

Redacting Legal Invoices – The Attorney-Client Privilege and Attorney-Work Product Doctrine (Section 305) – Privileged Records

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Earlier posts have discussed whether the requester has submitted a valid request that: 1) uses the proper form; 2) is properly addressed to and has been received by the open records officer; 3) is sufficiently specific; and does not 4) require legal research or judgments to respond. We'll return validity issues later. However, because the OOR recently issued a useful determination on request for legal invoices, a common type of request received by most local agencies, we're going to begin our discussion on exemptions and protections from disclosure.

Records in possession of a local agency are presumed public unless exempt under or protected by: 1) the RTKL; 2) other law; 3) *privilege*; or 4) judicial order or decree. See 65 P.S. § 67.305. The RTKL defines "privilege" as "[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-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.

Request for legal invoices require analysis of two privileges: the attorney-client privilege and the attorney-work product doctrine. Open records officers must be aware of these privileges to avoid accidental disclosure of protected information.

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.

The attorney-work product doctrine prohibits disclosure "of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pa.R.C.P. 4003.3. The "work product rule" is closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney, usually in anticipation of litigation.

In *Levy v. Senate of Pennsylvania*, 65 A.3d 361, 373 (Pa. 2013), the Pennsylvania Supreme Court applied the attorney-client privilege to descriptions of legal services contained within legal invoices. In determining whether the privilege applied to a particular entry in an invoice, the Court explained:

[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.

With respect to the application of the attorney-work product doctrine to legal invoice entries, the Commonwealth Court has added:

Although the general descriptions such as drafting a memo, making [a] telephone call, performing research, observing a trail, reflect work performed, without further detail they do not reveal an attorney's 'mental impressions, theories, notes, strategies, research and the like.' Disclosure of the general tasks performed in connection with the fee charged reveals nothing about litigation strategy. They simply explain the generic nature of the service performed and justify the charges for legal services rendered. Where, as here, the taxpayers are footing the bill for the legal services, they are entitled to know the general nature of the services provided for the fees charged . . .

Levy v. Senate of Pa., 94 A.3d 436 (Pa. Commw. Ct. 2014), petition for allowance of appeal denied 106 A.3d 727 (Pa. 2014).

With this background, the OOR recently issued a determination on redacted legal invoices in *Campbell v. Upper Moreland Township School District*, AP 2018-2186 (Feb. 19, 2018). After conducting an *in camera* review of requested legal invoices, the OOR made the following findings about what can and what cannot be redacted from legal invoice entries:

- Entries that contain descriptions of legal services that disclose legal strategy, including the identification of particular matters assigned to legal counsel for review, or would reveal the specific contents of confidential communications between the attorney and the client are protected by the attorney-client privilege.
- Entries that contain conclusions, opinions, notes or summaries, legal research or legal theories of the District's solicitors, as they relate to legal services rendered to the District are protected by the attorney-work product doctrine.
- Entries that reference routine responsibilities associated with providing legal services, such as making and receiving telephone calls, attending meetings, and receiving and sending correspondence are not privileged.
- Dates and file numbers are not privileged because they do not disclose any legal strategy or the specific content of any confidential communication and, to the extent these entries document work performed by an attorney, they do not disclose that attorney's mental impressions or conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.

The *Campbell* determination provides insight into how the OOR evaluates redacted legal invoices. Accordingly, upon receipt of a RTKL request for legal invoices, an open record officer should work with their solicitor to determine what can and cannot be redacted.

If you have any questions or comments, please do not hesitate to contact Chris Voltz or any of the other Municipal and School Attorneys at Tucker Arensberg, P.C.