

Pennsylvania Right-to-Know Law Update: The Death of the Attorney-Client Privilege Log?

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In a recent case, the Pennsylvania Commonwealth Court found that the use of an attestation may negate the need for a full privilege log when responding to a Right-to-Know Law, 65 P.S. §§ 67.701 *et seq.*, (“RTKL”) request where there are redacted privileged documents and an attestation providing context for the privilege. In *Bergere v. Pennsylvania Department of Community and Economic Development*, No. 269-CD-2024 (Pa. Cmwlth. Jan. 30, 2025) the Commonwealth Court reviewed an Office of Open Records (“OOR”) Final Determination relating to a RTKL request filed by the requester with the Department of Community and Economic Development (the “Department”) which sought records relating to communications and post decisional deliberations between board members and staff members regarding a Board of Property decision in favor of the applicant on April 24, 2023 and its subsequent vacation a day later on April 25, 2023.

The Department’s Open Records Officer (“ORO”) provided 163 pages of records in response to the request with a certification attesting that a good faith search has occurred in addition to the following language:

9. Certain emails included with the responsive records were redacted per the attorney-client privilege.
10. As to the claim of attorney-client privilege in the responsive records:
 - (a) the asserted holders of the attorney-client privilege, namely the Board of Property and its administrators, are clients of legal counsel, Thomas Blackburn, Esquire;
 - (b) the people to whom the referenced email communications were made are (1) Thomas Blackburn, Esquire, (2) the Board Members of the Board of Property; and (3) administrators of the Board of Property;
 - (c) the referenced email communications relate to facts of which legal counsel was informed by his client, without the presence of strangers, for the purpose of securing assistance in a legal matter (specifically, the drafting and finalization of an Order); and
 - (d) the attorney-client privilege has been claimed and not waived by the client.

Upon receipt of the records and certification, the requester appealed to the OOR seeking to have the redactions removed. The OOR’s final determination denied the requester’s appeal finding that the evidence was undisputed that Blackburn provides legal representation to the Board of Property, its members, and its administrators and that the communications in question “were for the purpose of obtaining legal advice and guidance concerning the drafting and finalization” of a Board adjudication. Furthermore, the requester offered no evidence that the emails were shared with third parties; that the legal advice was for the purpose of committing a crime or tort; or that the asserted attorney-client privilege had been waived. The OOR reviewed the subject matter lines in the redacted emails and the ORO’s certification and attestation, and inferred “that the redacted communications consist of discussions between legal counsel and Board members/administrators that, more likely than not, involve the solicitation and receipt of legal advice and guidance regarding the issuance of relevant Board of Property Orders.” The requester then petitioned the Commonwealth Court for review of the OOR’s final determination.

In his petition, the requester alleges that the Department’s invocation of the attorney-client privilege was deficient and that the OOR should have reviewed the redacted emails *in camera* or at the very least required a privilege log. In the requester’s brief, he argues that the certification and supplemental attestation merely recite the elements of the attorney-client privilege.

To establish the attorney-client privilege, the party claiming the privilege must demonstrate the following facts: (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. Notably, the attorney-client privilege cannot be asserted as a single blanket assertion, rather it must be asserted with each redaction and with each document sought to be withheld. Generally, the privilege is asserted by providing 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 or attestation.

The ORO's supplemental attestation contained the following additional information regarding the redacted emails:

5. The emails are communications between Board of Property Board Members ("Board"), Board of Property administrators ("administrators"), and Board of Property legal counsel, Thomas Blackburn, Esquire.
6. The emails consists of (a) Board and administrators supplying information to and seeking legal guidance from Mr. Blackburn in connection with the drafting and finalization of a Board of Property Order and (b) Mr. Blackburn responding to the Board and administrators' information supplied and requests for legal guidance in connection with the drafting and finalization of a Board of Property Order.
7. The emails were not shared with individuals outside of the Board, Board administrators, and Mr. Blackburn.
8. The Board and Board administrators claim the attorney-client privilege in connection with the emails and do not waive such privilege.
9. *To supply any further detail about the emails than what has been provided in this Attestation and in the Certification Affidavit would violate the attorney-client privilege being claimed by providing the substance of the legal advice sought and the legal advice supplied therein.*

The Commonwealth Court acknowledged that it is often a challenge to provide an adjudicating body enough detail to establish the privilege without also disclosing the protected information. For that reason, the OOR, in some instances, has required *in camera* review of documents to confirm privilege. In *Bergere*, the Department's ORO identified the specific legal controversy before the Board of Property and attested that the communications concerned the Board's adjudication in that matter, no single document was withheld in its entirety as privileged, and the documents produced contained enough unredacted information to identify the privileged nature of the information that was redacted. The Court's overall holding was that, in effect, the Department produced the functional equivalent of a privilege log. Because both the Court and the OOR were able to determine that the redactions were appropriate without a privilege log and *in camera* review, it was not necessary for the OOR to require an *in camera* review of the same.

Drafting a privilege log and annotating each individual instance of privilege can be a substantial task for an ORO where there are numerous responsive records including communications with the Solicitor. Allowing OROs to assert privilege via an attestation identifying the legal controversy provides a time-saving approach to an ORO's response. While the Right-to-Know Law's purpose and intent is to provide government transparency, it's clear that the OOR is acknowledging the challenges that OROs are facing and open to finding creative solutions to assist OROs in their duties.

ORO's should however be aware that the Court **did not grant a blanket exemption** stating that privilege logs are never required, nor did it say that a bare-bones attestation that simply stated that documents were redacted due to privilege would satisfy the ORO's obligations under the RTKL. In addition, the Court implies that if documents had been withheld in their entirety, it would have been much more difficult to establish the privilege and that this would have led to higher scrutiny for the Department. In *Bergere*, the Department met its burden by providing an attestation that, in conjunction with the unredacted information on the documents in question, allowed both the OOR and the Commonwealth Court to find that the privilege had been properly applied.

Furthermore, OROs should also be cautious about withholding documents in their entirety. The attorney-client privilege exemption applies only to the information that is specifically privileged itself, not the entire document. While there may be cases where an entire document is privileged, this is uncommon, and more often, basic information such as the author, recipient, and date of the document are not privileged. As this case demonstrates, even the subject matter or title of a document is often not privileged, as the mere fact that a municipal entity received guidance from an attorney on a specific issue is generally not privileged itself, though there are exceptions to this general rule. By not withholding entire documents and appropriately redacting documents provided, an ORO can provide the OOR enough information to concretely establish the privilege without being required to undergo a laborious privileged log process. Consult your Solicitor for guidance on how to best create a strong attestation.

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