

IN THE SENATE OF PENNSYLVANIA

Appeal of Levy

Senate RTK Appeal 01-2010

FINAL DETERMINATION  
September 16, 2010

Statements of Fact

By letters dated June 22, 2010, Mr. Marc Levy (Requester), a reporter with the Associated Press, sought access to copies of "all bills, contracts and payment records related to the hiring of any outside lawyer or law firm to represent Senator Robert J. Mellow beginning Jan. 1, 2009." An identical request was also made for any current or former employees of the Senate Democratic Caucus beginning January 1, 2009. These requests were submitted pursuant to the Right-to-Know Law, Act of February 14, 2008, P.L.6, 65 P.S. §67.101 et seq. (RTKL).

The Senate's Open Records Officer provided copies of the documents to the Requester on August 3, 2010. However, redactions were made before the

documents were made available to Requester and certain specific redactions are at issue in this appeal which was filed in this office on August 11, 2010. A one week continuance was granted in this case.

At the request of this Appeals Officer, both the Senate and the Requester have submitted copies of the redacted documents into evidence. These five packets of legislative records include:

1. An April 2007 contract between the Senate and James F. Tierney, IV, Esquire. The name of the client to receive legal representation by Mr. Tierney has been redacted. An April 12, 2007 letter from Attorney Tierney to the Senate with two paragraphs redacted. Invoices from Attorney Tierney to the Senate dated December 12, 2008, April 15, 2009, July 13, 2009, October 19, 2009, November 13, 2009, December 10, 2009 and January 14, 2010. On each of these invoices, the description of the professional legal services rendered was redacted.

2. A February 18, 2010 letter from the Senate to Brian J. Cali, Esquire engaging his legal services. The name of the client to be represented has been redacted. Invoices from Attorney Cali to the Senate for the months of

November and December, 2009 and January, February, March, April and May 2010. The description of the legal services rendered on each of these invoices has been redacted.

3. A May 11, 2010 letter from the Senate to Sal Cagnetti, Jr., Esquire engaging his legal services. The name of the client to be represented has been redacted. Invoices from Attorney Cagnetti to the Senate for the periods of November through May, 2009 and June through August, 2009. The description of the legal services rendered on each of these invoices has been redacted.

4. A June 2007 contract between the Senate and Alan C. Kohler, Esquire. The name of the client to be represented has been redacted. A description of the legal services to be provided by Attorney Kohler has been redacted. A June 11, 2007 letter of engagement from the Senate to Attorney Kohler with a paragraph and a partial sentence redacted. Invoices from Attorney Kohler to the Senate dated October 13, 2008, November 11, 2008, December 3, 2008 and December 31, 2008. The description of the legal services rendered on each of these invoices has been redacted.

5. A letter from Jane Gowen Penny, Esquire to the Senate confirming

representation. The purpose of the representation and the identification of the client has been redacted. A February 5, 2010 invoice from Attorney Penny to the Senate. The name of the client has been redacted. The description of the legal services rendered has been redacted. A February 22, 2010 letter to the Senate from the client authorizing the Senate to pay Attorney Penny's invoice. The client's name is redacted.

For each of these five clients, these financial records do indicate which attorney was hired. In addition, the time expended by each attorney, the dates the services were provided, the hourly rate charged for the services or the fee arrangements and the amounts paid by the Senate are revealed.

In the cover letter to the Requester providing copies of these documents, the Senate has asserted that the redacted information is protected by the attorney-client privilege and not accessible pursuant to section 305(b) of the RTKL. 65 P.S. §67.305(b). The Requester contends that the identity of any client and the purpose or reason for engaging an attorney are not covered by the attorney-client privilege.

Requester also questions whether or not the Senate has provided a full and

adequate response to his request for access to legislative records. Requester specifically requested access to the records of “any current or former employee of the Senate Democratic caucus.” The response from the Open Records Officer specifically states that the records provided were for “any employee of Senator Mellow...”

### Discussion

The attorney-client privilege is part of the codified law of Pennsylvania. The relevant statutory language, found at 42 Pa.C.S. §5928, is as follows.

“In a civil matter 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.”

In criminal actions, the statutory counterpart is found at 42 Pa.C.S. §5916.

Whether or not the attorney-client privilege will attach and protect client identity and the purpose or reasons why various attorneys were engaged is a question or conclusion of law made based on the facts presented for each of the five clients. Nationwide Mutual Insurance Company v. Fleming, 924 A.2d 1259 (Pa. Super. 2007), appeal granted 935 A.2d 1270 (Pa. 2007); In re Estate of Wood, 818 A.2d 568 (Pa. Super 2003), appeal denied 882 A.2d 479 (Pa. 2005);

Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc., 227 F.R.D. 382 (W. D. Pa. 2005).

The Superior Court has recently stated, "...the party who has asserted the attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked..." Carbis Walker, LLP v. Hill, Barth & King, LLC, 930 A.2d 573 at 581 (Pa. Super. 2007). In accord: T.M. v. Elwyn, Inc., 950 A.2d 1050 at 1063 (Pa. Super 2008) Commonwealth Court, as well, has stated that, "the party asserting the privilege has the initial burden to prove that it is properly invoked..." Joe v. Prison Health Services, Inc., 782 A.2d 24 at 31 (Pa Cmnlth. 2001). More recently, the court again stated, "The burden of establishing privilege is on the party seeking to prevent disclosure." Ario v. Deloitte Touche, LLP, 934 A.2d 1290 at 1294 (Pa. Cmnlth. 2007).

In deciding whether or not to conclude that an attorney-client privilege exists, four criteria must be examined. Those are:

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.

Nationwide, supra. at 1264; Commonwealth v. Mrozek, 657 A.2d 997 at 998 (Pa. Super. 1995); Montgomery County v. Microvote Corporation, 175 F.3d 296 at 301 (C.A. 3 (Pa.) 1999).

The evidence on the record in this case from which facts may be determined consists solely of copies of the redacted documents supplied to Requester. Nevertheless, sufficient facts may be gleaned from this documentary evidence to do a partial examination in accordance with the criteria outlined above.

There are five “sets” of redacted documents for five clients that were provided to the Requester. In each instance, it is indicated that each individual as a holder of the privilege did indeed seek to become a client of an attorney and that each individual did communicate this to the attorney. This communication

from the client would explain the purpose for which the attorney was being engaged. That is, what was the necessity or circumstance causing each of the clients to seek out and engage the attorney. Such a confidential initial communication from a client to counsel goes to the heart of the attorney-client privilege. Furthermore, it is not unreasonable to conclude that these clients also expected their identities to be protected by the privilege especially since they have a heightened awareness of the public nature of their employment. By these redacted submissions, each client has evidenced a legitimate expectation of confidentiality and privacy in dealing with their counsel. Finally, the redactions in these documents and this appeal itself clearly indicate that each of these five individuals is not waiving but is seeking to claim the attorney-client privilege.

It is impossible from the evidence submitted to determine whether or not the communications of identity and the purpose for which the attorney was being engaged were made “without the presence of strangers” and “not for the purpose of committing a crime or tort.” This lack of evidence does not, however, vitiate the privilege at this point.

It must be noted that Mr. Levy does argue that the documents themselves



evidence a waiver of the attorney-client privilege since they were shared with the Chief Clerk of the Senate<sup>1</sup> for the purpose of paying the legal fees. Such a conclusion cannot be made. Such intra-Senate type communications may retain a privileged status and be shared with employees of the Senate on a “need-to-know basis.” Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609 at 633 (M.D. Pa. 1997). Citing In re Grand Jury 90-1, 758 F. Supp. 1411 (D. Colo. 1991), the Andritz court further held at 633, “Only when the communications are relayed to those who do not need to know the information to carry out their work or make effective decisions on the part of the company is the privilege lost.” See also: SmithKline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467 at 476 (E.D. Pa. 2005); Southeastern Pennsylvania Transportation Authority v. CaremarkPCS Health, L.P., 254 F.R.D. 253 at 258 (E.D. Pa. 2008).

In the present case, it can be discerned that the records at issue were shared with the Chief Clerk of the Senate. The Chief Clerk is an elected officer of the Senate. It is well within the scope of his employment to receive copies of these records and make payment of the legal fees incurred by the Senate on

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<sup>1</sup>The Chief Clerk of the Senate also serves at the Open Records Officer for the Senate. 104 Pa. Code §7.1

behalf of its Members or employees. These documents do not facially reveal a waiver of the attorney-client privilege for this reason. However, it is equally impossible to conclude that these communications were made “without the presence of strangers” without further evidence being presented.

“The attorney-client privilege has been a part of Pennsylvania law since the founding of the Pennsylvania colony...” Commonwealth v. Noll, 662 A.2d 1123 at 1126 (Pa. Super. 1995) And, “the attorney-client privilege has deep historical roots and indeed is the oldest of the privileges for confidential communications in common law” Nationwide, supra. at 1263. Our Supreme Court has even termed it “the most revered of the common law privileges.” Commonwealth v. Maguigan, 511 A.2d 1327 at 1333 (Pa. 1986); Commonwealth v. Chmiel, 738 A.2d 406 at 414 (Pa. 1999).

In light of the foregoing, the attorney-client privilege deserves the utmost deference in any proceeding and must be zealously guarded and protected if possible. In this case, the Senate must be given the opportunity to offer and remedy that lack of objective indicia on this record to support the attachment of the attorney-client privilege. The Senate may provide sworn affidavits,

statements pursuant to 18 Pa.C.S. §4904 or any other probative evidence to conclude that the attorney-client privilege compels each redaction of client identity and purpose or reason for hiring an attorney for each of the five clients individually. Specifically, the Senate must address that these communications from the clients to their counsel were made without the presence of strangers and not for the purpose of committing a crime or tort. Such a remedy has been permitted in similar RTKL cases involving the attorney-client privilege. See: Thompson v. Dickinson Township, Office of Open Records (OOR) Dkt. AP 2009-302; Nychis v. North Versailles Township, OOR Dkt 2009-986; Latkanich v. Washington Township, OOR Dkt. 2010-329; Gluck v. West Jefferson Hills School District, OOR Dkt. 2010-308.

Requester has also questioned the adequacy of the Senate's response to his inquiry. Requester requested records for any Democratic caucus employee and the Open Records Officer provided records for employees of Senator Mellow. The Senate argues in a footnote in its memorandum of law that it has provided the records for all employees and not just Senator Mellow. However, there is no evidence on the record to support such a finding. The Senate may

provide an affidavit to the Requester that the requested records for all caucus employees have been produced and no other records exist. In the alternative, the Senate must provide records for any other caucus employees. Moore v. Office of Open Records, 992 A.2d 907 (Pa. Cmwnlth. 2010).

For the first time, the Senate has also argued in its memorandum of law that the redactions in the records may have related to grand jury proceedings which would require secrecy. Although the words “grand jury investigation” and the word “investigation” do appear in the redacted documents, that is not sufficient evidence to compel a reasonable person to conclude that grand jury secrecy must attach to those records or the redactions. There is nothing more on the record in this case to suggest which, if any of the clients or records, specifically pertain to grand jury proceedings or how or why such records must be secreted.

The Senate argues in its memorandum that the redactions were made because Section 708(b)(16) of the RTKL excepts from public disclosure “a record of an agency relating to or resulting in a criminal investigation...” 65 P.S. §67.708(b)(16). Unfortunately, again, no facts have been offered into evidence at

all to support such a finding. The only evidence in this proceeding are copies of the various redacted documents given to Requester. On the face of these redacted documents, it is impossible to conclude that these records have anything at all to do with a criminal investigation.

Finally, the Senate has argued that the redactions were necessary because the information is protected by the attorney-work product doctrine. This doctrine "is designed to shelter the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case." Birth Center v. St. Paul Cos., 727 A.2d 1144 at 1165 (Pa. Super. 1999). It is hard to discern how this doctrine could serve to protect client identity or the purpose or reason a client has engaged an attorney. However, it is not necessary to do so because no factual evidence has been offered in this proceeding to support such a finding.

IN THE SENATE OF PENNSYLVANIA

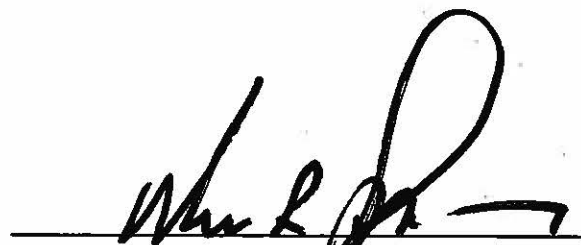
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ORDER

AND NOW, this 16th day of September, 2010, the Senate is directed to provide Mr. Levy with affidavits for each of the five clients from a person with knowledge attesting that the redacted portions of the records contain communications which were made "without the presence of strangers" and were made "not for the purpose of committing a crime or tort." Alternatively, the Senate is directed to provide the requested records to Mr. Levy revealing the identity of the clients and any purpose for which the various attorneys were engaged.

The Senate is directed to provide Mr. Levy with access to all bills, contracts and payment records related to the hiring of any outside lawyer or law firm to represent any current or former employee of the Senate Democratic Caucus since January 1, 2009. In the alternative, the Senate is directed to provide Mr. Levy with an affidavit attesting that all such records have already been provided and no further records exist.

A handwritten signature in black ink, appearing to read 'Mark R. Corrigan', is written over a horizontal line.

Mark R. Corrigan  
Senate Appeals Officer

## **APPEALING THIS DECISION TO COMMONWEALTH COURT**

Within 30 days of the mailing date of this final determination, either party to this action may appeal the decision to the Commonwealth Court. 65 P.S. §67.1301. If you have any questions about the procedure to appeal, you may call the Prothonotary of the Commonwealth Court at 717.255.1650.