PREPARED BY THE COURT

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, Plaintiff, v. DIVISON OF LAW, DEPARTMENT OF LAW & PUBLIC SAFETY, and the OFFICE OF THE ATTORNEY GENERAL,[1] Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MERCER COUNTY DOCKET NO. L-1396-23 CIVIL ACTION **ORDER GRANTING PLAINTIFF'S ORDER TO SHOW CAUSE**

THIS MATTER having come before the Court, the Hon. Robert Lougy, A.J.S.C., presiding, on the verified complaint and order to show cause filed by Plaintiff Government Accountability & Oversight, represented by Ronald Anthony Berutti, Esq., and Matthew Hardin, Esq., admitted *pro hac vice*; and Defendants Division of Law, Department of Law & Public Safety, and the Office of the Attorney General, represented by Deputy Attorney General Rachel Manning, having filed

[1] The Court corrects the caption to accurately describe Defendants.

opposition to the Order to Show Cause; and Plaintiff having filed a reply in further support of their requested relief; and the Court having considered the parties' pleadings and arguments; and for the reasons as stated below; and for good cause shown;

IT IS on this 11th day of June 2024 **ORDERED** that:

1. Plaintiff's application for an order compelling Defendants to produce the unredacted version of the documents requested in the Verified Complaint is **GRANTED.**
2. Plaintiff's application for an order declaring Plaintiffs the prevailing party in this matter, entitling it to a reasonable attorney's fee award and costs, is **GRANTED**. Plaintiff and Defendants shall negotiate the amount of attorney's fees and, if the issue regarding the quantum of fees is not resolved, Plaintiff may seek said relief from the Court, on notice to Defendants.
3. Defendants' application for an order dismissing Plaintiff's Complaint with prejudice is **DENIED**.
4. This Order shall be deemed filed and served upon uploading on eCourts.

/s/ Robert Lougy
ROBERT LOUGY, A.J.S.C.

X **OPPOSED**
UNOPPOSED

PURSUANT TO RULE 1:7-4(a), THE COURT PROVIDES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter comes before the Court on Plaintiff's Verified Complaint and Order to Show Cause seeking to compel the production of the unredacted portions of records produced in response to a request under the Open Public Records Act ("OPRA"). Defendants oppose the Order to Show Cause. Because the requested records are government records under OPRA and Defendants fail to sustain their burden of establishing a claim of privilege, the Court grants Plaintiff's Order to Show Cause.

The Court provides the following combined factual and procedural history. Plaintiff is Government Accountability & Oversight. Defendants are the Office of Attorney General ("OAG") and the Division of Law & and Public Safety, ("Division") a subdivision of OAG. Plaintiff filed this Complaint in November 2023, alleging a violation of OPRA by Defendants. Compl. ¶¶ 1-2. Plaintiff seeks the unredacted portions of the retainer agreement between Defendants and Sher Edling, L.L.P. ("Sher Edling"), a California based law firm retained as Special Counsel to the OAG in Platkin v. Exxon Mobil Corp., Docket No.: MER-L-1797-22 (Oct. 18, 2022) and Atty. Gen. of N.J. v. Dow Chemical Co., Docket No.:

MER-L-552-23 (March 23, 2023). Each matter is the subject of ongoing litigation. Kleinbaum Cert. ¶ 6. Plaintiff alleges Defendant improperly redacted information about retainer agreements in two documents produced, labeled the "Dioxane Retention Agreement…" and "NJ Sher Edling Agreement 1" ("the Retainer Agreements"). Compl. at ¶¶ 1-2. Defendants produced a copy of the retainer agreements, but heavily redacted, asserting various privileges. Id. at ¶ 11.

Defendants maintain the redactions were to protect material that may be subject to the attorney client privilege. Kleinbaum Cert. ¶ 12. Specifically, Defendants assert the redactions to the Retainer Agreements concern material that reflects the substance of conservations discussing "legal strategy" regarding the ongoing matters including but not limited to an "analysis of the legal issues" and the "strengths and weakness of the cases." Id. at ¶¶ 8, 12. The conversations occurred between the New Jersey Department of Labor, the New Jersey Department of Environmental Protection, the New Jersey Department of Community Affairs, and Sher Edling. Id. at ¶ 12. The communications "were intended to remain confidential during the course of the litigation." Ibid.

The redactions, according to Defendants, concern material that may be protected by the work product doctrine. Id. at ¶ 13. Defendants also asserted that

they redacted material under N.J.A.C. 13:1E-3.2(a)(3) to protect case specific legal and settlement strategy regarding the ongoing matters. Id. at ¶ 14.

The contingency fee grids on B-3 of the Retainer Agreements describe how the State values the ongoing matters and contains information regarding the "percentage of outside counsel's fees with respect to different [recovery thresholds]." Id. at ¶ 15. The redacted material on page B-2 of the Retainer Agreements describe how costs will be factored into any counsel fee award Sher Edling may receive, how Sher Edling may receive compensation based on certain litigation outcomes, and the basis for the calculation of said compensation. Id. at ¶ 16.

The material on B-1 of the Retainer Agreement and page C-1 of the climate change retainer allocates litigations costs, who bears their responsibility, and whether costs may be included in any potential recovery. Id. at ¶ 17. The redacted material on page C-1 of the climate change retainer under "Exceptions to Outside Counsel Guidelines" discusses case specific legal strategy. Id. at ¶ 18. This Court previously issued an Order directing an *in-camera* review of the relevant materials. Trans ID: LCV20233133505.

Plaintiff argues the following in support of its application. The information is not privileged, and Defendants have not met their burden of proving the

redactions were privileged. Pb4. Specifically, the attorney-client privilege and work-product doctrine do not apply, or in the alternative, were waived by Defendants. Prb6-7. Because the redactions were improper, Defendants must produce the unredacted versions of the Retainer Agreements. Id. at 5. Furthermore, RPC 1.8(f) supports Plaintiff's position that production of the unredacted documents is in the public interest. Id. at 11.

Plaintiff certifies the following in support of its application. Other government subdivisions who retained Sher Edling released unredacted retainer agreements like the retainer agreements in this matter. Harden Cert. ¶ 3. Plaintiff cites various retainer agreements with Sher Edling from other government subdivisions in active litigation. See id. at ¶¶ 2-11.

Defendants argue the following in opposition to Plaintiff's application. The redacted segments in the Retainer Agreements were properly redacted under OPRA. Db15. The redacted segments in the Retainer Agreements contain contingency fee grids which, if unredacted, would provide insight into the OAG's impressions as to counsel fees recovery in each matter. Id. at 14. The fee information, if disclosed, would also provide improper insights to the OAG's negotiation strategies because it would show how the OAG values different outcomes in litigation. Id. at 15, 18. Furthermore, the other redacted segments of

the Retainer Agreements detail specific legal issues as well as potential areas for legal research in the matters underlying the agreements. Id. at 17.

The Outside Counsel Guidelines within the Retainer Agreement for MER-L-1797-22 were properly redacted because they contain information about the OAG's legal strategy, including details about how the State would approach settlement negotiation. Id. at 19. Therefore, the redacted segments are protected under both the attorney-client privilege and work-product doctrine. Ibid. Furthermore, "the rules of professional conduct do not compel a contrary conclusion." Ibid. Defendants also argue Division regulation N.J.A.C. 13:1E3.2(a)(3) shields the release of the material. Id. at 11.

The Court now turns to the relevant law. "OPRA was enacted 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" Scheeler v. Off. of the Governor, 448 N.J. Super. 333 (App. Div. 2017) (quoting Mason v. City of Hoboken, 196 N.J. 51, 64 (2008)). OPRA mandates that "government records shall be readily accessible for inspection, copying, or examination by the citizens of [New Jersey], with certain exceptions, for the protection of the public interest, and any limitations on the right of access... shall be construed in favor of the

public's right of access." N.J.S.A. 47:1A-1. Government records, as defined under OPRA, include:

> "any paper… information stored or maintained electronically… kept on file in the course of… official business by any officer, commission, agency or authority of the State or of any political subdivision thereof… or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof…"
>
> [Ibid.]

The right to access to government records under OPRA is not absolute. Kovalcik v. Somerset Cty. Prosecutor's Off., 206 N.J. 581, 588 (2011) (citing Educ. L. Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 284 (2009)). OPRA "excludes twenty-one categories of information from the definition of a 'government record.'" Scheeler, 448 N.J. Super. at 343 (citing N.J.S.A. 47:1A-1.1).

OPRA specifically exempts "any record within the attorney- client privilege" and information from "bills or invoices may be redacted to remove any information protected by attorney-client privilege." N.J.S.A. 47:1A-1.1. However, the exemption "shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege." Ibid.

The attorney-client privilege safeguards the communications between lawyers and clients "in the course of that relationship and in professional confidence." N.J.S.A. 2A:84A-20(1); N.J.R.E. 504(1). The privilege applies to communications "(1) in which legal advice is sought, (2) from an attorney acting in his [or her] capacity as a legal advisor, (3) and [where] the communication is made in confidence, (4) by the client." Hedden v. Kean Univ., 434 N.J. Super. 1, 10 (App. Div. 2013).

However, "[s]ince the recognition of the privileged communication between attorney and client rests in the suppression of the truth[,] the privilege should be strictly construed in accordance with its object. The privilege is an anomaly and ought not to be extended." Paff v. Division of Law, 412 N.J. Super. 140, 150-51 (App. Div. 2010) (quoting In re Selser, 15 N.J. 393, 405-06 (1954)). Thus, "[t]he determination whether a communication between a client and an attorney is protected must be made 'on the basis of the purposes for which the privilege exists and the reasons for its assertion in the context of the particular case.'" In re Custodian of Recs., Crim. Div. Manager, Morris Cnty., 420 N.J. Super. 182, 187 (App. Div. 2011) (quoting Fellerman v. Bradley, 99 N.J. 493, 502 (1985)).

"Documents that satisfy the OPRA definition of government record are not subject to public access if they fall within the work-product doctrine." O'Boyle v.

Borough of Longport, 218 N.J. 168, 188 (2014) (citing Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 542 (2012)). The work-product doctrine "protect[s] against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." R. 4:10-2(c). For the doctrine to apply, the document must have been "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent)." Ibid. A document "will be considered to have been prepared in anticipation of litigation if the 'dominant purpose' in preparing the document was concern about potential litigation and the anticipation of litigation was 'objectively reasonable.'" Miller v. J.B. Hunt Transport, Inc., 339 N.J. Super. 144, 150 (App. Div. 2001).

Defendants do not dispute the records, absent an applicable claim of privilege, are otherwise government records under OPRA. Thus, absent an applicable privilege, the records must be produced. The Court reviewed the records *in camera*. The Court finds that neither the attorney client privilege nor the work product doctrine applies here, and Defendants must produce unredacted copies of the requested documents to Plaintiff.

The court first turns to whether the redactions were proper under the attorney client privilege. The Court finds that the Retainer Agreements are not subject to the attorney-client privilege. The Retainer Agreements are not communications seeking legal advice, rather they are documents memorializing the terms of a contract. Indeed, the redactions do not concern specific legal advice. The redactions concern (1) contingency fee grids, (2) cost allocation and cost recovery between Defendants and Sher Edling, (3) various scenarios where Sher Edling may recover counsel fees expended in the litigation, and (4) ethical guidelines that Sher Edling shall follow. This material covers basic terms of representation between the parties. While the redacted material may have been the product of substantive legal discussions regarding strategy, it is not by itself, legal advice. Defendants may assert the information is privileged; however a review of the Retainer Agreements does not support that assertion.

The main thrust of Defendants' opposition focuses on disclosure of the unredacted Retainer Agreements as a matter of fundamental fairness. They argue and certify that this information would disadvantage the State in litigation in a manner that a private party in litigation would not otherwise be subject to. This argument ignores the duty Defendants have as a public agency to produce government records under OPRA. See MAG Entm't, LLC v. Div. of Alcoholic

Beverage Control, 375 N.J. Super. 534, 545 (App. Div. 2005) ("Documents that are 'governmental records' and subject to public access under OPRA are no less subject to public access because the requesting party is opposing the public entity in possession of material sought in collateral litigation.").

Defendants' argument also runs into our Supreme Court's holding in O'Boyle, where the Court held "a bill for services prepared by an attorney retained by a public entity and submitted to it for payment, is subject to access pursuant to OPRA." 218 N.J. at 188. Furthermore, the attorney client privilege "ordinarily does not apply to lawyer's bills for services to a public entity." Hunterdon Cnty. Police Benevolent Ass'n v. Twp. of Franklin, 286 N.J. Super. 389, 394 (App. Div. 1996) (citing Matter of Grand Jury Subpoenas, 241 N.J. Super. 18, 36 (App. Div. 1989)). The privilege only shields "confidential communications . . . made within the context of the strict relation of attorney and client." Ibid. (citing Grand Jury Subpoenas, 241 N.J. Super. at 30). Defendants seeks to protect information relating to the terms of Sher Edling's representation, which goes beyond well-established case law governing a public entities' obligation to produce retainer agreements and fee invoices under OPRA. Therefore, the Court finds the redacted material is not protected by the attorney client privilege.

The Court now turns to the issue of whether the redactions were proper under the attorney work product doctrine. The Court declines to find additional protections for the redacted material under the work product doctrine. Defendants may certify the Retainer Agreements include "counsel's research, though processes, and mental impressions regarding calculation of litigation costs" and counsel fees regarding different outcomes in both pending matters. Def.'s Cert. ¶ 13. However, a thorough review of the redacted materials provides its publication would not reveal the mental impressions of Sher Edling, its attorneys, or the State regarding any of the above-mentioned litigation. Indeed, publication of the redacted material would not reveal any information that would qualify as attorney work product under the work product doctrine. Defendants' Certification is effectively additional legal argument purporting to be fact, a position unsupported by a review of the Retainer Agreements.

To the extent the redacted material may reveal the mental impression of any counsel, such a concern is far too speculative given the actual text underlying the redactions. Defendants fail to rectify how such speculation allows them to circumvent the well-established case law governing this matter.

The Court has scrutinized Defendants' redactions in light of their assertion that they may reveal the mental impression of Defendants or their internal or

outside counsel. While the Court accepts that such a concern is not fantastical, in the abstract, neither the records themselves nor Defendants' certification in opposition to the request establish something other than a speculative and conjectural risk, here. Simply put, Defendants fail to meet their burden that these records reveal the mental impressions of counsel.

Turning to the issue of attorney's fees, OPRA provides that "[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee." N.J.S.A. 47:1-6. Thus, a prevailing plaintiff in an OPRA action is entitled to an award of such attorney's fees. Smith v. Hudson Cnty. Register, 422 N.J. Super. 387, 393 (App. Div. 2011).

Here, given Plaintiff is a prevailing party, it is entitled to a reasonable attorney's fee award. The Court leaves it to the parties' counsel to negotiate in good faith regarding the exact quantum of fees Plaintiff may receive. If the parties fail to resolve the exact quantum of fees, Plaintiff may submit a motion for the Court's consideration upon notice to Defendants.