



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

**DAVID BAYNE,  
Requester**

**v.**

**LOWER BURRELL CITY,  
Respondent**

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**Docket No: AP 2022-2709**

### **FACTUAL BACKGROUND**

On November 2, 2022, David Bayne (“Requester”) submitted a request (“Request”) to Lower Burrell City (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “to do an in-person inspection of all invoices submitted by the [S]olicitor, [S]even [sic] [Y]akopes [sic] for any and all legal work performed for [the City] for the month of October in year 2022.”

On December 1, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the City granted the Request, providing a redacted copy of the Solicitor’s invoices.<sup>1</sup>

On December 2, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the City’s redaction. On December 2, 2022, the OOR issued an order notifying the

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<sup>1</sup> A copy of the redacted invoices was attached to the Requester’s December 2, 2022 correspondence. Invoice one is an invoice from the Solicitor to the City titled “Lower Burrell-October 2022” and invoice two is an invoice from the Solicitor to the City titled “Lower Burrell – Mr. Bayne – October 2022” (collectively “invoices”). Specifically, the Requester challenges two redactions (10/19 – “Calls with M. Marmo” and 10/3 – OOR Dkt.).

Requester that the appeal was deficient because it failed to include a copy of the Request and the City's response. The OOR informed the Requester that he was required to cure the deficiency and directed him to file the Request and the City's response pursuant to 65 P.S. § 67.1303(b). On December 3, 2022, the Requester submitted the Request and the City's final response, and indicated that he is challenging the redactions made to the invoices. On December 5, 2022, the OOR set a record closing date of December 19, 2022 and directed the City to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On December 19, 2022, the City submitted the attestation of Attorney Stephen Yakopec, Jr., ("Yakopec Attestation"), Solicitor for the City, who attests that the redactions are protected by the attorney-client privilege and/or the work product doctrine.

### **LEGAL ANALYSIS**

The City is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the City is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as "such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The City contends that the information redacted from the invoices is protected by the attorney-client privilege and/or the attorney work-product doctrine and is therefore not subject to public access. The RTKL defines "privilege" as "[t]he 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.” 65 P.S. § 67.102. 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 Bousamra v. Excelsa Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citations 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”). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978 (internal citation omitted), the work-product

doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id.* at 979 (internal citations and quotations omitted).

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 the City’s position that the redacted information is protected by the attorney-client privilege and/or the attorney work-product doctrine, the Yakopec Attestation provides, in relevant part, as follows:

1. [Yakopec] serve[s] as the Solicitor for the [City]....
2. In [his] capacity as the Solicitor, [Yakopec is] familiar with [his] invoices sent to the[City]. The invoices in this appeal are the total invoices sent to the City. No invoice has been withheld.
3. In [his] capacity as City Solicitor, [he is] familiar with [City] personnel who work for the City and who contact [him] for legal advice.
4. M. Marmo is Code Enforcement Officer and the Zoning Officer for the [City]. The 10/19/2022 calls with M. Marmo concerned a complaint submitted to the [City] which related to a noncriminal investigation. These calls and my legal advice therein are exempt from public access under the [RTKL] .... To [Yakopec’s] knowledge, there is no written record concerning the 10/19/2022 calls.
5. The attorney-client privilege applies to the 10/19/2022 calls....
6. ...[Yakopec] was contacted by the Code Enforcement Officer and Zoning Officer of the City concerning a complaint received which related to a noncriminal investigation.
7. The communication (phone calls) [Yakopec] received on 10/19/2022 relates to facts of which [Yakopec] was informed of by [his] client, without the presence of strangers, for the purpose of securing an opinion of law and assistance in a legal matter, and not for the purpose of committing a crime or tort. The privilege has been claimed by the City and myself. The City and [Yakopec] have not waived the privilege.
8. The phone calls relate to a noncriminal investigation and a complaint received by the City....
9. Concerning the 10/3/2022 redaction, [Yakopec] was contacted by the Chief of Police and requested to draft a document for submission in the OOR Dkt. AP 2022-0736 case. [Yakopec] drafted the document for the Chief of Police. The document contains my conclusions, legal theories, legal

research and also [Yakopec's] opinion on what was necessary to be submitted by the Chief of Police for a successful outcome in OOR Dkt. AP 2022-0736.

10. [Yakopec] cannot be more specific without violating the attorney-client privilege doctrine and/or the attorney work product doctrine jointly and/or severally as [the Requester] is an adversarial party in this appeal. As such, [the Requester] is [not] required to receive a copy of this document.

Under the RTKL, an attestation or statement made under the penalty of perjury may serve as sufficient evidentiary support. *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 evidence that the City acted in bad faith, “the averments in [the attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382- 83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the invoices provided for inspection includes twelve entries, each showing the date and time spend for services rendered. The City made the following redactions:

10/3 1.1 [REDACTED] OOR DKT AP 2022-0736 ON REMAND, RESEARCH

10/19 2.5 CALLS WITH M MARMO ON [REDACTED] DETENTION POND, S. MCCARTNEY, CALL WITH AMY ON SAME ISSUE OF DETNETION POND, RESEARCH

For the 10/19 redaction, the Yapopec Attestation explains that the City contacted the Solicitor for legal advice and that the 10/19 redaction concerned calls with M. Marmo relating to a noncriminal investigation in which the Solicitor gave legal advice. Yakopec Attestation, ¶¶ 3,4. In terms of redactions, the OOR has consistently held, in accordance with *Levy*, that an agency should redact the least amount of information possible – that is, generic information within an entry identifying things such as “phone call,” “email,” “research,” should not be redacted. The 10/19 redaction

reflects that the Solicitor made a call with M. Marmo and that the redaction reflects legal advice given by the Solicitor. Furthermore, the redaction does not appear to be a generic task.<sup>2</sup> Based upon a review of the 10/19 redaction, including the fact that the City has not waived its privilege, the City has met its burden, by a preponderance of the evidence, that the 10/19 redaction is protected by the attorney-client privilege.

Attorney Yakopec, the duly appointed Solicitor for the City, describes that for the 10/3 redaction, he drafted a document for the Chief of Police and that that document contains his “conclusions, legal theories, legal research and also [his] opinion.” Yakopec Attestation, ¶5. A review of the evidence suggests that the City is referring to a *document* that contains the Solicitor’s “conclusions, legal theories, legal research and also [his] opinion” as opposed to describing the redaction to the invoice and what the *redaction* encompasses. The OOR does not find it credible that the 10/3 *redaction* contains the Solicitor’s conclusions, legal theories, legal research, and his opinion because the redaction appears only to consist of a few words. While the OOR does not dispute that the document referenced in the Yakopec Attestation contains the Solicitor’s work product, the OOR is constrained to find that the City failed to meet its burden that the redacted portion of the 10/3 redaction contains the Solicitor’s “conclusions, legal theories, legal research and also [his] opinion.”

## CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the City is required to provide the 10/3 redaction 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 Westmoreland County Court of Common Pleas. 65

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<sup>2</sup> The OOR notes that the City did not redact the entire line and that the City did not redact generic tasks, for example, such as “Draft Legal Argument and Submit to OOR” or “Email to Appeals Officer.”

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.<sup>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: December 28, 2022**

*/s/ Lyle Hartranft*

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APPEALS OFFICER  
LYLE HARTRANFT, ESQ.

Sent via email to: Davis Bayne, Amy Rockwell, AORO; Stephen Yakopec, Esq.

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