

On June 3, 2016, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Authority to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On June 22, 2016, the Authority submitted a position statement with the affidavit of Justin O'Donoghue, Esq., the Authority's solicitor. In addition, the Authority provided copies of the redacted invoices, with notations to explain the individual bases for redaction. In response to a request for clarification, the Authority submitted a supplemental affidavit of Attorney O'Donoghue attesting that the invoices provided are all of the invoices responsive to 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 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

¹ In his appeal, the Requester granted the OOR an additional thirty days to issue a final determination. *See* 65 P.S. § 67.1101(b)(1).

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.

The Authority 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. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Similarly, the burden of proof in claiming a privilege from disclosure is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011); *Pa. Dep’t of Transp. v. Drack*, 42 A.3d 355, 364 (Pa. Commw. Ct. 2012) (“[T]he RTKL places an evidentiary burden upon agencies seeking to deny access to records even when a privilege is involved”); *In re: Subpoena No. 22*, 709 A.2d 385 (Pa. Super. Ct. 1998). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The Request seeks the Authority solicitor's invoices for the period June 1, 2015 through March 22, 2016. On appeal, the Authority provided copies of the redacted legal invoices. The Authority also provided the sworn affidavit of Justin O'Donoghue, Esq., who attests that he reviewed and redacted the legal invoices to protect the attorney-client privilege and attorney-work product.

The RTKL excludes records subject to a privilege from the definition of "public record." 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.* The OOR gives paramount respect to both the attorney-client privilege and the attorney-work product doctrine and recognizes the importance of guarding both.

In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. See *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). An agency may not rely on a bald assertion that the attorney-client privilege applies; instead, the agency must prove all four elements. See *Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 ("Simply invoking the phrase 'attorney-client privilege' or 'legal advice' does not excuse the agency from the burden it must meet to withhold records"). The attorney-client privilege

protects only those disclosures necessary to obtain informed legal advice, where the disclosure might not have occurred absent the privilege, and where the client's goal is to obtain legal advice. *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001).

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

In reviewing the redacted legal invoices, it is clear that the redactions involve descriptions of legal services and research on various legal issues, which are protected under the attorney-client privilege. *Levy v. Senate of Pa.*, 94 A.3d 436 (Pa. Commw. Ct. 2014). The invoices detail the general subject matter of the services provided, the dates of service, the attorney providing the service, the hours worked, hourly rate and cost of services. Furthermore, the invoices detail the individuals with whom the Authority’s attorneys interacted, either by meeting, teleconference or correspondence. The only matters redacted are specific descriptions of legal services and legal issues. Based on the Authority’s affidavit and the OOR’s review of

the redacted invoices, the Authority has met its burden of proof that it properly redacted information protected by the attorney-client privilege.

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, and the Authority is not required to take any further action. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Montgomery County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per 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.² This Final Determination shall be placed on the OOR website: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 29, 2016

/s/ Charles Rees Brown
CHARLES REES BROWN
CHIEF COUNSEL

Sent via e-mail to:

Steve Camburn
Justin O'Donoghue, Esq.

² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).