



IN THE MATTER OF

V.

[illegible]

Docket No: AP 2020-0089

William Cluck, Esq. (“Requester”) submitted a request (“Request”) to the Pennsylvania Department of Conservation and Natural Resources (“Department” or “DCNR”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, records of an excavation at Dent’s Run in Elk County. The Department partially denied the Request, stating the certain records are sealed by a federal court order, protected by attorney-client privilege and do not exist. 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 Department is required to take further action as directed.

FACTUAL BACKGROUND

On November 22, 2019, the Request was filed seeking:

1. Search Warrant served on DCNR for entry onto state forest land at Dent's Run in 2018;
2. Communications between DCNR and Department of Justice (including United States Attorney office) regarding excavation at Dent's Run in 2018;
3. Documents pertaining to meeting(s) between DCNR and FBI and/or Department of Justice officials regarding Dent's Run site;
4. Documents evidencing objects belonging to Finders Keepers taken from Dent's Run site between 2012 and 2018; and
5. Any geophysical investigations of Dent's Run between 2005 and 2018.

On December 31, 2019, after extending the response period for thirty days pursuant to 65 P.S. § 67.902, the Department partially denied the Request, stating that the search warrant is sealed by federal court order, certain records do not exist in the Department's possession, custody or control and that certain records are protected by the attorney-work product doctrine and attorney-client privilege.

On January 14, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On January 27, 2020, the Requester submitted his argument, stating that the search warrant is not sealed by court order and cited to *Cluck v. Department of Conservation and Natural Resources*, No. 1683 C.D. 2018, 2019 Pa. Commw. Unpub. LEXIS 582 (Pa. Commw. Ct. October 24, 2019) ("*Cluck I*").¹ The Requester further states that the communications between DCNR and

¹ A copy of this unreported case has been included in this matter.

the Department of Justice cannot be privileged and that records of meetings must exist. The Requester also requested *in camera* review of the records.

On January 27, 2020, the Department submitted its position statement, arguing that a search warrant and records pertaining to meetings do not exist. The Department further states that the emails it withheld are protected by the attorney-client privilege and attorney-work product doctrine through the common interest doctrine. The Department also submitted an affidavit under the penalty of perjury from Audrey Feinman Miner, Esq., Chief Counsel for the Department.

On January 28, 2020, the OOR ordered the Department to provide the withheld emails for *in camera* review. On February 11, 2020, the Department submitted the emails for *in camera* review.

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).

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 law also states that an appeals officer may admit into evidence testimony,

evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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). Similarly, the burden of proof in claiming a privilege from disclosure is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011). 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The search warrant does not exist and the Federal Writ of Entry/Federal Seizure is not subject to access

The Department contends that there is no search warrant, as sought in the Request; however, it has interpreted the Request as seeking the Federal Order that is under seal. The RTKL defines “public record” as “[a] record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or *judicial order or decree* ; or (3) is not protected by a privilege.” 65 P.S. § 67.102 (emphasis added); *see also* 65 P.S. § 67.305(a)(3). Therefore, a record made confidential by court order is not a public record as a matter of law. *Hinton v. Northumberland County*, OOR Dkt. AP 2013-1533, 2013 PA O.O.R.D. LEXIS 925.

Here, Chief Counsel Miner attests:

The Department was never served a search warrant by the FBI and/or United States Attorney’s Office ...in this matter.

Rather, the Department was served with a Federal Writ of Entry which had a Seizure Warrant attached to it, collectively referenced as the Order. The Department interpreted the RTKL Request ... as if the Requester asked for a copy of the Federal Seizure Warrant.

The Order, which was reviewed in its entirety by the Commonwealth Court in camera, was found to be under seal.

The Commonwealth Court in *Cluck I* stated that,

[a] review of the Order reveals that, although filed under seal, the Order does not protect or otherwise prohibit disclosure of communications between the FBI and DCNR regarding the excavation at Dent’s Run. Furthermore, the Order does not provide any conceivable basis for the withholding of the requested records under the RTKL, with the sole exception being the Order itself, which is filed under seal.

No. 1683 C.D. 2018, *6.

Under the RTKL, an affidavit 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 competent evidence that the Department acted in bad faith or that additional responsive records exist, “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)). Based on the evidence provided, no search warrant exists. Furthermore, the Federal Seizure Warrant, as attested by Chief Counsel Miner is the federal order the Commonwealth Court has determined to be under seal in *Cluck I*.² Accordingly, the Federal Seizure Warrant is not subject to access under the RTKL.

2. The records are not subject to the attorney-client privilege or attorney-work product doctrine

The Department asserts that it withheld three email communications pursuant to the attorney-client privilege and attorney-work product doctrine. The emails in question were sent between the Department’s Chief Counsel and counsel for the United States Attorney’s Office after receiving a RTKL request seeking records that would implicate the Federal Order.

The RTKL excludes records subject to a privilege from the definition of “public record.” *See* 65 P.S. § 67.102. The RTKL defines “privilege” as “[t]he attorney-work product doctrine, the 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.” *Id.* 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

² The Requester asked the OOR to conduct an *in camera* review of the federal order; however, the Court in *Cluck I* has already determined that the federal order is under seal.

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. *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). An agency may not rely on a bald assertion that the attorney-client privilege applies; instead, the agency must prove all four elements. *See Clement v. Berks County*, 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 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 Pennsylvania Supreme Court has explained that the attorney-work product doctrine “manifests a particular concern with matters arising in anticipation of litigation.” *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011) (citing *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001) and stating that “[t]he ‘work product rule’ is closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation”)); *see also Heavens v. Pa. Dep’t of Env’t. 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”).

The Requester argues that the emails cannot be protected by privilege, stating “there is no conceivable basis to assert attorney client privilege on communications between DCNR and either the FBI or the assistant United States Attorney.” Here, Chief Counsel Miner attests:

Not provided to the Requester were 3 emails/email chain communications between myself and the Assistant U.S. Attorney regarding Requester’s first RTKL request [underlying *Cluck I*]. These 3 emails are protected by the Attorney Work Product/Attorney Client privilege.

The common interest doctrine applies, which is an exception to the general rule that attorney-client privilege is waived when privileged information is shared with a third party. The common interest doctrine allows for attorneys with the same or substantially similar legal interests to share privileged information without waiving attorney client or attorney work product privileges.

The withheld emails were made between counsel, in confidence, for the purposes of obtaining or providing legal assistance for my client, the Department.

The withheld emails were strategic communications between the U.S. Attorney’s Office and myself concerning the response to the RTKL requests.

We have a shared legal interest in responding to RTKL requests and ensuring compliance with the Order.

The common interest doctrine protects these discrete email messages between myself and the U.S. Attorney’s office.

The Department cites to *Audi of America v. Bronsberg & Hughes Pontiac, Inc.*, 255 F.Supp. 3d 561 (M.D. Pa. 2017), wherein the Court held that the common interest doctrine applied to commercial transaction for the sale of assets that had the potential to result in a legal challenge, which was being threatened, and which both parties had a shared legal interest in defending. The Court, in its discussion of the common interest doctrine stated:

Pennsylvania law recognizes the common-interest privilege, but the parties and the Court have uncovered relatively few decisions from Pennsylvania courts actually applying it or defining its reach. *See Karoly v. Mancuso*, 619 Pa. 486, 65 A.3d 301,

315 (Pa. 2013) (observing that “under the prevailing law of this Commonwealth, the joint-client or common-interest privilege could potentially apply”); *see also In re Condemnation by City of Phila.*, 981 A.2d 391, 396-98 (Pa. Commw. Ct. 2009); *Gelman v. W2 Ltd.*, 2016 U.S. Dist. LEXIS 14787, 2016 WL 8716248, at *3 (E.D. Pa. Feb. 5, 2016) (observing that Pennsylvania courts have given the common-interest privilege “very little attention”). The common-interest privilege is not a standalone privilege, but is in effect an extension of the attorney-client privilege, which protects counsel’s ability to communicate with counsel for another party with whom his client has a shared legal interest without waiving the attorney-client privilege.

Id. at 569-70; *see also Andritz Sprout-Bauer, Inc. v. Beazer East Inc.*, 174 F.R.D. 609, 636 (M.D. Pa. 1997) (The common interest doctrine protects communications between an individual and an attorney who representing someone else, if they form part of an on-going and joint effort to set up a common defense strategy.); *Pallares v. Kohn*, 650 F.3d 216, 290, n. 19 (3d Cir. 2011); *In re Grand Jury*, 211 F.Supp. 555, 558 (M.D. Pa. 2008). The party asserting the common interest doctrine, here the Department, must demonstrate:

1. The communications were made in the course of a joint defense effort;
2. The statements were designed to further the effort; and
3. The privilege has not been waived.

Andritz, 174 F.R.D. at 634.

While Chief Counsel Miner states that the responsive emails were strategic communications between the Department and US Attorney’s Office with a shared legal interest in responding to the RTKL request, it does not provide sufficient detail to conclude that the emails are privileged or are work product. In fact, the affidavit focuses more on the common interest doctrine. Reviewing the records *in camera*, the OOR determines that the emails do not contain information that is protected by the attorney-client privilege. None of the emails were for the purpose of securing a legal opinion or services and contain only general factual information such as the recitation of a RTKL request and notice of the Commonwealth Court ruling in *Cluck I*. Further, the emails, themselves, do not reveal that there was a joint defense effort between the

Department and the US Attorney's Office. Rather, the communications are more akin to a courtesy of keeping the US Attorney's Office apprised of the RTKL Request and the Commonwealth Court's ruling. Accordingly, even if there was sufficient evidence to establish the asserted common interest doctrine, the emails do not contain information protected by the attorney-client privilege.

With respect to the attorney-work product doctrine, after conducting *in camera* review of the three emails, only the second full sentence in the email from Chief Counsel Miner to US Attorney Newton on November 22, 2019 at 2:59 p.m. would reveal an attorney's opinion or mental impression. Because this sentence is protected by attorney-work product, we must determine whether there was waiver. In *Bagwell*, the Commonwealth Court noted that the "work product doctrine is not absolute but, rather, is a qualified privilege that may be waived." What constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances." See *Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 417 (Pa. Commw. Ct. 2014) (citations omitted); see also *Harsh v. Petroll*, 840 A.2d 404, 434 (Pa. Commw. Ct. 2003) (holding that the wide dissemination of material initially protected by the attorney-work product doctrine operates as a waiver of the protection), *aff'd on other grounds by*, 887 A.2d 209 (Pa. 2005).

In *Bousamara v. Excela*, the Court states that

Whereas disclosure to a third party generally waives the attorney-client privilege, the same cannot be said for application of the work product doctrine because disclosure does not always undermine its purpose. See *Bagwell, supra*; *Allphin, [Kittitas Cnty. v. Allphin]*, 190 Wn.2d 691, 416 P.3d 1232, 1243 n.13 (Wash. 2018)]. As the purpose of the doctrine must drive the waiver analysis, we hold that the work product doctrine is waived when the work product is shared with an adversary, or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it. This waiver rule comports with the prevailing view in state and federal courts across the country, and the rule's fact intensive structure requires evaluation on a case-by-case basis. *Allphin, supra*; *Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Court*, 2012 MT 61, 364 Mont. 299, 280 P.3d 240, 248 (Mont. 2012) ("Disclosure only waives the work

product protection if it is inconsistent with the maintenance of secrecy from the disclosing party's adversary.”) (quoting *U.S. v. Deloitte*, 610 F.3d 129, 140, 391 U.S. App. D.C. 318 (D.C. Cir. 2010); *Fox v. Alfini*, 432 P.3d 596, 604, 2018 CO 94 (Colo. 2018) (Hood, J., concurring) (“[V]oluntary disclosure of information to third parties does not ordinarily constitute a waiver of exemption from discovery under the work product doctrine, unless such disclosure is to an adversary in the litigation[.]”); *Chevron*, 633 F.3d at 165 (“it is only in cases in which the material is disclosed in a manner inconsistent with keeping it from an adversary that the work-product doctrine is waived.”); *Blattman v. Scaramellino*, 891 F.3d 1, 5 (1st Cir. 2018) (same); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 91(4) (2000) (“Work-product immunity is waived if the client, the client's lawyer, or another authorized agent of the client . . . discloses the material to third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it.”).

201 A.3d 967, 977-79 (Pa. 2019).

Here, the email containing work product was exchanged between non-adversarial parties relating to a RTKL and a federal order of interest to both parties. Because the emails contain the mental impression of counsel and both parties have an interest in not disclosing the communication, it is reasonable to believe that the US Attorney’s Office would keep the communications confidential as well. *See Deloitte*, 610 F.3d at 140. Accordingly, the Department may redact the second sentence of the November 22, 2019 email pursuant to the attorney-work product doctrine.

3. Records relating to meetings do not exist

The Department states that there are no records of meeting as sought in the Request. However, the Requester asserts that a March 13, 2018 email produced in response to *Cluck I* refers to a meeting between DCNR and the FBI and Department of Justice. The Requester argues that there must be documents associated with that meeting. Chief Counsel Miner attests:

The Department had no meetings with the FBI or the Department of Justice through the U.S. Attorney’s office.

The FBI and the Assistant U.S. Attorney appeared at my office unannounced and without warning on March 12, 2018. At that time, the FBI and the Assistant U.S. Attorney informed me that they were present to serve the Order on the Department.

I accepted service of the Order on behalf of the Department.

I did not take any notes when accepting service.

This was the only time I met with the members of the FBI and/or Department of Justice regarding this matter. Thus, there are no records for this portion of the RTKL request.

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records *Sherry supra*. Based on the evidence provided, the Department has met its burden of proving that no responsive records exist regarding meetings in the possession, custody or control of the Department. *Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the Department is required to provide the three withheld emails subject to 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 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. 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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

FINAL DETERMINATION ISSUED AND MAILED: March 17, 2020

/s/ Jill S. Wolfe

APPEALS OFFICER
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