

4. The Office of Open Records (“OOR”) is a governmental unit established to receive and determine appeals of agency Right to Know Law decisions pursuant to Sections 1101 and 1310 of the Right to Know Law.

GENERAL STATEMENT OF MATERIAL FACTS

5. On January 11, 2022, Angela Couloumbis and Spotlight PA and Sam Janesch and The Caucus (collectively “Petitioners”) filed a Right to Know Law request (“Request”) seeking: *Engagement letters, retainer letters, contracts, invoices and any other financial documents detailing an agreement or payment for legal services by an outside individual attorney or law firm for departments under the governor's jurisdiction. We are seeking this information for calendar years 2019, 2020 and 2021.*
6. The Office of General Counsel on February 18, 2022 partially denied the Request, providing records redacted of personal identification information, 65 P.S. § 67.708(b)(6), and information protected by the attorney-client privilege and/or the attorney work-product doctrine.
7. On March 10, 2022, the Petitioners appealed to the OOR.
8. On November 21, 2022 the OOR denied the appeal.
9. On December 14, 2022 Petitioners requested reconsideration from the OOR, which the agency denied on December 15, 2022, ruling that the request was untimely.

DETERMINATION FOR WHICH REVIEW IS SOUGHT

10. A true and correct copy of the OOR’s Final Determination is attached as Exhibit A.
11. A true and correct copy of the Petitioner’s December 14, 2022 request for reconsideration is attached as Exhibit B.

12. A true and correct copy of OOR's denial of Requester's Petition for Reconsideration is attached as Exhibit C.

GENERAL STATEMENTS OF OBJECTIONS TO THE DETERMINATION

13. The OOR erred in concluding that the Office of General Counsel's partial denial of the Request pursuant to the attorney-client privilege and attorney work-product privilege was proper under the RTKL.

14. The OOR erred in rejecting Petitioners' argument that the invoice subject matters are not subject to the attorney-client privilege and the redactions "improperly obscure the purpose or name of the case."

15. The OOR erred in rejecting Petitioners' argument that the reason an attorney (or law firm) is hired is not protected information and more akin the general descriptions of legal services that the Supreme Court determined in *Levy v. Senate of Pennsylvania*, 619 Pa. 586 65 A.3d 361, 370 (2013) are not covered by privilege.

16. The OOR erred in not reading the RTKL and Sunshine Act, 65 Pa.C.S. §§ 701-716, *in pari materia*, and ordering the Office of General Counsel to produce records that show the subject matter of legal invoices.

17. The OOR erred in failing to conduct an *in camera* review of the legal invoices.

18. The OOR erred in denying the Petitioners' Request for Reconsideration.

STATEMENT OF THE RELIEF SOUGHT

WHEREFORE, Petitioners respectfully request that this Honorable Court reverse the OOR's determination of November 21, 2022, or, in the alternative, remand to the OOR for further proceedings, including in camera review. In addition, Petitioners request that the

Court award Petitioners their reasonable costs and attorney's fees and statutory damages pursuant to Section 1305(a) of the RTKL.

Dated: Dec. 21, 2022

Respectfully submitted,
/s/Paula Knudsen Burke

Paula Knudsen Burke
REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS
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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Paula Knudsen Burke

Signature: /s/Paula Knudsen Burke

Attorney No.: 87607

PROOF OF SERVICE

I hereby certify that I have served the foregoing document, Petition for Review, upon the person listed on the date and in the manner indicated below, which satisfies the requirements of Pa.R.A.P. 121:

Notification by first class mail and email addressed as follows:

Thomas P. Howell
OFFICE OF GENERAL COUNSEL
333 Market St., 17th Floor
Harrisburg, PA 17101-1825
thowell@pa.gov

Dated: Dec. 21, 2022

/s/ Paula Knudsen Burke _____
Paula Knudsen Burke
REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS
PA ID: 87607
PO Box
Lancaster, PA 17608
pknudsen@rcfp.org
Counsel for Petitioners

EXHIBIT A



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
ANGELA COULOUMBIS AND	:
SPOTLIGHT PA AND SAM JANESCH	:
AND THE CAUCUS,	:
Requester	:
	:
v.	: Docket No: AP 2022-0621
	:
PENNSYLVANIA OFFICE OF GENERAL	:
COUNSEL,	:
Respondent	:

FACTUAL BACKGROUND

On January 11, 2022, Angela Couloumbis and Spotlight PA and Sam Janesch and The Caucus (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania Office of General Counsel (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

Engagement letters, retainer letters, contracts, invoices and any other financial documents detailing an agreement or payment for legal services by an outside individual attorney or law firm for departments under the governor's jurisdiction. We are seeking this information for calendar years 2019, 2020 and 2021.

On February 18, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Office partially denied the Request, providing records redacted of personal identification information, 65 P.S. § 67.708(b)(6), and information protected by the attorney-client privilege and/or the attorney work-product doctrine.

On March 10, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.¹ The Requester explains in the Appeal Letter that they are appealing a very specific set of redactions, stating:

In every instance, the Office wholly obscured, through redactions, the synopsis of the purpose/legal matter in the documents it provided.

These specific redactions are typically located near the top of each individual invoice and preceded with “RE:” or “In the Matter of” or “Project:” This standard language for legal contracts or invoices usually provides a brief synopsis of the matter at hand or the name of the case, which often involves a public docket.

The Requester also provided a copy of the redacted invoices at issue.² The Requester specifically disclaimed any appeal of the personal identification information redactions. The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 3, 2022, the Office submitted a position statement reiterating its grounds for denial. In support of its position, the Office submitted the affirmation the attestation made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities, of Marc Eisenstein, the Office’s Open Records Officer.

LEGAL ANALYSIS

The Office is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Office is required to demonstrate, “by a preponderance of the

¹ The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

² Because the Requester identifies specific redactions of what the OOR will refer to as the “invoice subject matter” made pursuant to the attorney-client privilege and/or the attorney work product doctrine, this Final Determination will not address the redactions made to the body of the invoices based upon the privilege.

evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). While the Requester sought an *in camera* review of the invoice subject matter redactions, the OOR has the information and evidence before it to properly adjudicate the matter. Therefore, the request for *in camera* review is denied.

The Office argues that the redactions are appropriate pursuant to 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, 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).

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) (“*Levy III*”).

The Requester argues that the invoice subject matters are not subject to the attorney-client privilege and the redactions “improperly obscure the purpose or name of the case.” Further, they

argue that the reason an attorney (or law firm) is hired is not protected information and more akin the general descriptions of legal services that the Supreme Court determined in *Levy* are not covered by privilege. The Requester also argues that because the RTKL and Sunshine Act, 65 Pa.C.S. §§ 701-716, must be read *in pari materia*, the underlying message is clear – taxpayers should know how their money is being spent and the redactions should not be permitted.

The Eisenstein Affirmation states that all redactions were made pursuant to *Levy's* parameters and the redactions detail the legal advice and/or strategy relating to a variety of legal matters for which the client consulted an attorney. Affirmation ¶¶ 6-8. It further states:

11) The redacted information only details the specific work being performed and the nature of the legal issue being addressed only where such work is not a matter already disclosed to the public, such as in cases brought before the Courts of the United States or this Commonwealth....

13) Redacted information includes details of the legal issue for which the Office sought legal services.

Finally, the Affirmation verifies the information in the position statement. Affirmation ¶ 19.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury 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 evidence that the Office has acted in bad faith “the averments in [the affirmation] 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)).

The Requester raises no dispute regarding the attorney-client relationship between the Office and the various firms and the Office has met the low burden of proof that the redacted information is privileged. The evidence demonstrates that the redacted information at issue, the

invoice subject matter, includes details of the legal services provided, beyond generic descriptions of the services performed. Under the RTKL, an agency must only prove that a record is exempt from disclosure by a preponderance of the evidence. 65 P.S. § 67.708(a)(1). “A preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry.” *Delaware County v. Schaefer ex rel. Philadelphia Inquirer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012). Accordingly, the Office has provided sufficient evidence to meet its burden of proof in this matter.

The OOR notes that the subject matters of invoices are not generally withheld by agencies and also recognizes that this determination means that the public is unable to fully understand why taxpayer funded legal expenses have been incurred for these invoices. However, the Office has demonstrated that the specific information, in this instance, is protected by the attorney-client privilege.

In its position statement, the Office acknowledges the importance of transparency and the Requester’s role in communicating the Office’s expenditures to the public. The Office also confirmed that it “has separately reached out to Requester to verbally provide information regarding the general types of issues addressed by the firms that the Office retains” that is not contained within the invoices. Legal invoices are subject to the RTKL and regularly released to the public. Agencies and third parties should be cognizant of that when preparing legal invoices so that the invoices permit the public to see how and why taxpayer funds were spent.

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Office is not required to take any further action. 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. 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 21, 2022

/s/ Erin Burlew

SENIOR APPEALS OFFICER
ERIN BURLEW, ESQ.

Sent via email to: Angela Couloumbis; Sam Janesch; Thomas Howell, Esq.; Marc Eisenstein

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

EXHIBIT B

From: Couloumbis, Angela <acouloumbis@spotlightpa.org>

Sent: Wednesday, December 14, 2022 15:52

To: Burlew, Erin <eburlew@pa.gov>

Cc: Howell, Thomas P. (GC) <THOWELL@pa.gov>; GC, RTK-Exec Offices <RA-RTK-ExecOff@pa.gov>; Brad Bumsted <bbumsted@caucuspa.com>

Subject: [External] Re: Couloumbis (Spotlight PA) v. OGC, OOR Dkt. AP 2022-0621; final determination

***ATTENTION:** This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

Dec. 14. 2022

Re: Couloumbis (Spotlight PA) v. OGC; OOR Dkt. AP 2022-0621

Petition for reconsideration of request for *in camera* review in Docket No. AP 2022-0621

Dear Office of Open Records:

This is a petition for reconsideration of our request for an *in camera* review that was denied in the final determination, issued on Nov. 21, 2022, in the above matter. The *in camera* review was sought by Spotlight PA and The Caucus (Angela Couloumbis and Sam Janesch -- the latter now replaced by Brad Bumsted), as part of their appeal of redactions in legal bill invoices provided by the Office of General Counsel (OGC).

On page 3 of the final determination authored by Senior Appeals officer Erin Burlew, it states: "While the Requester sought an *in camera* review of the invoice subject matter, the OOR has the information and evidence before it to properly adjudicate the matter. Therefore, the request for in camera review is denied."

The presumption under the Right to Know law is that records are public unless specifically exempted. OGC argues portions of the records — specifically, the two or three word synopsis contained in the subject matter on the invoices — are exempt under the attorney-client privilege and the attorney work product doctrine.

What was sought by requesters was that synopsis under "Re: or "In the Matter of:" or "Project."

It defies logic that the OOR could determine whether the synopsis information was exempt without looking at it. Conducting an *in camera* review is an approach sanctioned by our appellate courts, and of particular importance in the complicated area of legal billing. See *Levy v. Senate of Pa.*, 65 A.3d 361, 373 (Pa. 2013) (approving the Commonwealth Court's appointment of a Special Master to conduct "careful line-by-line analysis of the content of the

invoices”).

In addition, the Commonwealth Court’s opinion in *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305, 307 (Pa. Commw. Ct. 1993), is instructive, particularly as Pennsylvania courts have repeatedly affirmed that the RTKL and the Sunshine Act are to be read in *pari materia*. See *Off. of Gen. Counsel v. Bumsted*, 247 A.3d 71, 81 (Pa. Commw. Ct. 2021). *Reading Eagle* concerned a provision of the Sunshine Act that permits an agency to hold an “executive”—i.e., closed—session when the agency intends to “consult with its attorney or other professional advisor regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed.” According to the Sunshine Act, when an agency intends to hold an executive session, its reason for doing so “must be announced” to the public in advance. The Commonwealth Court in *Reading Eagle* required more than just an announcement that it would hold an executive session “to discuss matters of litigation.”

The same level of detail must be present in the RTKL context. The public needs to know the general subject matter of the OGC’s legal engagements in order to “scrutinize the actions of public officials” and to “make public officials accountable for their actions.” Without *in camera* review, such scrutiny is impossible.

The OOR suggests it had the evidence to decide the matter. It did not describe that evidence, and requesters are, as a result, left without any tangible information to assess that assertion. Yet even that would not negate the need to look at the synopses requested by requesters.

OGC, in the hours before we published a story earlier this month on their redactions, provided some additional information regarding the reason for its legal bills; but in only one instance was it clear what actual issue the work involved.

In that case, OGC said it hired private lawyers for assistance with reviewing and organizing a sudden influx of pardon applications. It is a stretch to argue that such an explanation somehow violates the principles the attorney-client or work product privileges were meant to protect. And yet, that is the kind of information that had been redacted.

For all the above reasons, we respectfully ask that you reconsider the denial of our request for an *in camera* review.

Sincerely,

Angela Couloumbis
Spotlight PA
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717-350-3339

Brad Bumsted
The Caucus
bradbumsted@gmail.com
717-514-1032

On Mon, Nov 21, 2022 at 2:09 PM Burlew, Erin <eburlew@pa.gov> wrote:

Parties-

Please find attached a copy of the OOR's Final Determination in the above captioned appeal.

Sincerely,



Erin Burlew (she/her)

Senior Appeals Officer

Office of Open Records

333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

[\(717\) 346-9903](tel:(717)346-9903) | eburlew@pa.gov

<https://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

EXHIBIT C

OOOR RESPONSE TO PETITION FOR RECONSIDERATION

DATE ISSUED AND MAILED: December 15, 2022

IN RE: *Angela Couloumbis and Spotlight PA and Sam Janesch and The Caucus v. Pennsylvania Office of General Counsel*, OOR Dkt. AP 2022-0621

Upon review of the petition for reconsideration (“Petition”) filed with the Office of Open Records (“OOR”) to the above-referenced docket number, it is determined that the Petition is **DENIED** because:

The Final Determination in this matter was issued on November 21, 2022. Petitions for reconsideration must be filed within fifteen (15) calendar days after the issuance of a final determination, per OOR’s Procedural Guidelines, Section VIII. A, and 1 Pa. Code § 35.241.¹ In this case, any petition for reconsideration was due by December 6, 2022. The Petition was filed and received by the OOR on December 14, 2022. Therefore, the OOR does not have jurisdiction to entertain the Petition because it is untimely.

As set forth in the Final Determination, either party may appeal the Final Determination to the Commonwealth Court, pursuant to 65 P.S. § 67.1301(a).

Issued by:

/s/ Kyle Applegate

CHIEF COUNSEL

Sent to: Angela Couloumbis (via email only);
Brad Bumsted (via email only);
Thomas Howell, Esq. (via email only)

¹ The Petition for Reconsideration process is also summarized at <https://www.openrecords.pa.gov/Appeals/PostFD.cfm>.