



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD



ANGELA CRES TRUST OF JUNE 25, 1998 BY :
AND THROUGH ITS TRUSTEE LAUREL A :
HIRT and LAUREL A. HIRT, Individually :

v. :

EHB Docket No. 2025-005-W
(Consolidated with 2025-022-W
and 2025-118-W)

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and ERIE COUNTY :
CONSERVATION DISTRICT and :
MILLCREEK TOWNSHIP SCHOOL :
DISTRICT, Permittee :

Issued: July 6, 2026

**OPINION AND ORDER ON
APPELLANTS' MOTION TO COMPEL DIRECTED TO
DEPARTMENT OF ENVIRONMENTAL PROTECTION
AND ERIE COUNTY CONSERVATION DISTRICT**

By MaryAnne Wesdock, Judge

Synopsis

Where a party produces a privilege log asserting attorney-client privilege in response to a request for production of documents, the privilege log must contain sufficient factual information to demonstrate that the privilege was properly invoked. Here, we direct the Department and Conservation District to provide additional information in support of their claim of privilege.

OPINION

Introduction

This matter involves three consolidated appeals filed with the Environmental Hearing Board (Board) by Angela Cres Trust of June 25, 1998 by and through its trustee Laurel A. Hirt and by Laurel A. Hirt, individually (collectively, the Trust). The appeals challenge the grant of

coverage under Chapter 105 Bureau of Waterways Engineering and Wetlands General Permit-4 (the GP-4) to Millcreek Township School District (School District) by the Erie County Conservation District (Conservation District), as delegated by the Department of Environmental Protection (Department). Registration under the GP-4 authorizes the School District to construct an outfall for stormwater on property adjacent to that owned by the Trust. The project is known as the Asbury Storm Sewer Relocation Project and is part of a larger system aimed at managing stormwater in the area across from the Trust property along Sterrettania Road in Millcreek Township, Erie County.

The history of this matter was recently set forth in Opinions issued by the Board on April 16, 2026 and June 25, 2026. *Angela Cres Trust of June 25, 1998 v. DEP*, EHB Docket No. 2025-005-W (Consolidated) (Opinion and Order on Motion for Stay issued June 25, 2026); *Angela Cres Trust of June 25, 1998 v. DEP*, EHB Docket No. 2025-005-W (Consolidated) (Opinion and Order on Motions for Summary Judgment issued Apr. 16, 2026).

Throughout this appeal, the parties have engaged in discovery and filed various motions with the Board. This Opinion addresses the Trust's March 31, 2026 motion to compel directed toward the Department and the Conservation District.¹ The Department and Conservation District filed a response in opposition on April 15, 2026.²

The issue raised by the motion concerns approximately 170 pages of email communications sought by the Trust that the Department and Conservation District contend are protected by attorney-client privilege. In response to the Trust's request for production, the Department and Conservation District produced redacted copies of the emails and a privilege log

¹ A ruling on the Trust's motion was stayed by the Board pending the outcome of settlement negotiations. Because the parties were unable to reach a resolution of this matter, we shall now address the motion.

² The Department and Conservation District are represented by the same counsel in this matter.

that identified the Bates range for each document, the date of the communication, a general description of the author and recipient, the claimed privilege, and description. The description listed for each document was “Email communications between attorney and client.” (Motion, Ex. 1.) The Trust contacted the Department and Conservation District and asserted that it was “entitled to know the actual name of the author(s), the actual name of the recipient(s), and sufficient evidence of the substance of the communications so as to evaluate whether each communication is for legal advice and that the privilege was not waived.” (Motion, para. 9.) The Department produced the emails with revised redactions showing the names of the sender(s) and recipient(s), the date and the subject line. The Department and Conservation District also produced a revised privilege log containing the following revised descriptions for the various communications: “request for legal assistance,” “legal advice requested and provided,” or “provided legal assistance.” (Motion, Ex. 7.)

In its motion to compel, the Trust argues that the revised privilege log and document production remain deficient because the emails are “over-redacted,” and the privilege log provides only “a minimal perfunctory description of each document, so as to deprive Appellants [of] any ability to evaluate each claim of privilege.” (Motion, para. 25.) The Trust further argues that the “descriptions are so devoid of detail that it defeats the purpose of the privilege log, which is to provide sufficient evidence to establish the privilege.” (*Id.* at para. 26.) The Trust asks us to compel the Department and Conservation District to produce either “compliant documents” or an “adequate privilege log that sufficiently describes the subject matter of each document.” (*Id.*, para. 27.)

For their part, the Department and the Conservation District maintain that the privilege log together with the partially redacted emails “[provide] a general indication of substance or

description of the communications,” so that the Trust has “not been deprived of the ability to evaluate the claimed privilege.” (Response, para. 13, 16.)

Standard of Review

With limited exceptions, discovery proceedings before the Board are governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a); *Lananger v. DEP*, 2025 EHB 130, 133; *Protect PT v. DEP*, 2020 EHB 326, 333. “[T]he Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required.” *Northampton Twp. v. DEP*, 2009 EHB 202, 205.

The Rules of Civil Procedure establish that generally, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of the case. Pa.R.Civ.P. 4003.1; *Ullom v. DEP*, 2025 EHB 375, 377. Where a claim of privilege is made, “Pennsylvania law generally applies a burden-shifting framework...where the party invoking the privilege must first set forth facts establishing that the privilege is properly invoked, and the party seeking the information must then set forth facts establishing that disclosure will not violate the privilege.” *Tri-Realty Company v. DEP*, 2015 EHB 184, 189 (citing *St. Luke's Hosp. of Bethlehem v. Vivian*, 99 A.3d 534, 542 (Pa. Super. 2014)).

Timing of the Trust’s Motion

Before addressing the substance of the Trust’s motion to compel, the Department and Conservation District assert that the motion should be denied due to the Trust’s delay in raising the issues and lack of good faith in filing the motion.

As to the question of delay, the Department and Conservation District point out that they first served a privilege log on the Trust that addressed the bulk of the email communications in

question in August 2025. They heard nothing from the Trust as to deficiencies with the log until nearly six months later, on February 3, 2026, following the Department and Conservation District's January 9, 2026 production of supplemental responses to discovery (in the form of an amended erosion and sedimentation control plan) and an updated privilege log. The updated log contained the same information as the August 2025 log, as well as information on additional emails that were being withheld pursuant to attorney-client privilege. While we understand the Department and Conservation District's frustration at hearing nothing from the Trust after the initial production of the privilege log in August 2025, we note that the Trust raised its concern less than one month after being served with the updated privilege log on January 9, 2026. Moreover, following the Trust's February 3, 2026 communication, the parties have gone back and forth in an attempt to resolve the issue, including the production of updated and revised versions of the privilege log by the Department and Conservation District. Therefore, we do not believe that the timing of the discovery dispute prevents us from considering the Trust's motion.

The Department and Conservation District also point out that once the Trust brought the issues with the privilege log to their attention, they immediately revised the log and unredacted the names of the sender and recipient, date, and subject line from the emails for which they are claiming the privilege. (Motion, Exs. 5, 6; Response, Exs. A, B.) The latest version of the privilege log was produced on March 18, 2026. According to the Department and Conservation District, they received no response to their March 18, 2026 communication prior to the Trust filing its motion to compel less than two weeks later on March 31, 2026. They argue that the Trust's failure to notify counsel for the Department and Conservation District that the alleged deficiencies with the privilege log had not been addressed to the satisfaction of the Trust before filing its motion demonstrates a lack of good faith. (Brief in Support of Response, n. 1.) They also assert that the

Trust's motion failed to fully disclose the efforts on the part of the Department and Conservation District to address the issues raised by the Trust.

Our rules provide that “[a] discovery motion may not be filed unless it contains a certification that the movant has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure the requested discovery without Board action.” 25 Pa. Code § 1021.93(b). The Trust's motion contains such a certification stating, “Pursuant to 25 Pa. Code § 1021.93(b), the undersigned counsel hereby certifies that Appellants have made a good faith effort to obtain full and complete responses to its discovery requests without Board intervention; however, such efforts have been unsuccessful.” The Department and Conservation District argue that the Trust should have notified them that it continued to have issues with the privilege log produced on March 18, 2026 before filing its motion. Having heard nothing from the Trust following the production of the March 18 privilege log, they assumed that all of the Trust's issues had been resolved.

Based on our review of the communications exchanged between the parties from early February to mid-March 2026, and the representations made by the Department and Conservation District in their response, it is clear that counsel for the Department and Conservation District made a genuine effort to resolve the issues raised by the Trust. They produced several versions of the privilege log and provided less-redacted versions of the disputed emails in an attempt to address the Trust's concerns. We, therefore, agree that the Trust should have notified the Department and Conservation District that it continued to have issues with the privilege log produced on March 18, 2026 prior to filing its motion.

However, by the time the Trust filed its motion, the parties had engaged in over one month's worth of communications and the exchange of several versions of the privilege log in an

attempt to resolve their dispute. We can only surmise that when it filed its motion, the Trust did not believe that further discussion was likely to result in a resolution of the issue and, therefore, it sought Board intervention. At this time the discovery dispute has been pending for several months, and, therefore, we elect to address the issue by ruling on the Trust's motion.

Attorney-Client Privilege

The Department and Conservation District allege that the emails sought by the Trust are protected by attorney-client privilege. As the name suggests, this privilege protects confidential communications between attorney and client. 49 Pa.C.S. § 5928; *Brunner v. DEP*, 2004 EHB 6, 14 (citing *Sedat, Inc. v. Department of Environmental Resources*, 641 A.2d 1243, 1244-45 (Pa. Cmwlth. 1994)). The privilege applies to governmental attorneys when they are acting in their capacity as attorneys, *Brunner*, 2004 EHB at 14 (citing *Gould v. City of Aliquippa*, 750 A.2d 934, 937 (Pa. Cmwlth. 2000)), but does not apply if the government attorney is the decision-maker, as opposed to legal counsel giving advice to the decision-maker. *Sedat*, 641 A.2d at 1245.

To invoke the privilege, the following criteria must be met:

- 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...;
- 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.

BouSamra v. Excelsa Health, 210 A.3d 967, 983 (Pa. 2019). In the attorney-client relationship, “[c]onfidential information flows from the client to the attorney, and vice versa.” *Department of*

Education v. Bagwell, 114 A.3d 1113, 1124 (Pa. Cmwlth. 2015). "The attorney-client privilege is intended to foster candid communications between counsel and client, so that counsel may provide legal advice based upon the most complete information from the client." *Bergere v. Pennsylvania Department of Community and Economic Development*, 331 A.3d 719, 726 (Pa. Cmwlth. 2025) (citing *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 216 (Pa. 2014)).

It is important to note that "not all information passed between client and attorney is privileged; only communications that relate to the legal advice sought by the client are privileged." *Bergere*, 331 A.3d at 725. In order to be protected, the communication must have been made in the course of the client's effort to obtain informed legal advice. *National Railroad Passenger Corp. v. Fowler*, 788 A.2d 1053, 1064 (Pa. Cmwlth. 2001). "Thus, a communication from one governmental official to another that merely copies in an attorney in order to keep the attorney informed, as opposed to being made in the course of soliciting legal advice, may not be protected." *Brunner*, 2004 EHB at 15. Likewise, "the privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *National Railroad*, 788 A.2d at 1064 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 395, 101 S. Ct. 677 (1981)).

The Supreme Court of Pennsylvania has made it clear that a "party claiming a communication is privileged must set forth facts showing the privilege was properly invoked." *BouSamra*, 210 A.3d at 982. It has the initial burden of proof and "must prove [the] four elements" enumerated above. *Id.* at 983. Only once that is established, "the burden shifts to the party seeking disclosure, which must explain why the communication at issue should not be privileged." *Id.* See also *Fisher v. Erie Ins. Exch.*, 258 A.3d 451, 461-62 (Pa. Super. 2021) (The party asserting the privilege against discovery of requested materials bears the burden of demonstrating that the

materials are protected from disclosure. Where that party demonstrates that the elements of the privilege have been met, the burden then shifts to the party seeking disclosure, who must explain why the communication at issue is not privileged.)

Privilege logs are routinely used to identify withheld documents and provide information to evaluate whether an asserted privilege applies. *See Pennsylvania Trout v. DEP*, 2003 EHB 199,

205. As explained by the Superior Court:

When responding to written interrogatories or document production requests, our rules do not *per se* require the production of a privilege log when a responding party asserts privilege as a basis to object to production. *See* Pa.R.Civ.P. 4006 and 4009.12, respectively. Nonetheless, as stated, when privilege is asserted, the responding party bears the burden of proving the materials are protected from disclosure. The preparation of a privilege log provides an acceptable format in which to identify documents, the applicable privilege, and the reason for the privilege claimed.

Fisher, 258 A.3d at n. 8. Thus, as the parties claiming the privilege, the Department and Conservation District were required to “produce sufficient facts to demonstrate that the privilege was properly invoked.” *Id.* at 462 (citing *Ignelzi v. Ogg, Cordes, Murphy and Ignelzi, LLP*, 160 A.3d 805, 813 (Pa. Super. 2017)).

The Trust asserts that the privilege log provided by the Department and Conservation District does not contain enough detail to allow an assessment of whether the attorney-client privilege applies to the documents in question. Specifically, the Trust seems to take issue with the descriptions of the documents set forth in the privilege log which state only “request for legal assistance,” “request for legal advice,” “provided legal assistance” or “legal advice requested and provided.” While the Department and Conservation District also provided redacted copies of the emails in question that include the subject line, the Trust asserts that it is simply not enough

information to conduct an assessment of whether the redacted communications qualify for the protection of attorney-client privilege.

The Department and Conservation District rely on *Bergere, supra*, where the Commonwealth Court found that information similar to that provided by the Department in this matter was sufficient to demonstrate that email communications were covered by attorney-client privilege. In that case, the petitioner sought records from the Department of Community and Economic Development (DCED) pursuant to Pennsylvania's Right to Know Law (RTKL). In response to the request, DCED provided a number of records, including certain emails that had been redacted pursuant to a claim of attorney-client privilege. The petitioner appealed to the Office of Open Records, which denied the appeal, finding that the communications "were for the purpose of obtaining legal advice and guidance concerning the drafting and finalization" of an adjudication. *Bergere*, 331 A.3d at 723. In reaching its decision, the Office of Open Records focused on the subject line of the emails which stated "adjudication" and the name of the case.

On appeal to the Commonwealth Court, the petitioner argued that the DCED's claim of attorney-client privilege was not factually supported and could not be demonstrated by the minimal information provided as to the subject of the emails. In evaluating the privilege claim, the Court "conceded that it is a challenge to provide enough detail to establish the privilege without also disclosing the protected information." *Id.* at 728. Nonetheless, the Court found that "[t]he documents produced by the [DCED] contain[ed] enough unredacted information to identify the privileged nature of information that was redacted." *Id.*

Similarly, here, the Department and Conservation District argue that "the description of the email communications in [their] privilege log and the unredacted information in the email communications, identified as DEP000292-DEP000456 and DEP003237-DEP003239, provides

enough detail to identify the privileged nature of the information that was redacted without disclosing the substance of the legal advice sought and given.” (Brief in Response, p. 5.)

We note, initially, that *Bergere* did not involve a discovery dispute, as is the case here, but rather a request for information filed under the RTKL, which provides access to public records held by Commonwealth agencies and other government bodies. 65 P.S. § 67.701. Records protected by privilege, including attorney-client privilege, are exempt from the definition of “public records” under the RTKL. *Id.* at § 67.102. In reaching its decision that the DCED had provided sufficient information to claim attorney-client privilege with respect to the emails requested under the RTKL, the Court in *Bergere* relied at least in part on the fact that the DCED’s Open Records Officer provided an affidavit explaining why the emails were redacted as well as a supplemental attestation that provided additional details about the redacted emails. Because the Court found that the affidavit and attestation identified the specific legal matter and the parties involved and that the communications concerned the drafting of a legal decision, it concluded that sufficient factual information had been provided to establish that the redacted emails were protected by the attorney-client privilege.

Here, no such affidavit or attestation was provided. Nor are we convinced that the privilege log provided by the Department and Conservation District contains sufficient factual detail to establish that the redacted emails are clearly protected by the attorney-client privilege.

We believe this matter is more closely aligned with the facts of *California University of Pennsylvania v. Schackner*, 168 A.3d 413 (Pa. Cmwlth. 2017), which the *Bergere* court distinguished, and *Waste Management Disposal Services of Pennsylvania, Inc. v. DEP*, 2005 EHB 97. In *California University*, the Court found that descriptions such as “legal advice” and “strategy for investigation” were “conclusory and did not provide enough detail to establish the [attorney-

client] privilege.” *Id.* at 422. In *Waste Management*, the Department withheld three emails from discovery that it claimed were protected by the deliberative process privilege. The privilege log provided by the Department provided the names of the sender and recipient, the date of the emails and a subject line that said simply, “Pottstown Vertical Expansion Application.” The Department also provided an affidavit describing the genre of the three emails as “briefing memos.” The Board found that the privilege log reflected only “skeleton information” about the emails and, therefore, ordered an in camera review to determine whether the privilege claim was appropriately applied. *Id.* at 98.

In *Brunner v. DEP*, 2004 EHB 6, we held that a privilege log “should provide as much detail regarding the material in question as it can without effectively waiving the privilege, but at a minimum, it should identify the date, author, recipient, and subject matter of the communication.” *Id.* at 8-9. Likewise, the Superior Court, in *Fisher*, 258 A.3d at 462, has held that a privilege log must “provide enough useful information in the log to enable the trial court to rule on the relevance of the items listed or explain why privileges raised were applicable.” The *Fisher* court found that a privilege log was insufficient where it “simply lists numbers of documents, the subject of the document, and the privilege basis, all in cursory fashion.” *Id.* at 461. For example, it found descriptions such as “Strategy/tactics,” “Attorney client privilege,” or “Value/merit” to be deficient. *Id.* at 462. As such, the Court determined that the party asserting the privilege “failed to meet its burden to assert facts . . . to demonstrate that the privilege was properly invoked” and, therefore, “the burden of proof never shifted [to the party seeking the information].” *Id.*

Thus, the privilege log and redacted emails provided by the Department and Conservation District must provide enough information to allow an assessment of whether the attorney-client privilege has been properly invoked. While the subject lines of some of the redacted emails seem

to provide a basis for the Department and Conservation District’s claim of attorney-client privilege – for example, some of the emails list the subject as “deposition review” – others are rather nebulous, using terms such as “emails” or “availability,” or a simple reference to the name or docket number of the appeal. While we understand that the Department and Conservation District have gone to great lengths to ensure that they are not providing so much information as to effectively waive the privilege, the limited information they have provided concerning the purpose of the communication is of little assistance in determining whether the attorney-client privilege properly applies.

Where a party makes a claim of privilege, the Board presumes that the claim is justified and made in good faith. *Primrose Creek Watershed Association v. DEP*, 2013 EHB 187, 191. Here, we believe that the Department and Conservation District’s claim of attorney-client privilege has been made in good faith. Nevertheless, where that claim is challenged, the Board is required to assess whether the privilege applies, and the party asserting the privilege bears the burden of providing sufficient information to permit that assessment. Based upon our review of the privilege log and the accompanying redacted emails, we believe that the Trust has made a credible claim that the Department and Conservation District have not provided sufficient information for us to determine whether their claim of attorney-client privilege is met for all of the communications for which they have asserted the privilege.

The Trust asks that we either order the Department and Conservation District to produce compliant documents or direct the Department and Conservation District to provide a more detailed privilege log that sufficiently describes each document that is being withheld. We agree that the Department and Conservation District should be given an opportunity to provide a privilege log with sufficient information to demonstrate that the claim of attorney-client privilege

has been properly invoked for each of the documents for which it has asserted the privilege. Because the emails provided by the Department and Conservation District identify the recipient, sender, and date of each email, the only additional information that must be provided is a more detailed description of each email's subject matter and purpose, to the extent possible without waiving the privilege. In the alternative, the Board is also willing to conduct an in camera review of the documents in question if the Department believes that option would be more efficient. Where the claim of attorney-client privilege cannot be supported, the Department and Conservation District shall provide the requested documents to the Trust.



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ORDER

AND NOW, this 6th day of July, 2026, it is hereby ORDERED that the Trust's Motion to Compel directed at the Department and Conservation District is **granted**. On or before **July 20, 2026**, the Department and Conservation District shall supplement their privilege log to provide sufficient detail to support their claim of attorney-client privilege and shall produce any documents for which they cannot establish that a privilege applies. In the alternative, the Department and Conservation District may notify the Board on or before **July 15, 2026** if they believe it would be more efficient for the Board to conduct an in camera review.

ENVIRONMENTAL HEARING BOARD

s/ MaryAnne Wesdock

MARYANNE WESDOCK
Judge

DATED: July 6, 2026

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