsylvania
PO Box 60173
Philadelphia, PA 19102
510-390-0306

srose@aclupa.org
ashapell@aclupa.org

Catherine M. Harper, Esquire
Attorney I.D. 34568
Timoney Knox, LLP
400 Maryland Drive
P.O. Box 7544
Ft. Washington, PA 19034-7544
215-646-6000
charper@timoneyknox.com

Exhibit K

ACLU Pennsylvania

Ari Shapell <ashapell@aclupa.org>

Request to Schedule an Anti-SLAPP Hearing in Upper Pottsgrove Township v. Matthew E. Murray, No. 2025-00481

Infantolino, Melody <Melody.Infantolino@montgomerycountypa.gov> Tue, Apr 8, 2025 at 10:20 AM
To: Ari Shapell <ashapell@aclupa.org>
Cc: "Eric C. Frey" <efrey@dbdlaw.com>, Sara Rose <SRose@aclupa.org>, "Catherine M. “Kate” Harper" <CHarper@timoneyknox.com>, Robin Leedom <RLeedom@timoneyknox.com>

Good Morning,

Thank you for your patience while the Judge was out of office. Per the Judge there is currently no pending motion under this statute and this relief cannot be sought through Preliminary objections.

Thank you,

Melody Infantolino
Judicial Assistant to Judge Jeffrey Saltz
Courts
Montgomery County, PA

P: (610) 278-3786
www.montgomerycountypa.gov/Courts

From: Ari Shapell <ashapell@aclupa.org>
Sent: Thursday, March 27, 2025 1:42 PM
To: Infantolino, Melody <Melody.Infantolino@montgomerycountypa.gov>
Cc: Eric C. Frey <efrey@dbdlaw.com>; Sara Rose <SRose@aclupa.org>; Catherine M. “Kate” Harper

<CHarper@timoneyknox.com>; Robin Leedom <RLeedom@timoneyknox.com>
Subject: Request to Schedule an Anti-SLAPP Hearing in Upper Pottsgrove Township v. Matthew E. Murray, No. 2025-00481

Ms. Infantolino,

As discussed by phone yesterday, attached is a letter respectfully requesting that the Court schedule a hearing on Defendant Matthew Murray's anti-SLAPP motion in *Upper Pottsgrove Township v. Matthew E. Murray*, No. 2025-00481. I have cc'ed opposing counsel Eric Frey on this email. Thank you.

Regards,

Ari

--

Ari Shapell (he/him)
Legal Fellow
ACLU of Pennsylvania
P.O. Box 60173, Philadelphia, PA 19102
(856) 946-7120 | ashapell@aclupa.org

Exhibit L

IN THE COURT OF COMMON PLEAS IN AND FOR
THE COUNTY OF MONTGOMERY, PENNSYLVANIA
CIVIL DIVISION

- - -

UPPER POTTSGROVE TOWNSHIP : NO. 2025-00481
:
vs. :
:
MATTHEW E. MURRAY :

- - -

Plaintiff's Petition for
Preliminary and Final Injunction

- - -

Courtroom 12
Wednesday, January 22, 2025
Commencing at 1:05 p.m.

- - -

Norma Gerrity
Official Court Reporter
Montgomery County Courthouse
Norristown, Pennsylvania

- - -

BEFORE: THE HONORABLE JEFFREY S. SALTZ, JUDGE

- - -

COUNSEL APPEARED AS FOLLOWS:

ERIC C. FREY, ESQUIRE
for the Plaintiff

CATHERINE M. HARPER, ESQUIRE
for the Defendant

- - -

Upper Pottsgrove vs. Murray

(The following proceedings occurred in open court:)

THE COURT: Good afternoon, everyone.

MR. FREY: Good afternoon, Your Honor.

MS. HARPER: Good afternoon, Your Honor.

THE COURT: This is Upper Pottsgrove Township versus Matthew Murray, Number 2025-00481, and we are here on the township's Petition for Preliminary Injunction.

So Mr. Frey?

MR. FREY: Yes. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. FREY: We are here, we're asking for a preliminary injunction to temporarily stop the right-to-know requests being submitted by the defendant in this matter.

We can show you that he's put in numerous requests to the township over the past several years, much more than any other resident in the township, to the tune of over a hundred requests, and they drain on the staffing and financial of the township.

That's why we're asking for it. I can

go into more detail, if you want. I don't know how you want to handle it.

THE COURT: The first question that comes to mind is whether there's any precedent for an injunction of this type.

MR. FREY: I actually have a case out of Lehigh County, very similar complaint to what we filed, all the same counts.

In that court case, the court did enter an injunction on this matter. Now, I don't want to mislead the court.

What resulted there is the parties did have a joint stipulation in that matter, which resulted from the complaint and the petition for the injunction to be issued.

There is precedent. The court then adopted that as their order, and I have it here for you, if you would like.

THE COURT: I think that you've got the same circumstances?

MR. FREY: Agreed, yes.

THE COURT: I mean, is there any analysis? Is there an opinion? Is there --

MR. FREY: There is not.

THE COURT: Simply signed off on the stipulation or the agreement?

MR. FREY: Correct, yes.

THE COURT: All right. Other than that, there's no precedent?

MR. FREY: Not that I'm aware of, no.

THE COURT: Well, why don't you, why don't you tell me by offer of proof what you expect the evidence to show?

MR. FREY: So I have the township manager here, who would be my witness.

She would testify that she is the township right-to-know officer; that she was preceded by an employee who was the right-to-know officer, and because of the sheer volume of the right-to-know requests that were coming in, that employee resigned, which then she had to take over the right-to-know position.

There's been 102 right-to-know requests since November of 2022 by this defendant. In 2023 that was 55 percent of the right-to-know requests received by the whole township. In 2024 it was about 40 percent of the right-to-know requests received by the whole township.

In some weeks she's spent, she had spent over that duration 80 percent of her time responding to the defendant's right-to-know requests, and over that time, $58,000 has been spent just on the defendant's right-to-know requests, not right-to-know requests in general at the township, but just this defendant's right-to-know requests.

THE COURT: Are you allocating a portion of the township manager's salary to come up with that figure?

MR. FREY: It's probably a line item or it's probably legal. I can have her testify. It's not designated separately, but a lot of that's legal.

That's just a legal expense, not her time at all. We do not allocate or don't account for her time --

THE COURT: We're talking about out of pocket?

MR. FREY: Correct. Just so you know, what the right-to-know law allows municipalities to charge, they can't charge for staff time in compiling the documents.

They can't charge for the legal time in reviewing them to make sure you're not putting out

information which is otherwise privileged or things like that.

The only thing that they can charge for are copies. So they spend all this time, money, IT services in some instances, legal fees. They can't charge that to the requester.

In this township, there are approximately or more than 6,000 voters -- excuse me -- residents, and 4,100 voters.

And if just a handful of them did what this defendant is doing, the township would bankrupt in time and finances.

THE COURT: So they're not.

MR. FREY: They're not at this moment, correct. Further, there are several, there were several -- there were six items that the requester asked for documents dating back to, I believe, August of 2024, and on six of those items, the requester had to pay for copies.

He did not pick those up. So again that just was all part of our evidence to show that these things are just being done to harass the township. He has no desire to actually obtain those documents.

Since preparation of our documents, the

defendant has picked up those documents. I believe at the end of December, I think he went in and actually picked up those six categories.

Again, the reason that -- typically we obtain the documents. We simply e-mail them off to the requester, regardless of who it is.

In this situation, however, since money was owed, we said, once you pay the money, we'll give you the documents, and that's allowed by the right-to-know law.

In all matters, despite the fact that the six were outstanding, the right-to-know law also does not allow us not to process additional requests.

Even if he hasn't picked up six of them and they're sitting there and we know he's not going to pick them up, if he submits a new request, we still have to process and we still have to spend our time, staffing time, attorney time to review and compile the documents and then notify him that they're ready.

So simply, we have no ability to stop that. We have to do that under the right-to-know law, which is why we're here.

And on those six items, for the first one, every time he submitted a right-to-know request,

we would notify him that he owed the money and had to pick these up, so at least six times on the one he was notified to pick them up and he didn't until late December.

Additionally, Mr. Murray has appealed nine times to the Office of Open Records, so when we denied or granted him what was asked, he appealed nine times to the Office of Open Records. The township won eight of those matters.

So in only one situation did the Office of Open Records tell us we had to do something different for the requester.

Further, on I think over ten of the matters, so over ten of the 102, the requester was asking for plans for the township's proposed municipal complex.

So over the two years, he over and over again asked for plans for the township, and the township explained two things.

One, they weren't finalized, so we can't provide them to you; and two, once they are done, he'll get them and/or they'll be posted to the website so everybody will have them.

So despite that, he kept requesting them

and kept getting denied, and that was the subject of numerous appeals to the Office of Open Records. Again, in each case, the township won those appeals.

And you may recall, Your Honor, that the other thing she would testify to is that the defendant was, for a large duration of the timeframe that these requests were being sent to the township, he was a plaintiff suing the township.

So one of our issues also is that he was really weaponizing the right-to-know law and using it as discovery requests.

So while he had the right to obtain something in five days, we were subject to the Pennsylvania Rules of Civil Procedure to obtain documents from the other party.

THE COURT: I've seen many instances where a municipal entity was a party in a civil action, and the opposing party obtained documents through a right-to-know law request.

MR. FREY: It does happen, Your Honor. I'm just showing that, it's an arrow and a quiver, that this whole thing is really showing that he's weaponizing.

He's using it to harass the township.

He doesn't actually want the documents. He's just putting us through this process.

THE COURT: Well, in six percent of the time.

MR. FREY: But then also the ten requests for plans, the ten requests for the plans, he kept asking for those, even though he was told he'll get them once they're final.

The most, the two most recent requests, I think, goes to the fact also this is done for harassment and not for legitimate purposes is, I don't know if I have these in the right order, request 101 and 102 on the list of items requested is, one was a copy of the bill list for the township, and the second one was a copy of the budget adopted by the township.

Why these are harassment is that the copy of the bill list is provided to the public, copies are provided to the public at every township meeting.

His wife attends every township meeting and picks up these documents, I assume she picks them up, picks them up regularly.

So a right-to-know request isn't even required for that in that they're given to the public

at every meeting.

Secondly, the budget is posted on the website, so he can go to the website and it's there.

And that's actually a response to a right-to-know request, is that it's on the website, you're free to have it, you already have access to it.

It just shows that the issuing right-to-know request really serves no purpose in that he already has those documents.

So in a nutshell, that's what she would testify to in support of the fact that we satisfied all of these six criteria for the injunction.

Thank you.

THE COURT: Ms. Harper?

MS. HARPER: Thank you, Your Honor. It's nice to be back. I hope you feel the same way.

I filed an answer, and I did send it to chambers because of the holiday situation here.

Did you get it?

THE COURT: I did.

MS. HARPER: Great. It's in the nature of a Motion to Dismiss, and that's because the injunction that counsel --

THE COURT: Dismiss what?

MS. HARPER: The preliminary injunction.

THE COURT: All right.

MS. HARPER: Although I also think the complaint should be dismissed. I haven't gotten to filing my preliminary objections on that, because it was not served until a couple days ago; right?

So my answer to that is not due, and I will file a Motion to Dismiss when I get there.

I did this on the petition, because what he's really asking for is a preliminary injunction, which is not permitted under the law.

In order to get an injunction, he has to show a substantial likelihood of success on the merits, and he's not going to be able to win this case. I think if you look at my answer, there are several reasons why.

But the second thing is, this is also -- the right-to-know law is a first amendment right. It is a freedom of speech right. It is a freedom that belongs to every citizen making the request.

THE COURT: Are you saying that the first amendment -- what was the law before the right-to-know statute was passed?

MS. HARPER: You could stand up and ask in a public meeting, can I see the budget? You could do that.

THE COURT: But you couldn't make the kind of requests that Mr. Murray is making?

MS. HARPER: That's right, and I'll get to that. But if you read the opinion of the Office of Open Records, which I have attached to the response to the petition, it points out that every right-to-know request must be considered separately and on its merits.

And so by asking for an injunction that this citizen can't make any requests -- and, by the way, it says this citizen and anyone acting on his behalf.

So what does that mean? His wife can't file one? The folks in the room who are supporting him can't file one because they're acting on his behalf?

So it's a prior restraint on a first amendment right of people who aren't even served in this case, that this township doesn't have to comply with the state law.

The Office of Open Records points out,

you could deal with each one individually, and then you can appeal it if you don't like the way it turned out. He took advantage of the appeal practice a few times. That's true.

The Office of Open Records also said that they can't just say, you can't make any more right-to-know requests, and they said that in this case it wasn't burdensome, and that opinion is only a couple of months old.

So I think the township is collaterally estopped from making that argument before Your Honor today, because they already had a ruling, and they lost.

And they had a ruling in the place where they should have brought this action -- no offense, Your Honor -- because a right-to-know request goes on appeal to the Office of Open Records.

The Office of Open Records then makes a decision, and then you can appeal that, I believe, to the Commonwealth Court.

THE COURT: I believe to the Common Pleas Court.

MS. HARPER: Common Pleas Court. Okay. I'm sorry.

Upper Pottsgrove vs. Murray

THE COURT: I wish you were right.

MS. HARPER: Right. But, unfortunately, it's going to come to you. Okay.

But they didn't do that, and they didn't take an appeal of this decision where the Office of Open Records actually ruled on whether or not there were too many requests and too burdensome and said, no, no.

So in two ways, the opinion of the Office of Open Records is instructive in that it says, look, you've got to consider each right-to-know request separately, and the law says the documents shall be produced.

It's not, hey, maybe I can, maybe I can't. You have to produce them.

There's something in there about frivolous requests or repetitive requests or something like that, but the Office of Open Records ruled that he wasn't guilty of any of that.

Now, I can address specifically -- I did in my answer in a footnote -- the request for plans. Your Honor is familiar with the case.

My client stopped a municipal complex from being built on the Smola Farm, which was bought

with open space tax moneys.

Some of the documents we entered into evidence in that case were, in fact, obtained by a right-to-know request and not by discovery, because when we sent the discovery, the township hewed to the position that it had not used open space money.

So we went and got budgets, and we went and got documents that showed that they absolutely did use open space money to buy the Smola Farm.

The reason we kept asking for plans was, they spent $340,000 on engineers and architects for plans for this municipal complex on the Smola Farm, and they claim they don't exist.

Today counsel said that they're drafts, so we don't have to give them to you.

I think the right-to-know law would require that they ask their own agents, which would include the architects and the engineers who are being paid hundreds of thousands of dollars to create these plans, for those documents, and they didn't do it.

So my client was forced to file multiple requests, okay, you don't have them yet, you don't have them yet, you don't have them yet, you don't have them yet.

So he did request those documents more than once, because they claim they didn't exist, and the Office of Open Records agreed that they didn't have to produce them if they were in a draft format.

So he has to make requests. What else can a citizen do if he wants to know what the government is spending his money on?

He'll probably have to make a request to find out how much the government's paying to sue him here today to stop him from exercising his first amendment right to know what his government is doing with his money.

He's allowed to do that. So they have to show a substantial likelihood of success on the merits.

I think the Office of Open Records' opinion both collaterally estops, is res judicata, but also outlines that you can't do that.

You can't issue a prior restraint on right-to-know requests. You have that right as a citizen. And so why are we here?

But I don't know why we're here, and I actually think that they're claiming my client is using it as a weapon.

Upper Pottsgrove vs. Murray

This is a township that has sued this poor guy twice, once for defamation for an editorial, and now today he's to stop making requests.

THE COURT: All right. So they're only one ahead of him.

MS. HARPER: Right. Well, they've sued him twice, and he's only sued them once.

THE COURT: Thank you.

MS. HARPER: Be that as it may, the reason he doesn't go to public meetings anymore is because he got a letter from the police chief that had me, as his lawyer, saying, don't go to any more public meetings, I think they want to lead you out in handcuffs.

THE COURT: We're getting a little far afield.

MS. HARPER: We are. And I'm sorry for that. But it was alleged that my client is weaponizing the right-to-know law.

I would suggest the township should take the beam out of its own eyes on that one, because if anybody is weaponizing the court system, it's them, and not him.

So my client's here. He'll testify that

when he went to pick up those documents, he got a reminder from them, hey, we got some documents here.

He had to wait an hour because they hadn't copied them. He had to sit there in the lobby and wait an hour.

So I don't think that counsel is entirely correct that they're being overburdened by legitimate requests for public documents.

A budget is a public document. It just is. They should just say to him, go on the website.

They should say on the bill list, if it's not on the website, here it is. What's the problem? These are all public documents.

And so I think that the Petition for an Injunction should be dismissed, because there is no reason for an injunction and because they're collaterally estopped from claiming that he's abusing the system, because the Office of Open Records already ruled on that claim against this township on behalf of this requester.

Thank you, Your Honor.

THE COURT: Mr. Frey, has the township availed itself of Section 506(a) of the right-to-know law related to disruptive requests?

MR. FREY: We have, Your Honor. In many of the appeals to the Office of Open Records, we have asked them or argued to them that they were repetitive and duplicative.

THE COURT: Well, okay. Has the township denied a request submitted by Mr. Murray on the grounds that he has made repeated requests for the same records and that those repeated requests have placed an undue burden on the township?

MR. FREY: I don't believe so, Your Honor. Again, I didn't review all 102 of them.

However, on the appeal -- so we would deny them for a different reason, and if I can, I'll address the plan, and there is an exception for plans, and there's a reason for it, and case law substantiates the position.

But it is one of the exceptions to documents that you have to present, and that is, documents that are in draft form.

And while, yes, we did spend significant funds on plans for the township building, they weren't finished.

And there's case law, PennDOT plans for roadways, that's what the preeminent case is on that

one, is that you don't want to hand out draft plans, because then we're going to be in court arguing about a draft plan when it's not finalized, we're still working through DEP and things like that.

But we don't have to give them to anybody until the plans are finalized, and in this case, as soon as they were finalized, they were on the website. They went out. So they're available to everybody.

Getting to repetitive and duplicative, while it wasn't the reason we denied them, we denied them because they were draft plans, and that's why we won on those cases, we did argue that they're being duplicative and all that.

And the way the defendant got around that was essentially he had asked for final plans from January and February of 2023. There aren't any.

He then asked for final plans from March and April of 2023, and the right-to-know opinion there said, hey, it's very specific.

Unless you're asking for the exact same document for the exact same time period, they're handcuffed and they can't say it's repetitive.

So there is crafty ways the requesters

can get out of that finely interpreted, and they don't -- again, the Office of Open Records there, they're going to tell you, they're going to take the most transparent way of interpreting this, and they do.

So there's ways around beating that unduly repetitive request, and that's how it was done in this case. It was over and over and over, even though it was explained, you'll get them when they're finalized.

And also why we didn't appeal those to the Court of Common Pleas, we won the underlying case, so I don't know how we appeal an opinion that we won.

We may not have won one part of it, our argument, but we won the appeal in that we didn't have to present the plan, so we really had no decision to appeal to bring in here.

We started this action -- actually, we called the Office of Open Records and asked what our options were.

They're the ones who gave us the Lehigh County case and said, hey, this is something that's worked other places, this is the avenue.

They can only do the right-to-know. That's their jurisdiction. They can't do an

injunction. They can't do anything unless it's unduly repetitive.

It's not in this case. However, we feel it was. It was just a crafty way of draftsmanship to get around it.

THE COURT: All right.

MS. HARPER: I would just point out, Your Honor, that the opinion I attached to my response is the Office of Open Records' opinion where they said that he'd been repetitive and burdensome, and they denied that.

THE COURT: All right. I am going to assume that the township's witness will testify as Mr. Frey has represented and that her testimony will be credible.

MR. FREY: Thank you, Your Honor.

THE COURT: So assuming the facts as Mr. Frey has laid them out and without regard to any facts asserted by Ms. Harper as to what her client will testify to, I am focused on Section 506(a) of the right-to-know law, which is titled disruptive requests, and that reads:

One: An agency may deny a request or access to a record if the requester has made repeated

requests for that same record and the repeated request placed an unreasonable burden on the agency.

Two: A denial under this subsection shall not restrict the ability to request a different record.

So this section tells me two things about the intent of the legislature.

First, that if a requester abuses the process by making repeated requests for the same record, the township can simply say, no, you're done.

But it also says that a denial under that subsection shall not restrict the ability to request a different record, which means that the legislature contemplated that that same requester may go on to request different records.

Given this legislative intent as reflected in 506(a), I don't believe that the evidence proffered by the township makes out a clear right of relief to injunctive relief.

The legislature has created the remedy that is available for disruptive requests, but for a particular category of disruptive requests, and has denied the right of the township to preclude a repetitive requester from requesting new records.

So based on my reading of the statute and based on the requirement that a petitioner for preliminary injunction must establish a clear right to relief, I will deny the petition.

Thank you both.

MR. FREY: Thank you, Your Honor.

MS. HARPER: Thank you, Your Honor.

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(At 1:32 p.m., the proceedings were concluded.)

- - -

C E R T I F I C A T E

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause and that this is a correct transcript of the same.

Norma Gerrity
Official Court Reporter

- - -

Exhibit M

February 27, 2025

Via email: efrey@dbdlaw.com

Eric C. Frey, Esq.
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Pottstown, PA 19464

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Pennsylvania

Eastern Region Office
PO Box 60173
Philadelphia, PA 19102
215-592-1513 T
267-573-3054 F

Central Region Office
PO Box 11761
Harrisburg, PA 17108
717-238-2258 T
717-236-6895 F

Western Region Office
PO Box 23058
Pittsburgh, PA 15222
412-681-7736 T
412-345-1255 F

Re: *Upper Pottsgrove Township v. Matthew Murray*, No. 2025-00481

Dear Mr. Frey:

We write to inform you that Matthew Murray has retained the American Civil Liberties Union of Pennsylvania ("ACLU-PA") to defend him in *Upper Pottsgrove Township v. Matthew Murray*, No. 2025-00481 ("RTKL Lawsuit") as co-counsel with Kate Harper of Timoney Knox LLP. We intend to defend Mr. Murray's constitutional rights to free speech, to petition the government, and to governmental transparency against the Upper Pottsgrove Township's ("Township") meritless lawsuit. The RTKL Lawsuit seeks to silence Mr. Murray in retaliation for his successful litigation and advocacy challenging the Township's unlawful attempts to develop the Smola Farm open space. We urge the Township to immediately withdraw its RTKL Lawsuit or we will seek all remedies available under the Pennsylvania Anti-SLAPP statute.

Matthew Murray is an engaged resident of the Township. Through advocacy in the press, discussions at commissioners' meetings, information gathering using Right-to-Know Law requests, and litigation, Mr. Murray has exercised his constitutional and statutory rights to oppose the Township's attempts to illegally develop the Smola Farm. Mr. Murray's concerns about the Township's unlawful plans were validated on October 18, 2024, when the Court of Common Pleas held that the Township could not develop a municipal complex on the Smola Farm under the Open Space Lands Act.

Rather than acknowledge that they had acted improperly in their attempts to develop the Smola Farm, Township commissioners Trace Slinkerd, Hank Llewellyn, and Don Read sought to punish Mr. Murray for exercising his rights to protected public expression. First, they filed defamation lawsuits against Mr. Murray and Ms. Harper. Then, on January 9, 2025, they filed a civil action against Mr. Murray claiming that he had abused the RTKL by filing "excessive" requests out of a

desire to financially harm the Township. But such claims are meritless. Mr. Murray's RTKL requests did not violate the RTKL. And they were motivated by his desire to protect the Smola Farm from illegal development, not to harm the Township in which he lives.

The Township's RTKL Lawsuit is a clear example of a Strategic Lawsuit Against Public Participation, or "SLAPP" suit. In recognition of "a disturbing increase in lawsuits brought primarily to chill the valid exercise of protected public expression," Pennsylvania enacted an anti-SLAPP law that grants immunity and awards attorneys' fees to parties, like Mr. Murray, who "are forced to defend against meritless claims arising from the exercise of the rights to protected public expression." 42 Pa.C.S.A. § 8340.12.

The Township's decision to litigate a meritless SLAPP suit, brought in retaliation for Mr. Murray's constitutionally protected advocacy for the Smola Farm, subjects Township taxpayers to liability for the ongoing attorneys' fees Mr. Murray incurs in defending himself. In addition, we understand that the Township has already incurred tens of thousands of its own legal fees in prosecuting this lawsuit.

The ACLU-PA has considerable experience holding municipalities to account for filing frivolous and retaliatory claims against residents who are exercising their constitutional rights. For example, the City of Greensburg filed a lawsuit in 2014 against a man and his attorney in retaliation for the man filing a civil rights lawsuit against the City after he was beaten by police officers. After three years of litigation, the City dropped its lawsuit and agreed to pay $98,000 in damages and attorneys' fees.

We encourage the Township to withdraw its RTKL Lawsuit against Mr. Murray. Please let us know by **March 6, 2025,** if the Township agrees to withdraw its lawsuit and commits to pay Mr. Murray's attorneys' fees, which to-date exceed $13,000. If you would like to discuss this matter in the meantime, please contact me at ashapell@aclupa.org or 510-390-0306. We look forward to your response.

Sincerely,

Sara J. Rose
Deputy Legal Director

Ariel Shapell
Legal Fellow

Exhibit N

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL DIVISION

UPPER POTTSGROVE TOWNSHIP **NO. 2025-00481**

vs.

MATTHEW E. MURRAY

IN: Defendant Matthew E. Murray's Preliminary Objections to the Complaint (Seq. 9)

ORDER

AND NOW, this 2nd day of June, 2025, for reasons stated on the record, it is hereby **ORDERED** that the Defendant's Preliminary Objections are **SUSTAINED** and the Plaintiff's Complaint is **DISMISSED.**

BY THE COURT:

JEFFREY S. SALTZ, J.

Order e-filed 6/2/25
Plaintiff Attorney: Eric C. Frey, Esq., Themis Galanas, Esq.
Defense Attorney: Catherine M. Harper, Esq., Ariel Shapell, Esq.
Court Administration – Civil Division: Andrea Grace, Esq., Michael Jorgensen
Clerk: Lisa Nowicki
Court Reporter: Odalys Cummins

RULE 236 NOTICE PROVIDED ON 06/02/2025