Circuit Court for Baltimore City
Case No. 24-C-19-001095

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2602

September Term, 2019

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, P.C.

v.

BRIAN FROSH

Arthur,
Shaw Geter,
Wells,

JJ.

Opinion by Arthur, J.

Filed: March 1, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Under the Maryland Public Information Act (the "PIA"), Maryland Code (2014, 2019 Repl. Vol.), §§ 4-101 to -601 of the General Provisions Article ("GP"), the public is generally entitled to "access to information about the affairs of government and the official acts of public officials and employees." GP § 4-103(a). In some instances, however, the PIA requires the custodian of a public record to deny access to a public record. One such instance is when the record is privileged or confidential. GP § 4-301(a).

In this case, a public interest organization, Government Accountability & Oversight, P.C. ("GAO"), submitted a PIA request to the Office of the Attorney General ("OAG"). The request concerned communications between the OAG and the State Energy and Environmental Impact Center at the New York University School of Law (the "Impact Center"). The OAG produced much of the relevant document, but redacted portions of it on the ground that they were exempt from disclosure because they were subject to the attorney-client privilege.

Disagreeing with the OAG's redactions, GAO filed suit to compel disclosure in the Circuit Court for Baltimore City. The parties filed cross-motions for summary judgment, and the OAG provided the circuit court with an unredacted copy of the document for *in camera* review. The circuit court, concluding that the redacted segments of the document were exempt from disclosure under the attorney-client privilege, denied GAO's motion and granted OAG's cross-motion for summary judgment. GAO filed this timely appeal.

QUESTIONS PRESENTED

On appeal, GAO presents the following questions, which we have reordered and rephrased:

1. Whether the circuit court's decision was supported by an adequate factual basis.

2. Whether the circuit court erred in concluding that the document at issue is exempt from disclosure under the PIA as a protected attorney-client privileged communication.[1]

For the reasons stated herein, we shall affirm the decision of the circuit court.

FACTS AND LEGAL PROCEEDINGS

A. The Application

The document in dispute is an application submitted by the OAG to the Impact Center, a program associated with the New York University School of Law. The Impact Center offers legal advice and resources to support state attorney generals ("AGs") in pursuing environmental initiatives. Funding for the Impact Center comes from the businessman, philanthropist, and political figure Michael Bloomberg.

[1] GAO formulated the questions as follows:

1. Whether the Circuit Court's opinion is supported by an "adequate factual basis," as this Court required in *Comptroller of Treasury v. Immanuel*, 216 Md. App. 259, 266 (2014)?

2. Whether the Circuit Court erred, as a matter of law, in finding the document at issue constituted an attorney-client privileged communication and, thus, exempt from production under MPIA?

The Impact Center offers two distinct services to AGs: (1) direct legal assistance "to interested AGs on specific administrative judicial or legislative matters involving clean energy, climate change, and environmental interests" and (2) "funding to recruit and hire 10 NYU fellows who will serve as Special Assistant AGs, working as part of the state [AG's] staff."

In 2017 the Impact Center invited interested AGs to apply for the opportunity to have Special Assistant AGs ("SAAGs") "seconded" to their offices for a two-year term. The Impact Center would pay the salary for the SAAGs and provide ongoing support, but "the SAAGs' duty of loyalty" would "be to the attorney general who hired them."

The Impact Center instructed interested AGs to prepare an application that described "the particular scope of needs within their OAGs related to the advancement and defense of progressive clean energy, climate change, and environmental matters." The application was to include a detailed explanation on "how additional support could help advance the work of the state attorney general on behalf of his or her constituents."

The OAG applied to the Impact Center. In its application, the OAG described its "commitment to enhancing and protecting environmental laws and regulations."

The Impact Center selected the OAG as one of the participating offices and hired an NYU Fellow to be seconded to the OAG as a SAAG. In a separate agreement, the Impact Center undertook to provide pro bono counsel to the OAG in an attorney-client agreement.

B. The PIA Request

GAO, a non-profit research, public policy and public interest law firm, believed that the Impact Center was "deputiz[ing]" the OAG to carry out a "'progressive' ideological political agenda." GAO submitted a request under the PIA for "documents related to any 'determination' or 'analysis'" regarding OAG's authority to hire "legal fellows whose salary and benefits are provided by an outside funding source."[2]

The OAG provided GAO with several documents, including a redacted version of the OAG's application. The OAG informed GAO that the redacted sections were protected from disclosure by the attorney-client privilege.

On December 6, 2018, GAO submitted the PIA request at issue here. In this request, GAO asked the OAG to provide the OAG's "application to participate in the NYU State Energy and Environmental Impact Center's fellowship program." In response, the OAG again provided GAO with a redacted version of its application. After taking a "closer look," however, the OAG determined that it could produce portions of the document that it had previously redacted.

The OAG provided the more-lightly redacted application with a two-page letter explaining that the redacted portions were protected by the attorney-client privilege. The OAG stated that the redacted portions were privileged because they "relate to professional advice and to the subject-matter about which the advice is sought." The

[2] GAO filed similar requests, under the applicable state public information disclosure acts, seeking the applications prepared by AGs in New York, Oregon, Pennsylvania, Virginia, New Mexico, Illinois, Vermont, and Washington.

OAG further stated that "in some instances" the redacted portions included "information about our OAG's litigation strategy." The OAG asserted that, although it "did not yet have an attorney-client relationship with the Impact Center at the time [of the application], the attorney-client privilege extends, under Maryland law, to confidential preliminary discussions before the attorney-client relationship is formed concerning the subject matter about which legal advice is sought." The letter concluded by informing GAO of its right to contest the OAG's decision through mediation or judicial review.

C. The Circuit Court's Decision

On February 25, 2019, GAO filed suit in the Circuit Court for Baltimore City to "enforce the right to inspect public records pursuant to" the PIA. In its complaint, GAO challenged the OAG's claim that the redacted portions of the applications were exempt from disclosure under the attorney-client privilege.[3]

GAO moved for summary judgment, and the OAG filed a cross-motion for summary judgment. The OAG provided the circuit court with an unredacted copy of the application for the court to review *in camera*. Neither party requested a hearing. In the circuit court's assessment, the parties were in "substantial agreement as to the facts," and the dispute "appear[ed] to be a pure question of law."

On January 24, 2020, the circuit court denied GAO's motion for summary judgment and granted the OAG's cross-motion. In its five-page decision, the circuit

[3] GAO also challenged the OAG's statutory authority to enter into an agreement with Impact Center. GAO does not raise that issue on appeal.

court concluded that the attorney-client privilege applied to the redacted portions of the application. Based on its *in camera* review of the document, the court observed that the redacted portions of the application "relate to [the OAG's] reasons for seeking legal assistance and deal with the nature of potential services to be provided and strategies to be implemented." The court recognized that the attorney-client privilege may apply to communications that occur before a formal attorney-client relationship has been formally established, when the parties are engaged in "interviews and negotiations leading to the establishment of such a relationship." *Lanasa v. State*, 109 Md. 602, 617 (1909). Thus, the court determined that the attorney-client privilege protected the document and that the OAG, as the client, had not consented to disclosure.

GAO filed this timely appeal.

STANDARD OF REVIEW

This Court reviews the circuit court's grant of summary judgment in PIA cases "without deference." *Amster v. Baker*, 453 Md. 68, 75 (2017).

DISCUSSION

I. The Adequacy of the Factual Basis for the Court's Decision

In its lead argument, GAO complains that "the trial court's order is devoid of factual findings." It contends that we cannot "allow a judgment unsupported by factual findings to stand." It cites *Comptroller of Treasury v. Immanuel*, 216 Md. App. 259, 266 (2014), for the proposition that the circuit court's ruling must have "an adequate factual basis."

GAO misconceives the nature of the ruling under review in this case. Here, the circuit court decided cross-motions for summary judgment, granting the OAG's motion, and denying GAO's. In arriving at that decision, the court was prohibited from making factual findings. "'By definition, summary judgment may be granted only when there are no disputed issues of material fact, and thus no factfinding by the district court. Thus, where the district court has made a factual determination, summary judgment cannot be appropriate.'" *Amster v. Baker*, 453 Md. at 75 (quoting *Animal Legal Def. Fund. v. U.S. Food & Drug Admin.*, 836 F.3d 987, 988-89 (9th Cir. 2016)).

The factual basis for the circuit court's decision was the set of undisputed facts that the parties presented to the court. In claiming that they were entitled to summary judgment on the basis of those undisputed facts, both GAO and the OAG tacitly agreed that the court had an adequate factual basis on which to rule. *Cf.* Md. Rule 2-501(requiring a response to a summary judgment motion to "identify with particularity each material fact as to which it is contended that there is a genuine dispute"). Having contended that it was entitled to summary judgment based on the undisputed facts in the record before the circuit court, GAO cannot plausibly argue on appeal that the court lacked an adequate factual basis on which to rule.

The *Immanuel* case, on which GAO relies, does not dictate a different outcome. *Immanuel* does not involve the grant of summary judgment in a PIA case; it involves a hearing (a bench trial), at which the court heard testimony (*Comptroller of Treasury v. Immanuel*, 216 Md. App. at 264) and made a factual finding. *See id*. at 265. When

Immanuel spoke of the need for an "adequate factual basis" for the court's decision, it did so in the context of assessing whether the court's factual findings were clearly erroneous. *Id.* at 266. *Immanuel* has nothing to do with summary judgment, where a court does not (and, in fact, cannot) make factual findings.

II. Whether the Court Erred in Concluding that the Application is Privileged

GAO and the OAG agree that the document in question—the OAG's application to the Impact Center—is a record that would, without an exemption, be subject to disclosure under the PIA. GAO, however, disagrees with the OAG's contention that the redacted portions of the application are exempt from disclosure under the attorney-client privilege. GAO argues that the OAG submitted the application before an attorney-client relationship was developed and that the redacted portions of the application do not contain privileged communications. GAO contends that the redacted portions, instead, state the OAG's request for funding and for public relations assistance.

Based on our *in camera* review of the redacted portions of the application, we disagree. The redacted portions of the application are privileged as preliminary communications made between a client and its prospective counsel while seeking legal assistance. Thus, we shall affirm the circuit court's decision and hold that the redacted sections of the application are exempt from disclosure under the attorney-client privilege.

A. Statutory Background

Under the PIA, "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." GP § 4-

103(a). While the PIA is generally "construed in favor of allowing inspection of a public record," the statute includes numerous exceptions. GP § 4-103(b). For example, a request for inspection may be denied if "by law, the public record is privileged or confidential." GP § 4-301(a)(1). This exemption includes the attorney-client privilege. *Glass v. Anne Arundel County*, 453 Md. 201, 209 (2017) ("a record of communication covered by attorney-client privilege would not be disclosed in response to a PIA request, unless the client waived the privilege").

The government-custodian has the burden of sustaining the decision to deny inspection or a copy of the public record. GP § 4-362(b)(2)(i)(1)-(2). In denying a request for a public record under the PIA, the government must "demonstrate that . . . the denial or the exemption is clearly applicable to the requested public record." GP § 4-301(b)(1). The applicant may seek review of the denial of the record with the circuit court. GP § 4-362(a)(1). The court may "examine the public record in camera" to determine whether any part of it may be withheld from disclosure. GP § 4-362(c)(2).

B. Attorney-Client Privilege

The attorney-client privilege "prevents the disclosure of a confidential communication made by a client to [the client's] attorney for the purpose of obtaining legal advice." *E.I. du Pont de Nemours v. Forma-Pack, Inc.*, 351 Md. 396, 414-15 (1998). The "privilege is 'based upon the public policy than an individual in a free society should be encouraged to consult with [an] attorney . . . [and] be free from apprehension of compelled disclosures by [the] legal advisor.'" *100 Harborview Drive*

Condo. Council of Unit Owners v. Clark, 224 Md. App. 13, 55 (2015) (quoting *Zook v. Pesce*, 438 Md. 232, 241 (2014)). The attorney-client privilege should be "narrowly construed" to exempt the disclosure of communications only as "necessary to achieve [the] limited purpose of encouraging full and frank disclosure by the client to his or her attorney." *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 363 (2011) (citing *Maxima Corp. v. 6933 Arlington Dev. Ltd. P'ship*, 100 Md. App. 441, 456 (1994)).

In analyzing whether a communication is exempt from disclosure under the attorney-client privilege, we must first determine whether an attorney-client relationship existed. *E.I. du Pont de Nemours v. Forma-Pack, Inc.*, 351 Md. at 421. "[O]nce an attorney-client relationship is determined to exist," the second step "is to examine whether the communications between the attorney and the client were confidential." *Id.*

C. Attorney-Client Relationship

This Court applies an eight-part test to determine whether an attorney-client relationship exists:

> (1) Where legal advice of kind is sought (2) from a professional legal adviser in [the adviser's] capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at [the client's] insistence permanently protected (7) from disclosure by [the client] or by the legal adviser, (8) except the protection be waived.

Harrison v. State, 276 Md. 122, 135 (1975) (citations omitted); *see Attorney Grievance Comm'n of Maryland v. Stillwell*, 434 Md. 248, 260 (2013) (explaining that an attorney-client relationship exists when "(1) a person seeks advice or assistance from an attorney;

(2) the advice or assistance sought pertains to matters within the attorney's professional competence; [and] (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance").

Here, the OAG and the Impact Center meet the requirements for an attorney-client relationship under the *Harrison* test. The OAG, as the client, sought legal advice and assistance from the Impact Center. The legal advice directly pertained to the Impact Center's professional competence—clean energy, climate change, and environmental protection. In the application, the OAG explained its interest in retaining the Impact Center to "take legal action to defend against the federal government's efforts to turn the clock back on environmental protections." Thus, the OAG sought legal advice that directly pertained to "matters within the attorney's professional competence." The OAG, as the client, has not consented to a waiver of the privilege. In fact, the OAG showed its intention not to waive the privilege by releasing a partially redacted application and by stating it was invoking the attorney-client privilege in its response to GAO.

GAO argues that the attorney-client relationship had not yet formed at the time when the OAG submitted its application. However, the attorney-client privilege applies to communications made "during interviews and negotiations looking to the establishment of such a relationship between the parties[,]" as long as the communication "relate[s] to professional advice and to the subject-matter about which such advice is sought." *Lanasa v. State*, 109 Md. 602, 617 (1909); *accord Rubin v. State*, 325 Md. 552, 565-66 (1992); *Harrison v. State*, 276 Md. at 132; *see also Chaudhry v. Gallerizzo*, 174

F.3d 394, 402 (4th Cir. 1999) ("[u]nder the attorney-client privilege, confidential communications made between a client and an attorney in an effort to obtain legal services are protected from disclosure"). The privilege must extend to communications that precede the formal establishment of the attorney-client relationship, as "no person could ever safely consult an attorney for the first time . . . if the privilege depended on whether the attorney after hearing the statement of the facts decided to accept the employment or decline it." 1 *McCormick on Evid.* § 88 (8th ed. 2020) (citing *In re Dupont's Estate*, 140 P.2d 866, 873 (Cal. App. 1943)).

GAO argues that an attorney-client relationship was established, if at all, only after the OAG and the Impact Center signed a retainer agreement. GAO contends that because the Impact Center did not "serve[] as counsel" during the "application process," the OAG's preliminary application could not be privileged. However, the application was a preliminary communication between the OAG and its prospective counsel, the Impact Center. Similar to an initial interview with a prospective attorney, the OAG's application served as a communication made in an "effort to obtain legal services." *Chaudhry v. Gallerizzo*, 174 F.3d at 402. The application included an explanation of the reasons that the OAG was seeking legal counsel, as well as the potential initiatives that the OAG would pursue if the Impact Center agreed to provide legal services. Therefore, an attorney-client relationship existed at the time the OAG applied to the Impact Center seeking legal advice and assistance.

GAO goes on to argue that an attorney-client relationship could not have existed at the time the OAG sent its application because the OAG and the Impact Center did not sign a retainer agreement until several months after the application was submitted. GAO claims that because the parties prepared a retainer agreement for the legal assistance provided by the Impact Center and a separate "secondment agreement" for the seconded attorney, the application could only have included the OAG's attempt to request seconded attorneys.

GAO's argument is based on an erroneous factual premise. The application is a separate document from the resulting agreements. The application served as the initial communication, in which the OAG explained its interest in receiving both a seconded attorney *and* legal assistance by the Impact Center attorneys. The application, thus, resulted in two separate attorney-client relationships—one in which the OAG consulted with the Impact Center about having a fellow seconded to the OAG, and a second in which the Impact Center agreed to provide pro bono legal services to the OAG. Additionally, the application contained an explanation of the OAG's reason for seeking legal representation and its potential litigation strategies. Therefore, because the application served as the OAG's initial communication with its prospective counsel, in which the OAG explained its reasons for seeking legal representation and potential litigation strategies, an attorney-client relationship existed.[4]

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[4] GAO also argues the relationship between the OAG and the Impact Center would be "at odds" with the New York Rules of Professional Conduct concerning lawyer-referral services. GAO specifically argues that the attorney-client relationship would

D. Confidential Communications

To be protected by the attorney-client privilege, the OAG's application must pertain to legal advice or assistance and be "made with the intention of confidentiality." *Greenberg v. State*, 421 Md. 396, 403-04 (2011); *see Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 37 (D. Md. 1974) ("[o]nly those attorney-client communications pertaining to legal assistance and made with the intention of confidentiality are within the ambit of the privilege") (citation omitted).

A communication may be confidential if it "reveal[s] the motive of seeking representation." *100 Harborview Drive Condo. Council of Unit Owners v. Clark*, 224 Md. App. at 62. The communication, too, may be confidential if it is not "intended for disclosure to third persons." *E.I. du Pont de Nemours v. Forma-Pack, Inc.*, 351 Md. at 416 (citing *United States v. (Under Seal)*, 748 F.2d 871, 874 (4th Cir. 1984)); *see* 1 *McCormick on Evidence*, *supra*, § 88 ("[t]he privilege for communications of a client

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violate Rule 7.2, which states that an attorney cannot "compensate or give anything of value to a person or organization to recommend or obtain employment by a client." N.Y. Rules of Prof'l Conduct R. 7.2(a) (2020). GAO also claims that the relationship would violate Rule 1.8, which states that a "lawyer shall not advance or guarantee financial assistance to the client." N.Y. Rules of Prof'l Conduct R. 1.8(e). It is, however, unclear why the New York rules would even apply in this case, as the OAG is located in Maryland and the Impact Center is based in Washington, D.C. In any event, GAO did not ask the circuit court to evaluate an alleged violation of the New York disciplinary rules, and hence it has not preserved that issue for appellate review. Md. Rule 8-131(a). But even if the issue were before us, we would see no violation of the ethical rules. Nothing in those rules prevents an attorney from offering pro bono legal services, which is what the Impact Center effectively does.

with her lawyer hinges upon the client's belief that she is consulting a lawyer in that capacity and her manifested intention to seek professional legal advice").

GAO contends that there is "no indication that the correspondence was carefully safeguarded to preserve confidentiality." To support this contention, GAO argues that other attorneys general disclosed their applications to the Impact Center without any redactions and that the Maryland OAG is the only office to assert the attorney-client privilege.

GAO's conclusion does not follow from its premises. For example, the other attorneys general may not have included detailed litigation plans and strategies in their own applications, as the OAG did. Or the other attorneys general may have chosen to waive the attorney-client privilege as to their communications with the Impact Center. Without information about the contents of their communications with the Impact Center or the reasons why they decided to produce their applications, we cannot assign any significance to the actions of the other attorneys general.

GAO also argues that, based on the portions of the document it has reviewed, the application merely "reference[s] legal topics or issues," not legal advice or assistance. However, after reviewing the entirety of the application *in camera*, we agree with the OAG's assertion (and the circuit court's conclusion) that the redacted portions are privileged and, thus, exempt from disclosure. The redacted sections of the application describe the OAG's potential legal plans and litigation strategies, as well as the OAG's motivation in seeking representation by the Impact Center. Additionally, the nature of

the information within the application indicates that the OAG submitted the application with an expectation of confidentiality. The application describes, in detail, the initiatives and environmental goals the OAG would pursue with additional resources provided by the Impact Center. Therefore, as the redacted portions of the application pertain directly to the OAG's potential litigation strategy, the redacted communications are exempt from disclosure under the attorney-client privilege.

GAO contends that the redacted portions of the OAG's application cannot be privileged because the application is a "request for funding," not a preliminary communication from a client seeking legal advice or assistance. While the *in camera* review clarifies that GAO has mischaracterized the application as a "request for funding," merely labelling the document a "request for funding" does not prevent an inquiry into whether the document contains privileged information. Whether a document is privileged depends on the specific nature of the communication within and not on the type of document that holds the potentially privileged communication. If the document contains information that would "reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of the law," those portions of the document "fall within the privilege." *Chaudhry v. Gallerizzo*, 174 F.3d at 402 (citing *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992)).

For example, in *Chaudhry v. Gallerizzo*, 174 F.3d at 400, the plaintiffs requested the defendant's legal bills during discovery. The defendant provided a redacted copy of

the legal bills and claimed the redacted portions were exempt from disclosure under the attorney-client privilege. *Id.* at 401. After reviewing the unredacted legal bills *in camera*, the district court concluded that the bills did contain privileged information, such as the federal statutes researched by the attorneys. *Id.* The Fourth Circuit agreed and held that the legal bills "revealed the identity of the federal statutes researched." *Id.* at 403. "Since the records would divulge confidential information regarding legal advice, they constitute privileged communications and, as such, should not be disclosed." *Id.*

This Court's *in camera* review of the application confirms that the redacted portions of the application contain confidential privileged communications, including potential legal strategies and the OAG's reasons for seeking legal assistance. The redacted portions of the document include the OAG's litigation strategy, potential claims that the OAG would pursue if it had the resources available, and the legal services the OAG was seeking from the Impact Center.

Additionally, the OAG redacted only the portions of the application that it determined to be protected by the attorney-client privilege. Unlike the entity that asserted the privilege in *100 Harborview Drive Condo. Council of Unit Owners v. Clark*, 224 Md. App. at 62, the OAG, here, did not submit a "blanket assertion" and claim that the entire application was privileged. In addition, the OAG reconsidered its initial redactions that it had made after GAO's first PIA request and determined that additional portions of the application could be released. The portions that the OAG left redacted contain privileged

information, including the OAG's potential litigation strategies. Thus, the redacted portions of the application are exempt from disclosure under the attorney-client privilege.

In summary, because the redacted portions of the application are exempt from disclosure under the attorney-client privilege, we affirm the circuit court's decision granting the OAG's motion for summary judgment.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; APPELLANT TO BEAR ALL COSTS.