



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>SIMON CAMPBELL,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2018-2171</b>
	:	
<b>PENNSBURY SCHOOL DISTRICT,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Simon Campbell (“Requester”) submitted a request (“Request”) to the Pennsbury School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking certain legal invoices. The District partially denied the Request, redacting the legal descriptions from the invoices pursuant to the attorney-client privilege. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied in part** and **dismissed as moot in part**, and the District is not required to take any further action.

**FACTUAL BACKGROUND**

On November 9, 2018, the Request was filed, seeking, in part, “[a]ll invoices on all matters as received by [the District] from the regular school solicitor between the dates of September 1, 2018 and the present.” On December 17, 2018, after extending its time to respond by thirty days,

*see* 65 P.S. § 67.902(b)(2), the District partially denied the Request, providing redacted invoices and asserting that the redacted portions are privileged.

On December 18, 2018, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure.<sup>1</sup> 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 January 10, 2018, the District submitted a position statement, arguing that the redacted legal descriptions are protected by the attorney-client privilege. In support of its position, the District also submitted the sworn affidavit of Joanne Godzieba (“Ms. Godzieba”), the District’s Open Records Officer, who affirms that the District redacted only privileged information from the invoices. On the same day, the Requester submitted a position statement, asserting that the District’s submission is conclusory and requesting that the OOR make a finding of bad faith.

On January 22, 2019, in response to a request for additional evidence from the OOR, the District submitted a supplemental position statement, along with a revised set of the redacted legal invoices and a second sworn affidavit from Ms. Godzieba. On January 29, 2019, the Requester submitted a reply to the District’s supplemental position statement, asserting that “[t]he public has a right to know what work the [D]istrict is paying lawyers to do.” Finally, during the course of the appeal, the Requester provided the OOR with additional time to issue this Final Determination. 65 P.S. § 67.1101(b)(1).

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<sup>1</sup> The Request consisted of 7 items. On appeal, the Requester is only appealing the District’s response regarding Item 2 of the Request and does not challenge the sufficiency of the District’s responses to Items 1, 3, 4, 5, 6 and 7 of the Request. As a result, the Requester has waived any objections regarding the sufficiency of the responsive records provided for these Items. *See Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

## 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).

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; however, 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, the parties did not request a hearing, but the Requester asked the OOR to conduct an *in camera* review of the redacted records. Because the OOR has the requisite information and evidence before it to properly adjudicate the matter, the request for *in camera* review is denied.

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 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)).

**1. The District provided responsive records during the appeal**

During the appeal, the District provided the Requester with records responsive to the Request.<sup>2</sup> As such, the appeal as to the records provided on appeal is dismissed as moot.

**2. The District has demonstrated that the redacted portions of the responsive records are protected by the attorney-client privilege**

The District argues that portions of the descriptions of the legal services contained within the legal invoices are privileged and not subject to public disclosure. The RTKL defines “privilege” as “[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-

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<sup>2</sup> Specifically, the District provided a revised set of redacted legal invoices that contained fewer redactions.

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, however, rely on a bald assertion that the attorney-client privilege applies. *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”).

In *Levy v. Senate of Pennsylvania*, the Pennsylvania Supreme Court discussed 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 the attorney-client privilege where it would not call for disclosure of confidential communications).

In the instant matter, the District has submitted evidence demonstrating that the redacted portions of the responsive legal invoices are protected under the attorney-client privilege. Specifically, the portions of the entries subject to redaction contain descriptions of matters assigned to the Solicitor by the District for legal review and research, types of legal research conducted by the District’s Solicitor, and details regarding the specific legal work performed by the Solicitor on behalf of the District. Moreover, the Requester did not submit any evidence that the attorney-client privilege was waived. *See Office of the Governor*, 122 A.3d at 1192.

In further support of the District’s position that the redactions are privileged, Ms. Godzieba affirms, in part, as follows:

2. The amended redacted invoices contain descriptions of work performed for the School District that were redacted for the purpose of protecting certain information which is protected by the attorney-client privilege.
3. The District is represented by Rudolph Clarke, LLC (“Solicitor”) and has been a client during all relevant times. All individuals at the Solicitor’s Firm who

were party to the communications at issue were either among attorneys performing legal services for the District or their subordinates.

4. The purpose of the communications ... was to secure legal services, and to facilitate such legal services. The information contained therein was transmitted outside the presence of strangers. The redactions on the invoices, if disclosed, would disclose the content of such attorney-client privileged information.
5. The District claims the privilege as it pertains to the communications and the invoices, and it has not been waived.
6. Additionally, certain invoices contain the mental impressions and opinions regarding various matters that were either in ongoing litigation or were matters of potential litigation.

Under the RTKL, a sworn affidavit is competent evidence to sustain an agency's burden of proof. *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 competent evidence that the District acted in bad faith, "the averments in [the affidavit] 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)). Therefore, based on the evidence submitted by the District, along with a review of the redacted invoices, the redacted portions of the responsive legal invoices are privileged and are not subject to public access.

### **3. The OOR declines to make a finding of bad faith**

The Requester argues that the District's actions in responding to the Request warrant a finding of bad faith. While the OOR may make findings of bad faith, only the courts have the authority to impose sanctions on agencies. *See generally* 65 P.S. § 67.1304(a) (noting that a court "may award reasonable attorney fees and costs of litigation ... if the court finds ... the agency receiving the ... request willfully or with wanton disregard deprived the requester of access to a

public record ... or otherwise acted in bad faith..."); 65 P.S. § 67.1305(a) ("A court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith"). 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 **denied in part** and **dismissed as moot in part**, and the District 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 Bucks 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.<sup>3</sup> This Final Determination shall be placed on the OOR's website at: <https://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: February 14, 2019**

*/s/ Magdalene C. Zeppos*

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MAGDALENE C. ZEPPOS, ESQ.  
APPEALS OFFICER

Sent to: Simon Campbell (via email only); and  
Alexander Glassman, Esq. (via email only)

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