

**[J-2-2013] [MO: Castille, C.J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

IN RE: THIRTY-THIRD STATEWIDE INVESTIGATING GRAND JURY	: No. 85 MM 2012 : : Appeal from the Order of the Dauphin : County Court of Common Pleas at No.
PETITION OF: PENNSYLVANIA TURNPIKE COMMISSION	: 1325 MD 2010 (Notice No. 21) dated April : 24, 2012 : : ARGUED: March 5, 2013

**CONCURRING OPINION**

**MR. JUSTICE BAER**

**DECIDED: February 18, 2014**

I join the majority opinion in this case of first impression -- and agree that communications between a state agency and its counsel are not protected by the attorney-client privilege where the state agency is the subject of a grand jury investigation conducted by the Office of the Attorney General ("OAG"). I write separately, however, to emphasize, in my view, the limited nature of the majority's holding, and to caution state agencies and their officials to be cognizant of when the attorney-client privilege may be encroached.

It is well-established that the attorney-client privilege and the protection it provides to confidential communications are entrenched in Pennsylvania jurisprudence. See Commonwealth v. Chmiel, 558 738 A.2d 406, 414 (Pa. 1999) (citations omitted) (acknowledging that "[a]lthough now embodied in statute, the attorney-client privilege is deeply rooted in the common law. Indeed, it is the most revered of the common law privileges"). The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Levy v. Senate of Pa.,

65 A.3d 361, 368 (Pa. 2013) (citing Gillard v. AIG Ins. Co., 15 A.3d 44, 47 n.1 (Pa. 2011)). This Court has been reluctant to carve exceptions to the attorney-client privilege, as codified in 42 Pa.C.S. § 5916.<sup>1</sup> See Gillard, 15 A.3d at 59 (holding that, “in Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice”).

Nevertheless, after great deliberation, and upon consideration of the tension between the competing interests of justice in play (*i.e.*, the encouragement of trust and candid communications between lawyers and their clients and the accessibility of material evidence to further the truth determining process, Gillard, 15 A.3d at 57), I am persuaded that the majority’s legal analysis is sound. I agree that under the particular facts presented, the attorney-client privilege of the Pennsylvania Turnpike Commission (“Commission”) succumbs to the OAG’s statutory obligations under the Commonwealth Attorney’s Act (“CAA”) to investigate criminal offenses that it has the power to prosecute, 42 Pa.C.S. § 732-206(a), to convene investigating grand juries, id. at § 732-206(b), and to exercise its statutory right to access a Commonwealth agency’s books and papers, which are necessary for the OAG to carry out its duties, id. at § 732-208.

As noted cogently by the majority, the General Assembly has demonstrated its ability to protect privileged information by employing, in other statutes, express language excluding privileged materials from compelled disclosure. See Slip Op. at 20 (referencing, *inter alia*, 65 P.S. § 67.102, which defines accessible public records under the Right to Know Law as excluding privileged materials). In contrast, when enacting the

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<sup>1</sup> Section 5916 provides that “counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.” 42 Pa.C.S. § 5916.

CAA, the Legislature did not see fit to exclude from the OAG's access the books and papers of state agencies that are protected by the attorney-client privilege. Slip. Op. at 21. Further, I agree with the majority that to adopt the Commission's position as the rule of law of this Commonwealth would essentially be concluding that state agencies are independent of the Commonwealth's government, and need not be accountable for their expenditures of public funds or their manner of operating the public agency. Id. at 34.

That being said, however, I am compelled to emphasize what I view as the narrow scope of the holding in this case. The majority opinion appears to recognize that the Court's intrusion upon the attorney-client privilege in the instant case is limited to the facts presented. See Slip Op. at 25 (emphasizing the "special circumstances of this case" where a Commonwealth agency seeks to assert the attorney-client privilege to avoid disclosure to the OAG and a grand jury of communications it made to the agency's attorney in the course of operating the publicly-funded agency); id. at 33-34 (distinguishing the instant facts from cases where the attorney-client privilege protects communications between a state agency and its counsel when the agency is involved in civil litigation with non-Commonwealth agencies).

Similarly, the supervising judge articulated the limited nature of the restriction on the privilege, noting that the court's decision was limited to the facts before it. In re Thirty-Third Statewide Investigating Grand Jury, Dauphin County Common Pleas Court, No. 1325 M.D. 2010, dated April 24, 2012, at 13. The supervising judge stated: "The Court stresses that attorney-client privilege unquestionably remains in the private sector between private counsel who represent employees of executive administrative agencies in their personal or official capacities as well as in those actions initiated against executive administrative agencies by parties other than the OAG. The Court's decision in no way

erodes this time-honored privilege in any other circumstance.” Id. at 13-14. I share these sentiments.

State agencies and their officials should be cognizant that communications with counsel implicating criminal wrongdoing may be discoverable if the agency later becomes the subject of a criminal grand jury investigation initiated by the OAG. This should not compromise the ability of the agency to engage in frank discussions with government counsel to promote public interests in accordance with the law because [“a]n official who fears he or she may have violated the criminal law and wishes to speak to an attorney in confidence should speak with a private attorney, not a government attorney.” Slip Op. at 28 (citing In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8<sup>th</sup> Cir. 1997)). Thus, the majority’s holding respects the sanctity of the attorney-client privilege where appropriate, while ensuring that state agencies and their officials cannot shroud criminal conduct from the citizens they are obligated to serve.

Madame Justice Todd joins the Concurring Opinion.