



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION ON REMAND

<b>IN THE MATTER OF</b>	:
	:
<b>DAVID HOMMRICH and</b>	:
<b>SUNRISE ENERGY, L.L.C.</b>	:
<b>Requester</b>	:
	:
<b>v.</b>	<b>: Docket No.: AP 2017-0079</b>
	:
<b>PENNSYLVANIA PUBLIC UTILITY</b>	:
<b>COMMISSION,</b>	:
<b>Respondent</b>	:
	:
<b>FIRST ENERGY CORP., INC.,</b>	:
<b>Direct Interest Participant</b>	:

David Hommrich, on behalf of Sunrise Energy, L.L.C. (collectively, the “Requester”), submitted a request (“Request”) to the Pennsylvania Public Utility Commission (“Commission”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking emails and correspondence between the Commission and First Energy Corporation (“First Energy”) regarding certain litigation. The Commission denied the Request, arguing the requested records were protected by the attorney work-product doctrine, and the Requester appealed to the Office of Open Records (“OOR”).

Before the OOR, the Commission reiterated its grounds for denial and also argued that the requested records were also protected by the ethics-based rule of confidentiality and subject to the exclusive authority of the Pennsylvania Supreme Court to regulate the practice of law, Pa. Const. Art. V, § 10(c). Rejecting the Commission’s argument that its emails were subject to the common

interest doctrine,<sup>1</sup> the OOR held that the Commission waived the attorney work-product doctrine when it shared the records with First Energy. Furthermore, the OOR rejected the Commission's argument regarding the ethics-based rule of confidentiality because the Commission was not a litigant in the litigation referenced in the Request.<sup>2</sup> Accordingly, the OOR granted the appeal and ordered disclosure of the requested records.

The Commission filed a further appeal with the Commonwealth Court. Before the Commonwealth Court, the Court, *inter alia*, remanded the matter to the OOR to determine whether they were protected by the attorney work-product doctrine, and ordered the Commission to notify First Energy of the proceedings in order to permit First Energy to assert any defenses to disclosure.

On remand to the OOR, the Commission submitted a position statement, supported by the affidavit of Robert F. Young, Esq., the Commission's Deputy Chief Counsel. In its submission, the Commission argues that certain email exchanges do not document a transaction or activity of the Commission, and, therefore, are not "records" for purposes of the RTKL. *See* 65 P.S. § 67.102 (defining "records"). The Commission further argues that other records are protected by the attorney work product doctrine. Pursuant to the Commonwealth Court's order, the Commission submitted a privilege log describing the records and the bases for exemption; the Commission also submitted the records for the OOR's *in camera* review. In his affidavit, Deputy Chief Counsel Young attests that all records responsive to the Request were communications between legal counsel for the Commission and legal counsel for First Energy regarding the Commission's participation as *amicus curie* in certain litigation regarding the Commission's jurisdiction. Deputy

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<sup>1</sup> The "common interest doctrine" is an exception to the waiver of the attorney-client privilege where records are shared with a third party which shares a common legal interest with the party claiming the privilege. *In re: Condemnation by the City of Phila.*, 981 A.2d 391 (Pa. Commw. Ct. 2009).

<sup>2</sup> The ethic-based rule of confidentiality protects information contained within an attorney's litigation file. *City of Pgh. v. Silver*, 50 A.3d 296 (Pa. Commw. Ct. 2012).

Chief Counsel Young further attests that the Commission and First Energy shared a common legal interest versus an adversary in that litigation, *i.e.*, the Requester.

Also on remand to the OOR, the Commission notified First Energy of the pending proceedings and advised First Energy of its right to participate. *See* 65 P.S. § 67.1101(c) (permitting the participation of third parties with a direct interest in the records). Thereafter, First Energy submitted a position statement, supported by the affidavits of Charles Fullem, Director of Rates for First Energy; John F. Povilatis, Esq., outside counsel for First Energy; and, Tori Giesler, Esq., Regulatory Attorney for First Energy. In its submission, First Energy argues that the requested records are protected either by the attorney-client privilege or the attorney work-product doctrine. First Energy further argues that these privileges are not waived by virtue of disclosure to another party, the Commission, because the Commission and First Energy possess a common legal interest, and, therefore, these records are subject to the common interest privilege.

Finally, during the pendency of these proceedings, the Commission submitted the intervening decision of the Pennsylvania Supreme Court in the matter of *G. BouSamra, M.D. v. Excelsa Health*, 210 A.3d 967 (Pa. 2019), setting forth the standard for determining waiver of the attorney work-product doctrine. Pertinently, the Commission argues that *BouSamra* holds that waiver will be found only where the information is shared with an adversary or disclosed in a manner which significantly increases the likelihood that an adversary will obtain it. Therefore, the Commission argues, because those factors are not present, the OOR cannot find waiver of the attorney work-product doctrine.

The sole issue on remand is whether the requested records are protected from disclosure by the attorney work-product doctrine.<sup>3</sup> The attorney-work product doctrine prohibits disclosure

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<sup>3</sup> The Commission also claims that certain records do not document a transaction or activity of the Commission, and, therefore, are not records, 65 P.S. § 67.102; however, this issue is beyond the scope of the Court's remand order and

“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 underlying purpose of the work product doctrine is to guard the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case.” *Commonwealth v. Sandusky*, 70 A.3d 886 (Pa. Super.2013), *appeal denied*, 81 A.3d 77 (Pa. 2013). The purpose is not to shield “mundane and uninforming” information. *Valenti v. Allstate Ins. Co.*, 243 F.Supp.2d 200, 218 (M.D. Pa. 2003). Thus, the attorney work-product doctrine *does not* protect general information which reveals nothing about an attorney’s “mental impressions, theories, notes, strategies and the like.” *Levy v. Senate of Pa.*, 94 A.3d 436, 444 (Pa. Commw. Ct. 2014) (citation omitted).

The OOR has conducted an *in camera* review of the withheld records and while some records fall within the attorney work-product doctrine because they constitute drafts of pleadings and other filings, as well as the legal conclusions of counsel, other records do not fall within the attorney work-product doctrine because they are generic, non-legal communications, communications for the purposes of scheduling meetings and teleconferences, and transmittals of public filings without analysis. Specifically, the following items are generic, non-legal communications: Items 2, 4 – 6, 8 – 9, 11 – 12, 15, 23, and 26; the following items are communications for the purposes of scheduling meetings or teleconferences: Items 1, 3, 16, 19, 25, and 27 - 30; and, the following items are transmittals of public filings without analysis: Items 13, 20 and 22. None of the foregoing items reveal anything about an attorney’s mental impressions, theories, notes, strategies and the like, and may not be withheld under the attorney work-product doctrine.

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may not be considered. *Levy v. Senate of Pa.*, 94 A.3d 436, 442 (Pa. Commw. Ct. 2014, appeal denied 106 A.3d 727 (Pa. 2014) (issues beyond the scope of the remand order may not be considered on remand). Therefore, the OOR may only consider whether the records are protected by the attorney work-product doctrine.

The remaining items fall within the attorney work-product doctrine, and while shared with an outside party, there is no evidence that these items have been “shared with an adversary, or disclosed in a manner which significantly increases the likelihood that an adversary or anticipated adversary will obtain it.” 210 A.3d at 978. To the contrary, these items were shared among parties each advocating in favor of the Commission’s jurisdiction regarding certain matters. Thus, it cannot be said that the attorney work-product doctrine has been waived with respect to the remaining items.

For the foregoing reasons, the Requester’s appeal on remand is **granted in part and denied in part**, and the Commission is required to disclose the records as set forth above within thirty days. This Final Determination on Remand is binding on all parties. Within thirty days of the mailing date of this Final Determination on Remand, 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.<sup>4</sup> This Final Determination On Remand shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>4</sup> See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ON REMAND ISSUED: July 29, 2020**

/s/ Charles Rees Brown

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