



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**GERARD GREGA,  
Requester**

**v.**

**WEATHERLY AREA SCHOOL  
DISTRICT,  
Respondent**

:  
:  
:  
:  
:  
:  
:  
:  
:  
:

**Docket No: AP 2021-0206**

### **INTRODUCTION**

Gerard Grega (“Requester”) submitted a request (“Request”) to Weatherly Area School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the District’s invoices from Slusser Law firm. The District denied the Request, arguing stating that the invoices are subject to attorney-client privilege and certain invoices 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**, and the District is required to take additional action as directed.

### **FACTUAL BACKGROUND**

On December 17, 2020, the Request was filed, seeking:

Electronic copies of itemized hourly invoices paid (listed monthly) by the [District] to ‘The Slusser Law Firm PC’ during the entire previous 2019-2020 school year (July 1, 2019 through June 30, 2020) and this current 2020-2021 school year (July 1, 2020 up date of this request) for 1. all [District] Solicitor legal services (contractual, retainer, hourly, etc) and 2. all paid hourly invoices for [District’s]

delinquent tax collection services rendered by Slusser to [the District], per contract during these two interval periods listed.

On January 21, 2021, after invoking a thirty-day extension during which to respond. 65 P.S. § 67.902(b), the District denied the Request, arguing that invoices for Item 1 are exempt pursuant to attorney-client privilege and attorney-work product doctrine and that invoices responsive to Item 2 do not exist. The District provided an attestation made under the penalty of perjury from Teresa Barna, Secretary and records custodian for the District, attesting that invoices for delinquent tax collection services do not exist.

On February 1, 2021, 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 District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On February 10, 2021, the District submitted its verified position statement, supported by a statement made under the penalty of perjury from Jeffrey Rockman, Esq. The District states that the invoices are protected by attorney-client privilege and attorney-work product doctrine; however, it would provide invoices in redacted form to the Requester.<sup>1</sup>

On February 10, 2021, the Requester submitted a statement arguing that his name should not be redacted from the invoices.

On February 24, 2021, the Requester submitted his argument supported by his statement under the penalty of perjury. The Requester argues that he is interested in certain information in the invoices, but not the privileged information.

---

<sup>1</sup> The District raises an issue with the Requester submitting RTKL request as a school board member. The District provides a copy of its Board Policy No. 011.1 that establishes procedures for school board members to obtain information. Regardless of the District's position, this is not a consideration under the OOR's jurisdiction in determining the public nature of an agency record.

## 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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local 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)(1). The burden of proof in claiming a privilege 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 *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, “[t]he 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 District failed to provide sufficient evidence to support its denial of the invoices pursuant to attorney-client privilege and attorney-work product**

Here, the District asserts that the invoices are exempt pursuant to attorney-client privilege and attorney-work product doctrine. 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 Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). “[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.*). 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, 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 v. Excelsa Health*, 210 A.3d 967, 976 (Pa. 2019) (internal citations omitted); *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”). 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 quotation omitted).

Here, the Requester states in his appeal that:

Copies of REDACTED INVOICES, as necessary, acceptable. My interest is in our District budgetary COSTS and FREQUENCY of legal services utilized and NOT names/subjects/work-product ‘content’ of these legal services rendered.

He further explained that:

These privileges do not include the fees involved in charges for legal services. As I stated ...I am fully agreeable to accepting the name redacted paid invoices. I have absolutely no interest in obtaining any Student names that can be and should be redacted. My interest is in the aggregate totals of monthly solicitor costs of legal services rendered reflecting variable budgetary costs above and beyond the firms known annual retainer amount, which is fixed and paid in monthly increments.

On appeal, the District’s verified position statement indicates that it will provide hard copies of the law firm’s billing records/invoices containing the information as indicated above by the Requester. The Requester does ask the District not redact his name in the invoices.

In order to meet its burden of proof to withhold information, the agency must provide sufficient evidence. *But see Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements when construing exemptions). Under the RTKL, “a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*); *see also Office of the Dist. Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”) (citations omitted); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) (“Affidavits that are conclusory or merely parrot the

exemption do not suffice”) (citing *Scolforo*); *West Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) (“The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions”) (citing *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)). Based on the evidence submitted by the District, merely stating that the records are subject to the attorney-client privilege and attorney-work product doctrine is insufficient to meet the burden of proof to withhold the entirety of an invoice. Accordingly, the District must provide the invoices in the format in which they exist.<sup>2</sup>

## **2. The District must conduct a good faith search for the invoices in Item 2**

Here, the District asserts that invoices for the District’s delinquent tax collection services do not exist. Ms. Barna attests that:

in good faith searched the agency’s files to the best of my ability and that the records requested as set forth above do not exist. It is understood that this does not mean that the records do not exist under another spelling, another name, or under another classification.

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 record[.]” 65 P.S. § 67.901. The RTKL does not define the term “good faith effort” as used in Section 901 of the RTKL. In *Rowles v. Rice Township*, however, the OOR stated:

[I]n order for an agency to meet its burden that a good faith search was conducted in response to a FOIA request an agency must show that it has conducted a search reasonably calculated to uncover all relevant documents as established by relatively detailed and non-conclusory affidavits submitted in good faith by responsible officials.

---

<sup>2</sup> Because the Requester indicated that he would accept the invoices in redacted form, the Requester may indicate to the District what information he does not wish to obtain.

OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 857 F. Supp. 2d 129, 138-139 (D.D.C. 2012)) (citations omitted).

Additionally, the Commonwealth Court has held that an open-records officer's inquiry of agency members may constitute a "good faith effort" to locate records, stating that open-records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody, or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by Requestor.

*Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In Re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is "the open-records officer's duty and responsibility" to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

Here, the District did not provide any evidence of a good faith search for and ultimate determination of the nonexistence of such invoices. Accordingly, the District is required to conduct a search reasonably executed to locate the requested invoices and provide them to the Requester.

The OOR is mindful that an agency cannot produce records that do not exist within its "possession, custody or control" and, accordingly, is not ordering the creation of any records listed in the Request. Absent the District's provision of a sufficient evidentiary basis as to whether any responsive records exist in the first place, however, the OOR will order the disclosure of responsive public records. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 651.



## CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the District required to 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 Carbon County Court of Common Pleas. 65 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: February 26, 2021**

*/s/ Jill S. Wolfe*

---

APPEALS OFFICER  
JILL S. WOLFE, ESQ.

Sent to: Gerard Grega (via email only);  
Jeffrey Rockman, Esq. (via email only);  
Teresa Barna (via email only)

---

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