IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania Department of Education, Petitioner	:	
	:	No. 1138 C.D. 2014
v.	:	Submitted: January 16, 2015
Ryan Bagwell, Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION
BY JUDGE SIMPSON **FILED: April 16, 2015**

Procedurally, this controversy involves the certification of an adequate record for appellate review. Substantively, this case involves exemptions under the Right-to-Know Law (RTKL).[1]

More specifically, the Department of Education (Department) petitions for review from a final determination of the Office of Open Records (OOR) that directed disclosure of e-mails between the former Secretary of Education (Former Secretary) and counsel at the Office of General Counsel (OGC) to Ryan Bagwell (Requester). The Department denied access under the attorney-client and work-product privileges, and the predecisional deliberative exception. To prove the exemptions, the Department relied on a one-page verified statement, on which it declined to elaborate. Requester asked for a hearing to present evidence regarding waiver of the attorney privileges. OOR denied the request for a

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

hearing. After conducting *in camera* review, OOR determined the Department did not meet its burden of proof. The Department argues its verified statement established the privileges and the exception. The Department also requests correction of the certified record.

Procedurally, the certified record is deficient in that it does not include the material submitted to OOR for *in camera* review. Nor is it apparent from the record whether OOR was able to develop an adequate factual record as to waiver of the attorney privileges. Moreover, Requester disputes whether he had a full opportunity to develop the record before OOR regarding waiver of the attorney privileges, on which he bears the burden of proof. Therefore, as to the attorney privileges, we hold our disposition in abeyance, and remand the record to OOR to afford Requester this opportunity, and to certify a complete record. Substantively, as to the predecisional deliberative exception, where the Department failed to prove material facts on which it bore the burden, we affirm.

I. Background

Pursuant to the RTKL, Requester submitted a request for records from the Department seeking "copies [of] all e-mails sent between [Former Secretary] Ron Tomalis, James Schultz and Stephen Aichele on November 8, 2011" (Request). Reproduced Record (R.R.) at 7a. On that date, James Schultz was the First Executive Deputy General Counsel and Stephen Aichele was General Counsel to then Governor Tom Corbett.

The Department identified three e-mails with the subject line: "Attorney Recommendations" as responsive to the Request (E-mails). Based on the timing of the Request,[2] and surrounding circumstances, it is believed the E-mails pertain to an investigation of Penn State University's (PSU) handling of the allegations of child sexual abuse against Gerald Sandusky. However, the Department denied access, citing the attorney-client privilege, the work-product doctrine, and the deliberative process privilege codified in Section 708(b)(10) of the RTKL, 65 P.S. §67.708(b)(10) (predecisional deliberative exception).[3]

Requester appealed to OOR, arguing the records were not protected by the attorney privileges or the predecisional deliberative exception. In support, Requester asserted the Department waived the privileges by disclosing the E-mails to PSU. He also argued that E-mails regarding the hiring of a firm to perform an investigation do not implicate legal advice and are not deliberative.

OOR invited both parties to supplement the record, and directed the Department to notify third parties of their ability to participate pursuant to Section 1101(c) of the RTKL, 65 P.S. §67.1101(c). PSU did not participate in the proceedings or indicate a direct interest.

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[2] On November 5, 2011, the Pennsylvania Office of Attorney General released the presentment issued by a statewide grand jury investigating the child sexual abuse allegations against Gerald Sandusky.

[3] In Office of the Governor v. Scolforo, 65 A.3d 1095 (Pa. Cmwlth. 2013) (en banc), this Court explained the predecisional deliberative exception set forth in Section 708(b)(10) of the RTKL, 65 P.S. §67.708(b)(10), codified the deliberative process privilege recognized by our courts.

In response, the Department submitted a position statement relating the context of the E-mails between Former Secretary and Commonwealth counsel. The Department explained that in those communications, Former Secretary was acting on the Department's behalf; thus, he was under the executive agency umbrella protected by the attorney-client relationship with OGC. The Department submitted a verification signed by Former Secretary. In full, the verification made in accordance with 18 Pa. C.S. §4904 states:

> 1. As the Secretary of the [Department] on November 8, 2011, I was a client of the [OGC];
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> 2. I communicated with Stephen Aichele and/or James Schultz, attorneys in the [OGC], on November 8, 2011, as represented in e[-]mails of that date described in [the Department's] response to your [Request];
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> 3. The e[-]mails of November 8, 2011 that are in my possession and identified in [the Department's] response to your [Request] include only Mr. Aichele, Mr. Schultz and myself, and contain the mental impressions and/or opinions of Mr. Aichele and Mr. Schultz pertaining to an issue I presented to them for the purpose of seeking legal services or assistance in a legal matter, and was not for the purpose of committing a crime or tort; and,
>
> 4. I claim and have not waived the attorney-client privilege regarding the e[-]mails of November 8, 2011 identified in [the Department's] response to your [Request] that are in my possession.

R.R. at 6a (Verification, dated April 7, 2014). In addition, the Department requested an opportunity to respond to any allegations Requester proffered as to waiver of the attorney-client privilege.

To support his waiver claim, Requester submitted an e-mail dated November 11, 2011, from Former Secretary to PSU Trustee Ken Frazier. The content of that e-mail follows: "Re[:] Freeh[4] and Chertoff –I noted the same thing about Freeh when I had reviewed the names prior to forwarding them to [PSU Board Chairman] John [Surma] earlier in the week, and agree it gives the edge to Chertoff." R.R. at 37a. Requester contended the reference to forwarding names to PSU Board Chairman Surma shows the E-mails of "Attorney Recommendations" were disclosed to Surma. Requester asked OOR to conduct a hearing to present witnesses to prove his waiver claim.

Prior to issuing a final determination, OOR undertook *in camera* review of the E-mails upon request. The Department provided an accompanying index that identified each e-mail by sender/recipient and by time, with the corresponding exemption (Index). R.R. at 71a. E-mail No. 1 was the first e-mail sent from Schultz to Aichele, both OGC counsel. E-mail No. 2 forwarded that e-mail from Aichele to Former Secretary and to Schultz. Less than a half an hour later, Former Secretary sent E-mail No. 3 to Aichele and to Schultz. The Index did not include any description of content. After conducting *in camera* review, OOR offered the Department an opportunity to submit rebuttal to Requester's waiver submission. The Department refused.[5]

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[4] "Freeh" refers to the law firm of Freeh, Sporkin & Sullivan LLP, which was ultimately hired to investigate allegations underlying the Sandusky scandal.

[5] Specifically, the Department asserted OOR lacked authority to request particular information from the Department under Section 1102 of the RTKL, 65 P.S. §67.1102 (relating to appeals officers). In so doing, OOR undertook the mantle of an advocate. See R.R. at 99a, Letter of Department ("The Appeals Officer's directed information request is akin to a discovery request or a cross-examination of the affidavit previously filed by [the Department] in this appeal.").

Ultimately, after declining to hold a hearing, the appeals officer granted the appeal, directing disclosure of the E-mails. See Bagwell v. Dep't of Educ., OOR Dkt. No. AP 2014-055, (issued June 9, 2014) (Final Determination). OOR did not base its determination on its *in camera* review. Rather, OOR reasoned that unsworn statements consisting of legal argument (the Department's position statement) are not competent evidence to withhold records from disclosure. OOR also determined the Verification lacked sufficient detail to substantiate any of the exemptions. Specifically, OOR noted the Verification did not identify the legal issues under consideration or "provide any factual support in its affidavit that the content of the communication within the withheld records is for the purpose of seeking legal services or assistance in a legal matter, other than merely parroting the language of the attorney-client privilege." Final Determination at 8. Therefore, OOR concluded the Department did not meet its burden of proof.

The Department filed a petition for review to this Court. The Department bears the burden of proving its denial grounds. Nonetheless, the Department did not request that this Court conduct *in camera* review of the E-mails, relying on its submissions to OOR as sufficient to meet its burden of proof.

II. Discussion

The Department seeks reversal of the Final Determination on the merits. The Department challenges OOR's determination that it did not prove the privileges and exception protected the E-mails. The Department also asks this Court

to expand the certified record, arguing all submissions accepted by OOR, to which no party objects, must be included.

Seeking to enlist our fact-finding authority, Requester sought an evidentiary hearing before this Court. Requester represented the purpose of the hearing would be to present testimonial evidence from Former Secretary and others as to whether the E-mails were disclosed to third parties. He disputes the adequacy of the record to make findings regarding waiver.

"As to factual disputes, this Court may exercise functions of a fact-finder, and has the discretion to rely upon the record created below or to create its own." Dep't of Labor & Indus. v. Heltzel, 90 A.3d 823, 828 (Pa. Cmwlth. 2014) (en banc). In this case, we exercise our discretion to rely upon the record that is created by OOR.

OOR concluded the Verification did not contain sufficient detail to establish any of the exemptions. However, OOR had the benefit of reviewing the E-mails *in camera* prior to issuing the Final Determination. Regrettably, OOR did not include the E-mails in the certified record. In addition to *in camera* review, OOR attempted to supplement the record by other means. Specifically, OOR requested that the Department substantiate its claim that it did not waive the attorney privileges such as by disclosure to third parties. The Department declined.

A. Content of Certified Record

1. Record on Appeal

Section 1303(b) of the RTKL provides that "[t]he record before a court shall consist of the request, the agency's response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer." 65 P.S. §67.1303(b). We previously held that this language does not limit the record on appeal. Dep't of Transp. v. Office of Open Records (Aris), 7 A.3d 329 (Pa. Cmwlth. 2010). As we reasoned in Aris,

> we believe that ... the Legislature intended the record to be certified to this Court pursuant to Section 1303(b) to include evidence and documents admitted into evidence by the appeals officer .... To hold otherwise—that the record certified to this Court should not contain relevant, probative evidence considered by the OOR—would be an absurd reading of Section 1303(b). It would also frustrate appellate review of the determination to exclude from this Court's review the evidence that was before the appeals officer.

Bowling v. Office of Open Records, 75 A.3d 453, 476 (Pa. 2013) (citing Aris, 7 A.3d at 333-34) (citation omitted).

Based on its Interim Guidelines, OOR did not include the E-mails it reviewed *in camera* as part of the record on appeal. Nor did OOR describe the E-mails to shed insight as to their content. The appeals officer explained she was constrained by OOR's Interim Guidelines to "generic descriptions of the withheld records" as set forth in the Index. Final Determination at 8. As our Supreme Court noted, OOR's Interim Guidelines "do not constitute duly promulgated regulations" entitled to deference. Bowling, 75 A.3d at 471 n.20.

This Court's ability to conduct appellate review is compromised when the certified record is incomplete. We recently recognized the importance of receiving records reviewed *in camera* in a memorandum opinion[6] involving Requester and another agency. See Bagwell v. Office of Attny. General (Pa. Cmwlth., No. 1008 C.D. 2014, filed Nov. 20, 2014) (unreported), 2014 Pa. Commw. Unpub. LEXIS 686. There, we noted when the records are not adequately described, and an appeals officer undertakes *in camera* review, "documents reviewed *in camera* should be included in the record and filed under seal with this Court so that we can undertake adequate appellate review." Id., slip op. at 5, 2014 Pa. Commw. Unpub. LEXIS 686, at *5-6.

Here, the certified record does not include the evidence submitted to OOR for *in camera* review. At a minimum, the record on appeal shall consist of all evidence an appeals officer considered when making a determination. Aris. This includes records OOR accepted under seal and that an appeals officer reviewed *in camera.* Content of the record becomes important when there are disputes of material fact and challenges regarding the sufficiency of proof, as in this case.

Accordingly, OOR is required to certify as part of the record all evidence accepted and considered by its appeals officer. With regard to the records submitted *in camera*, OOR shall submit such records under seal.

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[6] Pursuant to Commonwealth Court Internal Operating Procedure 414, 210 Pa. Code §69.414, an unreported panel decision of the Commonwealth Court, issued after January 15, 2008, may be cited for its persuasive value.

2. Creating a Complete Record

The Department asserts the certified record is incomplete for other reasons. It contends OOR should have included correspondence regarding the proceedings within the certified record to this Court in accordance with Section 1303(b) of the RTKL (relating to record on appeal). To that end, the Department filed a Motion to Correct and Supplement the Record before this Court to include correspondence between the parties and OOR regarding requests to supplement the record. See R.R. at 96a-119a. Pursuant to this Court's order, the Department submitted these materials, separately designated, within the reproduced record.

We will not consider documents attached to a brief or included in a reproduced record that were not part of the certified record. Little v. Pa. State Police, 33 A.3d 659 (Pa. Cmwlth. 2011); Budd Co. v. Workers' Comp. Appeal Bd. (Kan), 858 A.2d 170 (Pa. Cmwlth. 2004). As such, the documents the Department designated in the reproduced record, from page 96a through page 119a (Supplemental Record), are not part of the record on appeal to which we are limited. However, we reviewed the documents comprising the Supplemental Record to assess their relevance for inclusion in the certified record.

From our review, these records reflect that OOR provided the Department with a full and fair opportunity to defend its denial grounds. The correspondence also shows OOR's attempt to obtain additional information from the Department regarding waiver of the attorney privileges. Specifically, the appeals officer sought clarification regarding whether any of the E-mails were forwarded to PSU Board member John Surma, and requested an affidavit regarding

the allegation that the Department waived the attorney privileges by disclosure to a third party.

The Department argues OOR is compelled to include within the certified record all materials filed by any party that it accepts. Otherwise, it contends, the record is incomplete. We disagree.

Not all information filed by any party in an appeal to OOR must be included in the record on appeal. 65 P.S. §67.1102(a)(2) (although required to review information, an appeals officer "*may* admit into evidence ... documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute.") (emphasis added). While it is clear that all *evidence* considered by an appeals officer shall be included in the certified record, Aris, the issue is less clear as to correspondence between appeals officers and parties.

One of an appeals officer's duties under Chapter 11 of the RTKL is to develop an adequate factual record on appeal. Levy v. Senate of Pa., 94 A.3d 436, 442 (Pa. Cmwlth.), appeal denied, 106 A.3d 727 (Pa. 2014) ("[i]n the ordinary course of RTKL proceedings [receipt of evidence] will occur at the appeals officer stage and a reviewing court will defer to the findings of the appeals officer.") (citing Bowling). Addressing requests to supplement the record is instrumental in accomplishing this goal, often without the formality of an order. OOR routinely communicates timelines and supplementation requests through correspondence to both parties, including by e-mail. See, e.g., R.R. at 105a (appeals officer e-mail dated May 2, 2014).

Procedural matters, especially those pertaining to requests to create a full record at this presumed fact-finding stage, may affect this Court's disposition. Levy, 94 A.3d at 442 (a court may serve as fact-finder in the "rare, extraordinary case"). A record of such requests is essential when a party challenges the adequacy of the record or claims inability to develop the record on an issue for which he bears a burden of proof.

Requester challenges the adequacy of the record as to waiver of the privileges. He repeatedly requested an opportunity to present evidence of waiver, which was effectively denied when the Department declined to supplement the record.

The Department argued OOR lacked the authority to request supplementation of the record as to specific facts. Because it bears on the adequacy of the record before us, we address the Department's refusal to provide information the appeals officer requested.

An appeals officer functions as the initial fact-finder, and acts in a quasi-judicial capacity pursuant to Section 1102 of the RTKL. Office of Open Records v. Center Twp., 95 A.3d 354 (Pa. Cmwlth. 2014) (en banc) (appeals officer may conduct *in camera* review to perform its fact-finding functions); Levy (appeals officer receives evidence to resolve factual disputes as reviewing courts rarely act as fact-finder); see also Heltzel (remanding to OOR as initial fact-finder to consider application of exemption in the first instance). In these circumstances,

it is incumbent upon an appeals officer to create an adequate factual record in order to issue a determination. 65 P.S. §67.1102(a).

Moreover, an appeals officer should consider procedural matters as the fact-finder in the first instance. Center Twp.; Bagwell v. Dep't of Educ., 76 A.3d 81, 91 (Pa. Cmwlth. 2013) (en banc). In Center Township, we reasoned that appeals officers had the authority to conduct *in camera* review "to better enable appeals officers to develop an adequate record for judicial review, and at the same time, to render an informed and reasoned decision– one that is based upon a sufficient factual predicate– especially with regard to matters concerning privileged or sensitive material." Center Twp., 95 A.3d at 370. Such authority is implied, and may be necessary to discharge fact-finding duties when the record does not contain more than bald allegations that records are protected by the attorney privileges. Id.

By logical extension, an appeals officer has many options available to supplement the record aside from *in camera* review. *In camera* review may not be the most efficient tool to create a full factual record, such as when the records at issue are voluminous, or when the agency is able to explain the reason the records are protected by affidavit. Written submissions may be appropriate to streamline the process and ensure an adequate factual record. Additionally, allowing an appeals officer to ask targeted questions designed to elicit facts is no different than allowing a hearing examiner or referee to ask questions to ensure a complete record. To deny OOR appeals officers that ability would lead to an absurd result

of limiting the ability to find facts efficiently, and it may frustrate this Court's ability to perform appellate review. 1 Pa. C.S. §1922(1); Bowling.

Accordingly, appeals officers are empowered to develop the record to ensure Chapter 13 courts may perform appellate review without the necessity of performing their own fact-finding. Center Twp; Levy.

As to content of the certified record, in addition to evidence pertaining to disputed facts, the certified record should include communications regarding a disputed procedural issue. Here, that issue involves efforts to supplement the record. Thus, any requests by the appeals officer to supplement the record, and any responses, should be included in the record on appeal where the issue is raised. This would also include a refusal to supplement the record as requested, and offers of alternatives such as hearings, depositions or sworn statements.

Including communications on disputed procedural issues will allow this Court to evaluate OOR's decisions in context, especially as they affect development of a full record. Further, a certified record that includes communications relating to disputed procedural matters may avert the need for a remand in some cases.

Therefore, we remand so OOR may correct the certified record as outlined above. This remand with direction resolves the Department's motion.

B. Merits

The RTKL is remedial in nature and "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." Pa. State Police v. McGill, 83 A.3d 476, 479 (Pa. Cmwlth. 2014). Consistent with the RTKL's goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed. Id.

Further, the RTKL contains a presumption of openness as to any records within a defined agency's possession. Bowling. The Department's possession of the E-mails, through Former Secretary, is not in dispute.

Under the RTKL, records in possession of a Commonwealth agency are presumed to be public unless they are: (1) *exempt under Section 708 of the RTKL*; (2) "*protected by a privilege*;" or, (3) exempt under any other Federal or State law or regulation or judicial order or decree. Section 305 of the RTKL, 65 P.S. §67.305 (emphasis added). Section 102 of the RTKL defines "privilege" as:

> The attorney work-product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court incorporating the laws of this Commonwealth.

65 P.S. §67.102 (emphasis added).

The burden of proving a privilege rests on the party asserting it. Heavens v. Dep't of Envtl. Prot., 65 A.3d 1069 (Pa. Cmwlth. 2013). Similarly, pursuant to Section 708(a) of the RTKL, an agency bears the burden of proving the

application of any of the exceptions within Section 708(b) by a preponderance of the evidence. See 65 P.S. §67.708(a).

1. Predecisional Deliberative Exception

The Department submitted only the Verification to support its assertion of the predecisional deliberative exception in Section 708(b)(10)(i) of the RTKL, 65 P.S. §67.708(b)(10)(i). That section protects:

> A record that reflects:
>
> (A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. §67.708(b)(10)(i)(A) (emphasis added).

To establish this exception, an agency must show: (1) the information is internal to the agency; (2) the information is deliberative in character; and, (3) the information is prior to a related decision, and thus "predecisional." Carey v. Dep't of Corr., 61 A.3d 367 (Pa. Cmwlth. 2013). "Only information that constitutes 'confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice' is protected as 'deliberative.'" Id. at 378 (quoting In re Interbranch Comm'n on Juvenile Justice, 988 A.2d 1269, 1277-78 (Pa. 2010)

(quotation omitted)). Records satisfy the "internal" element when they are maintained internal to one agency or among governmental agencies. Id.

OOR determined the records were not protected under the predecisional deliberative exception. OOR concluded the Department did not meet its burden of proving the exception as required by Section 708(a) of the RTKL. We agree.

In order "to demonstrate that the withheld documents are deliberative in character, an agency must 'submit evidence of specific facts showing how the information relates to deliberation of a particular decision.'" McGowan v. Dep't of Envtl. Prot., 103 A.3d 374, 383 (Pa. Cmwlth. 2014) (quoting Carey, 61 A.3d at 379). Affidavits that are conclusory or merely parrot the exemption do not suffice. Office of the Governor v. Scolforo, 65 A.3d 1095 (Pa. Cmwlth. 2013) (en banc).

As we explained in Scolforo:

> [i]t is not enough to include in the [a]ffidavit a list of subjects to which internal deliberations may have related. The [a]ffidavit must be specific enough to permit the OOR or this Court to ascertain how disclosure of the entries would reflect the internal deliberations on those subjects. Because this [a]ffidavit is not detailed, but rather conclusory, it is not sufficient, standing alone, to prove that the [records] are exempt from disclosure.

65 A.3d at 1104. As to the predecisional deliberative exception, this Court holds each of the three elements must be established by the underlying facts, as the absence of any of the elements precludes protection under the exception. See, e.g.,

Carey (holding agency did not establish exception because it did not set forth facts to substantiate all three elements).

The only evidence the Department submitted here to support its denial was the Verification. The Verification does not directly address any of the three elements required to establish the predecisional deliberative exception.

Of relevance, the Verification is silent as to whether the content was deliberative in nature or internal. Indeed, OOR invited the Department to supplement the record to clarify with whom the E-mails were shared, if anyone. The Department elected to rely exclusively on the Verification. Because it contains none of the predicate facts required to establish this exception, the Verification is insufficient. Based on the foregoing, we affirm OOR's determination that the Department did not meet its burden of proving the predecisional deliberative exception applies.

2. Attorney Privileges

Next, we review OOR's determination that the Department did not meet its burden of proving that the records were privileged under either the attorney-client privilege or the work-product doctrine. Although it appears that the E-mails related to assisting PSU with hiring a firm to conduct an investigation of the allegations against Sandusky, (see Final Determination at 9), the record lacks any evidence or stipulation on this point.

We recently assessed OOR's application of the attorney-client privilege in another case involving Requester, Bagwell v. Department of Education, 103 A.3d 409 (Pa. Cmwlth. 2014). We held that to establish the attorney-client privilege, the agency asserting it 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.
>
> (4) The privilege has been claimed and is not waived by the client.

Id. at 420 n.12 (citing Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259 (Pa. Super. 2007), aff'd by an equally divided court, 992 A.3d 65 (Pa. 2010)); see also Heavens.

The work-product doctrine, while closely related to the attorney-client privilege, provides broader protection. Levy; Dages v. Carbon Cnty., 44 A.3d 89 (Pa. Cmwlth. 2012). Confidential information flows from the client to the attorney, and vice versa, in the attorney-client relationship. Gillard v. AIG Ins. Co., 15 A.3d 44 (Pa. 2011). The attorney-client privilege protects such confidential communications. Id. By contrast, the work-product privilege only applies to "the mental impressions, theories, notes, strategies, research and the like *created by an attorney* in the course of his or her professional duties …." Pa. Pub.

Util. Comm'n v. Seder 106 A.3d 193, 201 (Pa. Cmwlth. 2014) (emphasis added) (citing Levy). Neither privilege protects mere facts. Commonwealth v. Vartan, 733 A.2d 1258 (Pa. 1999); Upjohn Co. v. United States, 449 U.S. 383 (1981).

The Department asserts these attorney privileges apply to all three E-mails, without redaction. In support, it argues the Verification states the E-mails contain the mental impressions and/or opinions of counsel for the purpose of seeking legal services or assistance in a legal matter.

Notably, the language of the Verification in paragraphs 3 and 4 mirrors the third and fourth prongs of the Fleming test set forth above. The only substantive difference between paragraph 3 in the Verification and the third prong of the test is the third prong specifies "[t]he communication relates to a fact of which the attorney was informed by his client, without the presence of strangers." Id. Requester contends the communications here were not maintained between the Department and OGC "without the presence of strangers." To the contrary, he asserts the Department waived the attorney privileges by disclosing the E-mails to third parties.

It is well-established that once attorney-client communications are disclosed to a third party, the attorney-client privilege is waived. Commonwealth v. Chmiel, 738 A.2d 406 (Pa. 1999); Joe v. Prison Health Servs., Inc., 782 A.2d 24 (Pa. Cmwlth. 2001). Likewise, the work-product doctrine, as a "qualified privilege," may be waived by disclosure to third parties. Commonwealth v. Kennedy, 876 A.2d 939, 945 (Pa. 2005). As we held en banc in Bagwell v.

Department of Education, a requester challenging the attorney privileges based on waiver by disclosure to third parties bears the burden of proving that waiver. 103 A.3d 409. We confirmed the attorney privileges apply in the RTKL context as they do in other contexts, by placing this burden on the requester. Id. at 420.

Requester in this case declared the intent to prove waiver, and he requested a hearing in order to do so. Our review of the Supplemental Record reflects that, after conducting *in camera* review, OOR attempted to compile a complete record as to waiver. Presumably, in lieu of a hearing, OOR's appeals officer asked the Department to supplement the record on waiver by addressing the factual dispute concerning disclosure in an affidavit. The Department declined.

Regarding the content of the E-mails, OOR determined the Verification was conclusory. We are inclined to agree, especially because the Verification comes close to parroting the elements of the Fleming test, without detail. Nevertheless, we are mindful that *in camera* review may be appropriate to evaluate privilege claims when a description of a record would reveal confidential information. Center Twp.

Importantly, OOR had the benefit of reading the E-mails to assess the attorney privileges. That option is not available to this Court on the current certified record. Were we to address the merits of the attorney privileges now, this Court would be evaluating OOR's judgment that the E-mails are not privileged, sight unseen.

However, *in camera* review is not an appropriate means to evaluate a waiver challenge, on which a requester bears the burden of proof. A requester may be at a distinct disadvantage when an appeals officer conducts *in camera* review because a requester may have no information about the records being reviewed other than an index. That disadvantage is compounded when that index contains no description of the content, like the Index here.

Moreover, waiver may not be apparent from the face of the records, and thus not discernible from *in camera* review. In this case, as to waiver, Former Secretary stated: "I claim and have not waived the attorney-client privilege regarding the [E-mails]." R.R. at 6a (Verification, ¶4). Without more, the record may be inadequate to determine this factual dispute, especially in light of Requester's offer of proof.

From our review of the Supplemental Record, it appears OOR's appeals officer attempted to compile an adequate record as to this material fact. However, that attempt was thwarted when the Department declined to advise OOR whether the records were disclosed to third parties. That, coupled with the denial of a hearing or any other meaningful option to make the case on waiver, frustrated Requester's ability to prove his claims regarding disclosure to third parties.

In the interest of fundamental fairness, Requester deserves an opportunity to present evidence regarding waiver. Thus, we remand to OOR as to the attorney privileges in part to provide Requester an opportunity to develop a complete record on this issue.

On the current certified record, this Court is not in a position to evaluate OOR's judgment on a crucial legal question. Therefore, we hold in abeyance our disposition on the merits as to the attorney privileges until we have a complete certified record.[7] In the event Requester decides to pursue his waiver challenge on remand, and OOR develops the evidentiary record in that regard, the record shall include any additional evidence or other relevant documents.

III. Hearing Request

Lastly, we address Requester's application for an evidentiary hearing. Requester asks this Court to conduct a hearing to resolve an issue of material fact. Specifically, he requests the opportunity to submit evidence regarding the Department's alleged waiver of the attorney privileges.

Because we decline to serve as fact-finder, and we remand to OOR to allow Requester the opportunity to develop a record regarding the alleged waiver of the attorney privileges, Requester's application for an evidentiary hearing in this Court is denied.

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[7] This Court may bifurcate a decision on the merits when it has a complete record as to certain exemptions, and may limit development of the record as to other exemptions as needed to clarify material facts. Carey v. Dep't of Corr., 61 A.3d 367 (Pa. Cmwlth. 2013) (affirming OOR final determination in part as to predecisional deliberative exception, and holding in abeyance disposition of security exceptions for further development of the record).

IV. Conclusion

Based on the foregoing, OOR's final determination is affirmed in part, as to the predecisional deliberative exception, and held in abeyance in part as to the attorney privileges.

We remand the record to OOR to prepare and certify a complete record on appeal, including all records reviewed *in camera*, under seal, and all correspondence pertaining to any request to supplement the record. As to the attorney privileges, we remand to OOR to allow Requester an opportunity to prove his waiver challenge.

In the event Requester elects this opportunity to develop the record to meet his burden, OOR is authorized to develop an evidentiary record limited to the waiver issue that is adequate for this Court's appellate review. Accordingly, the record shall include any additional evidence and other writings regarding the compilation of the record on the waiver issue, and OOR shall issue a supplemental determination so limited. An appropriate order, with timelines, follows.

ROBERT SIMPSON, Judge

Judge Cohn Jubelirer did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania Department of Education, Petitioner	:	
v.	:	No. 1138 C.D. 2014
Ryan Bagwell, Respondent	:	

ORDER

AND NOW, this 16th day of April, 2015, the final determination of the Office of Open Records (OOR) is **AFFIRMED IN PART** as to the predecisional deliberative exception. Disposition on the merits as to the attorney privileges is **HELD in ABEYANCE** awaiting recertification of a complete record. The record is **REMANDED** to OOR as follows:

1. Content of Certified Record. Records reviewed *in camera* shall be included in the certified record, clearly designated as such and under seal. Correspondence exchanged between the parties and/or OOR shall be included in the certified record to the extent it reflects any party's request (or refusal) to present evidence or to the extent it otherwise relates to OOR's compilation of a complete record, thus addressing Petitioner's motion to correct the certified record.

2. Timing of Recertification and Supplementary Evidence (Waiver).

(a) In the event Respondent Ryan Bagwell elects to proceed with his waiver challenge before OOR, for which he bears the burden of proof, he shall so notify OOR in writing **within thirty (30) days.**

Therein, Respondent shall describe the evidence he plans to submit, as well as his preferred method of submission (*e.g.*, by documents, by deposition, or by hearing).

Following receipt of Respondent's notice, OOR **SHALL NOTIFY** this Court, and OOR is **DIRECTED** to allow the parties a full and fair opportunity to develop a record regarding the alleged waiver of the attorney privileges. Thus limited, OOR may direct the parties to supplement the record as it deems appropriate, including by documentary evidence, by deposition, or by in-person testimony.

Further, OOR is **DIRECTED** to issue a supplemental determination corresponding to OOR AP Dkt. No. 2014-055, limited to the waiver issue, and to remit same with a complete certified record on appeal, including any supplementary evidence, within **one hundred and eighty (180) days** of the date of this order.

(b) In the event Respondent does <u>not</u> pursue his waiver challenge pursuant to paragraph 2(a) above, OOR is **DIRECTED** to certify the complete record on appeal **within forty-five (45) days** of the date of this order.

3. Request for Hearing. Because this Court affords Respondent the opportunity to supplement the record to substantiate his waiver allegations before OOR, Respondent's application for an evidentiary hearing is **DENIED**.

Jurisdiction of this matter is retained. Upon recertification of the record, this Court shall address the merits of the attorney privileges. Upon request of any party, the Court may set a schedule for supplemental briefing limited to the waiver issue.

ROBERT SIMPSON, Judge

Certified from the Record

APR 16 2015

and Order Exit