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OFFICE OF OPEN RECORDS

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION IN MANDAMUS

PENNSYLVANIANS FOR UNION REFORM,
Plaintiff

v.

STACY PARKS-MILLER, DISTRICT ATTORNEY OF CENTRE COUNTY, IN HER OFFICIAL CAPACITY,
Defendant

Docket No. 2016-1323

Type of Case: **Mandamus**

Type of Pleading: **Complaint**

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DEBRA K. HAMEL
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CENTRE COUNTY PA
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Filed on behalf of Plaintiff:
Pennsylvanians for Union Reform

Counsel of Record for Plaintiff:
Sean P. McGraw
Pa. Attorney ID No. 81584

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333 South Allen Street
State College, PA 16801
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814-867-8811 (fax)

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION IN MANDAMUS

PENNSYLVANIANS FOR UNION REFORM, Plaintiff	:	
v.	:	Docket No. 2016-1323
STACY PARKS-MILLER, DISTRICT ATTORNEY OF CENTRE COUNTY, IN HER OFFICIAL CAPACITY, Defendant	:	

NOTICE

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.

Court Administrator's Office
Centre County Courthouse
102 South Allegheny Street
Bellefonte, Pennsylvania 16823
814-355-6727

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION IN MANDAMUS

PENNSYLVANIANS FOR UNION REFORM, Plaintiff	:	
v.	:	Docket No. 2016-1323
STACY PARKS-MILLER, DISTRICT ATTORNEY OF CENTRE COUNTY, IN HER OFFICIAL CAPACITY, Defendant	:	

COMPLAINT IN MANDAMUS

NOW COMES the Plaintiff, Pennsylvanians for Union Reform, by and through undersigned counsel, and requests that this Court issue a writ of mandamus compelling the District Attorney of Centre County to comply with the directives set forth in the Final Determination of the Office of Open Records at OOR Docket No. AP 2016-0093.

PRELIMINARY STATEMENT

By Final Determination issued on February 26, 2016, the Office of Open Records ("OOR") directed the Centre County District Attorney to provide certain records to Pennsylvanians for Union Reform ("PFUR") which had been requested by that organization pursuant to Pennsylvania's Right to Know Law. District Attorney Stacy Parks Miller took no appeal from the Determination, and the time period for filing an appeal has expired.

"[M]andamus lies where there is a clear legal right in the plaintiff and a corresponding duty in the defendant, and the act requested is not discretionary but only ministerial..." *Garratt v. Philadelphia*, 387 Pa. 442, 127 A.2d 738, 741 (1965). Because it was, by statute, a final order, the

OOR Final Determination created a legal right in PFUR to the disputed records, and a corresponding duty in Parks Miller to produce them. That duty was merely ministerial; Parks Miller had only to produce the records for PFUR. Because she has not produced these records, this Court should compel her to do so by issuing a writ of mandamus.

FACTS

1. Plaintiff is Pennsylvanians for Union Reform ("PFUR"), a non-profit corporation existing under the laws of Pennsylvania with an address of 668 Stony Hill Road #110, Yardley, Pennsylvania.

2. Defendant is Stacy Parks Miller, the District Attorney of Centre County, with an address of 102 South Allegheny Street, Centre County Courthouse, Room 404, Bellefonte, Pennsylvania.

3. This action is brought against Defendant Parks Miller in her official capacity as District Attorney of Centre County.

4. Defendant Parks Miller is, or purports to be, the open-records officer for the Centre County District Attorney's Office pursuant to Section 502 of the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*

5. On December 16, 2016, Plaintiff submitted a Right-to-Know Law records request to Defendant Parks Miller requesting various records pertaining to the activity of the Centre County District Attorney's Office.[1]

6. Defendant Parks Miller issued a written response to Plaintiff's request on January 19, 2016, in which she refused to respond to requests 1, 4, and 6; responded in full to request 2; and

[1] A copy of Plaintiff's request is attached hereto as "Exhibit A."

responded in part to request 3 (with a partially redacted copy of the requested record) and request 5 (with a cover page of the requested document).

7. Plaintiff took an appeal to the Office of Open Records ("OOR") from Defendant Parks Miller's refusal to disclose the requested records. The appeal was docketed at OOR Docket No. AP 2016-0093.

8. In response to Plaintiff's appeal, OOR issued a Final Determination on February 26, 2016, granting in part and denying in part Plaintiff's appeal.[2]

9. The Final Determination directed Defendant Parks Miller/ the Centre County District Attorney's Office to produce and provide to Plaintiff the following:

a. 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, and Eric Reed to represent Centre County District Attorney Stacy Parks Miller in the *quo warranto* action docketed in the Pennsylvania Supreme Court at 20 MM 2015;

b. records of the dates in 2015 that Montgomery County resident Bruce Castor traveled to, and departed from, Centre County to perform work under a contract employing him as a special assistant district attorney of Centre County; 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 work he performed, during Attorney Castor's visits to Centre County;

c. 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

[2] A copy of the Final Determination is attached hereto as "Exhibit B."

District Attorney (in whole or in part) initiated a lawsuit or any other legal pleading against any other party in 2015; and

d. 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 of in whole), in which the recipient of the correspondence was threatened with legal action for allegedly defaming Ms. Parks Miller.

10. A petition for review of an OOR Final Determination pertaining to a local agency, such as a District Attorney's Office,[3] must be filed "within 30 days of the mailing date of the final determination... in the court of common pleas for the county where the local agency is located." 65 P.S. §67.1302(a).

11. The time for filing a petition for review of the OOR Final Determination in the Centre County Court of Common Pleas expired on March 28, 2016.

12. Defendant Parks Miller has not filed a petition for review of the OOR Final Determination.

[3] *See Miller v. County of Centre*, 2016 WL 981393 (Pa.Cmwlth. 2016), wherein the Commonwealth Court rejected Defendant Parks Miller's claim that her office was a "judicial agency."

COUNT I
MANDAMUS

13. All of the preceding representations of this Complaint are incorporated herein as though set forth verbatim.

14. Mandamus is the appropriate vehicle for enforcing final determinations of the Office of Open Records.[4]

15. The Final Determination at OOR Docket No. AP 2016-0093 gave Plaintiff a clear right to possess the records identified in paragraph ** above.

16. The Final Determination at OOR Docket No. AP 2016-0093 imposed a mandatory duty on Defendant Parks Miller to produce the records identified in paragraph ** above to the Plaintiff.

17. Absent the filing of a petition for review in the Centre County Court of Common Pleas, "[t]he determination by the appeals officer shall be a final order." 65 P.S. §67.1101(b)(1).

18. Defendant Parks Miller has not filed a petition for review of the OOR Final Determination, nor can she because the time period for doing so has expired.

WHEREFORE, this Court should issue a writ of mandamus compelling the District Attorney of Centre County to provide Plaintiff with all records whose production was ordered by the Final Determination at Office of Open Records Docket No. AP 2016-0093; order that Defendant pay attorney's fees and costs of litigation; and award such other relief, including a civil penalty and sanctions, as authorized by law.

---

[4] *Wishnefsky v. Department of Corrections*, 2015 WL 5460111 (Pa.Cmwlth. 2015). *Wishnefsky* is an unpublished memorandum opinion of the Commonwealth Court but may nonetheless be cited for its persuasive value. *See* Section 414 of the Commonwealth Court's Internal Operating Procedures.

COUNT II
PEREMPTORY JUDGMENT IN MANDAMUS

19. All of the preceding representations of this Complaint are incorporated herein as though set forth verbatim.

20. "At any time after the filing of the complaint, the court may enter judgment [in mandamus] if the right of the plaintiff thereto is clear." Pa.R.C.P. 1098.

21. The Final Determination at OOR Docket No. AP 2016-0093 is publicly available on the OOR website.[5]

22. The publicly-available records of the Prothonotary of Centre County are devoid of any action requesting review of OOR's Final Determination at Docket No. AP 2016-0093.

23. Absent the filing of a petition for review in the Centre County Court of Common Pleas, "[t]he determination by the appeals officer shall be a final order." 65 P.S. §67.1101(b)(1).

24. Because the Final Determination at OOR Docket No. AP 2016-0093 is, by statute, a final order, Plaintiff's right to judgment is clear.

WHEREFORE, this Court should issue, immediately and without hearing, a writ of mandamus compelling the District Attorney of Centre County and/or the Centre County District Attorney's Office to provide Plaintiff with all records whose production was ordered by the Final Determination at Office of Open Records Docket No. AP 2016-0093; order that Defendant pay attorney's fees and costs of litigation; and award such other relief, including a civil penalty and sanctions, as authorized by law.

---

[5] http://dced.state.pa.us/open-records/final-determinations/FileHandler.ashx?FileID=21694

COUNT III
ATTORNEY'S FEES, COSTS, AND SANCTIONS

25. All of the preceding representations of this Complaint are incorporated herein as though set forth verbatim.

26. Defendant Parks Miller has exhibited a pattern of refusing to honor Right to Know Law requests while taking court action to enjoin dissemination and use of Right to Know Law records lawfully disclosed.

27. In short, although as district attorney she is charged with faithfully executing the laws of this Commonwealth, Defendant Parks Miller simply does not believe, as a matter of her own predilections, that citizens should have the right to scrutinize her official conduct through Right to Know Law requests.

28. Defendant acted willfully and with wanton disregard of the Right to Know Law in depriving Plaintiff of access to the public records whose disclosure was ordered by OOR at Docket No. AP 2016-0093.

29. Defendant acted in bad faith in depriving Plaintiff of access to the public records whose disclosure was ordered by OOR at Docket No. AP 2016-0093.

30. The exemptions, exclusions, and defenses asserted by Defendant Parks Miller in denying access to the records were not based on a reasonable interpretation of the law.

31. Because of the foregoing, Section 1304(a) of the Right to Know Law requires that this Court "award reasonable attorney fees and costs of litigation." 65 P.S. §§67.1304.

32. Because Defendant Parks Miller denied Plaintiff access to public records in bad faith, this Court should impose on her a civil penalty of $1,500.00. 65 P.S. §§67.1305.

WHEREFORE, this Court should issue an order compelling Defendant to pay the attorney's fees, costs of this litigation, a civil penalty of $1,500.00, and such other sanctions as authorized by law.

ANDREW J. SHUBIN, P.C.

Sean P. McGraw
333 South Allen Street
State College, PA 16801
814-867-3115
814-867-8811 (fax)
mcgraw@statecollegelaw.com
Pa. Attorney ID No. 81584

VERIFICATION

The facts set forth in the foregoing are true and correct to the best of the undersigned's knowledge, information, and belief.

I, the undersigned, understand that the statements made herein are subject to the penalties of 18 Pa.C.S. §4904, relating to unsworn falsification to authorities.

Simon Campbell
President, Pennsylvanians for Union Reform

Exhibit A

pennsylvania

OFFICE OF OPEN RECORDS

STANDARD RIGHT-TO-KNOW REQUEST FORM

Attn: Open Records Officer (ORO)
Centre County District Attorney's Office
102 South Allegheny Street, Room 404
Bellefonte, PA 16823-1986

DATE OF REQUEST	**DECEMBER 16, 2015**
REQUEST SUBMITTED BY	**EMAIL** (spmiller@centreda.org) & FAX (814) 355-6756
NAME OF REQUESTER	PENNSYLVANIANS FOR UNION REFORM ("PFUR")
STREET ADDRESS	668 STONY HILL RD #110
CITY/STATE/ZIP	YARDLEY, PA 19067
EMAIL	stopunionabuse@paunionreform.org

BACKGROUND TO THE REQUEST

PFUR suspects that the Stacy Parks Miller in her official capacity as Centre County District Attorney (i.e. the Centre County District Attorney's office[1]) has unlawfully used outside attorneys to provide legal services to the Office (in various differing roles), without those attorneys having any contract or personnel agreement to perform such roles; in violation (at a minimum) of Section 1420 of the County Code which *requires a* contract with the County of Centre or the DA's Office. See:

> (a) The district attorney may appoint such number of assistants, special assistants or deputy assistants, learned in the law, to assist him in the discharge of his duties, as is fixed by the salary board of the county. The salary board shall fix the salary of such assistants, special assistants and deputy assistants.
>
> (b) The district attorney may appoint temporary assistants, temporary special assistants or temporary deputy assistants, learned in the law, to assist him in the discharge of his duties, as provided by contract or other personnel agreement with the **county or the district attorney** ....
>
> 16 P.S. § 1420 (emphasis added)

Section 1420(a) of the County Code is the most common way that contracts involving the retention of personnel or vendors to the government are approved. It requires a quorum of County Commissioners to approve the contracts (16 P.S. § 504) at a public meeting under the Sunshine Act (65 Pa.C.S.A. § 701 et seq.). The Centre County DA's office does not have tax raising authority and, therefore, contracts must normally be approved by the County Commissioners.

[1] An official capacity suit represents another way of pleading an action by or against an entity of which an officer is an agent. *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 690 n.55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed. 2d 611, n. 55 (1978). An official capacity suit is, in all respects, a suit against the entity itself. Id. at 690 n.55, 98 S.Ct. at 2035, n.55; *Brandon v. Holt*, 469 U.S. 464, 471-72, 105 S.Ct. 873, 878, 83 L.Ed. 2d 878 (1985).

One exception to this general rule is when Section 1420(b) of the County Code is used in combination with case precedent in *Yost v. McKnight*, 865 A.2d 979 (2005). Here, personnel and outside vendors can be retained but payments for their services can only come from previously budgeted tax dollars. PFUR has made Right to Know Law requests of the County of Centre and we know that the County has not approved any contracts for the use of Rogers-Castor. PFUR therefore concludes, logically, that the employment contract seen in Attachment D was drafted in accordance with the *Yost* precedent.

---------- **Contracts must still exist even under the *Yost* precedent** ----------

The *Yost* precedent does not change the fact that contracts and personnel agreements must still exist between a government agency and personnel retained to represent or provide services to the government agency. Section 1420(b) is unequivocal on this point ("[t]he district attorney may appoint ...[personnel] ... *as provided by contract or other personnel agreement* with the county or the district attorney ....").

---------- **Contracts worth >$18,500 must be bid out** ----------

Not only must contracts exist but if the services provided exceed a base amount of $18,500 then advertising for bids must occur, and the bids must be received by controller and the chief clerk of the county commissioners in sealed envelopes:

> "All contracts for services and personal property where the base amount thereof exceeds the sum of eighteen thousand five hundred dollars ($18,500), subject to adjustment under section 1801(b.1), shall be written and shall, except as otherwise hereinafter specified, be made by advertising for bids." 16 P.S. § 1802(a)

A narrow exception exists for the provision of legal services as follows:

> 16 P.S. § 1802(h): "The contracts or purchases made **by the commissioners** which shall not require advertising, bidding or price quotations, as hereinbefore provided, are as follows:
>
> ...
>
> "Those involving services of members of the medical or legal profession, registered architects, engineers, certified public accountants or other personal services involving professional expertise." 16 P.S. § 1802(h) (5)

No exception to the bidding requirement exists for contracts worth >$18,500 with lawyers who enter into contracts with the District Attorney's Office as opposed to the Commissioners.

---------- **Summary of law** ----------

Various statutes, and other ethics rules, exist in relation to government agencies that contract for the provision of labor or services to the government. Whereas a contact between a lawyer and a private citizen is a private matter, a contract between a lawyer and a government agency is a public matter. Lawyers who perform work – *any* work – for a government agency must have a retention agreement/contract that spells out the nature of the work to be performed and the amount of taxpayer-provided compensation to be provided if any. If lawyers have contracted to work for the government agency *pro bono* then the public has a right to see that pro bono agreement too.[2]

[2] The Pennsylvania Supreme Court has held that attorney-client agreements with government agencies are public records under the Right to Know Law. *Levy v. Senate of Pennsylvania*, 65 A.3d 361 (Pa.2013).

In light of the conflict of interest provisions of the Public Offical and Employee Ethics Act, 65 Pa. C. S.§1101 et seq., and the Rules of Professional Conduct, lawyers representing government agencies have to be careful if wishing to represent a public official from a governmental client in that public official's individual personal capacity.

The Sunshine Act exists for a reason and Section 1420(b) of the County Court is clear. The Centre County District Attorney's Office can only contract with lawyers under the *Yost* precedent (i.e. without any bidding process and away from the Sunshine Act) if the total cost of the contract is <$18,500, and all monies to be spent are to come from previously budgeted tax dollars.

While Stacy Parks Miller in her individual personal capacity can privately retain lawyers to pursue her interests as a private citizen[3] she cannot, by law, do the same thing in her official capacity. Stacy Parks Miller in her official capacity equals the DA Government Agency, and government agencies cannot retain lawyers (or indeed any vendors) on a nod and wink. We have already requested the contracts for Bruce Castor's services as counsel in another pending Right to Know request and today we seek information regarding other legal vendors.

PFUR has shown in the attachments that various lawyers have performed different services for the Centre County District Attorney in her official capacity in 2015. Contracts or personnel agreement must therefore exist for all of them, otherwise the law has been broken.

The following requests are made of the DA's Office pursuant to Pennsylvania's Right-to-Know Law ("RTKL") 65 P.S. § 67.101 *et seq.* Please send to PFUR:

Request #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[4] in the *quo warranto* action shown in Attachment A.

Request #2: A copy of the contract or personnel agreement that authorized Robert B. Stewart, Esq. to work in the capacity as Special Assistant District Attorney shown in Attachment B.

Request #3: A copy of the most recently completed insurance application for the Centre County District Attorney's Office as seen in Attachment C.

---

[3] It is believed that Ms. Parks Miller in her individual personal capacity may have retained the law firm of Rogers Castor to pursue her private interests. See e.g. threats made to PFUR, PFUR's president, and other citizens in Attachment E. An action undertaken in a public official's personal capacity is a liability risk in that public official's personal capacity. *Kentucky v. Graham*; 473 U.S. 159 (1985).

[4] Only the DA's Office (i.e. Stacy Parks Miller in her official capacity as District Attorney) could have filed the quo warranto action. See #21 in the petition "Petitioner has standing to bring this quo warranto action in light of her role as District Attorney ..." See also Bruce Castor's comment to the media "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"; (source http://www.statecollege.com/news/local-news/taxpayers-could-foot-big-legal-bills-from-fight-over-parks-miller-forgery-allegations.1462958/).

Request #4: With reference to the employment contract in Attachment D, please send records[5] 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 Casfor 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.

Request #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]

Request #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)[7], in which the recipient of the correspondence is threatened with legal action for allegedly defaming Ms. Parks Miller.

The reason PFUR makes Request #3 is to see if the DA's office has neglected to provide all information to its insurance carrier. Request #5 is made to end the confusion as to which capacity (official or individual) Stacy Parks Miller has been filings her various lawsuits in 2015. The reason PFUR makes Request #6 is *inter alia* to obtain, on the record, the capacity in which PFUR was threatened by Stacy Parks Miller on 10-19-15.

"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(b).

"Prohibition. - A judicial agency may not deny a requester access to a financial record due to the intended use of the financial record by the requester." 65 P.S. § 67.304(b).

We look forward to hearing from the DA's Office within the required five (5) business days.

---

1. **DOES PFUR WANT COPIES? YES**
2. **DOES PFUR WANT TO INSPECT THE RECORDS? NO**
3. **DOES PFUR WANT CERTIFIED COPIES OF RECORDS? NO**

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[5] Examples of records containing the sought after information could be time sheets, expense reports, receipts, communication records, bills, invoices, etc.

[6] In line with the Section 703 requirement of a Requester to be sufficiently specific please know that we are not seeking docket numbers of disputes that involve Stacy Parks Miller initiating legal action exclusively in her individual (personal) capacity.

[7] Correspondence relating to Stacy Parks Miller acting exclusively in her individual personal capacity is not sought.

4. **DOES PFUR WANT TO BE NOTIFIED IN ADVANCE IF THE COST EXCEEDS $100?** **YES** (The agency should not incur costs >$100 that it believes can be charged to PFUR without first obtaining PFUR's consent).

FOR AGENCY USE ONLY

OPEN-RECORDS OFFICER:

□ I have provided notice to appropriate third parties and given them an opportunity to object to this request.

DATE RECEIVED BY THE AGENCY:

AGENCY FIVE (5) BUSINESS DAY RESPONSE DUE:

**Public bodies may fill anonymous verbal or written requests. If the requestor wishes to pursue the relief and remedies provided for in this Act, the request must be in writing. (Section 702.) Written requests need not include an explanation why information is sought or the intended use of the information unless otherwise required by law. (Section 703.)

ATTACHMENT A

Fox Rothchild attorneys' representation*, as counsel, of Stacy Parks Miller in her official capacity as the District Attorney of Centre County (i.e. the DA's office) before the Pennsylvania Supreme Court. Only three pages are copied from this failed effort (enough to show the services of counsel).

(*The contract authorizing Attorney Bruce Castor's counsel services as in this same failed effort has been requested by PFUR in a separate Right to Know Law request dated 11-24-15 with final answer due on 12-30-15).

ROGERS CASTOR
By: Bruce L. Castor, Jr., Esq.
Attorney I.D. No. 46370
26 East Athens Avenue
Ardmore, PA. 19003
Phone: 610.285.7338
Facsimile: 877.649.7966

Attorneys for Petitioner

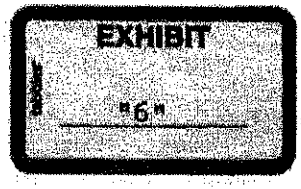
FOX ROTHSCHILD LLP
By: Robert S. Tintner, Esq., Patrick J. Murphy, Esq. and Eric E. Reed, Esq.
Attorney I.D. Nos. 73865, 93709, and 204692
2000 Market Street, 20th Floor
Philadelphia, PA 19103
Phone: 215.299.2000
Facsimile: 215.299.2150

IN THE SUPREME COURT OF PENNSYLVANIA
HARRISBURG DIVISION

STACY PARKS MILLER, Petitioner, v. BELLEFONTE POLICE DEPARTMENT, CENTRE COUNTY BOARD OF COMMISSIONERS, STEVEN G. DERSHEM, C. CHRIS EXARCHOS, AND MICHAEL PIPE, in their official capacities, LOUIS GLANTZ, in his capacity as Centre County Solicitor, COURT OF COMMON PLEAS FOR CENTRE COUNTY, and COURT OF COMMON PLEAS FOR CLINTON COUNTY Respondents.	QUO WARRANTO ACTION

EMERGENCY PETITION FOR QUO WARRANTO AND SPECIAL AND/OR PRELIMINARY INJUNCTION

Petitioner, Stacy Parks Miller, the twice-elected District Attorney for Centre County, Pennsylvania, petitions the Court for *quo warranto* and injunctive relief under Pa.R.C.P. 1531.



(3) Quo warranto as to any officer of Statewide jurisdiction.

42 Pa.C.S. § 721.

20. "The general rule is that a *quo warranto* action constitutes the proper method to challenge title or right to public office." *Matter of One Hundred or More Qualified Electors of Municipality of Clairton*, 673 A.2d 879, 881 (Pa. 1996) (citing *Andrezjwski v. Borough of Millvale*, 673 A.2d 879, 881 (Pa. 1996)).

21. Petitioner has standing to bring this *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 her office by Respondents and Respondents' to-be-selected special prosecutor. *Id.* at 286 (citing *Spykerman v. Levy*, 421 A.2d 641, 649 (Pa. 1980)).

22. Respondents' actions and their anticipated appointment of a special prosecutor are unlawful.

23. Respondents claim entitlement to proceed as they have (and will, unless enjoined) under the 1955 County Code, 16, P.S. § 1406, which provides as follows:

> If any district attorney is charged according to law, with any crime or misdemeanor, before or bound over or committed by any court to answer for willful and gross negligence in the execution of the duties of his office, it shall be the duty of the court to appoint some competent attorney thereof to prepare an indictment against such district attorney and to prosecute the same on behalf of the Commonwealth until final judgment. Such attorney shall be paid by the county for his services a reasonable compensation to be fixed by the court. If such district attorney shall be convicted of any crime for which he may be sentenced to imprisonment by separate or solitary confinement at labor, his office shall be declared vacant by the court.

24. Respondents' position is fatally flawed in that the County Code was supplanted by the 1980 Commonwealth Attorneys Act, which provides as follows:

> (a) Prosecutions.--The Attorney General shall have the power to prosecute in any county criminal court the following cases:

WHEREFORE, Petitioner respectfully requests that the Court enter the accompanying proposed order and set the matter for hearing.

Respectfully submitted,

ROGERS CASTOR
By: Bruce L. Castor, Jr.
26 East Athens Avenue
Ardmore, PA. 19003
Phone: 610.385.7338
Facsimile: 877.649.7966

FOX ROTHSCHILD LLP
By: Robert S. Tintner, Esq., Patrick J. Murphy, Esq. and Eric E. Reed, Esq.
2000 Market Street, 20th Floor
Philadelphia, PA 19103
Phone: 215.299.2000
Facsimile: 215.299.2150

Attorneys for Petitioner

Dated: January 29, 2015

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

STACY PARKS MILLER,	: No. 20 MM 2015
Petitioner	:
	: Petition for Quo Warranto
v.	:
BELLEFONTE POLICE DEPARTMENT, CENTRE COUNTY BOARD OF COMMISSIONERS, STEVEN G. DERSHEM, C. CHRIS EXARCHOS, AND MICHAEL PIPE, IN THEIR OFFICIAL CAPACITIES, LOUIS T. GLANTZ, IN HIS CAPACITY AS CENTRE COUNTY SOLICITOR, COURT OF COMMON PLEAS FOR CENTRE COUNTY, AND COURT OF COMMON PLEAS FOR CLINTON COUNTY,	:
Respondents	:

ORDER

PER CURIAM

AND NOW, this 13th day of February, 2015, the Application for Leave to File Original Process is **GRANTED**. The Emergency Petition for *Quo Warranto* and Special and/or Preliminary Injunction are **DENIED**. Respondents' motions to dismiss for lack of jurisdiction, standing, and ripeness are **DISMISSED as moot**.

ATTACHMENT B

Oath of Office of Special Assistant DA Robert Stewart to work for the Centre County District Attorney's Office

OATH OF OFFICE

CM-15-2015

Centre County, ss:

I, Robert B. Stewart, Esquire, do swear I will support, obey and defend the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania, and that I will perform the duties of a Special Assistant District Attorney with fidelity in the County of Centre, that I have not paid or contributed, or promised to pay or contribute either directly or indirectly, any money or valuable thing to procure my nomination or election, except for necessary and proper expenses expressly authorized by law, that I have not knowingly violated any election law of the Commonwealth or procured it to be done by others in my behalf, that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law.

I further solemnly swear that my activities as a Special Assistant District Attorney of Centre County are intended to extend to cases seeking forfeiture of unlawful proceeds obtained and/or property used or obtained by unlawful activity engaged in under the provisions of The Controlled Substance, Drug, Device and Cosmetic Act or any laws of this Commonwealth, and other related matters as the Centre County District Attorney might assign to me from time to time. I further understand that the appointment is "at will" pursuant to the law of the Commonwealth of Pennsylvania and 16 P.S. 1420.

Robert B. Stewart, Esquire

Sworn and subscribed, the 6th day of July 2015, before me duly authorized by Act of Assembly.

Jonathan D. Grine
Judge

FOR RECORD
-6 AM 11:35
PROTHONOTARY
COUNTY, PA

ATTACHMENT C

A copy of the application form used by insurance broker, Complete Equity Markets*, and available online
at: http://www.cemins.com/pdf_applications/da.pdf.

(*The Centre County District Attorney's taxpayer-financed insurance policy (underwriter, Lloyds) is provided via Complete Equity Markets. This application in Question 4 requires a listing of all lawyers, full or part-time, who provide professional services to the DA's office. In Question 6 the following question is asked: **"Does [the Centre County DA's office] or any person specified in response to Question 4 know of any circumstance, error, or omission or injury that could result in a claim, suit ...." Etc.**).

LAWYERS PROFESSIONAL LIABILITY INSURANCE
Issued to The
NATIONAL DISTRICT ATTORNEYS ASSOCIATION
And
SPECIFIED MEMBER ORGANIZATIONS
(This policy does not cover Private Law Practice)
THIS IS AN APPLICATION FOR A CLAIMS MADE POLICY

1. Name of Organization _____

Address _____

City _____ State _____ Zip Code _____

Area Code/Phone No _____ Area Code/Fax No. _____

Date of Formation _____ Email Address _____

Mailing Address: _____

2. List Branch Offices and Addresses, if any.

1. _____

2. _____

3. _____

3. Total number of cases and/or files handled or processed annually. _____
(An estimate may be used if accurate count is not available.)

4.

COLUMN ONE	COLUMN TWO	COLUMN THREE
List names of all lawyers (full or part-time) providing professional services on behalf of the Organization:	*List names of all practicing Law Students, Legal Interns and Paralegals providing professional services on behalf of the Organization:	List names of all Investigators providing professional services on behalf of the Organization:
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Other paid personnel employed by the Prosecuting Attorney's office such as secretaries, file clerks and receptionists are covered according to the conditions of this policy.

5. Has any claim, suit, charge, investigation or proceeding ever been made or instituted against the Organization or any Lawyer or other person providing professional services on behalf of the Organization which alleges any of the following types of conduct? (Please check appropriate box.)

(a) Negligent acts or omissions in the course of rendering professional services as a Lawyer or Notary Public? ☐ Yes ☐ No
(b) Attorney misconduct or breach of professional ethics? ☐ Yes ☐ No
(c) False arrest, detention or imprisonment or malicious prosecution? ☐ Yes ☐ No
(d) Publication or utterance of a libel or slander or of other defamatory or disparaging material or publication or utterance in violation of an individual's right of privacy? ☐ Yes ☐ No
(e) Wrongful entry or eviction, or other invasion of the right of private occupancy. ☐ Yes ☐ No
(f) Conduct for which the claimant seeks an award of punitive or exemplary damages? ☐ Yes ☐ No
(g) Violation of a federal, state, municipal or local criminal statute or law? ☐ Yes ☐ No
(h) Conduct which may give rise to a contempt proceeding? ☐ Yes ☐ No
(i) Any conduct in connection with the employment, hiring, failure to hire, discharge or termination of the employment of an employee, former employee or applicant for employment? ☐ Yes ☐ No
(j) Conduct which has resulted in an injunction or functionally similar order, including but not limited to a restraining order, a writ of mandamus, a writ of prohibition or an order to compel prosecution? ☐ Yes ☐ No

If any of the above items are answered Yes, please provide the name of the Lawyer or other person involved, the disposition of the matter, and all other pertinent details (use a separate sheet, if necessary).

_____

_____

_____

6. Does the Organization or any person specified in response to Question 4 know of any circumstance, act, error, omission or injury that could result in a claim, suit, charge, investigation or proceeding against the Organization or any Lawyer or other person providing professional services on behalf of the Organization based on any of the types of conduct described in Question 5 above? ☐ Yes ☐ No

If Yes, please provide the name of the Lawyer or other person involved and all other pertinent details (use a separate sheet, if necessary).

_____

_____

_____

IMPORTANT
In the event that a claim or claims against the Organization or the Lawyers named in this application have been reported to Underwriters or disclosed in this application, Underwriters reserve the right to individually rate insurance for the above applicant based upon the applicant's experience.

It is understood that the policy applied for will issue on the 1st day of the month following receipt of the premium and the acceptance of the application by the insurer. I/We hereby declare, based upon my/our knowledge and upon reasonable investigation, that the above statements are true and that I/we have not suppressed or misstated any material facts and that this Proposal Form shall be the basis of the contract with the Underwriters at Lloyd's, London.

_____

Date | Signature | Title

1. Answer all questions
2. Sign and date application.
3. Send completed application to:
Incomplete applications will delay processing.

NDAA Insurance Services
c/o Complete Equity Markets, Inc.
In California dba Complete Equity Markets Insurance Agency, Inc.
1190 Flex Court
Lake Zurich, Illinois 60047-1578

ATTACHMENT D

The employment contract* and oath of office for Bruce Castor to work for the Centre County District Attorney's Office

(*PFUR requested copy of this contract in our Right to Know Law request of 11-24-15 with a final answer due on 12-30-15. The inclusion of this contract here, obtained from an anonymous source via postal mail, does not alleviate the need of the DA's office to release the record in final response to our 11-24-15 request. Indeed its release by the DA's office on 12-30-15 is necessary to validate its authenticity. Here, we simply presume it to be valid and remain shocked at:

a) The loose legal language that does not actually specify the precise amounts of compensation (seemingly leaves the expenditure of public money to the sole discretion of the District Attorney).

b) The provision of taxpayer-financed food, travel expenses, and accommodation.

Our request today is designed, inter alia, to find out how much public money has been paid out, and on what).

EMPLOYMENT CONTRACT.

The District Attorney of Centre County, PA, Stacey Parks Miller, Esq. enters into this contract with the ROGERS CASTOR Law Firm ("Firm,") of Ardmore, Montgomery County, PA for partner Bruce L. Castor, Jr. to serve as a temporary Special Assistant District Attorney of Centre County serving at the will and discretion of the District Attorney of Centre County. The Firm is to be paid for Mr. Castor's services in such amounts periodically as the District Attorney shall determine, but only to the extent that the District Attorney has funding in her 2015 County Commissioner-approved budget for assistant district attorneys. Nothing in this contract shall be construed as the District Attorney binding Centre County to pay for assistant district attorney positions not already budgeted for by the Centre County Commissioners.

Mr. Castor shall be sworn according to law and a copy of said oath attached to this contract serving at the pleasure of the District Attorney. Further, Firm shall be reimbursed for reasonable costs for travel, meals and accommodations expended in the performance of Mr. Castor's duties on behalf of the Commonwealth upon presentation to the District Attorney of receipts for same. This contract is effective April 9, 2015 and will include time and expenses incurred by Mr. Castor in preparation for hearings April 10, 2015 and going forward, but only for time and expenses Mr. Castor incurs in the course of acting as an attorney for the Commonwealth.

Hon. Stacy Parks Miller
District Attorney
Centre County, PA.

Bruce L. Castor, Jr.
ROGERS CASTOR

Date: April 9, 2015

CM-15-2015

2015 APR 10 AM 9:01
COPY

OATH OF OFFICE

Centre County, ss:

I, Bruce L. Castor, Jr., do solemnly swear that I will support, obey and defend the Constitution of the United States and the constitution of this Commonwealth and that I will discharge the duties of the office of a Special Assistant District Attorney of Centre County with fidelity. I swear that I have not knowingly violated any election law of the Commonwealth or procured it to be done by others in my behalf, that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law.

I further 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. I further understand that the appointment as Special Assistant District Attorney is revocable upon demand by the District Attorney for any reason she may so choose and my appointment is "at will" pursuant to the laws of the Commonwealth of Pennsylvania and 16 P.S. 1420.

Bruce L. Castor, Jr.

Sworn and subscribed, the April 10th, *2015, before me duly authorized by Act of Assembly.*

ATTACHMENT E

Attorney Bruce Castor from the law firm of Rogers Castors threatens, of behalf of Centre County District Attorney Stacy Parks Miller*, to sue **every** American citizen "who reposts or reprints" information from PFUR's website and Facebook page

(*PFUR is considering whether these threats are being made by DA Parks Miller in her official capacity or in her individual personal capacity).

R&C
ROGERS CASTOR

October 19, 2015

VIA U.S. First Class Mail & Email

Simon Campbell, President
Pennsylvanians for Union Reform
668 Stony Hill Road #110
Yardley, PA 19067

Re: Defamation of Stacy Parks 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 (http://paunionreform.org/) and Facebook page (https://www.facebook.com/corruptda). 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 possible believe them to be true. I'm afraid you are mistaken, as your conduct is defamatory *per se*.

While you are certainly free to unjustly criticize and express your opinion about a government official, the law does not allow you *carte blanche* to maliciously lie about our client to the public. Your lies that Ms. Parks Miller committed criminal acts are textbook examples of defamation, and directly contradicted by the Thirty-Seventh State-wide Investigating Grand Jury's Report, which fully exonerated Ms. Parks Miller of any crime. When the Report was accepted by the presiding judge, and issued by the Office of Attorney General, the findings contained therein became facts.

You are liable for the dissemination of this false material and everyone who reposts or reprints it is likewise liable for reprinting your lies. Furthermore, your lies, publication of Ms. Parks Miller's private telephone number, and public exhortations for people to call her resulted in harassment and threats of sexual violence to her person, as doubtless was your intent.

While you paint yourself as a champion of free speech and transparency, you hide your funding behind an opaque Section 501(c)(4) organization, which is *ordinarily* not

26 E. Athens Avenue • Ardmore, PA 19003 • Phone: 610.649.1880 • Fax: 877.649.1880
Email: info@rogerscastor.com • www.rogerscastor.com

required to publicly disclose its secret donors. Your unnatural obsession with DA Parks Miller and Centre County appears geographically and ideologically far-a-field from your Yardley-based organization's purported purpose of "Educational Services and Schools" that you reported to the Internal Revenue Service. It begs the question: who is funding your political smear campaign against selected public officials in Centre County, Pennsylvania? I challenge you to tell the world who is paying for this? You won't, of course. Fortunately, that is why the Rules of Civil Procedure allow for "discovery."

Stop publishing and remove the malicious lies from your websites about District Attorney Parks Miller—who is busy protecting the public from ***actual*** criminals. If you do not comply immediately, we will sue you and your Section 501(c)(4) organization, which appears to be nothing more than a thinly-veiled money laundering operation for organized defamation by secret donors. I think a public apology is in order too.

If you are represented by counsel kindly forward this to your lawyer. If not, I advise you to retain counsel at once for this matter.

Please do not mistake this letter as a threat. We are presenting you an opportunity to, perhaps, avoid being sued. Maybe your secret donors and others operating in collusion with you are willing to pay for your defense. Maybe some insurance company is willing to defend you against your intentional, malicious, and tortious conduct. Regardless, you and your organization are spending money on matters not related to its reported purpose and engaging in repeated violations of the law defaming a public official. While I don't think there is any chance whatsoever you will stop, you now cannot say we failed to warn you.

Sincerely,

BRUCE L. CASTOR, JR.

County of Centre

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE DISTRICT ATTORNEY

STACY PARKS MILLER
District Attorney

MARK S. SMITH
First Assistant District Attorney

102 S. Allegheny St.
Courthouse, Room 404
Bellefonte, PA 16823

Telephone (814) 355-6735
Victim/Witness (814) 548-1107
FAX (814) 355-6756

December 21, 2015

Pennsylvanians for Union Reform
668 Stony Hill Rd #110
Yardley, PA 19067

Re: Right to Know Request

To Whom It May Concern:

Thank you for writing to the District Attorney's Office with your request for information pursuant to the Pennsylvania Right-To-Know law.

On December 16, 2015, we received your request for the following:

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 shown in Attachment A.

2) A copy of the contract or personnel agreement that authorized Robert B. Stewart, Esq. to work in the capacity as Special Assistant District Attorney shown in Attachment B.

3) A copy of the most recently completed insurance application for the Centre County District Attorney's Office as seen in Attachment C.

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 her performed, during those visits.

5) 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) 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.

Your requests are being reviewed.

I am unable to provide an answer within five (5) days because, pursuant to Section 902 of the Right to Know law, a legal review is necessary to determine whether any requested documents exist that satisfy your requests under the Right to Know law. I anticipate that this review will take less than thirty (30) days.

Respectfully,

Stacy Parks Miller, Esquire
Centre County District Attorney

SPM/sy

Exhibit B

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[1] 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

[1] 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.[2]
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.**

[2] 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 people 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."[3]

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

[3] 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.[4] *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.

[4] 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.[5] 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,

[5] 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.[6] 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 warrento* 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

[6] 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,[7] 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)

[7] 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 Envtl. 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 possible 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.[8] 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.

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)

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

SERVICE

I hereby certify that I am this date filing the foregoing document with the Prothonotary of Centre County, with service to be made as follows:

1. On Defendant Stacy Parks Miller by the Sheriff of Centre County in accordance with Pennsylvania Rules of Civil Procedure 400 and 402.

2. Via U.S. Mail and electronic mail to:

J. Chadwick Schnee, Esq.
Appeals Officer/ Assistant Chief Counsel
Office of Open Records
Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

jschnee@pa.gov

Date: 4-11-16

Sean P. McGraw
Attorney I.D. No. 81584
Counsel for Plaintiff

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION IN MANDAMUS

PENNSYLVANIANS FOR UNION REFORM, Plaintiff	:	
v.	:	Docket No. 2016-1323
STACY PARKS-MILLER, DISTRICT ATTORNEY OF CENTRE COUNTY, IN HER OFFICIAL CAPACITY, Defendant	:	

WRIT OF MANDAMUS

AND NOW this _____ day of _____, 2016, upon consideration of Plaintiff's Complaint in Mandamus and the attachments thereto, this Court concludes that Plaintiff's right to relief is clear and, after notice to the parties in accordance with Pennsylvania Rule of Civil Procedure 1098, it is hereby ORDERED that the Defendant, Stacy Parks Miller, District Attorney of Centre County, shall produce and provide to the Plaintiff, Pennsylvanians for Union Reform, the following materials:

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, and Eric Reed to represent Centre County District Attorney Stacy Parks Miller in the *quo warranto* action docketed in the Pennsylvania Supreme Court at 20 MM 2015;

2. records of the dates in 2015 that Montgomery County resident Bruce Castor traveled to, and departed from, Centre County to perform work under a contract employing him as a special assistant district attorney of Centre County; 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 work he performed, during Attorney Castor's visits to Centre County;

3. 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 (in whole or in part) initiated a lawsuit or any other legal pleading against any other party in 2015; and

4. 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 of in whole), in which the recipient of the correspondence was threatened with legal action for allegedly defaming Ms. Parks Miller.

IT IS FURTHER ORDERED THAT a hearing on Plaintiff's request for attorney's fees, costs of litigation, a civil penalty, and other sanctions is scheduled for _____, 2016, at _____ in _____ of the Centre County Courthouse, Bellefonte, Pennsylvania.

BY THE COURT:

_____ J.

Supreme Court of Pennsylvania

Court of Common Pleas
Civil Cover Sheet

Centre _____ County

For Prothonotary Use Only:
Docket No: 2016-1323

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DEBRA C. MEEK
PROTHONOTARY
CENTRE COUNTY, PA

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

Commencement of Action:
☒ Complaint ☐ Writ of Summons ☐ Petition
☐ Transfer from Another Jurisdiction ☐ Declaration of Taking

Lead Plaintiff's Name:	Lead Defendant's Name:
Pennsylvanians for Union Reform	Stacy Parks Miller
Are money damages requested? ☐ Yes ☒ No	Dollar Amount Requested: (check one) ☐ within arbitration limits ☐ outside arbitration limits
Is this a *Class Action Suit*? ☐ Yes ☒ No	**Is this an *MDJ Appeal*?** ☐ Yes ☒ No

Name of Plaintiff/Appellant's Attorney: Shubin Law P.C./ Sean McGraw

☐ **Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)**

SECTION B

Nature of the Case: Place an "X" to the left of the **ONE** case category that most accurately describes your ***PRIMARY CASE***. If you are making more than one type of claim, check the one that you consider most important.

TORT *(do not include Mass Tort)*
☐ Intentional
☐ Malicious Prosecution
☐ Motor Vehicle
☐ Nuisance
☐ Premises Liability
☐ Product Liability *(does not include mass tort)*
☐ Slander/Libel/ Defamation
☐ Other:

MASS TORT
☐ Asbestos
☐ Tobacco
☐ Toxic Tort - DES
☐ Toxic Tort - Implant
☐ Toxic Waste
☐ Other:

PROFESSIONAL LIABLITY
☐ Dental
☐ Legal
☐ Medical
☐ Other Professional:

CONTRACT *(do not include Judgments)*
☐ Buyer Plaintiff
☐ Debt Collection: Credit Card
☐ Debt Collection: Other
☐ Employment Dispute: Discrimination
☐ Employment Dispute: Other
☐ Other:

REAL PROPERTY
☐ Ejectment
☐ Eminent Domain/Condemnation
☐ Ground Rent
☐ Landlord/Tenant Dispute
☐ Mortgage Foreclosure: Residential
☐ Mortgage Foreclosure: Commercial
☐ Partition
☐ Quiet Title
☐ Other:

CIVIL APPEALS
Administrative Agencies
☐ Board of Assessment
☐ Board of Elections
☐ Dept. of Transportation
☐ Statutory Appeal: Other
☐ Zoning Board
☐ Other:

MISCELLANEOUS
☐ Common Law/Statutory Arbitration
☐ Declaratory Judgment
☒ Mandamus
☐ Non-Domestic Relations Restraining Order
☐ Quo Warranto
☐ Replevin
☐ Other:

Updated 1/1/2011

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April 11, 2016

J. Chadwick Schnee, Esq.
Appeals Officer/Assistant Chief Counsel
Office of Open Records
Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

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Via U.S. Mail.

Dear Mr. Schnee:

With this letter please find the enclosed Complaint in Mandamus seeking enforcement of OOR's Final Determination at Docket No. AP 2016-0093.

Thank you.

Very truly yours,

Sean P. McGraw
Attorney at Law

SPM: ol
Enclosure