pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
SIMON CAMPBELL,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2018-0266**
	:	
MILLCREEK TOWNSHIP SCHOOL	:	
DISTRICT,	:	
Respondent	:	

INTRODUCTION

Simon Campbell ("Requester") submitted a request ("Request") to the Millcreek Township School District ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking legal invoices and correspondence between the District and its solicitors. The District sought prepayment of duplication fees prior to processing the Request and, as a result of the Requester's failure to remit payment, subsequently denied the Request. 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**, **denied in part** and **dismissed as moot in part**, and the District is required to take further action as directed.

FACTUAL BACKGROUND

On December 21, 2017, a 13-Item Request was filed, seeking:

Request #1. The most recent Rule 1.5(b) written statement from Attorney William Weichler (for his law firm Conner Riley Friedman & Weichler) being used as the basis for charging fees to the Government for the legal services described in the media story (i.e. the litigation with Lou Alitoa).

Request #2. Minutes of the school board meeting/s at which William Weichler (or his law firm Conner Riley Friedman & Weichler) was approved to be retained as counsel for Superintendent Hall and the School Board as referenced in media story.

Request #3. The most recent Rule 1.5(b) written statement from Attorney David Rhodes (or his law firm Elderkin Law Firm) being used as the basis for charging fees to the Government for the legal services described in the media story (i.e. the litigation with Lou Aliota).

Request #4. Minutes of the school board meeting/s at which David Rhodes (or his law firm Elderkin Law Firm) was approved to be retained as counsel to the Government to conduct an investigation into Lou Aliota as described in the media story.

Request #5. All invoices to date submitted to the Government by William Weichler (or his law firm Conner Riley Friedman & Weichler) and Attorney David Rhodes (or his law firm Elderkin Law Firm) for all legal work performed by these lawyers/law firms as described in the media story.

Request #5(a). All court filings (including any/all exhibits) made to date by all parties and/or proposed parties in the litigation with Lou Aliota described in the media story.[1]

Request #6. The official censure (i.e. the exact wording of it) of Lou Aliota approved at a February 2017 school board meeting as described in the media story, and a copy of the school board policy that Mr. Aliota allegedly violated.

Request #7. *The phrase "any government lawyer" used in this request shall mean any lawyer at the law firms of a) Conner Riley Friedman & Weichler, b) Elderkin Law Firm, and c) Knox McLaughlin Gornall & Sennett:* All written communication exchanges (including those on personal communication devices) that occurred between the dates January 1, 2017 and December 19, 2017 between any government lawyer (operating in a representative capacity for the Governor) and School Board President John DiPlacido or Superintendent William Hall, that in whole or in part references the actions or behavior of School Board Director Louis Aliota.

[1] The Request included two Items marked as #5. The District renumbered the Request to include a "#5(a)" in order to avoid the confusion of having two Items labeled #5. The OOR will proceed with the numbering used by the District.

> Request #8. All RTKL requests received by the Government between the dates of January 1, 2017 and December 19, 2017 that sought communications between and/all Millcreek Township School Board Director/s and Simon Campbell (me).
>
> Request #9. All written communication sent from Millcreek Township School District solicitor Timothy Sennett (of the law firm Knox McLaughlin Gornall & Sennett) between the dates January 1, 2017 and December 19, 2017 to any/all Millcreek Township School Board Director/s at their government e-mail addresses that sought information about each School Board Director's communications (actual, perceived or presumed) with Simon Campbell (me); and any responses received by Attorney Sennett from any Board Director to such request/s.
>
> Request #10. All invoices dated between January 1, 2017 and December 19, 2017 from the law firm Knox McLaughlin Gornall & Sennett that includes billing for legal work performed for the Government relating to processing RTKL requests and/or RTKL appeals.
>
> Request #11. A copy of the solicitation correspondence (typically a letter from PSBA CEO Nathan Mains) received from PSBA between the dates January 1, 2017 and August 1, 2017 in which PSBA encouraged the Government to renew membership in PSBA for the school year 2017-2018; and all descriptions of all membership options that was included with, or sent separately to, that solicitation.
>
> Request #12. A copy of the correspondence sent from the Government to PSBA in response to the solicitation referenced in Request #11 in which the Government informed PSBA what membership option it had selected for 2017-2018 school year.

On January 5, 2018, the District invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On January 22, 2018, the District sought a prepayment of fees in the amount of $200.00. On January 22, 2018, the Requester responded to the District, refusing to make payment due to the Requester seeking electronic copies of records, and stating that he would consider his Request as being deemed denied. On February 5, 2018, the District responded to each Item of the Request, granting Items 1-4, 5(a), 6, 11, and 12. The District partially denied Items 5, 7 and 10, providing responsive records while redacting portions of the records that it argues are protected by the attorney-client privilege. Additionally, the District denied Items 8 and 9 of the Request, stating that no responsive records exist. However, the District denied the Request as a whole due to the Requester's failure to remit prepayment pursuant to 65 P.S. § 67.1307(h). The

District notified the Requester that the total payment due for the requested records was $252.00, including $236.50 for copies and $15.60 for postage, and that the requested records would not be provided to the Requester until all fees were paid.

On February 14, 2018, the Requester appealed to the OOR, asserting that he submitted payment for fees on February 7, 2018, but did not receive any records from the District, and stating ground 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. *See* 65 P.S. § 67.1101(c).

On February 22, 2018, the District stated that it received payment from the Requester and provided the Requester with copies of responsive records, while also reiterating that no records responsive to Item 9 exist. The District further stated that 107 pages of records originally believed to be responsive to Item 7 the Request, were later determined not to be responsive, while two additional pages of records were located as being responsive to Items 11 and 12. As such, the District refunded the Requester in the amount of $27.70.

The Requester submitted several position statements to the OOR, arguing that an email responsive to Item 9 exists within the District's possession, custody or control, while also challenging fees, asserting that he requested electronic copies and that redactions to responsive records were made electronically.

On February 26, 2018, David J. Rhodes, Esq., of the Elderkin Law Firm, submitted a request to participate in the appeal, asserting that he served as Special Counsel to the District during a period of time relevant to the Request. Attorney Rhodes also submitted a sworn affidavit and a privilege log identifying twelve responsive records, two of which were redacted to reflect information protected by attorney-client privilege, as well as settlement discussions. Because

Attorney Rhodes' affidavit and privilege log were also submitted by the District and made part of the record in this appeal, and because Attorney Rhodes participated in this appeal by submitting evidence regarding redactions made to responsive records in his possession from his legal representation of the District, his participation as a direct interest party is unnecessary and duplicative, and the request to participate is denied. *See* 65 P.S. § 67.1101(c)(2) (permitting an appeals officer to grant a request to participate if "the appeals officer believes the information will be probative"); 65 P.S. § 67.1102(a)(2) (permitting an appeals officer to "limit the nature and extent of evidence found to be cumulative").

On February 27, 2018, the District submitted a position statement, reiterating its reasons for denial. The District also submitted the sworn affidavit previously submitted by Attorney Rhodes on February 26, 2018, as well as the sworn affidavits of Linda Sitter, Open Records Officer for the District, who verifies the contents of the position statement, and Timothy M. Sennett, Esq., Solicitor for the District. The District also provided a privilege log of withheld records.

On March 19, 2018, at the request of the OOR, the District submitted a supplemental position statement, indicating that the District was providing a refund to the Requester in the amount of $26.25 for fees associated with twenty-eight legal invoices that did not require redactions before being disclosed to the Requester. The District also argued that it charged permissible fees for redactions made to responsive records. The District reiterated that no records responsive to Item 9 exist.

On March 30, 2018, following the Requester's agreement to an extension of time to issue the Final Determination in this matter, *see* 65 P.S. § 67.1101(b)(1), the OOR directed the District to submit unredacted copies of the withheld records in this matter for *in camera* review. On March 30, 2018, the OOR also sought copies of unredacted records in order to perform its *in camera*

review. On April 12, 2018, the District submitted a compact disc of redacted and unredacted records to the OOR for *in camera* review. On April 12, 2018, Attorney Rhodes submitted records from the Elderkin Law Firm for *in camera* review.

On May 9, 2018, the Requester submitted a position statement, arguing that he did not receive copies of unredacted records sent by the District to the OOR. On May 9, 2018, the OOR notified the District that the compact disc provided for *in camera* review did not include all of the responsive records. The OOR directed the District to provide all withheld records for *in camera* review. The OOR also directed the District to provide copies of all redacted records to the OOR and the Requester. On May 14, 2018, the District re-submitted copies of all redacted and unredacted records to the OOR, and the OOR performed *in camera* review.[2]

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).

[2] The District provided all records, redacted and unredacted, to the OOR for *in camera* review and did not provide copies of the redacted records to the Requester at the time that the records were submitted to the OOR. The Requester challenges the submission of the redacted records to the OOR without a copy to the Requester. While the District argues that it is not required to provide *in camera* records to the Requester, the OOR clearly directed the District to provide redacted records, separate from *in camera* records, to the Requester. However, as the District previously provided the Requester with the records upon receiving payment from the Requester, and the Requester acknowledges receipt of those records, and has received all inspection indexes and privilege logs associated with the records that were verified by the District as being the redacted responsive records provided to the Requester, the OOR concludes that nothing in the RTKL requires that the District provide responsive records to a Requester more than once in response to a single Request.

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 performed an *in camera* review and has the necessary information and evidence before it to properly adjudicate the matter.

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). 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); *Pa. Dep't of Transp. v. Drack*, 42 A.3d 355, 364 (Pa. Commw. Ct. 2012) ("[T]he RTKL places an evidentiary burden upon agencies seeking to deny access to records even when a privilege is involved"); *In re: Subpoena No. 22*, 709 A.2d 385 (Pa. Super. Ct. 1998). 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)). "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. To the extent responsive records have been provided, the appeal is dismissed as moot

During the course of the appeal, after receiving payment for copying and postage fees from the Requester, the District provided responsive records. Certain responsive invoices and emails were redacted. As a result, the appeal as to the unredacted portions of the records is dismissed as moot.

2. The Requester may challenge the completeness of the records provided and redactions made to responsive records provided on appeal

The District argues that because the Requester failed to remit payment for copying and postage fees and filed the present appeal before receiving responsive records, the appeal should be denied. In *Indiana Univ. of Pa. v. Loomis*, a requester was granted access to redacted records; however, rather than paying for the assessed copy charges and obtaining the records, the requester appealed directly to the OOR, challenging the fees and redactions. 23 A.3d 1126 (Pa. Commw. Ct. 2011). The Commonwealth Court held that because the RTKL allows an agency to withhold access to records until all fees are paid, *see* 65 P.S. § 67.901, and the requester did not pay the

copy fees for the redacted records, "the OOR should have denied his appeal." 23 A.3d at 1128; *but see Pa. Dep't of Transp. v. Drack*, 42 A.3d 355, n.8 (Pa. Commw. Ct. 2012) (distinguishing *Loomis* because it "arose in the context of records in the possession of third parties").

In *Buehl v. Pa. Dep't of Corr.*, No. 198 C.D. 201, 2015 Pa. Commw. Unpub. LEXIS 552 (Pa. Commw. Ct. 2015), the Court held that that a requester could timely file an appeal both from the date of an agency's response and the date when an agency mailed responsive records. Here, although after the response, the Requester submitted payment to the District before the appeal was filed, and upon receipt of payment, the District provided the Requester with responsive records on appeal. Although the appeal was filed before the Requester received the records, pursuant to *Buehl*, the Requester timely appealed the District's February 5, 2018 response and nothing prevents the Requester from challenging the redactions to or the completeness of the responsive records provided upon his receipt of the records.

3. The District has established that certain records do not exist within its possession, custody or control

The District argues that no records responsive to Items 8 and 9 exist within the District's possession, custody or control. Additionally, the District argues that it granted Items 1-4, 5, 5(a), 6, 11 and 12, and that no additional records exist. In support of its position, the District submits the sworn affidavit of Linda Sitter, Open Records Officer for the District, who attests as follows:

> 3. Regarding Request #8, I reviewed the Request at issue, and performed an appropriately designed search and review of the records of the School District and determined that no records exist which would be responsive to a request for Right-to-Know requests received by the School District between the dates of January 1, 2017 and December 19, 2017 that sought communications between and/all Millcreek Township School Board Director's and Simon Campbell.
>
> 4. Request #9 was for "[a]ll written communications sent from the Millcreek Township School District solicitor Timothy Sennett (of the law firm Knox McLaughlin Gornall & Sennett) between the dates of January 1, 2017 and December 19, 2017 to any/all Millcreek Township School Board Director/s at

their government e-mail addresses that sought information about each School Board Director's communications (actual, perceived or presumed) with Simon Campbell (me); and any responses received by Attorney Sennett from any Board Director to such request/s." *(sic)*

5. Following my review of Request #9 while originally facilitating the [R]equest, I performed an appropriately designed search and review of the records of the School District, and determined that no records existed which would be responsive to the Request.

6. Following the issuance of the Final Response, and after review of the filings by the Requester which specifically alleged that an email which was responsive to Request #9 did exist, I took steps identified in the letter memorandum drafted by Attorney Wachter, including (1) having a search performed of the School District's server for any emails from Attorney Sennett from any or all of the Board members during 2017, and upon review, determined that none existed which were responsive to the Request; and (2) inquired, in writing, with the Board Members, as to whether any Board Members had in their possession any such emails. Mr. Aliota did not respond in writing. As the information from Mr. Campbell alleged that the email was sent to all School Board Directors, that conclusion that no such email did in fact exist was confirmed.

7. Also, upon receipt of the Request, the School District performed a good faith search of its records, and provided notification to all relevant attorneys, to obtain responsive records for all requests.

8. Upon completion of the above noted searches and inquires, it was determined that, other than the records which were disclosed to the Requester, no further records exist in the possession custody or control of the School District that are responsive to the [R]equest and are subject to disclosure.

Additionally, in its position statement, the contents of which were verified by Ms. Sitter, the District states that all records responsive to Item 5 of the Request were provided to the Requester, and that no redactions were made to the responsive records. Furthermore, Timothy Sennett, Esq., the District's Solicitor, attests that he searched his emails and found no records responsive to Item 9 of the Request. Attorney Sennett also attests that he "inquired with Mr. Aliota as to whether he received the email requesting that he review his records to identify any emails which may have been responsive to Request #9. Ultimately, Mr. Aliota stated that he received the

request, he reviewed his emails and that he concluded he did not have any such emails." Additionally, Attorney Sennett attests that "Mr. Aliota indicated that he was not aware of any such emails. Also, during this exchange Mr. Aliota stated that he nor any one representing him, had any conversations with [the Requester] or exchanged any emails with [the Requester]."

Under the RTKL, a sworn affidavit may serve as sufficient evidentiary support. *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). Although the Requester argues that an email responsive to Item 9 of the Request exists, in the absence of any competent evidence that the District acted in bad faith or that additional records responsive to the Request exist, "the averments in [the affidavit] 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)). Based on the evidence provided, the District has demonstrated that no records responsive to Items 8 and 9, and other than the records that have been provided, no additional records responsive to Items 1-4, 5, 5(a), 6, 11 and 12, exist within its possession, custody or control. *See Hodges*, 29 A.3d at 1192.

4. The District has proven that certain records responsive to Items 7 and 10 of the Request may be redacted pursuant to the attorney-client privilege and attorney-work product doctrine

The District redacted records responsive to Items 7 and 10 of the Request, arguing that the information is protected by the attorney-client privilege and the 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 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 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 Envtl. 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").

In support of its redactions pursuant to the attorney-client privilege and the attorney-work product doctrine, Timothy Sennett, Esq., attests as follows:

1. I am the Solicitor for the Millcreek Township School District…and have served in such capacity during all relevant times and have personal knowledge of the facts contained herin.

2. Attached are two documents. The first is a Privilege Log pertaining to written communications and is attached hereto as Exhibit A. The second is Privilege Log pertaining to legal invoices and is attached hereto as Exhibit B.

3. Exhibit A contains written communications that were redacted for the purpose of protecting certain information which is protected by attorney-client privilege or the attorney-client work product doctrine.

4. Exhibit B contains descriptions of work performed for the School District that were redacted for the purpose of protecting certain information which is protected by attorney client privilege or the attorney-client work product doctrine.

5. The School District is a client of the Knox Firm and has been a client during all relevant times. All individuals at the Knox Firm who were party to the communications at issue were either attorneys performing legal services for the School District, or their subordinates.

6. The purpose of the communications protected by attorney-client privilege was to secure legal services, and to facilitate such legal services. The information contained therein was transmitted outside the presence of strangers, and confidentiality of the same was expected by the client. The redactions on the invoices, if disclosed would disclose the content of such attorney-client privileged information.

7. The School District claims the privilege as it pertains to the communications and the invoices, and it has not been waived.

8. Additionally, certain of the communications as identified on Exhibit A, and certain invoices identified on Exhibit B, contain the mental impressions and opinions regarding various matters that were either in ongoing litigation or were matters of potential litigation.

a. Item 7

The OOR has conducted an *in camera* review of the redactions made to communications responsive to Item 7 of the Request. The first set of records at issue, as identified in Inspection Index – Request #7, Knox McLaughlin Gornall and Sennett Records and Connor Riley Friedman & Weichler Records, contain limited redactions, that if disclosed, would reveal information protected by the attorney-client privilege and the attorney-work product doctrine. The records contain requests for legal advice from District representatives and responsive legal advice, analysis and opinions from the District's Solicitors, including a legal memorandum regarding a specific District issue.

The second set of records at issue are records submitted by David Rhodes, Esq. of the Elderkin Law Firm, as identified by Inspection Index – Elderkin Law Firm Records. In support of redactions made regarding the responsive Elderkin Law Firm records, the District submitted the affidavit of Attorney Rhodes, who attests as follows:

1. I served as Special Counsel to the Millcreek Township School District … during a period relevant to the Right-to-Know [R]equest at issue and have personal knowledge of the facts contained herein.

2. I received notice of the appeal in this matter from Attorney Wachter on February 20, 2018.

3. Upon receipt of the original [R]equest I reviewed records which could be responsive to the [R]equest, and supplied copies of the potentially responsive records to the School District.

4. Two of the responsive records contain information subject to settlement discussions in unrelated tax assessment litigation. The redactions are highlighted in the Privilege Log attached hereto as Exhibit A.

5. The client communications identified on Exhibit A above are protected by the attorney-client privilege.

6. I represented the School District during the period of time that the two communications at issue were sent.

7. The purpose of the communications at issue were to inform my client as to the status of ongoing tax assessment litigation. The information contained therein was transmitted outside the presence of strangers, and confidentiality of the same was exempted by the client.

8. The School District claims the privilege as it pertains to the emails, and it has not been waived.

The Elderkin Law Firm disclosed 12 records responsive to Item 7, two of which were redacted pursuant to the attorney-client privilege. The OOR's *in camera* review of the limited redactions indicates that the withheld portions reveal information regarding legal strategy pertaining to the course of action regarding the settlement of a tax assessment matter.

Accordingly, based on the evidence submitted and the OOR's *in camera* review, the redactions made to the records responsive to Item 7 of the Request are permitted, as disclosure of the redacted information would reveal privileged material.

b. Item 10

Item 10 of the Request seeks legal invoices. The Pennsylvania Supreme Court discussed, in *Levy v. Senate of Pennsylvania*, the attorney-client privilege in regard to descriptions of legal services contained within legal invoices. 65 A.3d 361, 373 (Pa. 2013) ("[T]he 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"). 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. at 373-74 (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).

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).

Using the *Levy* decisions as a guide, the OOR has conducted an *in camera* review of the legal invoices. Based upon the evidence provided, as well as the OOR's *in camera* review, the District permissibly redacted the legal invoices. The entries referenced in the District's Inspection

Index – Request #10, contain descriptions of legal services that would disclose legal strategy, including the identification of particular matters that were researched during the course of legal representation of the District, and, in some cases, detailed descriptions of the legal work resulting from those matters. Furthermore, the disclosure of these entries would reveal the specific contents of confidential communications between the District and its attorneys, or would reveal the attorneys' legal strategy and theories, opinions, mental impressions and conclusions regarding various aspects of the litigation. Accordingly, the District has met its burden of proving that these entries or portions of the entries are protected by the attorney-client privilege and the attorney-work product doctrine. *See Spaid v. Borough of Irvona*, OOR Dkt. AP 2014-0180, 2014 PA O.O.R.D. LEXIS 517.

5. The names of individuals 17 years of age or younger are exempt from disclosure

The District asserts, in its verified position statement, that it withheld the name of a minor who is 17 years of age or younger. Section 708(b)(30) of the RTKL expressly exempts from public disclosure "[a] record identifying the name, home address or date of birth of a child 17 years of age or younger." 65 P.S. § 67.708(b)(30). Based on the evidence submitted and the OOR's *in camera* review, the District permissibly redacted records identifying the information of a child 17 years of age or younger.

6. Personal cellular telephone numbers may be redacted

The District asserts that it redacted personal identification information from the records. Section 708(b)(6) of the RTKL expressly exempts from disclosure "personal identification information … [including] [a] record containing… home, cellular or personal telephone numbers … [and] personal e-mail addresses[.]" 65 P.S. § 67.708(b)(6)(i)(A). Based on the OOR's *in*

camera review, the District permissibly redacted the personal cellular telephone number of a District Board Member.

7. The fee charged by the District for redacted records was permissible

The Requester challenges the fees assessed by the District for records that exist electronically. Specifically, the Requester argues that because the District provided paper copies of responsive records, that it made electronic redactions to, he should not have been charged copying and postage fees for electronic redactions. The Requester argues that "[t]he released records – hundreds of pieces of paper – existed in electronic medium and were redacted in electronic form." The District, in its verified position statement, asserts that the only records that were provided in paper form and which were redacted were those records responsive to Items 10 of the Request.

Pursuant to Section 701 of the RTKL, "[a] record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists." 65 P.S. § 67.701. The RTKL does not define "medium"; however, the OOR has defined it "as the substance through which something is transmitted or carried, a 'means,' such as on paper or on the hard-drive or on a database or over the internet." *Acton v. Fort Cherry Sch. Dist.*, OOR Dkt. AP 2009-0926, 2009 PA O.O.R.D. LEXIS 786, *aff'd*, No. 2010-719 (Wash. Com. Pl. July 26, 2011), *aff'd*, 38 A.3d 1092 (Pa. Commw. Ct. 2012), *petition for allowance of appeal denied*, 57 A.3d 72 (Pa. 2012). Here, the Requester states that he sought "all requested information in electronic form via electronic medium (email or web-link preferred but I will accept CD/USB stick delivery if needed). I will only accept paper copies if no electronic form of the requested information exists."

The District asserts that its calculation of fees was proper. Section 1307 of the RTKL provides that the OOR has the authority to establish fees for duplication by photocopying for Commonwealth and local agencies. *See* 65 P.S. § 67.1307(b)(1)(i). Pursuant to this authority, the OOR has approved a Fee Structure and posted the information on its website. *See id*. The OOR has approved fees up to $ 0.25 a page for the duplication of records as set forth in the OOR's Fee Schedule. The RTKL also allows an agency to charge for postage, provided the fee does "not exceed the actual cost of mailing." *Id.*

In support of the District's position regarding fees assessed where redactions were made, Timothy Wachter, Esq. attests as follows:

1. I am a Shareholder at Knox McLaughlin Gornall & Sennett, P.C. (the "Knox Firm") the law firm which, through the services of Timothy M. Sennett, serves as Solicitor for the Millcreek Township School District….

2. Among other services I provide, I serve as Right-to-Know Law counsel to the School District….

5. The [R]equest contained thirteen (13) individual requests for information, some of which involved the School District's interactions with attorneys from other law firms who were engaged by the School District to serve as conflict counsel due to legal conflict with the interest held by the Knox Firm. Attorney Weichler, a member of the law firm of Connor Riley Friedman & Weichler, and Attorney David Rhodes, a member of the Elderkin Law Firm, served as relevant conflict counsel.

6. Specifically, Request #5, which was a request for invoices submitted to the School District by Attorneys Weichler and Rhodes, and Request #7, which was a request for certain written communications between all School District Attorneys involved in a particular situation, including Attorney Sennett, Weichler and Rhodes, implicated records that potentially contained information protected by attorney-client privilege or the attorney-work product doctrine.

7. As Attorneys Weichler and Rhodes were hired as conflict counsel due to a legal conflict held by the Knox Firm, I was not able to, on behalf of the School District, either identify or review potentially responsive records involving Attorneys Weichler or Rhodes.

8. I was unable to review such records because my review of such unredacted records could potentially violate the privileges claimed by the School District.

9. Accordingly, I forwarded the request to Attorneys Weichler and Rhodes and requested that they, as conflict counsel and contractors to the School District, forward copies of any responsive records after they were reviewed and appropriately redacted.

10. At current issue within the appeal, Attorney Rhodes and Attorney Weichler forwarded hard copies of communications responsive to Request #7. Such copies constituted 376 pages. There were no redactions on these records.

11. Regarding [R]equest #10, ninety-six (96) total invoices were identified as being responsive to the Request.

12. The Knox Firm sends paper copies of invoices to the School District. The invoices are generated by an electronic billing system maintained by the Knox Firm. In order to identify responsive invoices, copies of all potentially responsive invoices were printed from the Knox Firm billing system and then they were reviewed. At the time of facilitating the [R]equest it was believed that the system could only print final invoices.

13. Following notification of receipt of the copying and postage fees, and reviewing the legal positioning of the matter as a result of the intervening appeal that was filed by the Requester, my office began redacting the correspondence from the Knox Law Firm that was responsive to Request #7 and the invoices that were responsive to Request #10.

14. The Knox Firm invoices were scanned for the purpose of facilitating electronic redactions. Sixty-eight (68) of the ninety-six (96) invoices were redacted. Following the completion of the redactions, the redacted records were printed and hard copies of all of the invoices were provided to the School District.

15. At the time that the [R]equest was being processed, it was believed that the Knox Firm billing system could not generate an electronic invoice and could only print hard copies of the invoices. During the pendency of this matter, and after further research, it was determined that electronic copies of the invoices could be produced. Of the ninety-six (96) total invoices, twenty-eight (28) did not contain information which was necessitated redactions as evidence on Exhibit B of Attorney Sennett's Affidavit previously submitted. The twenty-eight (28) invoices which were produced in paper copy but were not redacted constituted 105 pages. At $.25 per page, those invoices generated $26.25 in copying fees. The copying fees will be refunded to the Requester.

The District initially notified the Requester that that the fees sought represented copying costs of $.25 per page for 946 pages of records and $15.60 for postage, for a total amount of $252.00. The

Requester remitted payment to the District in the amount of $252.00. During the course of the appeal, the District provided the Requester with two refunds in the amounts of $27.70 and $26.25, respectively. The District explained in its verified position statement that the only redacted records provided in paper form were legal invoices responses to Item 10 of the Request. The District provided sixty-eight invoices, totaling 456 pages that were redacted by the Knox Firm. The District has established that it only received hard copies of legal invoices from the Knox Firm and that copying was necessary in order for the District to make necessary redactions.

Because it was necessary for the District to print copies of legal invoices in order to make redactions, the District is permitted to charge $.25 per page for the redacted records. *See Nolen v. Philadelphia District Attorney's Office*, OOR Dkt. AP 2017-2180, 2018 PA O.O.R.D. 198 (where records were scanned to make electronic redactions the agency was permitted to charge duplication fees).

However, the Requester argues that he is "owed a refund on all law firm produced records." Attorney Wachter attests that Attorney Rhodes and Attorney Weichler forwarded hard copies of communications responsive to Item 7 of the Request, and that copies of these records constituted 376 pages. While hard copies can be printed in order to make redactions, here, Attorney Wachter attests that no redactions were made to the 376 pages. As the District has not submitted evidence to establish that the 376 pages of responsive communications do not exist in electronic form as sought in the Request, the Requester is owed a refund for such records.

8. The District did not act in bad faith

The Requester asks the OOR to find that the District acted in bad faith. While the OOR may make findings of bad faith, only the courts have the authority to impose sanctions on agencies.

Here, the OOR finds no evidence that the District acted in bad faith and, accordingly, declines to make a finding of bad faith.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part, denied in part** and **dismissed as moot in part**, and the District is required to refund the portion of the duplication fee charged for unredacted records that exist electronically, 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 or petition for review to the Erie 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. 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 website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: June 11, 2018

/s/ Kathleen A. Higgins

_____

APPEALS OFFICER
KATHLEEN A. HIGGINS, ESQ.

Sent to: Simon Campbell (via email only);
Linda Sitter (via email only);
Timothy Wachter, Esq. (via email only)

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