

On January 8, 2024, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Charter School to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On January 30, 2024, the Charter School submitted a position statement reiterating its grounds for denial. In support of its position, the Charter School submitted the attestations, made subject to the penalties of 18 Pa.C.S. § 4904, of its Open Records Officer, Eileen Cannistraci (“Cannistraci Attestation”) and of its Solicitor, Adam Attia, Esq. (“Attia Attestation”). The Charter school also submitted an Exemption Log and an *In Camera* Inspection Index.² See Charter School Exhibits B and D. Additionally, the Charter School submitted copies of the responsive records with additional information unredacted. See Charter School Exhibit F.

On March 6, 2024, the OOR ordered the Charter School to produce unredacted copies of the withheld responsive records for the OOR’s *in camera* inspection.

On April 5, 2024, the Charter School submitted unredacted records for *in camera* review, along with an updated *In Camera* Inspection Index, the supplemental attestation, made subject to the penalties of 18 Pa.C.S. § 4904, of Eileen Cannistraci (“Cannistraci Supplemental Attestation”), and the attestation, made subject to the penalties of 18 Pa.C.S. § 4904, of the Charter School’s attorney Terry Mutchler, Esq. (“Mutchler Attestation”). The Charter School also submitted updated copies of the responsive records with further information unredacted.

¹ The Requester granted the OOR a thirty-day extension to issue a final determination. See 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”). The Requester also granted the OOR and additional ninety-day extension for the OOR to conduct *in camera* review of the responsive records.

² At the time of this submission the OOR had not ordered *in camera* inspection nor had the OOR received the unredacted responsive records.

LEGAL ANALYSIS

The Charter School 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 Charter School 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)). Additionally, the OOR conducted a review of certain records *in camera* on agreement of the parties.

1. The appeal is moot in part

During the appeal, as part of its January 30, 2024 submission and of its April 5, 2024 submission, the Charter School provided updated copies of the responsive records with additional information unredacted. *See* Attia Attestation, ¶ 11; Mutchler Attestation, ¶ 7. Thus, insofar as the Request seeks the information provided, the appeal is dismissed as moot. *See Chester Water Auth. v. Pa. Dep’t of Cmty. & Econ. Dev.*, 249 A.3d 1106, 1114 (Pa. 2021) (finding that a matter was settled by provision of records, and thus, “the controversy has been mooted”); *Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931 (Pa. Commw. Ct. 2019)

2. The Charter School demonstrated that the redacted information contained within the responsive records is protected by privilege

The Charter School argues that certain information contained within the responsive records is protected by the attorney-client privilege and by the attorney work-product privilege.

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). “[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege must prove waiver under the fourth prong.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2014) (citing *id.*).

The Commonwealth Court addressed the application of the attorney-client privilege and the attorney work product doctrine to descriptions of legal services on legal invoices in *Levy v. Senate of Pennsylvania*, 65 A.3d 361, 373 (Pa. Commw. Ct. 2013). In *Levy*, the Court held that “the determination of the applicability of the attorney-client privilege does not turn on the category of a document, such as whether it is an invoice or fee agreement. Instead, the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege.” *Id.* 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. (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); *see also Upjohn Co. v. United States*, 449 U.S. 383 (1981) (privilege extends only to communications and not to underlying facts); *Pa. Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1124 (Pa. Commw. Ct. 2015) (citing *Commonwealth v. Vartan*, 733 A.2d 1258 (Pa. 1999)). 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.

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*”).

Here, it is undisputed that Barton Gilman LLP represents the Charter School and that the attorneys of Barton Gilman LLP are licensed to practice law in Pennsylvania.

In support of the Charter School’s position, the Mutchler Attestation states that Attorney Mutchler “performed a good faith search of records as required by Section 901 of the law for records in the possession, custody and control of Insight that were responsive to the request .” See Mutchler Attestation, ¶ 3. The Mutchler Attestation also states:

4. ...The legal invoices represent Barton Gilman’s legal work on behalf of Insight for the period of time requested.
5. I personally reviewed each and every invoice for legal services responsive to...[the] [R]equest.
6. I reviewed the original production provided to...[the Requester] by Insight in December 2023. In examining the block redactions of legal invoices provided, I determined that additional disclosure was required under the RTKL.
7. As a result of a re-examination of the original production to...[the Requester], I unredacted significant portions of the invoices in accordance with the RTKL.
8. In my examination, I conducted a “line by line analysis” of the records as outlined by the Supreme Court in *Levy*, 65 A.3d [at 373]....
9. I “narrowly construed” the exemptions of the RTKL as required by *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), aff’d 75 A.3d 453 (Pa. 2013).
10. I attest that the dates that the work was performed, the amount of time the work took and the billing amounts remained fully in public view and were not redacted.
11. I left intact for public review each line of the “type” of work being conducted, such as a telephone call, email, meeting, drafting, analyzing or research, in accordance with both the letter and the spirit of *Levy* instructions.
12. I made redactions judiciously, in accordance with guidelines established by Pennsylvania Courts related to legal invoices, exemptions and redactions.
13. I consulted with Insight and Barton Gilman on redactions related to confidential and protected information pursuant to 65 P.S. § 67.305.

14. In each instance where I redacted a portion of an entry, the redactions solely related to legal services, legal advice, and/or strategy relating to a variety of matters for which the client consulted legal counsel as permitted by *Levy*.
15. I made only such redactions as necessary to prevent disclosure of client's motives for seeking legal counsel, legal advice, strategy, or other confidential information.
16. ... For further justification for the redactions, please see the privilege log. To provide further justification would require me to provide information that is itself subject to the attorney privilege and its disclosure/production would violate said privilege.

See Mutchler Attestation, ¶¶ 4-16. In further support of the Charter School's position, the Attia Attestation affirms that the Charter School "has not waived the attorney-client privilege[.]" and the Requester has not provided any evidence to contradict the Attia Attestation or to show the privilege has been waived by the Charter School. *See Attia Attestation*, ¶ 8.

Under the RTKL, a sworn affidavit 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 Charter School acted in bad faith or that additional responsive records exist, "the averments in [the statements] 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)).

Here, the Mutchler Attestation is authored by the Charter School's attorney who "advis[es] the [Charter School]... on matters pursuant to the...RTKL...[.]" and who personally "conducted a 'line by line analysis' of the [responsive] records." *See Mutchler Attestation*, ¶¶ 2, 5, 8; *see also Levy, supra*. The Mutchler Attestation affirms that "the redactions [made to the responsive invoices] solely related to legal services, legal advice, and/or strategy relating to a variety of

matters for which the client consulted legal counsel as permitted by *Levy*.” See Mutchler Attestation, ¶ 14. The Mutchler Attestation also affirms that “only such redactions [were made] as necessary to prevent disclosure of client’s motives for seeking legal counsel, legal advice, strategy, or other confidential information.” See Mutchler Attestation, ¶ 15.

Additionally, using *Levy* as a guide, the OOR conducted an *in camera* review of the unredacted legal invoices to determine if the redacted material is privileged, as asserted by the Charter School. The Charter School identified seven entries on the responsive invoices as responsive to the Request:

Bates No.	Date	Entry No.
Insight 006	9/26/2023	74
Insight 006	9/26/2023	75
Insight 006	9/26/2023	78
Insight 011	10/25/2023	110
Insight 011	10/25/2023	111
Insight 011	10/27/2023	114
Insight 011	10/27/2023	115

A review of the unredacted invoices, in comparison with the redacted invoices provided by the Charter School with its April 5, 2024 submission,³ shows that the seven above entries identified by the Charter School are the only entries contained within the fifteen pages of the two invoices provided that are responsive to the instant Request.⁴ A review of the unredacted invoices also

³ See April 5, 2024 Charter School Submission, Exhibit 3.

⁴ The updated *In Camera* Inspection Index provided by the Charter School with its April 5, 2024 submission indicates that the remainder of the entries on the responsive invoices are “[b]eyond the scope of...[the instant] Request[,]” and that the redacted information is privileged. See April 5, 2024 Charter School, Exhibit 5; see also *Haverstick v. Pa. State Police*, 273 A.3d 593, 599 (Pa. Commw. Ct. 2022); *Smart Communications Holding, Inc. v. Wishnefsky*, 240 A.3d 1014, 1019 (Pa. Commw. Ct. 2020); *Scheinler v. Southern Lehigh Sch. Dist.*, OOR Dkt. AP 2021-1696. 2021 PA O.O.R.D. LEXIS 1923 (explaining that an agency may not redact nonresponsive information from responsive records); *Ference v. Sewickly Borough*, OOR Dkt. AP 2020-0095, 2020 PA O.O.R.D. LEXIS 1879 (distinguishing

shows the redactions made to the responsive invoice entries protect descriptions of legal work that reveal the Charter School's motive for seeking legal advice or reflect potential confidential attorney-client communications. Routine responsibilities associated with providing legal services to the Charter School, such as sending emails to outside parties or attending meetings remain unredacted from the responsive invoice entries. Accordingly, based on the evidence presented and the OOR's *in camera* review of the responsive records, the Charter School has met its burden of proving by a preponderance of the evidence that the redacted portions of the applicable entries are exempt under the attorney-client privilege.⁵

CONCLUSION

For the foregoing reasons, the appeal is **denied in part** and **dismissed as moot in part**, and, within thirty days, the Charter School is not required to take any additional action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Chester County Court of Common Pleas. 65 P.S. § 67.302(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, 65 P.S. § 67.1303, but as the quasi-judicial tribunal that adjudicated

withholding entire nonresponsive records and making redactions). However, the OOR's *in camera* review of the responsive invoices show that the Charter School properly redacted the invoices subject to the attorney-client privilege and the attorney-work product doctrine as set forth above. The redactions protect descriptions of legal work that reveal the Charter School's motive for seeking counsel, reveal legal strategy or reflect potential confidential attorney-client communications. Therefore, to the extent that a "nonresponsive" entry has been redacted, it has been appropriately redacted of privileged material.

⁵ The Requester argues that the Charter School acted in bad faith. However, there is no evidence in the record that the Charter School intentionally impeded the Requester's lawful access to responsive records. The Charter School timely responded to the Request and, although the initial response contained block redactions, the Charter School twice provided copies of the responsive invoices with additional information unredacted. Additionally, on appeal, the Charter School met the submission deadlines set by the OOR and provided evidence in support of its positions concerning the remaining redacted portions of the responsive invoices.

this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁶ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: June 18, 2024

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO

Sent via OOR portal to: Bradley Willwerth
 Adam Alaa Attia, Esq.
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⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).