



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JOSHUA BONN AND COHEN SEGLIAS	:	
PALLAS GREENHALL & FURMAN PC,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2026-3505
	:	
PENNSYLVANIA OFFICE OF GENERAL	:	
COUNSEL,	:	
Respondent	:	

FACTUAL BACKGROUND

On July 1, 2026, Joshua Bonn and Cohen Seglias Pallas Greenhall & Furman PC (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania Office of General Counsel (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

1. Governor Shapiro issued a letter on April 29, 2026 to electric, gas, and water utility leaders, in which he proposed certain practices to evaluate rate case proposals (hereinafter the “Utility Reform Proposal”), including requirements that utilities account for shareholder returns by (i) providing a benchmark that is transparently derived through a public process with competitive bidding to establish a fair market cost for that equity (hereinafter the “Competitive Market-Based Process”), or (ii) by requesting a rate on equity that does not exceed the rate of the current 10-year U.S. Treasury yield plus the five-year median of the equity risk premium as published in the Federal Reserve’s Financial Stability Reports (hereinafter the “Acceptance of the Market Rate of Return”). Please provide written and electronic communications regarding the Utility Reform Proposal, the Competitive MarketBased Process, or the Acceptance of the Market Rate of Return from January 1, 2026 through the date of this request between the Office of General Counsel personnel responsible for energy

affordability or utility matters, including Mark Szybist, Special Counsel for Energy Affordability and any of the below listed individuals or entities:

- a. Mark Ellis;
 - b. the American Economic Liberties Project (“AELP”) and any representative, agent, or employee acting on its behalf;
 - c. MarketClear Utility Policy Research (“MarketClear”) and any representative, agent or employee acting on its behalf;
 - d. Pennsylvania Public Utility Commission (PUC) Commissioners; and
 - e. Sam Robinson, Deputy Chief of Staff and/or Dana Fritz, Chief of Staff, of the Governor’s Office.
2. All calendars, calendar records or entries, meeting invites, visitor logs, agendas, or notes related to any meeting, call, videoconference, or event involving or discussing the Utility Reform Proposal, the Competitive Market-Based Process, or the Acceptance of the Market Rate of Return from January 1, 2026 through the date of this request between the Office of General Counsel personnel responsible for energy affordability or utility matters, including Mark Szybist, Special Counsel for Energy Affordability and any of the below listed individuals or entities:
- a. Mark Ellis;
 - b. the AELP and any representative, agent or employee acting on its behalf;
 - c. MarketClear and any representative, agent or employee acting on its behalf;
 - d. Pennsylvania Public Utility Commission (PUC) Commissioners; and
 - e. Sam Robinson, Deputy Chief of Staff and/or Dana Fritz, Chief of Staff, of the Governor’s Office.
3. All records (written and electronic) in the possession, custody or control of Office of General Counsel personnel including Mark Szybist, Special Counsel for Energy Affordability discussing, analyzing, referencing, attaching, forwarding, or citing materials concerning the Utility Reform Proposal, the Competitive Market-Based Process, or the Acceptance of the Market Rate of Return from January 1, 2026 through April 29, 2026.
4. All records that identify all non-public individuals or organizations that were asked to help prepare or consulted with on the Utility Reform Proposal, the Competitive MarketBased Process, or the Acceptance of the Market Rate of Return from January 1, 2026 through April 29, 2026.
5. All records identifying the origin or source of the Competitive Market-Based Process or the Acceptance of the Market Rate of Return from January 1, 2026 through April 29, 2026.

On August 10, 2026, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Office granted the Request in part and provided the Requester with responsive

emails and email attachments.¹ The Office denied the Request in part, arguing that certain responsive records are exempt from disclosure as internal, predecisional deliberations and are protected under the attorney-client privilege. *See* 65 P.S. § 67.708(b)(10).

On August 24, 2026, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.² The Requester specifically argues that the Office has not demonstrated that the requested records are exempt from public disclosure as pre-decisional deliberations or attorney client communications. 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. 65 P.S. § 67.1101(c).

On September 4, 2026, the Office submitted the attestation of Marc Eisenstein, the Open Records Officer for the Office (“Eisenstein Attestation”), which argues that the Office identified responsive records and withheld certain responsive records on the basis of attorney-client privilege and as internal, predecisional deliberations. *See* 65 P.S. § 67.708(b)(10). The Office also provided an Exemption Log, which identifies and describes the responsive email and email attachment withheld.

On September 4, 2026, the Requester submitted evidence and argument that the Office failed to conduct a good faith search for all responsive records and failed to prove that the responsive records are exempt from public access. On September 18, 2026, in response to the OOR’s inquiry, the Office submitted the supplemental attestation of Marc Eisenstein (“Supplemental Eisenstein Attestation”), describing the search conducted by the Office in response

¹ The Office redacted portions of the responsive records on the basis of personal identification information. On September 9, 2026, the Requester confirmed that he does not challenge the Office’s redaction of the emails on the basis of personal identification information.

² The Requester granted the OOR a 30-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).”)

to the Request. The Supplemental Eisenstein Attestation identified three additional messages that are “potentially, but not clearly, responsive to the [R]equest” and submitted evidence that such messages are protected under the attorney-client privilege.

LEGAL ANALYSIS

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)).

1. The Office proved that it conducted a good faith search for certain responsive records

In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the identified record[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors ... After obtaining all potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020).

An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency's records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep't of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

The Eisenstein Attestation³ states that he:

[C]ommissioned and conducted a search of the Office's records by both inquiring with Information Technology staff who, by virtue of their positions, support the Office's electronic records systems and have access to any such records that exist within the Office's possession, custody or control; and, by directly searching the email accounts of individuals whose email accounts are within the possession, custody or control of the Office.

See Eisenstein Attestation ¶ 4.

In response to the OOR's inquiry, the Office submitted evidence specifically addressing its good faith search for records responsive to the Request, stating:

- 6) In response to the initial [R]equest, I searched the email accounts of Jacob Boyer and Mark Szybist, who are attorneys employed by the Office of General Counsel and who provide legal services to the Department of Environmental Protection and Office of the Governor, among other agencies and offices within the executive branch.
- 7) I subsequently directly inquired with the individuals identified above to confirm that they did not possess, maintain or have custody or control over any records, such as text messages, that were not within their email accounts.
- 8) That inquiry revealed three messages between Special Counsel Szybist, and Governor's Office Deputy Chief of Staff Sam Robinson, his client, about matters that are potentially, but not clearly, responsive to the [R]equest. . . .

³ Under the RTKL, an attestation is generally competent evidence to sustain an agency's burden of proof. *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 attestations] should be accepted as true."

- 12) After receipt of Requester's position statement, I broadened the terms used to search for responsive records, and located the records that appear on pages 112-115 and page 121 of Requester's submission at Exh. F.

See Supplemental Eisenstein Attestation ¶¶ 6-8, 12.

The Requester argues that the Office failed to conduct a good faith search, noting that the Office failed to produce: (1) an email with attachments from Mark Szybist to Cadi Eberly dated June 10, 2026; and (2) a calendar event of Scott Thomas and PUC Commissioner Kathryn Zerfuss titled "Commissioner Zerfuss/Mark Szybist meeting."

Part 1 of the Request seeks "written and electronic communications regarding the Utility Reform Proposal, the Competitive Market-Based Process, or the Acceptance of the Market Rate of Return from January 1, 2026 through [July 1, 2026] between the Office of General Counsel personnel . . . including Mark Szybist" and Mark Ellis, the AELP, MarketClear, PUC Commissioners, Sam Robinson, Deputy Chief of Staff for the Governor, and/or Dana Fritz, Chief of Staff for the Governor. The June 10, 2026 email from Mark Szybist to Cadi Eberly is an email from Mark Szybist to the PUC legal assistant registering to present public comment at a telephonic hearing. None of the individuals copied on the email are the individuals or entities listed in Part 1 of the Request.⁴ Thus, this June 10, 2026 would not be responsive to Part 1 of the Request, as drafted. The evidence submitted by the Office demonstrates that it conducted a search for emails text messages, and written communications responsive to Part 1 of the Request and that no additional responsive records exist in the Office's possession, custody or control. Based on the evidence submitted, the OOR finds the Office's evidence to be credible that the Office conducted

⁴ The email addresses copied on the June 10, 2026 email are the active parties in docket number 2025-3059430 that are required to receive copies of any documents or exhibits presented at a public input hearing. See <https://www.puc.pa.gov/pcdocs/1932362.pdf> (last visited September 21, 2026). None of these active parties are the individuals or entities listed in Part 1 of the Request.

a good faith search for records responsive to Part 1 of the Request and provided those records to the Requester.

Notwithstanding, Part 2 of the Request seeks all “calendars, calendar records or entries, meeting invites, visitor logs, agendas, or notes related to any meeting, call, videoconference, or event involving or discussing the Utility Reform Proposal, the Competitive Market-Based Process, or the Acceptance of the Market Rate of Return” from January 1, 2026 through July 1, 2026 between the Office personnel responsible for energy affordability or utility matters, including Mark Szybist and certain named individuals or entities. The evidence submitted by the Office is silent as to its search for records responsive to Part 2 of the Request, such as calendar invitations or events. None of the records provided in response to the Request are calendar events or invitations, and the Requester submitted credible evidence that Mark Szybist attended meetings scheduled by the named individuals. The Supplemental Eisenstein Attestation confirms that when he conducted a broader search, he located the calendar invitation referenced on page 121 of the Requester’s Exhibit F. Accordingly, the Office has failed to prove that it conducted a sufficiently thorough search for the records responsive to Part 2 of the Request and is directed to do so.

1. The Office proved that certain records are protected under the attorney-client privilege

The Office submitted evidence that through the searches conducted for responsive records, the Office identified: (1) an email with an attachment between Jacob Boyer, Deputy General Counsel at the Office, Laurie Malone, Chief of Staff at the Office, and Theron Perez, First Deputy General Counsel at the Office; and (2) three messages between Special Counsel Mark Szybist and the Governor’s Office Deputy Chief of Staff Sam Robinson. The Office argues that all of these communications are protected under the attorney-client privilege. The RTKL’s definition of privilege includes the attorney-client privilege, and the presumption that records in the possession

of local agencies are public records does not apply to records that are privileged. *See* 65 P.S. §§ 67.102 and 305(a)(2). 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). 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). 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, e.g., Mezzacappa v. Northampton Cnty.*, OOR Dkt. AP 2022-2617, 2023 PA O.O.R.D. 240.

The Eisenstein Attestation states the records identified in the Exemption Log are “requests for or the provision of legal advice between client and counsel, and denote the legal issues or problems posed to or by counsel.” *See* Eisenstein Attestation ¶ 9. In relation to the three messages between Mark Szybist and Sam Robinson, the Supplemental Eisenstein Attestation states that these messages are communications where they exchanged thoughts regarding the legal work that Mark Szybist would perform, his process and strategy for engaging in such legal work and analysis, information necessary for the provision of legal advice, and the mental impressions and strategy of counsel. *See* Supplemental Eisenstein Attestation ¶¶ 9-11

The evidence submitted demonstrates that the Office withheld responsive communications that were exchanged among Office personnel and their legal counsel for the purpose of requesting

or providing legal advice and legal services. *See* Eisenstein Attestation ¶ 9; Supplemental Eisenstein Attestation ¶¶ 9-11. The Office contends that these communications have been maintained confidentially, and it identified all of the individuals listed in the Exemption Log as Office personnel and/or legal counsel. *See* Exemption Log. The evidence further demonstrates that the Office has not waived privilege. *See* Eisenstein Attestation ¶ 9; Supplemental Eisenstein Attestation ¶¶ 9-11. Accordingly, the OOR finds the Office has demonstrated that the messages, emails and email attachments identified in the Eisenstein Attestations and the Exemption Log are protected under the attorney-client privilege, and the OOR cannot order the Office to produce such records. *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); *Yoder v. Lancaster Cnty. Solid Waste Management Auth.*, OOR Dkt. AP 2016-0796, 2017 PA O.O.R.D. LEXIS 636 (mental impressions of attorneys are privileged material).⁵

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Office is to conduct a search for records responsive to Part 2 of the Request and provide all responsive records 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 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 according to court rules as per 65 P.S. § 67.1303, but 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.⁶ All documents or communications following the

⁵ Because the Office proved that the records identified in the Exemption Log are protected under the attorney-client privilege, the OOR need not address the Office's alternative grounds for denial of these records as internal, predecisional deliberations.

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

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: September 25, 2026

/s/ Catherine R. Hecker

CATHERINE R. HECKER
APPEALS OFFICER

Sent via the OOR portal to: Joshua Bonn, Esq.
Marc Eisenstein, AORO