



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
STEPHEN KANE,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2022-1673
	:	
DELAWARE COUNTY DISTRICT	:	
ATTORNEY'S OFFICE,	:	
Respondent	:	

INTRODUCTION

Stephen Kane ("Requester") submitted a request ("Request") to the Delaware County District Attorney's Office ("Office") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking bills and invoices sent from the Law Offices of Robert Scott. The Office redacted the responsive invoices of privileged information, and 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 June 14, 2022, the Request was filed, seeking:

[A]ll Bills / Invoices sent and received from the Law offices of Robert Scott from the time period of 05/01/202[2] thru 06/14/2022.

On July 18, 2022, following a 30-day extension, 65 P.S. § 67.902(b), the Office issued a partial grant, providing two one-page invoices from Attorney Scott, but with descriptions of

services heavily redacted. In its response, the Office argued that the redacted material reflected material covered by the attorney-client and attorney-work product privileges.

On July 19, 2022, the Requester appealed to the OOR, arguing that the OOR should perform an *in camera* inspection. The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).¹

On July 28, 2022, the Office submitted a position statement arguing that the redacted material constitutes privileged communication relating to ongoing litigation between the Office and the Requester. In support of this argument, the Office submitted the affidavit of Jennifer Glackin, the Office's Open Records Officer, who attests that the redacted information details the specific work being performed and the legal issue being addressed.

The same day, the Requester submitted a short statement asserting that taxpayers had a right to know what Attorney Scott was being paid for.

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).

¹ The same day, the Requester notified the OOR again that he was seeking an *in camera* review of the records.

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, the Requester sought an *in camera* review, but that request is denied because the OOR has sufficient evidence to rule on the privileges asserted.

The Office is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the 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 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)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa.

Commw. Ct. 2010)). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011).

The Request seeks bills and invoices from Attorney Scott, a private attorney who has been hired to represent both Delaware County and the Office for certain matters, including an appeal of a previous decision of the OOR. The Office produced two one-page invoices, from May 2, 2022 and June 1, 2022, respectively. Together, the invoices contain 14 individual item lines, all but one of which contains a significant redaction; the Office argues that these redactions are proper because these lines contain material made exempt by the attorney-client or attorney-work product privileges.

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 Bousamra v. Excelsa Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citation omitted). An agency may not rely on a bald assertion that the attorney-client privilege applies; instead, the agency must establish the first three prongs of the privilege for it to apply. *See id.* When waiver is at issue, the burden of proof shifts to the requester. *See Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014).

The attorney work-product doctrine, on the other hand, prohibits disclosure “of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. “The purpose of the work product

doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation.” *Bousamra*, 210 A.3d at 976; *see also Heavens v. Pa. Dep’t of Env’tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) (“[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked”).

In *Levy v. Senate of Pa.*, the Pennsylvania Supreme Court discussed the attorney-client privilege regarding descriptions of legal services contained within legal invoices. 65 A.3d 361, 373 (Pa. 2013). In determining whether the privilege applied to a particular entry in an invoice, the Court approved a “line-by-line analysis.” *Id.* The Court also discussed what content is considered privileged:

[T]he relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege. 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. In contrast, an entry that generically states that counsel made a telephone call for a specific amount of time to the client is not information protected by the attorney-client privilege but, instead, is subject to disclosure under the specific provisions of the RTKL.

Id. at 373-74 (citations omitted); *see also Slusaw v. Hoffman*, 861 A.2d 269, 272-73 (Pa. Super. Ct. 2004) (holding that production of evidence from attorneys regarding meetings and telephone calls would not violate attorney-client privilege where it would not call for disclosure of confidential communications).

With respect to invoices where the attorney-work product doctrine is at issue, the Commonwealth Court has added:

Although the general descriptions such as drafting a memo, making [a] telephone call, performing research, observing a trial, reflect work performed, without further detail they do not reveal an attorney’s ‘mental impressions, theories, notes,

strategies, research and the like' disclosure of the general tasks performed in connection with the fee charged reveals nothing about litigation strategy. They simply explain the generic nature of the service performed and justify the charges for legal services rendered. Where, as here, the taxpayers are footing the bill for the legal services, they are entitled to know the general nature of the services provided for the fees charged....

Levy v. Senate of Pa., 94 A.3d 436 (Pa. Commw. Ct. 2014) (internal citations omitted), *petition for allowance of appeal denied*, 106 A.3d 727 (Pa. 2014) ("*Levy III*").

In support of its argument that the responsive invoices contain privileged material, the Office submitted the verification of Attorney Barker, who attests that:

2. In my capacity as the Open Records Officer, I am familiar with the records of the Office.
3. The redacted portion of the records contain detailed descriptions of the work performed by Attorney Robert Scott for the County of Delaware and the [Office].
4. The redacted information is protected by attorney/client privilege and work product privileges. *See* 65 P.S. §67.305(a)(2).
5. Robert Scott, who authored the bills, is an attorney who represents the County of Delaware and handles a wide variety of legal issues for the County.
6. The redacted information detail[s] the specific work being performed and include[s] the nature of the legal issue being addressed. The redacted information reveals the attorney's legal strategies on varied issues. For example, when the attorney noted that an email was sent... attorney Scott listed the specific reason/legal issue for which it was sent.
7. Redacted information includes details of the legal issue for which the County is seeking Mr. Scott's services.
8. The [Office] hired Robert Scott to represent the [O]ffice in an appeal of an OOR decision, in which Mr. Kane, the [R]equester, is a party to the suit.
9. Some of the billed services in question, are services provided to the [Office] for Mr. Kane's previous appeal.
10. The County has not waived its attorney-client privilege, nor has the [Office] waived its attorney-client privilege.

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the withholding of responsive records. *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, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the redacted items of the two invoices list the purpose of each entry - for example, the first item reads “review [redacted] emails from/to [redacted]”, another item reads “Kane OOR Appeal – Review/analyze [redacted] email to [redacted]”, while another reads “OOR Appeal – Boggs Personnel File [redacted].” In combination with the Office’s affidavit, it is apparent that the Office has redacted the identifying description or case names of individual matters (except two OOR appeals), the names of people with whom emails are exchanged, and details beyond “review”, “analyze” or “respond.” Furthermore, the invoices are communications sent directly to Attorney Scott’s client, the Office; the Requester makes no claim that the privilege has been waived or that disclosures of this information have been made to any third parties.

The descriptions of the subjects for which an agency seeks legal advice and the detailed description of the work done by the attorney relating to such matters are both privileged, and so the Office was permitted to redact those descriptions. *See Mollick v. Methacton Sch. Dist.*, OOR Dkt. AP 2020-2531, 2021 PA O.O.R.D. LEXIS 2350. However, the OOR has previously found that the privilege does not encompass redactions which merely conceal the names of individuals with whom the attorney had a phone call or sent a letter. In this instance, because the Office has provided no evidence that redaction of the names of individual contacts would reveal a legal

strategy, the OOR cannot find that those redactions are subject to the attorney-client or attorney-work product privileges. *Dows v. Franklin Twp.*, OOR Dkt. AP 2016-1302, 2016 PA O.O.R.D. LEXIS 1609; *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (“It is not incumbent upon the Office of Open Records to request additional evidence when developing the record.”); *see also Crocco v. Pa. Dep’t of Health*, 214 A.3d 316, 321 (Pa. Commw. Ct. 2019) (“Absent unusual circumstances or a deficient record, ... this Court declines to serve as fact-finder, and relies on the record created before [the] OOR”).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Office is required to provide the Requester with a copy of the responsive invoices without redacting the names of individuals with whom email was exchanged or to whom phone calls were made. 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 Delaware 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. 65 P.S. § 67.1303. 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 at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 18, 2022

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS, ESQ.

Sent via email to: Stephen Kane (via email);

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

Jennifer Glackin (via email)