IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Matthew Haverstick and Kleinbard LLC,	:	
Petitioners	:	
	:	
v.	:	No. 1407 C.D. 2025
	:	Argued: October 13, 2026
Pennsylvania Office of the Governor (Office of Open Records),	:	
Respondent	:	

BEFORE: HONORABLE ANNE E. COVEY, Judge
HONORABLE STACY WALLACE, Judge
HONORABLE MARY HANNAH LEAVITT, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE WALLACE FILED: November 16, 2026

Matthew Haverstick and Kleinbard LLC (Requesters) petition for review from the September 25, 2025 final determination of the Office of Open Records (OOR), denying Requesters' appeal from the Pennsylvania Office of the Governor's (Office) refusal to produce records they requested under the Right-to-Know Law (RTKL).[1] Upon review, we vacate and remand for further proceedings.

BACKGROUND

On March 14, 2025, Requesters submitted a request (March 14 Request) for records to the Pennsylvania Office of General Counsel (OGC), seeking

[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

communications between OGC and certain private casinos and OGC and the Pennsylvania State Police (PSP). OGC provided some redacted records, but withheld many others based on certain exemptions and privileges. On appeal before the OOR, OGC invoked the common-interest doctrine to shield communications between OGC, PSP, and private entities.[2] On June 20, 2025, Requesters sent a letter to the OOR, requesting an evidentiary hearing to assess the propriety of OGC's exemption log. On the same date, the OOR, among other things, directed OGC to elaborate on the common-interest doctrine. In response, OGC provided additional factual support for invoking the doctrine.

Thereafter, on July 15, 2025, during the pendency of the appeal before the OOR,[3] Requesters submitted the underlying request for records to the Office concerning the Office's involvement in the March 14 Request. Specifically, Requesters sought:

> 1. All documents related to the March 14 [Request] by Matthew Haverstick (excluding documents produced to Requester), and appeal therefrom, including but not limited to documents related to the drafting of OGC's [e]xemption [l]og.

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[2] The common-interest doctrine "function[s] as an exception to the general rule that disclosure of information to third parties constitutes a waiver of the attorney-client privilege." *In re Fortieth Statewide Investigating Grand Jury*, 191 A.3d 750, 763 (Pa. 2018) (referencing the doctrine with approval). This Court has held a party seeking to invoke the common-interest doctrine must demonstrate:

> (1) the parties' agreement to same; (2) a common-interest in the litigation or a jointly shared litigation strategy; (3) the communications were made pursuant to such agreement, and (4) the continued confidentiality of the communications, i.e., the communications were not disclosed to other third parties such that the privileges were waived.

Pa. Pub. Util. Comm'n v. Sunrise Energy, LLC, 177 A.3d 438, 445 (Pa. Cmwlth. 2018).

[3] The OOR ultimately denied in part and dismissed as moot in part the Requesters' appeal. The Requesters' petition for review is currently pending before this Court at Docket No. 1051 C.D. 2025.

> 2. All documents related to Requestor Matthew Haverstick's June 20, 2025 letter to the Office of Open Records.
>
> 3. All documents related to OGC's efforts to comply with the [OOR] June 20, 2025 directive to OGC.

Reproduced Record (R.R.) at 7a. After receiving an extension of time to respond, the Office denied the request, claiming the records were protected from disclosure by the attorney-client privilege or the attorney-work-product doctrine, or otherwise exempt as internal, predecisional deliberations. R.R. at 3a (citing 65 P.S. §§ 67.102 and 67.708(b)(10)).

On August 22, 2025, Requesters appealed to the OOR, which invited the parties to supplement the record and file position statements, and directed the Office to notify third parties of their ability to participate in the appeal process. The Office filed an affirmation by Marc Eisenstein (Eisenstein), its Open Records Officer, who stated his search of the Office records "resulted in the collection of three pages of material, of which all were withheld as exempt under the RTKL." *Id.* at 22. Paragraph 7 of the affirmation contained a privilege log (Privilege Log) that identified the three withheld pages and listed the reasons for their non-disclosure as attorney-client privilege, attorney-work-product doctrine, and the predecisional deliberation exemption. Eisenstein explained:

> 8) Each of the attachments detailed in paragraph 7 are documents prepared by counsel and his subordinates and circulated to clients to provide legal advice as requested by clients, and do convey such advice regarding [RTKL] inquiries.
>
> 9) Each of the attachments detailed in paragraph 7 reflect counsel's thoughts and mental impressions regarding strategies for responding to inquiries from the public and prepare clients for potential litigation regarding such matters.
>
> 10) Each of the attachments detailed in paragraph 7 provide agency employees['] thoughts and guidance regarding inquiries from the

> public, and discuss how best to respond to such matters. These discussions occurred prior to officials' final decisions regarding such matters.
>
> 11) The attachments detailed in paragraph 7 have not been shared beyond the Commonwealth's executive agencies, and the Office has not waived any relevant privilege.

Id. at 23a.

That same day, Requesters submitted a position statement, asserting the Office had failed to demonstrate its entitlement to withhold the three pages, and requesting the OOR to conduct *in camera* review. *Id.* at 24a-33a.

On September 25, 2025, the OOR denied Requesters' appeal, concluding the attorney-client privilege and the attorney-work-product doctrine protected the three withheld pages from disclosure.[4] In so doing, the OOR principally relied upon Eisenstein's affirmation containing the Privilege Log. *Id.* at 38a-39a. Requesters petitioned this Court for review.

DISCUSSION

On appeal, Requesters raise three issues for our review.

> [I.] Did the OOR err when it concluded that the attorney-client privilege and/or work product doctrine applied?
>
> [II.] Does the predecisional exception to the [RTKL] apply to the records?
>
> [III.] Did the OOR err as a matter of law in declining to conduct *in camera* review of the records to assess the asserted privileges?

Requesters' Br. at 6.

[4] Having determined the records to be privileged, the OOR declined to address whether the deliberative process exemption, as set forth in Section 708(b)(10) of the RTKL, applied.

We have summarized our standard and scope of review in RTKL appeals as follows:

> Pursuant to Chapter 13 of the RTKL, with respect to appeals relating to decisions of Commonwealth agencies, this Court is the ultimate factfinder in RTKL disputes. Section 1301 of the RTKL, 65 P.S. § 67.1301. Accordingly, we owe no deference to the OOR's legal analysis or factfinding, as our standard of review of a final determination of the OOR is de novo. *Bowling v. Off. of Open Recs.*, [] 75 A.3d 453, 474 ([Pa.] 2013). In addition, we are "entitled to the broadest scope of review[,]" covering all justiciable issues raised and preserved below. *Id.* at 477. *See also Payne v. Pa. Dep't of Health*, 240 A.3d 221, 225 n.6 (Pa. Cmwlth. 2020). Unlike in other administrative agency contexts, "we . . . may substitute our own findings of fact for that of the agency." *W. Chester Univ. of Pa. v. Browne*, 71 A.3d 1064, 1067 n.4 (Pa. Cmwlth. 2013). We have the discretion to conduct a hearing, or to remand to the OOR, to supplement the record. *Id.*

Pa. Off. of Governor v. Brelje (Off. of Open Recs.), 312 A.3d 928, 932 (Pa. Cmwlth. 2024) (footnote omitted).

For ease of disposition, we combine Requesters' first and third issues. They argue the OOR erred in concluding the attorney-client privilege and the work-product doctrine applied to the three withheld pages given the Office's "formulaic" and "insufficient" response, and ask this Court to direct the OOR to conduct *in camera* review of the pages. Requesters' Br. at 16, 29.

When an agency asserts a privilege, "it bears the burden of proof to demonstrate by *sufficient facts* that the privilege applies." *Janesch v. Pa. House of Representatives*, 299 A.3d 1030, 1036 (Pa. Cmwlth. 2023) (citation omitted) (emphasis added); *see also* Section 708(a)(1) of the RTKL, 65 P.S. § 67.708(a)(1) (providing "[t]he burden of proving that a record of a Commonwealth agency . . . is exempt from public access shall be on the . . . agency . . . by a preponderance of the

evidence"); Section 903(2) of the RTKL, 65 P.S. § 67.903(2) (when denying a request in whole or in part, an agency shall state in writing "[t]he specific reasons for the denial, including a citation of supporting legal authority"). "To meet its burden of proving that a record need not be disclosed under the RTKL, the agency may establish facts with affidavits or attestations." *Couloumbis v. Senate of Pa.*, 300 A.3d 1093, 1104 (Pa. Cmwlth. 2023) (*en banc*). This Court has explained:

> Affidavits are the means through which a governmental agency . . . justifies nondisclosure of the requested records under each exemption upon which it relied upon. The affidavits must be detailed, nonconclusory, and submitted in good faith . . . . Absent evidence of bad faith, the veracity of an agency's submissions explaining reasons for nondisclosure should not be questioned.

McGowan v. Pa. Dep't of Env't Prot., 103 A.3d 374, 381 (Pa. Cmwlth. 2014) (quotation omitted). Furthermore, a privilege log listing "the date, record type, author, recipients, and a description of the withheld record[] can serve as sufficient evidence to establish an exemption, especially where the information in the log is bolstered with averments in an affidavit." *Id.*

Moreover, Section 305 of the RTKL provides a Commonwealth agency record generally is presumed to be public unless "protected by a privilege" or subject to other exemptions. 65 P.S. § 67.305(a). Section 102 of the RTKL also excludes privileged documents from the definition of "public record." 65 P.S. § 67.102. The RTKL defines privilege to include "the attorney-client privilege" and the "attorney-work product doctrine." 65 P.S. § 67.102. In civil matters, "counsel shall not be competent 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. § 5928.

Although an agency has some discretion under the RTKL to release otherwise exempt records, it lacks discretion to release privileged records. Section 506(c)(2) of the RTKL, 65 P.S. § 67.506(c)(2). The RTKL permits redaction of "the information which is not subject to access." Section 706 of the RTKL, 65 P.S. § 67.706. Redactions may be made even if the record is protected by privilege. *Couloumbis*, 300 A.3d at 1099. "Whether the attorney-client privilege protects communications from disclosure is a question of law." *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 215 (Pa. 2014).

In *Levy v. Senate of Pennsylvania*, 65 A.3d 361 (Pa. 2013), our Supreme Court explained the application of the attorney-client privilege in the context of RTKL cases.

> This Court has repeatedly noted that the attorney-client privilege is deeply rooted in our common law and is the most revered of our common law privileges. The General Assembly has defined attorney-client privilege identically for purposes of criminal and civil law . . . . We recently observed that 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. We acknowledged, however, that the attorney-client privilege is often in tension with the truth-determining process of the justice system, and, in this case, with the RTKL's goal of government transparency. In balancing these competing purposes, we note that not all information passed between client and attorney is privileged, but rather the privilege is limited to communications related to the legal advice sought by the client.

Id. at 368-69 (internal citations and quotation marks omitted). Additionally,

> the determination of the applicability of the attorney-client privilege does not turn on the category of the information, such as a client's identity or address, or 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. 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 (internal citations omitted). To establish the application of the attorney-client privilege, an agency must demonstrate:

> (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 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.

Couloumbis, 300 A.3d at 1102.

The work-product doctrine is closely related to the attorney-client privilege but "provides broader protection." *Bagwell v. Dep't of Educ.*, 103 A.3d 409, 415 (Pa. Cmwlth. 2014) (citation omitted). Although the attorney-client privilege protects confidential communications, the work-product doctrine "only applies to records that are the work-product of an attorney and may extend to the product of an attorney's representative secured in anticipation of litigation." *Id.* (citation omitted). In the context of the RTKL, "the work-product doctrine protects the 'mental impressions, theories, notes, strategies, research and the like created by an attorney in the course of his or her professional duties, particularly in anticipation or prevention of litigation' from disclosure." *Id.* at 416 (quoting *Levy v. Senate of Pa.*,

94 A.3d 436, 443 (Pa. Cmwlth. 2014)). The party asserting waiver of a privilege bears the burden of proof. *Bagwell*, 103 A.3d at 420 (recognizing the procedural disadvantage requesters face in RTKL appeals, this Court nevertheless placed the burden of proving waiver on requesters).

Here, Requesters argue neither the attorney-client privilege nor the work-product doctrine protects the three withheld pages from disclosure, because the Office failed to identify the attorney, the client, or the relationship between them. With respect to the attorney-client privilege, they argue the Office only "vaguely asserted that the responsive records were 'prepared by *counsel* . . . and circulated to *clients* to provide legal advice'" and that the records "reflected '*counsel's* thoughts and mental impressions regarding strategies for responding to inquiries' and 'potential litigation.'" Requesters' Br. at 19 (emphasis in original).

According to Requesters, the Office does not explain its role relative to the creation of the three withheld pages. Requesters explain the Eisenstein affirmation's reference to "counsel" cannot pertain to the Office, because it "does not represent agencies or typically function as counsel and, consequently, does not provide confidential legal advice to 'clients' in the regular course." *Id.* at 20. Requesters assert the Office could not have provided legal advice regarding RTKL matters to OGC, because providing such advice is the function of OGC. *Id.*

Requesters further explain the Eisenstein affirmation's reference to "clients" likewise cannot pertain to the Office, because they directed the March 14 Request to OGC. *Id.* They described the Office as "an unrelated third party." *Id.*

Finally, Requesters assail the Office's explanations as nonsensical and as "an attempt to render standard documents privileged merely because OGC was

implicated." *Id.* at 21 ("Invoking 'OGC' is not a talisman that renders records privileged under the RTKL.").

As for the attorney-work-product doctrine, Requesters cast doubt on the Office's ability to demonstrate the three withheld pages "reflect the mental processes of an attorney acting on behalf of a client" because the Office has not established the identity of either the attorneys or the clients. *Id.* at 22. Requesters, therefore, urge this Court to reverse the OOR's decision and remand this matter to the OOR with instructions to conduct *in camera* review of the three withheld pages to determine whether the Office properly invoked the privileges.

The Office counters Requesters' understanding of OGC's role is incorrect. Citing the Commonwealth Attorneys Act,[5] the Office explains OGC acts "as the primary 'law firm' for the day-to-day operations of the executive." Office's Br. at 6; 71 P.S. § 732-301. As a result, it asserts legal advice from OGC to the executive should be privileged. Office's Br. at 6. The Office notes OGC had represented executive agencies in certain gaming matters involving private entities and that the March 14 Request "sought information from OGC about such representation." *Id.* Thereafter, Requesters initiated the present request with the Office to obtain communications related to the March 14 Request. *Id.* at 7. Although Requesters directed their March 14 Request to OGC, the Office suggests it was implicated as a client because OGC represents the executive. *Id.* Moreover, the Office asserts the Pennsylvania Rules of Professional Conduct mandated that OGC consult with the Office concerning the March 14 Request. *Id.* (citing Pa.R.P.C. 1.4). The Office maintains Requesters are not entitled to communications it had with OGC

[5] Act of October 15, 1980, P.L. 950, *as amended*, 71 P.S. §§ 732-101-732-506.

concerning the March 14 Request, and should not be permitted to define "the scope of OGC lawyers' legal representation." *Id.* at 8.

With respect to the work-product doctrine, the Office suggests Requesters' "inquiry *expressly sought records relating to OGC's work product*." *Id.* at 10 (emphasis in original). But even if that were not the case, the Office argues, the Eisenstein affirmation satisfies every element of the work-product doctrine, because the three withheld pages "were created by counsel to prepare clients (here, [the Office]) for potential litigation (which did, as this matter demonstrates, actually ensue)." *Id.*

In response, Requesters continue to argue that, contrary to the Office's statement, which they characterize as "untrue," the March 14 Request submitted to OGC had "nothing to do" with the Office. Requesters' Reply Br. at 3, 8. They neither sought "communications between OGC and [the Office], nor did the March 14 Request facially concern OGC's legal representation" of the Office under the Commonwealth Attorneys Act. *Id.* at 3. Separately, the current request only seeks documents in the Office's possession bearing any relation to the March 14 Request. *Id.* at 3-4.

Requesters contend the Office's position that the March 14 Request was about OGC's representation of the Office is an alternative explanation, raised for the first time on appeal. *Id.* at 7. They argue the Office "is attempting to supplement its evidentiary showing to the OOR and cure its prior evidentiary failures." *Id.*

Upon review of the entire record, as detailed above, we agree with Requesters that the OOR erred in concluding the attorney-client privilege and the work-product doctrine applied to the three withheld pages. Critically, the Eisenstein affirmation is facially inadequate, conclusory, and otherwise generic. *C.f. Janesch*, 299 A.3d at

1042-43 (finding the affidavits sufficiently detailed); *Bonner v. Dep't of Cmty. and Econ. Dev.* (Pa. Cmwlth., No. 292 C.D. 2025, filed July 16, 2026), slip op. at 11 (noting the "attestations sufficiently state why the privilege was invoked and provide adequate detail as to why the privilege extends to the record at issue").[6]

The Eisenstein affirmation does not provide any information about the nature of the pages, whether they are e-mails, memoranda, or the like, or to what they specifically relate. Rather, Eisenstein summarily states the three withheld pages were "prepared by counsel and his subordinates and circulated to clients to provide legal advice as requested by clients, and do convey such advice regarding [RTKL] inquiries." R.R. at 23a. Similarly, with respect to the application of the work-product doctrine, the Eisenstein affirmation states the pages "reflect counsel's thoughts and mental impressions regarding strategies for responding to inquiries from the public and prepare clients for potential litigation regarding such matters." *Id.* The Privilege Log, likewise, did not provide sufficient information to support the invocation of the privileges. It only identified the records at issue as "Adobe Acrobat (PDF)," the date and time they were last modified, and the applicable Sections of the RTKL and the Judicial Code.[7] Thus, because the Office did not sufficiently explain the basis for nondisclosure through the Eisenstein affirmation and the Privilege Log, *in camera* review is necessary. *See UnitedHealthcare of Pa., Inc. v. Pa. Dep't of Hum. Servs.*, 187 A.3d 1046, 1060 (Pa. Cmwlth. 2018) (noting "where an agency sufficiently explains the basis for nondisclosure through an affidavit, a log or *in camera* review may not be necessary"). Without a detailed

[6] An unreported panel decision of this Court, "issued after January 15, 2008," may be cited "for its persuasive value[.]" Section 414(a) of the Commonwealth Court's Internal Operating Procedures, 210 Pa. Code § 69.414(a).

[7] Tellingly, the Privilege Log under the column "record type" simply noted "attachment." R.R. at 22a.

affirmation, a privilege log, or *in camera* review, the Office may shield from disclosure every document by globally invoking the attorney-client privilege or work-product doctrine if the document in any way references or involves OGC.[8] *See Twp. of Neshannock v. Kirila Contractors, Inc.*, 181 A.3d 467, 474 (Pa. Cmwlth. 2018) (noting "the attorney[-]client privilege must be asserted with respect to each . . . document sought to be withheld, rather than a single, blanket assertion") (quotation omitted). This would contravene the RTKL's goal of government transparency. Accordingly, given the record before it, the OOR erred in concluding the attorney-client privilege and work-product doctrine applied.[9] We, therefore, remand this case to the OOR with instruction to conduct *in camera* review of the three withheld pages to determine if the privileges apply.

CONCLUSION

In light of the foregoing, we vacate the OOR's final determination, and remand the matter to the OOR for *in camera* review of the three withheld pages. The OOR is instructed to issue a final determination within 60 days of the date of this Court's Order.

_____
STACY WALLACE, Judge

[8] We agree with the Office's contention that OGC's core function is to provide legal advice to the executive. *See* 71 P.S. § 732-301.

[9] Given the outcome of this case, we need not address Requesters' second issue, but we do instruct the OOR to address the deliberative process exemption on remand, should it determine the asserted privileges do not apply.

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	:	
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O R D E R

AND NOW, this 16th day of November 2026, the September 25, 2025 final determination of the Pennsylvania Office of Open Records (OOR) is hereby **VACATED** and this matter is **REMANDED** to the OOR for further proceedings consistent with the accompanying memorandum opinion.

Jurisdiction **RELINQUISHED**.

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STACY WALLACE, Judge