



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
PENNSYLVANIANS FOR UNION REFORM,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2016-0093
	:	
CENTRE COUNTY DISTRICT ATTORNEY'S OFFICE,	:	
Respondent	:	

### INTRODUCTION

Pennsylvanians for Union Reform (“Requester”) submitted a request (“Request”) to the Centre County District Attorney’s Office (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various records generally related to the activities of the Centre County District Attorney Stacy Parks Miller. The Office partially denied the Request, stating that certain records do not exist. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Office is required to take further action as directed.

### FACTUAL BACKGROUND

On December 16, 2015, the Request was filed, seeking, in relevant part:

[1.] A copy of the contract or personnel agreement that authorized the law firm of Fox Rothschild and/or Fox Rothschild attorneys Robert Tintner, Patrick Murphy Eric Reed to represent Stacy Parks Miller in her official capacity as

District Attorney in the *quo warranto* action [*Stacy Parks Miller v. Bellefonte Police Department, et al.*, No. 20 MM 2015]...

[3.] A copy of the most recently completed insurance application for the Centre County District Attorney's Office...

[4.] With reference to the employment contract in Attachment D, please send records evidencing the following information in relation to the (contractually stated) "performance of Mr. Castor's duties" from April 9, 2015 to the present day:

The dates in 2015 that Montgomery County resident Attorney Bruce Castor traveled to, and departed from, Centre County to perform work under this contract; the names of the places he stayed for accommodation during those visits (Hotels, motels or personal residences), the names of the restaurants he ate at (or places he purchased food from); all receipts he submitted for reimbursement for those visits, all actual payments he received; and all records showing the hours and general description of the nature of the work he performed, during those visits.

[5.] Please send copies of all state and/or federal court docket numbers (meaning the cover page or front page of pleadings) in which Stacy Parks Miller in her official capacity as District Attorney of Centre County (in whole or in part) has initiated a lawsuit or any other legal pleading against any other party in 2015.

[6.] Please send copies of any and all correspondence sent in 2015 by Attorney Bruce Castor of the law firm Rogers Castor on behalf of Centre County District Attorney Stacy Parks Miller acting in her official capacity as District Attorney (in part or in whole), in which the recipient of the correspondence is threatened with legal action for allegedly defaming Ms. Parks Miller.

On December 21, 2015, the Office invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On January 19, 2016, the Office denied access to Items 1, 4 and 6 of the Request, stating that no responsive records exist. The Office provided a redacted copy of an insurance application in response to Item 3 of the Request, but the Office did not provide any explanation for the redactions. *See* 65 P.S. § 67.903(2). With respect to Item 5 of the Request, the Office provided "the front page of a lawsuit in which Stacy Parks Miller ... is 'described' as a party."

On January 27, 2016, the Requester appealed to the OOR, challenging the denial with respect to Items 1 and 3-6 of the Request only<sup>1</sup> and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c). On January 28, 2016, the Requester submitted an additional statement in support of his appeal. Upon request of the Office, the OOR allowed the parties additional time to supplement the record. On February 4, 2016, the Requester submitted an additional statement in support of his appeal.

On February 5, 2016, law firm Fox Rothschild LLP (“Fox Rothschild”) filed a three-page statement requesting to participate in this appeal, arguing that it “served as personal counsel to Ms. Parks Miller and was not engaged by the ... Office” and that it “has received no public funds related to its legal representation of ... Parks Miller.” On February 6, 2015, the Requester objected to Fox Rothschild’s participation in this appeal, arguing that Fox Rothschild lacks standing to participate and that Fox Rothschild represented District Attorney Parks Miller in her official capacity. On February 7, 2016, the Requester filed a motion asking the OOR to conduct an *in camera* review of the requested agreement between Fox Rothschild and District Attorney Parks Miller.

On February 8, 2016, the OOR invited the parties and Fox Rothschild to further supplement the record “with relevant evidence and legal argument in support of their respective positions” and advised that the OOR would rule on Fox Rothschild’s request to participate as a direct interest participant and the Requester’s Motion for *In Camera* review.

On February 8, 2016, the Requester submitted an additional statement in support of his appeal. On February 9, 2016, the Requester provided various filings made by Fox Rothschild

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<sup>1</sup> As the Requester does not challenge the Office’s response with respect to Item 2 of the Request, the Requester has waived any objections regarding Item 2. *See Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

attorneys on behalf of District Attorney Parks Miller in other litigation, including a memorandum of law that contained the following phrase: “Plaintiff, Centre County District Attorney Stacy Parks Miller, in her capacity as the elected chief law enforcement officer of Centre County, requests...” On February 11, 2016, the Requester provided additional argument, arguing that neither the Office nor Fox Rothschild have established that the attorney-client privilege protects the agreement from disclosure.

On February 12, 2016, Fox Rothschild submitted a four-page, verified position statement in which it argues:

the engagement agreement governing *Stacy Parks Miller v. Bellefonte Police Department* is not a record of the Centre County District Attorney’s Office under the RTKL, because the Centre County District Attorney’s Office did not engage Fox Rothschild LLP. Rather, Stacy Parks Miller engaged Fox Rothschild LLP to represent her personal interests, and the firm did just that. PFUR's appeal should be denied for this reason....

The engagement agreement between Stacy Parks Miller and Fox Rothschild LLP is not an agency record under the RTKL and is not a record of the Centre County District Attorney's Office. *In camera* review is unnecessary in light of the above and other submissions in this matter, but Stacy Parks Miller as the owner of the applicable privileges and confidentiality interests is certainly free to consent to whatever process she deems appropriate.

On February 12, 2016, District Attorney Parks Miller, as the Office’s Open Records Officer, filed an attestation under penalty of perjury arguing that the OOR lacks jurisdiction over this appeal because the Office is a judicial agency. In the alternative, the Office argues, with respect to Item 1 of the Request:

35. After conducting a good faith search of the Agency’s files and inquiring with relevant Agency personnel, I have made the determination that the records requested do not exist **within the Agency’s possession, custody or control**....

39. The undersigned contract between herself and Fox Rothschild was purely personal, for personal representation. The contract did not bind the county nor the [O]ffice, nor was that possible in any event.

40. The agreement is not subject to disclosure to any parties due to privilege, privacy and attorney-client privilege.<sup>[2]</sup>

41. It is irrelevant that the undersigned's title was used in the legal pleadings. The undersigned is in fact, the District Attorney. That was relevant to legal issues that were at stake and relevant to the legal analysis. That fact is not conclusive as to who hired the lawyers.

42. The representation agreement is between the undersigned personally and the firm of Fox Rothschild.

43. Furthermore, the contract/representation agreement itself does not in any way mention the quo warranto matter and for this reason alone, the request can be denied.

With respect to the redactions to records responsive to Item 3 of the Request, the Office states:

46. ... The document was provided although it was not required to be provided. Such document did not form the basis of an agency decision and was a mere annual re-execution of a form for existing ongoing insurance policy coverage.

47. Two items were redacted. Since the entire form was not required to be provided, the redaction does not need to be justified.

48. In the event OOR decides it did need to be provided, (despite the fact that OOR does not have jurisdiction over this matter), the redacted information is clearly confidential.

....  
50. Since the redacted information detailed specific confidential information disclosed solely to trigger legal representation, the record and more specifically the information on the record is not public by definition and the Office ... is required to maintain the confidentiality of the information related to this disclosure.

....  
53. Further, Section 506 of the Law states that an agency lacks discretion to release privileged information. 65 P.S. § 67.506(c)(2). The relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege. Chmiel, 889 A.2d at 531–32; Maguigan, 511 A.2d at 1334. Levy v. Senate of Pennsylvania, 619 Pa. 586, 606, 65 A.3d 361, 373 (2013) **For example, descriptions of legal services that address the client's motive for seeking counsel, legal advice, strategy, or other confidential communications are undeniably protected under the attorney client privilege.** Levy v. Senate of Pennsylvania, 619 Pa. 586, 606, 65 A.3d 361, 373 (2013).

54. **Levy, supra permitted this exact type of information to be redacted.**

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<sup>2</sup> Although these reasons for denying access were not raised in the Office's response, the Office is permitted to raise these additional reasons on appeal. See Levy v. Senate of Pa., 65 A.3d 361 (Pa. 2013).

55. The topic is generally addressed by Section 70 of the Restatement, titled “Attorney– Client Privilege–‘Privileged Persons.’ ” Privileged persons include agents of either the client or the lawyer who facilitate communications between them and agents of the lawyer who facilitate the representation. Restatement (Third) of The Law Governing Lawyers SS § 70 (2000). Comment e provides in part that “If the third person is an agent for the purpose of the privilege, communications through or in the presence of that person are privileged; if the third person is not an agent, then communications are not in confidence ... and are not privileged.” Restatement (Third) of The Law Governing Lawyers § 70 cmt. e (2000).

56. Comment f addresses a client’s agent for communications. One such agent is described as follows (with emphasis added): *The privilege applies to communications to and from the client disclosed to persons who hire the lawyer as an incident of the lawyer’s engagement. Thus, the privilege covers communications by a client-insured to an insurance-company investigator who is to convey the facts to the client’s lawyer designated by the insurer, as well as communications from the lawyer for the insured to the insurer in providing a progress report or discussing litigation strategy or settlement.* Restatement (Third) of the Law Governing Lawyers § 70 cmt. f (2000). Levy v. Senate, 34 A.3d 243, 254-55 (Pa. Commw. Ct. 2011) aff’d in part, rev’d in part sub nom. Levy v. Senate of Pennsylvania, 619 Pa. 586, 65 A.3d 361 (2013)

57. Clearly, the application contains the redacted descriptions of two potential legal matters which were described to the insurance company for the sole purposes of putting the insurance company on notice of them and obtaining coverage for legal advice and representation. Insurance coverage terms require the disclosure of such matters immediately to the carrier to ensure coverage and representation by lawyers who will be provided by the insurance carrier through their selection of attorneys to fulfill the terms of the contract.

58. The description of the exact potential legal matters is completely privileged and confidential as it is relayed to the insurance agent by the person who holds the policy and is entitled to the legal representation (the Centre County District Attorney’s Office members) when it is specifically intended for the lawyers the insurance company will or already has provided for the matter. The insurance company is clearly an agent of the lawyer for purposes of this information as they “hire/provide the lawyer”. In fact, that is their sole purpose under the contract. As such, the information is protected by attorney client privilege.

59. Most importantly, the application and the description of a privileged matter is not an “agency decision”, does not entail a disruption of or increase of spending of agency dollars or impact the same as the taxpayer spending for the policy is a flat fee for legal services. In return for the flat fee, Lloyds may elect to appoint an attorney to render advice on a matter or defend a matter with the spending of non-taxpayer dollars, and requestor is not entitled to see that information under any theory unless the matter is made public.

(Emphasis in original).

Regarding Item 5 of the Request, the Office states that “Request Number 5 required a legal conclusion to which the Office will not make and is reserved for a Court. Nevertheless, the Office sent a cover page of a lawsuit in which the District Attorney was referred to by title.” The Office also stated that it denied Item 6 of the Request “as no such agency records exist after a thorough search of all agency records.” The Office did not address Item 4 of the Request.

On February 12, 2016, the Requester submitted an additional argument, alleging, among other things, that “Fox Rothschild LLP represented Stacy Parks Miller *in her official capacity* at the Supreme Court in the *quo warranto* case. Therefore, the retention agreement that authorized this law firm to be counsel in that matter is a presumptively public financial record of the agency.”<sup>3</sup>

On February 26, 2016, the Requester made an additional submission. As this submission as received after the record closed, it was not considered. *See* 65 P.S. § 67.1102(b)(3).

Based on the evidentiary record before the OOR, the OOR denies the request to conduct an *in camera* review of the agreement responsive to Item 1 of the Request.

### **LEGAL ANALYSIS**

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their

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<sup>3</sup> After the record closed, Fox Rothschild re-submitted a copy of its February 12, 2016 submission, and the Requester objected to the submission. As Fox Rothschild’s February 16, 2016 submission and the Requester’s February 16, 2016 objection were submitted after the record closed, they were not considered. *See* 65 P.S. § 67.1102(b)(3).

actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

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

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). 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)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

**1. The Office is collaterally estopped from arguing that it is a judicial agency**

The Office argues that the OOR does not have jurisdiction over this appeal because the Office is a “judicial agency” under the RTKL. *See* 65 P.S. § 67.102 (defining judicial agency as “[a] court of the Commonwealth or any other entity or office of the unified judicial system”). The OOR does not have jurisdiction to hear appeals related to requests for records of judicial agencies. *See Court of Common Pleas of Lackawanna County v. Office of Open Records*, 2 A.3d 810, 813 (Pa. Commw. Ct. 2010); *Antidormi v. Lackawanna County Clerk of Courts*, No. 274 C.D. 2011, 2011 Pa. Commw. Unpub. LEXIS 779, \*5-6 (Pa. Commw. Ct. 2011). Instead, appeals involving judicial agencies are to be heard by an appeals officer designated by the judicial agency. *See* 65 P.S. § 67.503(b).

The Requester argues that the Office is collaterally estopped from re-litigating the issue of whether the Office is a judicial agency under the RTKL. Collateral estoppel prevents a party from re-litigating an issue if: 1) the issue decided in the earlier case is identical to the issue presented in the latter case; 2) there was a final judgment on the merits; 3) the party against whom estoppel is asserted was a party to the prior case; and 4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior case. *City of Pittsburgh v. Zoning Bd. of Adjustment*, 599 A.2d 896 (Pa. 1989). Collateral estoppel does not require

mutuality of parties in both cases, *In re: Stevenson*, 40 A.3d 1212 (Pa. 2012); only the party against whom collateral estoppel is asserted need be a party in the prior case.

In *Sawicki v. Centre County District Attorney's Office*, the OOR examined the issue and held that the Office is a local agency as defined in the RTKL. OOR Dkt. AP 2015-0757, 2015 PA O.O.R.D. LEXIS 885. The issue here is identical to the issue in *Sawicki*, there was a final judgment on the merits, and the Office, against which collateral estoppel is asserted, was a party in *Sawicki*, and had a full and fair opportunity to litigate the issue. The Office did not appeal the OOR's decision in *Sawicki*, although it had a right to do so. *See* 65 P.S. § 67.1302. Accordingly, the Office is collaterally estopped from claiming that it is a judicial agency.<sup>4</sup> *See also Pa. Dep't of Corr. v. Maulsby*, 121 A.3d 535 (Pa. Commw. Ct. 2015) (applying collateral estoppel in the context of RTKL appeals); *see, e.g., Pennsylvanians for Union Reform v. Centre County District Attorney's Office*, OOR Dkt. AP 2015-2557, 2015 PA O.O.R.D. LEXIS 2124 (holding that the Office was estopped from arguing that it is a judicial agency).

**2. The Office has not demonstrated that records responsive to Items 4 and 5 of the Request do not exist or are not subject to public access**

In response to Item 4 of the Request, the Office stated that no responsive records exist. On appeal, however, the Office did not provide any evidence demonstrating that no responsive records exist. Similarly, in response to Item 5 of the Request, while the Office provided the front page of one lawsuit in which District Attorney Parks Miller “is ‘described’ as a party,” the Office did not provide any other records or allege that the record provided is the sole responsive record.

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<sup>4</sup> In support of its position, the Office cites a recent Bedford County Court of Common Pleas opinion. However, the decision in that matter is not binding precedent as the Office is an agency located in Centre County. *See Boyd v. Langhorne Borough*, OOR Dkt. AP 2010-1040, 2010 PA O.O.R.D. LEXIS 997; *but see Stacy Parks Miller v. County of Centre et al*, No. 15-1185 (Centre Com. Pl. May 13, 2015) (Kurtz, S.J.) (holding that the Office is a judicial agency), *appeal pending* 856 CD 2015 and 857 CD 2015.

On appeal, the Office, without explanation, asserts that “Request Number 5 required a legal conclusion to which the Office will not make and is reserved for a Court.”

Under the RTKL, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges*, 29 A.3d at 1192. As the Office has not provided any evidence establishing that no records responsive to Item 4 or that no additional records responsive to Item 5 of the Request exist, the Office has not met its burden of proof. *See id.*; 65 P.S. § 67.708(a)(1).

### **3. Fox Rothschild does not have standing to participate in this matter**

During the course of the appeal, Fox Rothschild asked to participate in this matter as a direct interest participant. Section 1101(c) of the RTKL provides that:

(1) A person other than the agency or requester with a direct interest in the record subject to an appeal under this section may, within 15 days following receipt of actual knowledge of the appeal but no later than the date the appeals officer issues an order, file a written request to provide information or to appear before the appeals officer or to file information in support of the requester’s or agency’s position.

(2) The appeals officer may grant a request under paragraph (1) if:

- (i) no hearing has been held;
- (ii) the appeals officer has not yet issued its order; and
- (iii) the appeals officer believes the information will be probative.

65 P.S. § 67.1101(c). The decision to allow a person to participate in an appeal pending before the OOR “is subject to the discretion of the OOR appeals officer, who may or may not permit Appellants to submit information or appear at a hearing and present evidence.” *See Pa. State Educ. Ass’n ex rel. Wilson v. Pa. Office of Open Records*, 50 A.3d 1263, 1275 n.8 (Pa. 2012).

The submissions provided by Fox Rothschild total seven pages in which it reiterates the Office’s argument that it “served as personal counsel to Ms. Parks Miller and was not engaged by the ... Office.” The submissions by Fox Rothschild do not provide any additional information beyond that offered by the Office, such as clarifying the scope of its representation

in light of the pleadings submitted by the Requester or detailing from whom it expects to receive compensation for its representation.<sup>5</sup> Accordingly, the submissions by Fox Rothschild are duplicative of the Office’s arguments and are not otherwise probative to the question of whether Fox Rothschild represented District Attorney Parks Miller solely in her personal capacity, Fox Rothschild has not established that it has a direct interest in this matter. *See* 65 P.S. § 67.1101(c)(2)(iii); *see also* 65 P.S. § 67.1102(a)(2) (“The appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. The appeals officer may limit the nature and extent of evidence found to be cumulative”).

**4. The agreement responsive to Item 1 of the Request is a record subject to public access**

In its response, the Office initially denied Item 1 of the Request by stating that “[n]o such records exist in the District Attorney’s office.” On appeal, the Office clarified its position by stating that “[t]he undersigned contract between herself and Fox Rothschild was purely personal,

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<sup>5</sup> Notably, in his February 6, 2016 submission, the Requester provided a news article in which Fox Rothschild’s co-counsel, Bruce Castor, reportedly suggested that legal fees stemming from his representation of District Attorney Miller in the *quo warranto* action would be paid out of public funds by Centre County:

... Bruce Castor, a lawyer for Centre County District Attorney Stacy Parks Miller, says things could get much pricier for the county. Because Parks Miller filed in the state supreme court in her official capacity as district attorney, Castor expects his legal fees are going to make their way back to the commissioners’ office. “At some future point in time, maybe the county gets a really big bill from me,” Castor says. “It will be interesting to see what they do with it.” Castor says he doesn’t know how much his bill will be because he can’t predict how long his services will be required. If the case is resolved in a couple weeks, for instance, he says it will be much cheaper than if things drag on for a couple more months. Either way, Castor says his hours on the job are adding up fast. For his work with Parks Miller, he’s driven to Centre County, Cambria County and Pittsburgh – each of which are several hours away from his home in Montgomery County. “I am certain that our fees will be in the six figure range,” Castor says. “The county has ways to dispute that, but whether a court will agree that they don’t have that responsibility is another matter.”

Michael Martin Garrett, *Taxpayers Could Foot Big Legal Bills From Fight Over Parks Miller Forgery Allegations*, StateCollege.com, Feb. 26, 2015, available at <http://www.statecollege.com/news/local-news/taxpayers-could-foot-big-legal-bills-from-fight-over-parks-miller-forgery-allegations.1462958/>.

for personal representation. The contract did not bind the county nor the office, nor was that possible in any event” and that “[t]he representation agreement is between the undersigned personally and the firm of [Fox Rothschild].” Notably, the Office did not provide any evidence that Fox Rothschild will *not* be compensated with public funds or that Fox Rothschild’s compensation will be paid exclusively from the District Attorney’s private funds.

In its February 6, 2016 submission, the Requester provided a copy of an Emergency Petition for Quo Warranto and Special and/or Preliminary Injunction (“Petition”) filed on behalf of Stacy Parks Miller by Fox Rothschild and temporary Special District Attorney of Centre County Bruce Castor.<sup>6</sup> The Petition identifies the Petitioner as “Stacy Parks Miller, the twice-elected District Attorney for Centre County” and seeks to quash “actions [that] are a bald attack on the independence of the District Attorney.” *See* Petition, p. 1-2. The Petition avers various examples of a “long-standing adverse relationship” between Miller in performing her duties as District Attorney and various Centre County Commissioners and “certain members of the local defense bar” regarding investigations, sentencing and other policy matters. *Id.* at ¶¶ 5-6. While the Petition makes a number of averments concerning activities surrounding the District Attorney in her official capacity, the Petition is devoid of any reference to any actions performed by the District Attorney in her individual or personal capacity.

The Petition notes that, in order to have standing to bring a *quo warranto* action, a party must have standing to do so. *See* Petition, ¶ 21 (citing *Matter of One Hundred or More Qualified Electors of Municipality of Clairton*, 673 A.2d 879 (Pa. 1996)). The Petition alleges that Miller has standing to bring the *quo warranto* action “in light of her role as District Attorney, and her special right or interest in the matter, namely, the unlawful attack on her and

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<sup>6</sup> As part of his appeal, the Requester provided an April 9, 2015 employment contract between Attorney Castor and District Attorney Miller identifying Attorney Castor as a Special Assistant District Attorney of Centre County, along with an Oath of Office made on April 10, 2015. The Office has not refuted the appointment of Attorney Castor.

her office by Respondents...” *Id.* In other words, according to the face of the Petition, Miller brought the action both in her official capacity as District Attorney *and* in her personal capacity.

*Id.*

The RTKL defines a “record” as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a dataprocessed or image-processed document.

65 P.S. § 67.102. The RTKL imposes a two-part inquiry for determining if certain material is a record: 1) does the material document a “transaction or activity of an agency?” and 2) if so, was the material “created, received or retained ... in connection with a transaction, business or activity of [an] agency?” *See* 65 P.S. § 67.102; *Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034-35 (Pa. Commw. Ct. 2011). Because the RTKL is remedial legislation, the definition of “record” must be liberally construed. *See A Second Chance*, 13 A.3d at 1034; *Gingrich v. Pennsylvania Game Commission*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*13 (Pa. Commw. Ct. 2012) (“[H]ow [can] any request that seeks information ... not [be] one that seeks records[?]”).

Because the Petition states that it was filed “in light of [Miller’s] role as District Attorney” and specifically seeks to address “actions [that] are a bald attack on the independence of the District Attorney,” the agreement between Miller and Fox Rothschild documents a transaction of activity of the Office, namely, the filing of litigation on behalf of District Attorney Miller in her official capacity as head of the Office. Additionally, as the agreement was in connection of this activity, the agreement qualifies as a presumptively-public “record” under the RTKL. *See* 65 P.S. § 67.102; 65 P.S. § 67.305(a). Even if the records are outside the physical

possession of the Office, they may still be subject to public access. *See generally Indiana University of Pennsylvania v. Atwood*, No. 633 C.D. 2010, 2011 Pa. Commw. Unpub. LEXIS 668 (Pa. Commw. Ct. 2011) (“Essentially, ... records [existing sole in the possession of a third-party contractor] are deemed to be in the constructive possession of the agency, and this would be true even if the agency had never been in actual physical possession of the records”).

The Office argues that “[t]he agreement is not subject to disclosure to any parties due to privilege,<sup>7</sup> privacy and attorney-client privilege.” The Office, however, has not provided any evidence establishing how the record – an agreement between Fox Rothschild and the head of the Office acting, as previously described, in her official capacity – is privileged or otherwise inaccessible under the RTKL. The OOR recognizes the importance of safeguarding the attorney-client privilege and the attorney-work product doctrine and of the potential, albeit slight, that the agreement at issue may contain privileged material. *See Levy*, 65 A.3d at 368-74. However, as the Office has not provided any evidence establishing how all or portions of the agreement are privileged, the Office has not demonstrated that attorney-client privilege applies. *See Office of Open Records v. Center Township*, 95 A.3d 354, 358 (Pa. Commw. Ct. 2014) (“It is the local agency’s burden to prove, by a preponderance of the evidence, that a record is exempt from public access on the basis that the record contains privileged material”).

Similarly, the Commonwealth Court has held that parties bear the burden of proving that constitutional rights protect records from public access. *See, e.g., Commonwealth v. Cole*, 52 A.3d 541, 551-52 (Pa. Commw. Ct. 2012) (holding that parties did not establish that the constitutional right to privacy protected certain records from public access); *see generally County of York v. Office of Open Records*, 13 A.3d 594, 597 n.6 (Pa. Commw. Ct. 2011)

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<sup>7</sup> Although the Office did not specifically which privilege applies, the OOR operates under the understanding that the Office intended to raise the attorney-work product doctrine as an additional defense here, as the definition of “privilege” includes the attorney-work product doctrine. *See* 65 P.S. § 67.102 (defining “privilege”).

(holding that constitutional privacy concerns related to the release of addresses were waived). Here, the Office has not provided any evidence establishing that the requested agreement is protected under the constitutional right to privacy. As a result, the Office has not overcome the presumption that the agreement is subject to public access. *See* 65 P.S. § 67.305(a). To the extent that the Office is not in physical possession of the requested agreement, the Office is required under the RTKL to obtain the responsive agreement and provide it to the Requester. *See id.*; *Hayward v. City of Wilkes-Barre*, OOR Dkt. AP 2011-1131, 2011 PA O.O.R.D. LEXIS 801 (granting appeal related to credit card statements); *see generally* Transcript of Proceedings at 30-32, *Edinboro University of Pennsylvania v. Folletti*, No. 1900 CD 2010 (Pellegrini, J.) (contemplating whether to order an agency to sue a contractor in order to obtain records found to be subject to public access under the RTKL).

**5. The Office has established that the material redacted from records responsive to Item 3 of the Request are privileged**

Although the Office did not assert any reason for redacting material from the requested insurance application as part of its response, the Office, on appeal, asserts that the redacted material is subject to the attorney-client privilege. The RTKL excludes records subject to privilege from its definition of “public records.” *See* 65 P.S. § 67.102. The RTKL defines “privilege” as “[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth.” *Id.*

In order for the attorney-client privilege to apply, an agency must affirmatively demonstrate 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the

presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007); *see also Levy*, 34 A.3d at 249 (“The party asserting the attorney-client privilege must initially set forth facts showing that the privilege is properly invoked”). The attorney-client privilege protects communications to and from a client. *See Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011); *see, e.g., Romig v. Macungie Borough*, OOR Dkt. AP 2010-0674, 2010 PA O.O.R.D. LEXIS 573; *Fikry v. Retirement Bd. of Allegheny County*, OOR Dkt. AP 2009-1149, 2010 PA O.O.R.D. LEXIS 19. Additionally, with respect to the fourth element of privilege, “a requester challenging the attorney privileges based on waiver by disclosure to third parties bears the burden of proving that waiver.” *Pa. Dep’t of Educ. v. Bagwell*, 114 A.3d 1113, 1124 (Pa. Commw. Ct. 2015).

In *Levy*, the Commonwealth Court recognized Comment f of Section 70 the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, holding that communications between agents of a client administering an insurance policy constitute privileged records. 34 A.3d 243, 254-55 (Pa. Commw. Ct. 2011), *aff’d in part and rev’d in part on other grounds* 65 A.3d 361 (Pa. 2013); *see also Serrano v. Chesapeake Appalachia, LLC*, 298 F.R.D. 271, 282 (W.D.Pa. 2014) (citing *Levy* and the Restatement for the proposition that “communications between an insured and an insurance carrier and their respective agents [may be privileged] where the disclosures to the agents are in furtherance of the purpose of the privilege”). One of the illustrations within Comment f of Section 70 of the Restatement provides as follows:

The privilege applies to communications to and from the client disclosed to persons who hire the lawyer as an incident of the lawyer’s engagement. Thus, the privilege covers **communications by a client-insured to an insurance-company investigator who is to convey the facts to the client’s lawyer designated by the**

**insurer**, as well as communications from the lawyer for the insured to the insurer in providing a progress report or discussing litigation strategy or settlement (see § 134, Comment f). Such situations must be distinguished from communications by an insured to an insurance investigator who will report to the company, to which the privilege does not apply.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 cmt. f (2000) (emphasis added).

In the present case, the Office has provided an attestation under penalty of perjury from District Attorney Parks Miller, who describes the redacted material as

57. ... descriptions of two potential legal matters which were described to the insurance company for the sole purposes of putting the insurance company on notice of them and obtaining coverage for legal advice and representation. Insurance coverage terms require the disclosure of such matters immediately to the carrier to ensure coverage and representation by lawyers who will be provided by the insurance carrier through their selection of attorneys to fulfill the terms of the contract.

58. The description of the exact potential legal matters is completely privileged and confidential as it is relayed to the insurance agent by the person who holds the policy and is entitled to the legal representation (the Centre County District Attorney's Office members) when it is specifically intended for the lawyers the insurance company will or already has provided for the matter. The insurance company is clearly an agent of the lawyer for purposes of this information as they "hire/provide the lawyer". In fact, that is their sole purpose under the contract. As such, the information is protected by attorney client privilege.

Based on the evidence provided, as the Office's insurance carrier hires counsel to represent members of the Office and the Office communicates various matters to its insurance carrier for the purpose of obtaining legal counsel, the redacted material falls within the protection of the attorney-client privilege as recognized in Comment f of Section 70 the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS. Accordingly, this material is not subject to public access.

**6. The Office has not established that records responsive to Item 6 of the Request do not exist**

In response to Item 6 of the Request, District Attorney Miller alleged that no responsive records exist, and, on appeal, District Attorney Miller affirms in a sworn statement that “no such agency records exist after a thorough search of all agency records.” Ordinarily, an attestation made under penalty of perjury may serve as sufficient evidentiary support as to whether additional records exist. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Office acted in bad faith or that additional records exist, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

As noted previously, the Requester, as part of his original appeal submission, provided a copy of an employment contract and an Oath of Office appointing Attorney Castor as a Special Assistant District Attorney of Centre County, and the Office has not disputed the accuracy of these documents. The Oath of Office signed by Attorney Castor states, in relevant part,

I ... solemnly swear that my activities as Special Assistant District Attorney of Centre County will extend only to cases involving efforts to disqualify the District Attorney of Centre County and her assistants from prosecuting cases, and **such other matters as the District Attorney might assign to me from time to time.**

(Emphasis added). The Requester’s original appeal submission also included a letter dated October 19, 2015 addressed to the Requester’s President, Simon Campbell, from Attorney Castor, which purportedly was sent on behalf of District Attorney Miller:

Mr. Campbell:

We represent Centre County District Attorney Stacy Parks Miller. You and your organization, Pennsylvanians for Union Reform, have intentionally engaged in a

campaign of lies to mislead the public and defame DA Parks Miller, on your website ... and Facebook page ... We might as well speak plainly: you are a liar. Moreover, you are lying about Ms. Parks Miller with malicious intent. I know you think none of this is actionable since your claims are so outlandish, indeed clown-like, that no one could possibly believe them to be true. I'm afraid you are mistaken, as your conduct is defamatory *per se*.

Based on a review of the contract and Oath of Office, the Requester has provided competent evidence that records responsive to Item 6 of the Request exist: namely, the Requester provided a copy of “correspondence sent in 2015 by Attorney Bruce Castor of the law firm Rogers Castor on behalf of Centre County District Attorney Stacy Parks Miller acting in her official capacity as District Attorney (in part or in whole), in which the recipient of the correspondence is threatened with legal action for allegedly defaming Ms. Parks Miller.” While the Office had the opportunity to provide evidence establishing that this correspondence fell outside the scope of Attorney Castor’s service as Special Assistant District Attorney, the Office did not provide such evidence or demonstrate that it inquired whether its Special District Attorney possesses responsive records. *See In Re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry of agency personnel concerning a request and to determine whether to deny access). Certain records in the possession of an agency’s legal counsel have been considered to be within an agency’s possession. *See Waldinger v. Bloomfield Twp.*, OOR Dkt. AP 2014-1177, 2014 PA O.O.R.D. LEXIS 1424 (granting access to an agency record in a solicitor’s possession); *O’Neill v. Concord Twp.*, OOR Dkt. AP 2015-0774, 2015 PA O.O.R.D. LEXIS 878 (holding that records solely within the possession of an agency’s solicitor were within an agency’s control and presumptively subject to public access). Accordingly, based on a review of the evidence provided, the Office has not demonstrated that no records responsive to Item 6 of the Request exist and must provide all records responsive to this portion of the Request to the Requester.

## CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the Office is required to provide all responsive records, with the exception of Item 3 of the Request, to the Requester 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 Centre County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>8</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: February 26, 2016**

/s/ J. Chadwick Schnee, Esq.

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APPEALS OFFICER/ ASSISTANT CHIEF COUNSEL  
J. CHADWICK SCHNEE, ESQ.

Sent to: Simon Campbell (via e-mail only);  
Stacy Parks Miller, Esq. (via e-mail only);  
Eric Reed, Esq. (via e-mail only);  
Robert Tintner, Esq. (via e-mail only)

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<sup>8</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).