



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
TODD SHEPHERD AND BROAD + LIBERTY,	:
Requester	:
	:
v.	: Docket No: AP 2026-1544
	:
PENNSYLVANIA OFFICE OF THE GOVERNOR,	:
Respondent	:

FACTUAL BACKGROUND

On March 10, 2026, Todd Shepherd, on behalf of Broad + Liberty (collectively “Requester”), submitted a request (“Request”) to the Pennsylvania Office of the Governor (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq*, seeking:

[...A] copy of the email identified as Control Number REL0000000129 in the document log produced by the Governor’s Office in response to [RTKL] request C-2025-120. This record is identified by the subject line “Fwd: Code of Conduct – CONFIDENTIAL” and is dated April 13, 2023. I am requesting the complete email including all header information (sender, recipient, CC, BCC fields), the full body of the email, and any attachments. I am also requesting a copy of any code of conduct document or policy referenced in or by the body of this email.

On April 16, 2026, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Office denied the Request, arguing that all responsive records are protected by the attorney-client privilege, the attorney-work product doctrine, or are records that would reveal the internal, predecisional deliberations of officials or employees. 65 P.S. § 67.102, 65 P.S. § 67.708(b)(10).

On April 17, 2026, 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 Office to notify the OOR if any third parties have a direct interest in the appeal. *See* 65 P.S. § 67.1101(c).

On April 30, 2026, the Office submitted a position statement, reiterating its argument that the responsive records are protected by the attorney-client privilege and/or the attorney-work product doctrine. In support of its position, the Office submitted the attestation, made under the penalty of perjury,² of Marc Eisenstein (“Eisenstein Attestation”), Open Records Officer (“ORO”) for the Office. In addition, the Office submitted a Privilege Log identifying the responsive records (i.e. an email chain containing an email from Governor Shapiro and a return email from Jennifer Selber, the Office’s General Counsel) and a list of position titles of those individuals in the Privilege Log. *See* Exhibits “A” and “B”.

On April 30, 2026, the Requester submitted a position statement, arguing that the responsive email chain cannot be protected as privilege because it was sent to “the family financial advisor”, that the submission is silent to the Code of Conduct document, and asks the OOR to conduct *in camera* review.

On May 18, 2026, in response to an inquiry by the OOR,³ the Office submitted a supplemental position statement, made subject to the penalties of 18 Pa.C.S. § 4904, arguing that the responsive Code of Conduct document is protected by privilege.

LEGAL ANALYSIS

¹ The Requester provided the OOR with additional time to issue a final determination in this matter. *See* 65 P.S. § 67.1101(b)(1).

² While the Eisenstein Attestation does not specifically cite to 18 Pa.C.S. § 4904, it was submitted under penalty of perjury.

³ The OOR asked the Office to address the portion of the Request seeking “a copy of any code of conduct or policy referenced in or by the body of this email.”

The Office is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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 Office 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)). While the Requester sought *in camera* review of the withheld records, the parties have presented a sufficient factual record to enable the OOR to adjudicate the matter on the merits. Therefore, the request for *in camera* review is denied.

The Office asserts that it properly withheld the responsive emails under by the attorney-client privilege.⁴ 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

⁴ Two emails were identified in the Privilege Log as being exempt under the attorney-client privilege, the attorney-work product doctrine, and as internal, predecisional deliberations of the agency. The OOR notes that the internal, predecisional deliberations exemption was not raised in the Office’s position statement. As such, it will not be further addressed in this Final Determination.

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.” *Off. of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2014) (citation omitted). An agency may not rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks Cnty.*, 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, 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. Work product immunity is only waived by disclosure to an adversarial party or by disclosure “to third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it.” *Id.* at 978 (internal quotation omitted).

In support of its position, the Eisenstein Attestation provides,⁵ in relevant part, the

⁵ Under the RTKL, an affidavit or statement made under 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. Off. of Open Records*,

following:

5. On April 16, 2026, the Office provided a final response. The Office withheld one document comprised of 2 pages of a singular email. The withheld document is detailed in the accompanying [P]rivilege [L]og (Exhibit A).
[...]
7. With respect to materials denoted in the [P]rivilege [L]og as containing attorney-client or attorney[-]work product privileged material, the withheld record document[s] an exchange of legal advice communicated from the General Counsel to the Governor, who then, at counsel's request and for the purposes of informing that representation, consulted with a subject matter expert to inform and assist such legal representation. Neither the Office, agencies nor counsel have further disclosed such communications nor have any parties waived such privileges.
8. The titles and agencies for the senders and recipients in the [P]rivilege [L]og may be found in Exhibit B.

On appeal, the Requester argues that the portion of the email chain sent by the family financial advisor is not protected by the attorney-client privilege, as the financial advisor was not acting as an agent for the attorney for the purpose of the legal representation. Generally, "once the attorney-client communications have been disclosed to a third party, the privilege is deemed waived." Joe, 782 A.2d at 31. However, as noted in *Levy v. Senate of Pa.*, "[p]rivileged persons include agents of either the client or the lawyer who facilitates communications between them and agents of the lawyer who facilitate representation." 34 A.3d 243, 254-55 (Pa. Commw. Ct. 2011) (citing the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 (2000)), *aff'd in part and rev'd in part on other grounds*, 65 A.3d 361 (Pa. 2013).

In *BouSamra v. Excelsa Health*, the Pennsylvania Supreme Court, when determining that forwarding an email to a hired consultant waived the attorney-client privilege, explained:

[S]ome Pennsylvania courts have extended the attorney-client privilege to third parties; specifically, agents of the client or lawyer. *See Commonwealth v. Noll*, 443 Pa. Super. 602, 662 A.2d 1123, 1126 (Pa. Super. 1995).

992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Office has acted in bad faith, "the averments in the [attestation] should be accepted as true." *McGowan v. Pa. Dep't of Env't Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

...

As we recognized above, the attorney-client privilege is waived when a confidential communication is shared with a third party. See *Prison Health Servs., Fleming, supra*. Cate was an employee of Jarrard, not Excelsa, and thus under the current iteration of the law, Cate was not capable of acting on Excelsa's behalf, as she is not an officer, executive, or director of Excelsa. See *Yocabet v. UPMC Presbyterian*, 2015 PA Super 132, 119 A.3d 1012, 1028 (Pa. Super. 2015). Accordingly, Fedele could not send the email to Cate as an individual under the ambit of the attorney client privilege as it applied to Excelsa and its outside counsel. *Id.* Excelsa points out, however, that under the reasoning of *Noll* and *Kovel*, the privilege should not be waived, as Jarrard and its employees were agents of Excelsa who were facilitating the lawyer's ability to provide legal advice. We find this reasoning unpersuasive. In both *Kovel* and *Noll*, the respective third parties--an accountant and an accident reconstruction expert--were privy to confidential information as a necessary means of improving the comprehension between the lawyer and client which facilitated the lawyer's ability to provide legal advice. In *Kovel*, the accountant's presence and opinion were necessary for the lawyer to understand the client's tax story, a prerequisite to furnishing legal advice. *Kovel*, 296 F.2d at 922 ("the presence of an accountant...while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege[.]"). Similarly, in *Noll*, the accident reconstruction expert was hired by the lawyer to prepare for possible litigation--again, a step that was required prior to the lawyer being able to give legal advice to the client. *Noll*, 662 A.2d at 1125 (noting that the attorney hired an accident reconstruction expert "to assist in preparation for possible litigation."); accord *Harris*, 32 A.3d at 253 (extending attorney client privilege to expert witness); *duPont*, 730 A.2d at 977 ("[A]ttorneys today often consult with and rely upon the advice of other professionals to assist them in providing legal services. However, application of the privilege requires confidential communications made in connection with providing legal services.").

In both cases, the critical fact is that the third-party's presence was either indispensable to the lawyer giving legal advice or facilitated the lawyer's ability to give legal advice to the client.

[...]

In some situations, a third party's presence may be necessary for a lawyer to provide legal advice to a client. This is the type of situation that *Kovel* contemplates, where an accountant or interpreter must be present in order to explain foreign concepts or terms. In that situation, the lawyer cannot, or would find it exceedingly difficult, to provide legal advice.

BouSamra v. Excelsa Health, 653 Pa. 365, 393-97, 210 A.3d 967, 983-986 (2019).

In order for the privilege to extend to the third-party agents of the Office, we apply the test from *BouSamra* in that the attorney-client privilege will be waived unless the third party’s “presence was either indispensable to the lawyer giving legal advice or facilitated the lawyer’s ability to give legal advice to the client.” *Id.* at 985. Here, the records are email chains involving the Governor’s financial advisor, an outside third-party consultant. The Eisenstein Attestation states that “the withheld records document an exchange of legal advice communicated from the General Counsel to the Governor, who then, at counsel’s request and for the purposes of informing that representation, consulted with a subject matter expert to inform and assist such legal representation.” Eisenstein Attestation, ¶ 7.

Here, General Counsel asked that the Governor obtain his financial advisor’s advice to address the legal issue in which the Governor sought advice from General Counsel. Thus, the financial advisor was an active participant, as opposed to the passive consultant in *BouSamra* who merely received an email from counsel. In *BouSamra*, the Court noted that a situation may arise where a third party was necessary for legal advice, “in instances [that] unlike the present matter, involve *soliciting* advice or input from a public relations firm.” *BouSamra*, 210 A.3d at 986, n.15 (emphasis in original). Although the situation here is different, as it is the client, not the attorney, who contacted the financial advisor (at the attorney’s request), the evidentiary record shows that General Counsel requested that Governor Shapiro obtain information from his family’s financial advisor to facilitate the legal advice being provided by General Counsel and, as a result, the financial advisor’s information was *indispensable* to the legal advice being rendered. *See Sandoz Inc. v. Lannett Co.*, 570 F. Supp. 3d 258, 263 (E.D. Pa. 2021) (after applying “the *BouSamra* test,” the Court found, in relevant part, that a third-party consultant was “an active participant,” by providing this work product and soliciting legal advice from the client’s attorney). It was that

communication between the Governor and his financial advisor, triggered by that relationship at the request of General Counsel, that is protected by the attorney-client privilege.

The Request also sought “a copy of any code of conduct document or policy referenced in or by the body of [Control Number REL 0000000129].” The Requester argues that the Office’s initial submission does not address whether a code of conduct exists, asserts an exemption for any responsive policy document, or certifies that no such document exists. After being provided the opportunity to submit additional evidence, the Office argues that the Requester does not seek “any record that he has identified, nor even one that is identifiable to him” and, instead, “seeks a copy of a document (“whatever” document) was referenced by client and counsel in an otherwise privileged communication.” The Office further argues that “[t]o provide a copy of such a document, though, is to provide a description of the precise matter as to which legal advice was sought.”⁶ Here, such a document was presented to counsel by the Governor for the purpose of seeking legal advice. Office Supplemental Position statement, ¶ 3. The disclosure of such records would necessarily provide a description of the precise matter to which legal advice was sought. *See Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001) (both requests for legal advice and information disclosed to obtain that legal advice is privileged). Accordingly, the Office demonstrated, by a preponderance of the evidence, that the record identified in the body of a privileged email is also privileged.

Thus, based upon a review of the Eisenstein Attestation and the descriptions in the Privilege Log, the Office has demonstrated that the withheld records are protected under the attorney-client privilege. As such, the above-described records, identified in the Privilege Log as Control Number REL0000000129, were properly withheld and are not subject to public access.

⁶ The OOR notes that the Office’s supplemental position statement was made subject to the penalties of 18 Pa.C.S. § 4904.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Office is not required to take any further action. 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 Commonwealth Court. 65 P.S. § 67.1301(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.⁷ 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 OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: June 10, 2026

/s/ Lyle Hartranft

LYLE HARTRANFT, ESQ.
APPEALS OFFICER

Sent via E-File Portal to: Todd Shepherd; Marc Eisenstein, AORO; Thomas Howell, Esq.

⁷ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).