

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 1425 CD 2022

ANGELA COULOUMBIS

Petitioner,

v.

PENNSYLVANIA OFFICE OF GENERAL COUNSEL,

Respondents.

RESPONDENT’S BRIEF

Appeal from the Final Determination of the Office of Open Records dated
November 21, 2022 at Docket No. AP 2022-0621

JENNIFER C. SELBER

General Counsel

THOMAS P. HOWELL

Deputy General Counsel

Attorney I.D. No. 79527

OFFICE OF GENERAL COUNSEL

333 Market Street, 17th Floor

Harrisburg, PA 17101-1825

Tel: (717) 783-6563

Fax: (717) 787-1788

Email: thowell@pa.gov

Dated: May 1, 2023

Counsel for Respondent

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COUNTER-STATEMENT OF QUESTION PRESENTED

1. WHETHER the OOR correctly determined that descriptions of legal services and clients' motivations for seeking legal counsel were protected by the Attorney-Client privilege?

Suggested answer in the affirmative.

COUNTER-STATEMENT OF THE CASE

On January 11, 2022, Angela Couloumbis (“Requester” or “Petitioner”) filed a request with the Office’s Agency Open Records Officer (AORO) 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. ...for calendar years 2019, 2020 and 2021.” R.R.01a.

This Office informed Requester that it would require an extension of time to review the request. R.R.02a. The Office subsequently granted the request in part. R.R.03a. Requester appealed to the OOR, and the matter was submitted to mediation. R.R.07a. Mediation did not resolve the matter in total; however, the Office did make available copies of contracts, appointment letters, awards and invoices for law firms retained by the Office of General Counsel’s main office. See, <https://www.ogc.pa.gov/Outside%20Counsel/Pages/Awarded-Engagements.aspx>. (last visited 5/01/2023). R.R.011a. – 014a.

In its production, the Office redacted portions of legal invoices that reflect attorney-client communications and attorney work product, as well as personal financial information, including Employer Information Numbers (EINs) and banking wire-transfer information. *Id.* On October 3, 2022, the

Office submitted a position statement, as well as the attestation of Marc Eisenstein, the Office's Open Records Officer. R.R.014a-022a.

On November 21, 2022, the OOR denied Requester's appeal, determining that "the Office has provided sufficient evidence to meet its burden of proof in this matter." R.R.022a. Requester then filed the instant appeal.

SUMMARY OF ARGUMENT

“[T]he objective of the RTKL ‘is to empower citizens by affording them access to information concerning the activities of their government.’” *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012)). The RTKL, however, is not a mechanism for an individual to access private or nonpublic information; it is a procedure for individuals to access “public records.” 65 P.S. § 67.301; *Clinkscale v. Dep’t of Pub. Welfare*, 101 A.3d 137 (Pa. Cmwlth. 2014).

The RTKL, however, exists within the universe of existing laws and privileges. Nothing in the RKTL obviates the privilege afforded to descriptions of legal services and clients’ motivations for seeking counsel. Here, the Office properly established, and the OOR properly held, that the attorney-client privilege protects the redacted information from disclosure.

ARGUMENT

- I. The OOR properly determined that portions of legal invoices detailing the nature of services performed and the clients' motivations for seeking counsel are protected by the attorney-client and attorney work product privileges.**

A. The Attorney-Client Privilege Protects Descriptions of Legal Services from Disclosure.

“The attorney-client privilege "is deeply rooted in our common law" and is "the most revered of our common law privileges." *Levy v. Senate of Pa.*, 65 A.3d at 368 (quoting, *Commonwealth v. Maguigan*, 511 A.2d 1327, 1333 (Pa. 1986)). The attorney-client privilege protects information from disclosure where: the asserted holder of the privilege is or sought to become a client; the person to whom the communication was made is a member of the bar; the communication relates to a fact of which the attorney was informed by the client, in the absence of strangers, for the purpose of securing legal advice, and the privilege has been claimed by the client and not waived. *See, Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007).

Here, the Office demonstrated each of the foregoing factors, and the OOR properly determined that the attorney client privilege protected the redacted information from disclosure. Specifically, the OOR relied upon the Office's credible affirmation that to determine that the redacted information was communicated between counsel and client for the purpose of securing or

providing legal advice, that such communications were solely between the counsel and client(s), and that such privilege has not been waived.¹

In response, Petitioners ask this court to disregard the attorney-client privilege as it applies to public agencies. Petitioners neglect to consider, though, that the United States Court of Appeals for the Third Circuit, has already addressed an agency's obligations to provide legal invoices in discovery, and recognized that legal "billing records are privileged because they reveal the nature of the services . . . rendered." *Montgomery County v. Microvote Corp.*, 175 F.3d 296, 304 (3^d Cir., 1999)(citing, *Fidelity & Deposit Co. of Maryland v. McCulloch*, 168 F.R.D. 516, 532 (E.D. Pa. 1996)).

Nevertheless, Petitioner then contends that the attorney client privilege is limited by virtue of the limited scope of the RTKL's exemptions. However, the attorney client privilege was developed through the common law and the Unified Judicial System's regulation of the practice of law, and is not the product of the RTKL. *See, Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (noting that the attorney-client privilege is "the oldest of the privileges

¹ As this Court has often held, "an affidavit or statement made under penalty of perjury may serve as sufficient evidentiary support." *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Indeed, in the absence of any evidence that an agency has acted in bad faith, "the averments in the [attestation] 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 *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013))

for confidential communications known to the common law.”). As such, the privilege, exists independently of the RTKL’s exemptions and is not limited by the mere interpretive goals of the RTKL’s statutory construct. *See*, 65 P.S. § 67.102 (excluding privileged records from the definition of “public records”); 65 P.S. § 67.305 (establishing that privileged records are not presumed to be public). Thus, Petitioner’s argument in this regard also fails.

Petitioners further contend that the “financial” nature of the documents somehow vitiates the privilege, and appear to assert, in contrast to the evidence, that legal invoices do not contain such privileged information. Because our Supreme Court has already held otherwise, Petitioner’s argument is unavailing.

Specifically, the Supreme Court analyzed this issue of privilege as to legal invoices in *Levy v. Senate of Pa*, 65 A.3d 361 (Pa. 2013). Ultimately, the Court held that the “relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege. . . . [such as] descriptions of legal services that address the client’s motive for seeking counsel, legal advice, strategy, or other confidential communications...” *Id.* at 373-374 (emphasis added).² Here, as properly

² While Petitioners contend that they do not know “how and for what purpose the Office allocated taxpayer money,” such assertion is belied by the fact that the Office produced both Requests for Proposals and contracts applicable to each firm’s engagements. Each of the foregoing set forth the “general nature of the services provided,” without the need to delve into the detailed legal issues of the invoices. *See, Levy*, 94 A.3d at 436

determined by OOR, the redacted portions of the invoices would similarly result in disclosure of privileged information, and Petitioner has provided not evidence to the contrary. As such, the determination of OOR should be affirmed.

Petitioners further contend (without evidence) that “as a rule, private law firms to not put privileged information in the captions of invoices,” (*Pet’s brief at 10*). Such assertion, however, is belied by opinions of the Courts of this Commonwealth and the Third Circuit. For example, in *Leach v. Quality Health Servs.*, 162 F.R.D. 499 (E.D. Pa. 1994), the United States District Court for the Eastern District of Pennsylvania analyzed the distinction between non-exempt and exempt information, noting that “the actual invoice may contain privileged information in the “for X services rendered” column” and that even a check for payment may be privileged if the “memo line” “is sufficiently detailed.” *Leach*, 162 F.R.D. at 502. Here, like the descriptions of services in *Leach*, the redacted sections of the invoices here expressly describe the “services rendered.” As such, the OOR correctly determined that the redacted information is privileged, and properly dismissed the appeal.

Similarly, *McCulloch, infra.*, recognized that invoices will often contain privileged information or topics. Therein, the Court observed that often the only non-exempt material in redacted invoices will be “the date services were

performed, the number of hours spent, the amount bills, and perhaps the names of the attorney performing the services.” *McCulloch*, 168 F.R.D. at 523. Here, the Office has provided all of the information contemplated by *McCulloch*, and has redacted only those items that reveal the legal questions asked of counsel or similar confidential entries. As such, the Office has demonstrated that it appropriately redacted privileged information from the subject invoices, and the determination of OOR should be affirmed.

II. The OOR properly determined that the evidence supported the Office’s redactions.

A. The Office’s evidence is detailed, credible and convincing.

In response to Petitioner’s appeal, the Office submitted an affirmation executed by the Office’s Open Records Officer (AORO) under penalty of perjury. In that affirmation, the AORO attested to the scope of his review of the records, described the nature of the provided records, provided detail into the process of redacting records, and described of the types of information redacted.

In response, Petitioner posits that “longstanding industry practice” is inconsistent with the averments of the affirmation. Such assertion, however, has no evidentiary support. Indeed, Petitioner submitted no evidence to OOR at all, and now merely cites their unsigned, unverified position statement in

support of their factual allegations. Petitioner's untimely attempts to raise these allegations dehors the record should be disregarded.

Further, even a cursory review of the Office's affirmation reveals the sufficiency of the Office's affirmation. Petitioner attempts to compare the Office's multi-faceted affirmation to the single paragraph offered by the agency in *Dep't of Educ. v. Bagwell*, 131 A.3d 638 (Pa. Cmwlth. Ct. 2015). However, the "conclusory and vague" assertions of the Bagwell affidavit are a far cry from the detailed, process-oriented averments offered by the Office.

Indeed, the cited portions of the Bagwell affidavit provide no insight into how the affiant reviewed the records, or what process was applied to determine how information should be withheld (en toto) from access. In contrast, the instant affirmation provides exhaustive detail into the limited, individual redactions made to these legal invoices.

Ultimately, however, Petitioners take exception not to the sufficiency of the Office's affirmation, but to the office's assertion of the privilege as to matters that are *not* cases in litigation. Because the legal questions asked of counsel and contained in the reference lines of the invoices are the *sine qua non* of privileged communications, the OOR correctly held that the Office properly redacted the information, and its determination should be affirmed.

B. The Office’s evidence established that the redacted headings contain details of legal questions, rather than case names or docket numbers.

Petitioners continually disregard that the legal engagements at issue here may not involve “litigation” nor contain “docket number[s] of [a] case” or a “court in which [an action] is filed.” *Pet’s Brief at 17*. Instead, as set forth in the Office’s affirmation, reference information was redacted only where it “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.” That is, the redacted information does not reference matters in litigation or “cases,” but instead references “the client’s reasons or motivation for seeking legal advice,” such as the specific legal questions or issues presented to counsel for analysis.³

Petitioner places much weight upon their characterization that the redacted information is part of a “caption.” While that characterization is itself inaccurate (as set forth above, the information withheld is *not* part of a public docket or “caption”), nothing in jurisprudence of attorney-client privilege

³ In this regard, Requester argues that the RTKL must be read *in pari materia* with the Sunshine Act, which requires agencies to reveal why they may call for executive session. Of course, the instant matter involves not the application of the RTKL, but the law of attorney client privilege – there is no rationale to read the rules of professional conduct or well-established rules of evidence “in pari materia” with the Sunshine Act. Further, nothing in the Sunshine Act requires agencies to waive the privilege.

distinguishes between information in a heading or footer of a document versus the body of a letter. Ultimately, the determinative question is whether the redacted information describes legal services and would reveal the clients' motivation for seeking advice of counsel. As credibly established by the Office's affirmation and as found by the OOR, the redacted information would do so, and is thus privileged.⁴

III. The Office properly demonstrated that portions of the Klehr Harrison and Obermayer invoices are exempt as revealing the institution, progress or result of investigations.

In its affirmation, the Office affirmed that redactions on the Klehr Harrison and Obermayer invoices includes details that would reveal the institution, progress or result of investigations. In response, Petitioner appears to assert that the office was *too* judicious in its application of the exemption.

Specifically, Petitioners observe that the redacted information “consist of a few words – a sentence at most,” and thus contends that they cannot reveal the institution, progress or result of an investigation. Of course, there is no “minimum word count” on the application of an exemption, and it hardly seems

⁴ Petitioner further criticizes the Office for addressing *all* redactions in its affirmation, rather than merely addressing the redactions about which Petitioner now disagrees. *Pet.'s Brief* at 20. Because the agency bears the burden to demonstrate the applicability of all exemptions, the Office was required to address all redactions in its position statement and affidavit. Nevertheless, as Petitioner now appears to concede the propriety of the Office's redactions except as set forth in the subject or reference lines of the invoices, the Office limits this brief to only those privileges that are relevant to those subject or reference lines.

appropriate for a requester to argue that an agency should be compelled to redact *more* information than is necessary. Where requester has presented *no evidence* to call into question the well-developed affirmation of the Office's AORO, there is no grounds to disregard that affirmation. As such, the OOR properly found that the Office had appropriately redacted the subject invoices, and that determination should thus be affirmed.⁵

⁵ Given the legal ramifications inherent in disclosing records of investigations, the Office does not object to an in camera review of such material, or any other subject material as to which the Court requires further illumination.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Office respectfully requests that the Determination of the Office of Open Records should be AFFIRMED.

Respectfully submitted,

JENNIFER C. SELBER
General Counsel

By: /s/Thomas P. Howell
THOMAS P. HOWELL
Deputy General Counsel
Attorney I.D. No. 79527
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101-1825
(717) 783-6563 (phone)
(717) 787-1788 (fax)
thowell@pa.gov

Attorney for Petitioner
Commonwealth of Pennsylvania,
Office of the Governor

Dated: May 1, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Respondent complies with the word-count limit set forth in Rule 2135(a)(1). Based on the word-count function of the word processing system used to prepare the brief, the brief contains 2883 (excluding portions of the brief covered by Rule 2135(b)).

/s/Thomas P. Howell
THOMAS P. HOWELL
Attorney I.D. No. 79527

CERTIFICATE OF COMPLIANCE

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

/s/Thomas P. Howell
THOMAS P. HOWELL
Attorney I.D. No. 79527

CERTIFICATE OF SERVICE

I, Thomas P. Howell, hereby certify that on this 1st day of May, 2023, the foregoing **Respondent's Brief** has been served upon counsel in the manner indicated below, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

VIA eSERVICE:

Paula Knudsen Burke
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
P.O. Box 1328
Lancaster, PA 17608
pknudsen@rcfp.org

/s/Thomas P. Howell
THOMAS P. HOWELL
Attorney I.D. No. 79527