



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION UPON REMAND

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

This Final Determination Upon Remand stems from the Commonwealth Court’s (“Commonwealth Court”; “Court”) July 23, 2024 Order, which partially vacated an November 21, 2022 Final Determination issued by the Office of Open Records (“OOR”) and remanded the matter to the OOR for further proceedings. Specifically, after the Court conducted an *in camera* review of a portion of the legal invoice records at issue in this appeal, the OOR was directed conduct an *in camera* review to determine whether the subject matter lines contained in a set of invoices are exempt from disclosure pursuant to the attorney-client privilege.<sup>1</sup>

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<sup>1</sup> The Court’s Opinion explained:

“What remains to be decided is the applicability of the attorney-client privilege to the subject matter lines in the balance of the invoices, found on pages 26a to 61a, 95a to 100a, and 190a to 194a of the Reproduced Record. We have determined that remand to OOR for *in camera* review of these invoices is appropriate to develop a factual record...Further, given the discrepancy between what we found in our *in camera* review of the Klehr Harrison and Obermayer invoices and what was represented in the Eisenstein affirmation, we believe *in camera* review necessary to confirm the applicability of the attorney-client privilege to the balance of the invoices’ subject matter lines.”

On remand, the OOR directed the Pennsylvania Office of General Counsel (“Office”) to produce the remaining legal invoices as identified by the Court for *in camera* review on August 28, 2024.

On September 17, 2024, the Office submitted the remaining invoices to the OOR for *in camera* review. In support of the unredacted invoice records, the Office also submitted the supplemental attestation of Marc Eisenstein, Open Records Officer for the Office (“Supplemental Eisenstein Attestation”). However, on remand, the Commonwealth Court specifically instructed the OOR to review the subject matter lines of the invoices *in camera*. The Supplemental Eisenstein Attestation attempts to add additional evidence specifically concerning the subject matter lines. As the intake of any additional evidence was not within the scope of the Commonwealth Court’s instructions to the OOR on remand, the OOR will not consider that evidence.

On remand, the OOR must determine whether the subject lines of the 170-pages of remaining invoices<sup>2</sup> are exempt from disclosure pursuant to the attorney-client privilege. 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

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<sup>2</sup> After review of the records, it appears that the Office re-produced the entire balance of invoices at issue. Accordingly, while some invoices may have already been inspected by the Commonwealth Court as described in its opinion, the OOR reviewed the entirety of the invoices on remand.

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 Bousamra v. Excelsa Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citations omitted). “[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. *See Clement v. Berks Cnty.*, 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 Commonwealth Court addressed the application of the attorney-client privilege to descriptions of legal services on legal invoices in *Levy v. Senate of Pennsylvania*, 65 A.3d 361, 373 (Pa. Commw. Ct. 2013) (“*Levy*”). The Court held that “the 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.” *Id.* In determining whether the privilege applied to a particular entry in an invoice, the Court approved a “line-by-line analysis.” *Id.* The Court 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.* (citations omitted) (emphasis added); *see also Couloumbis v. Senate of Pa.*, 300 A.3d 1093, 1101 (Pa. Commw. Ct. 2023); *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). The OOR has consistently held, in accordance with *Levy*, that an agency should redact the least amount of information possible - that is, generic information within an entry identifying things such as “phone call,” “email,” “research,” should not be redacted. *See, e.g., Monaghan v. Lycoming Cnty.*, OOR Dkt. AP 2023-1761, 2023 PA O.O.R.D. LEXIS 2468.

The mere fact a client sought legal advice from an attorney is not generally privileged. *Levy*, 65 A.3d at 371-72. The attorney-client privilege does not protect “mere facts.” *Couloumbis*, 300 A.3d at 1105 (citing *Pa. Dep’t. of Educ. v. Bagwell*, 131 A.3d 638, 657 (Pa. Commw. Ct. 2016)); *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (privilege extends only to communications and not to underlying facts). While *Levy* does not set forth a prophylactic rule either protecting or requiring the production of the subject matters of legal representation, where that legal representation is a matter of public record it is not privileged. *See Janesch v. Pa. House of Representatives*, 299 A.3d 1030, 1040-41 (Pa. Commw. Ct. 2023); *Couloumbis*, 300 A.3d at 1105. Further, the Commonwealth Court stresses that “...each subject matter is to be analyzed independently to determine whether its disclosure would compromise confidential information.” *Couloumbis*, 300 A.3d at 1104. The application and propriety of any redactions made on the grounds of privilege “must be addressed on a case-by-case basis.” *Janesch*, 299 A.3d at 1041.

Accordingly, generic language like “Representation,” “Hearing[s],” or even the name of an individual before state and federal grand juries are not protected under the attorney-client

privilege. *Id.* (holding that the attorney’s redaction of “medical marijuana” is not permitted under attorney-client privilege because while it discloses a subject matter it “does not reveal privileged information such as mental impressions of an attorney or motive for the legal engagement.”).

On remand, after reviewing the subject matter lines on the invoices via *in camera* review, using the *Levy* decision as a guide, certain subject matter lines contain descriptions of legal services that would clearly reveal the Office’s motives for seeking counsel, which in these instances are the subject matter of specific nonpublic legal actions for which legal counsel was sought. Accordingly, certain redactions were properly made pursuant to the attorney-client privilege. The subject matter lines located on the following pages are protected by the attorney-client privilege as they reflect specific issues/subject matters for which the Office sought legal advice and reveals the Office’s motives for seeking counsel: pgs. 37-38; 41-42; 44-47; 50-51; 53-54; 58-59; 63-66; 96-102; 107-108; 110-111; 113-114; 118-119; 121-122; 124-125; 127-128; 130-131; 133-134; 136-137; 141-146; 148-149; 151-152; 154-155; 158-159; 161-164; and 170.

However, certain subject matter lines are not protected by the attorney-client privilege. As previously identified by the Commonwealth Court, the subject matter line of certain invoices concern individuals, some who have been identified by name, that were represented as witnesses before state and federal grand juries, and in an investigation by the State Ethics Commission. As the court held, the fact of an individuals’ representation in a grand jury or State Ethics Commission proceeding does not reveal: “[s]pecific descriptions of legal services that would divulge confidential client communications or an attorney’s mental impressions, legal theories or analysis, notes, strategies, and the like.” *Couloumbis*, 300 A.3d at 1103-04 (citing the *Levy* decisions). Moreover, as previously established, the mere fact that a client sought legal advice from an attorney is not generally privileged. *Levy*, 65 A.3d at 371-72. Because the subject matter lines of

certain invoices merely establish the fact that legal advice was sought, these subject lines are not privileged. Accordingly, the subject matter lines located on the following pages are not protected by the attorney-client privilege, because they merely state that representation was provided in public proceedings, or generally demonstrate that legal advice was sought, which does not amount to attorney-client privilege and must therefore be provided: pgs. 1-36; 39-40; 43; 48-49; 52; 55-57; 60-62; 67-68; 70-95; 103-106; 109; 112; 115-117; 120; 123; 126; 129; 132; 135; 138-140; 147; 150; 153; 156-157; 160; 165-169.

### CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Office is required to provide unredacted subject matter lines identified above that were previously redacted pursuant to the attorney-client privilege within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the 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.<sup>3</sup> All documents or communications following the issuance of this Final Determination shall be sent to [oor-postfd@pa.gov](mailto:oor-postfd@pa.gov). This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: November 19, 2024**

*/s/ Tope L. Quadri*

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TOPE L. QUADRI  
APPEALS OFFICER

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

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