

Exhibit A



HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

Via Certified Mail No. 7011 0470 0002 7989 5918

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Hon. Brooke Wheeler, Esq.
House Open Records Officer
Pennsylvania House of Representatives
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RIGHT-TO-KNOW LAW APPEAL
Mailing Date: January 19, 2022

DECISION

RE: Appeal No. 2021-0002 ACA

This is an appeal pursuant to 65 P.S. § 67.101 *et seq.*, also known as the Right-To-Know Law, (“RTKL”)¹, filed on October 15, 2021 by Sam Janesch and Angela

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101 – 67.3104.

Couloumbis (the “Requesters”). This is an appeal of a denial issued by the Hon. Brooke Wheeler, Open Records Officer (the “ORO”) of the Pennsylvania House of Representatives, (the “House”) Room 129, Main Capital Building, Harrisburg, PA 17120.

The ORO’s denial was issued on November 22, 2021. In response to that denial, the Requesters filed an appeal on October 8, 2021. That appeal is the subject of the within decision.

I. STATEMENT OF FACTS

The facts identified from the submissions of the parties are as follows:

1. On October 15, 2021, Requesters directed a RTKL to the House RTKL Office for (1) attorney invoices for House outside counsel for the period January 1, 2021 to October 15, 2021, (2) attorney engagement letters for the same period, (3) expense reports showing payments to attorneys for the same period, and (4) other documents concerning the engagement of outside attorneys.²

2. After invoking its right to an extension,³ the House timely issued its final response on November 22, 2021⁴.

3. The House granted the request in part and denied it in part.

4. The House produced 607 pages of attorney invoices, engagement letters, and expense reports in PDF format.⁵

² Requesters’ October 15, 2021, RTKL, request is attached and labeled “Request.”

³ See Interim Response dated October 22, 2021 from ORO to Requesters.

⁴ See final response dated November 22, 2021 from ORO to Requesters.

⁵ This includes a supplemental production of 13 pages on December 7, 2021.

5. The House redacted documents protected by the attorney-client privilege and work-product doctrine, as required by the decisions *Levy v. Senate of Pennsylvania*.

6. The House redactions also included personal financial information relating to billing and payment.

7. Requesters appealed to the Appeals Officer on December 14, 2021.

8. Requesters do not challenge the redactions for personal financial information, but dispute only the attorney-client privilege and work-product doctrine redactions.

9. On December 15, 2021, the Appeals Officer notified the House of the appeal on December 14, 2021 and was directed to make a submission in support of its position by January 10, 2022.

II. ARGUMENT

a. Scope of Review

The RTKL does not expressly establish a scope of review regarding appeals. Supporting *de novo* review, or a broad standard of review, the RTKL mandates that the appeals officer set a schedule so that documents can be submitted by all parties in support of their positions. 65 P.S. § 671102(a)(1). The RTKL does not restrict the documents that can be submitted nor does it prescribe the appeals officer's authority to request documents which can be submitted.

Instead, the RTKL broadly buttresses the authority by directing the appeals officer to "review all information filed relating to the request." 65 P.S. § 67.1102(a)(2).

Additionally, among other things, the appeals officer is authorized by the RTKL to hold a hearing and admit testimony, documents and other evidence which the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Accordingly, a *de novo*, or broad standard of review will be used in reviewing the present Appeals.⁶

b. Analysis

**THE RTKL REQUIRES REDACTION OF
ATTORNEY INVOICES AND ENGAGEMENT LETTERS.**

To refresh the facts above, Requester's original RTKL Request on October 15, 2021 sought access to the following records:

- (1) attorney invoices for House outside counsel for the period January 1, 2021 to October 15, 2021, (2) attorney engagement letters for the same period, (3) expense reports showing payments to attorneys for the same period, and (4) other documents concerning the engagement of outside attorneys.

The House ORO issued a response on November 22, 2021, granted the request in part and denied it in part, and noted that some of the information had been redacted based on attorney-client privilege, attorney work product or financial information.

The Pennsylvania Supreme Court has "repeatedly noted that the attorney-client privilege is deeply rooted in our common law and is the most revered of our common law

⁶ A broad standard of review is comparable to the wide latitude of review granted to the final finders of fact in administrative hearings. In unemployment compensation matters, appeals are handled by referees and the Board of Unemployment Compensation. Referees review decisions of the Department of Labor Personnel. The referee's scope of review is limited by statute to consideration of the issues expressly ruled upon in the decision being appealed. 34 Pa. Code § 101.87. Appeals of the referee's decision are made to the Board of Unemployment Compensation. That Board is the ultimate fact finder in unemployment cases and is empowered to resolve conflicts in evidence, determine the credibility of witnesses, and determine the weight to the accorded evidence. The Board can affirm, modify, or reverse the referee's decision based on previously submitted evidence, or after taking further evidence. The authority granted to appeals officers under 65 P.S. § 67.1102 of the RTKL more closely approximates that granted to the Board in unemployment compensation cases.

privileges.” *Levy v. Senate of Pa.*, 65 A.3d 361, 368 (Pa. 2013) (“*Levy II*”) (cleaned up). Its purpose “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Id.* (quoting *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 47 n.1 (Pa. 2011)). Given the importance of the privilege, a “broader range of derivative protection is appropriate to facilitate open communication.” *Levy v. Senate of Pa.*, 34 A.3d 243, 248 (Pa. Commw. 2011) (“*Levy I*”).

The work-product doctrine is even broader than the attorney-client privilege. *Levy v. Senate of Pa.*, 94 A.3d 436, 443 (Pa. Commw. 2014) (“*Levy III*”). It covers “any material prepared by the attorney in anticipation of litigation, regardless of whether it is confidential.” *Id.* (cleaned up); *see also Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 415-17 (Pa. Commw. 2014) (holding doctrine applies even beyond anticipated litigation). Its purpose “is to guard the mental processes of an attorney, providing a privileged area within which” the attorney can “analyze and prepare” his or her case. *Levy III*, 94 A.3d at 443 (citation omitted). The doctrine forbids disclosure of wide swaths of information - including anything reflecting an attorney’s mental impressions, strategies, research, theories, opinions, conclusions, memoranda, notes, and summaries. *Id.*

The RTKL “specifically exempts privileged documents from disclosure.” *Levy II*, 65 A.3d at 368 (citing 65 P.S. §67.102 & §67.305). Privileged material includes information covered by the attorney-client privilege and work-product doctrine. *Id.* (citing 65 P.S. §102). And, while an agency has the discretion to disclose exempt documents, that

leeway does not extend to privileged material. It never may be disclosed. *Id.* (citing 65 P.S. §67.506(c)(2)). And, if a document includes a combination of privileged and non-privileged information, the agency must redact the privileged information before disclosure. 65 P.S. §67.706.

The decisions in *Levy v. Senate of Pennsylvania* explain the portions of an attorney's invoice that are protected by the attorney-client privilege and work-product doctrine in RTKL cases. They protect "the specific descriptions of legal services, such as the subject of the memo, who was called, the nature of the research performed, [and] identification of the trial attended." *Levy III*, 94 A.3d at 444 n.9. Similarly, "descriptions of legal services that address the client's motive for seeking counsel, legal advice, strategy, or other confidential communications are undeniably protected." *Levy II*, 65 A.3d at 373. If "invoices contain any references to confidential communications, those references [must] be redacted." *Levy I*, 34 A.3d at 254; *id.* at 252 (stating same).

On the other hand, the privilege and doctrine do not cover "general descriptions of legal services," *id.* at 254, such as "mundane and uninforming entries" like those stating "the bare fact that a telephone conference occurred." *Levy III*, 94 A.3d at 443; *see Levy II*, 65 A.3d at 373 (stating same). "General descriptions such as drafting a memo, making a telephone call, performing research, and observing a trial" reflect that the lawyer performed work, but "without further detail" "do not reveal an attorney's mental impressions, theories, notes, strategies, research and the like." *Levy III*, 94 A.3d at 444 (cleaned up). Such entries

“simply explain the generic nature of the service performed and justify the charges for legal services rendered.” *Id.*

The privilege and doctrine are extremely important privileges. An agency may disclose an attorney fee invoice under the RTKL, but only to the extent of its general description of the service performed, such as drafting a memorandum, making a telephone call, performing research, or attending a trial. The agency must redact any further details, including the specific description of a legal service provided, the subject of a memorandum, the identity of a person called, the nature of the research performed, or identification of the trial attended.

The agency must redact any references to the client’s motive for seeking counsel and any legal advice, strategy, or confidential communications. As such, the agency must redact any reference to an attorney’s mental impressions and legal strategies, theories, opinions, and conclusions.

THE HOUSES’ REDACTIONS WERE APPROPRIATE

Enclosed with this submission are the sworn Affidavits of four House witnesses: Daniel W. Coleman, CORE Legal Counsel for the Pennsylvania House of Representatives; Charlene A. Bashore, Senior Legal Counsel and Caucus Open Records Officer for the House Republican Caucus; Matthew S. Salkowski, Senior Legal Counsel to the House Democratic Caucus; and Matthew S. Salkowski, Senior Legal Counsel to the House Democratic Caucus. It is well-settled that these Affidavits are competent evidence here.⁷

⁷ See Affidavits attached hereto.

See Heavens v. Pa. Dep't of Env'tl. Prot., 65 A.3d 1069, 1073-74, 1076-77 (Pa. Commw. 2013) (explaining that agencies may use affidavits to meet RTKL burdens and that the agency's affidavits proved its attorney-client and work-product claims).⁸ These Affidavits "should be accepted as true," as there is no evidence of bad faith. *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. 2014) (citation omitted).

As explained in the Affidavits, House personnel thoroughly searched House files for potentially responsive outside attorney invoices and engagement letters. The assembled documents were comprised of attorney fee invoices and engagement letters, and expense reports for the requested periods from several outside law firms. Those firms were engaged as legal counsel for the House or a constituent part of the House.

House personnel reviewed the assembled materials to determine the documents and portions of documents that were subject to RTKL disclosure. Upon review, it was determined that the documents contained three types of information excluded from RTKL disclosure: information protected by the attorney-client privilege; information protected by the work-product doctrine; and personal financial information.

To determine what material had to be withheld on attorney-client and work-product grounds, the House followed the Pennsylvania Courts' direction and guidance in *Levy v. Senate of Pennsylvania*. (As discussed above, *Levy* permits disclosure of general descriptions of attorney services, but precludes disclosure of further details.) The

⁸ See also *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. 2011) (explaining that agencies may use affidavits for RTKL burdens); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. 2010) (same); *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. 2011) (same).

assembled invoices and letters were reviewed and redacted consistent with *Levy*. Given the volume of documentation involved, House personnel were required to invest significant time and effort in performing the necessary redactions.

The redactions for the attorney-client privilege and work product doctrine were made to the narrative entries of the attorney fee invoices and in the body of certain engagement letters. This content was written by or at the direction of outside House lawyers, and thus constitute written communications by attorneys to their clients. As the witnesses explain, those items were redacted because the redacted information constituted a protected attorney-client communication, attorney work-product information, or both.⁹

None of the attorney-client and work-product redactions reflect purely factual information or any other type of information not subject to an exemption or other protection under the RTKL. Nor have the redacted items been disclosed to a third party or otherwise publicly disclosed, as the House always rigorously and routinely protects and maintains as confidential all of this information under the attorney-client privilege and work product doctrine.

For these reasons, the House maintains, and this Officer agrees, that its RTKL production complies with Pennsylvania law. It has produced all of the documents requested that are within its possession, custody, and control, comprised of 607 pages of attorney fee invoices, engagement letters, and expense reports, and has redacted only what the law says must be withheld. The documents provided explain to the Requesters (and,

⁹ As noted, the documents also were redacted for personal financial information—the law firms’ billing and payment information. Requesters do not challenge those redactions on appeal.

by extension, the public) the general nature of the services the attorneys provided and the fees they charged. As the Commonwealth Court explained in *Levy*, this meets the RTKL’s objective of public transparency. *See Levy III*, 94 A.3d at 444 (“Where, as here, the taxpayers are footing the bill for the legal services, they are entitled to know the general nature of the services provided for the fees charged.”).

Additionally, Requesters have access to publicly filed documents in House litigation matters, including pleadings, briefs, and other materials submitted to the courts. Requesters thus have a clear picture of the activities of House outside counsel and know the names of all the outside lawyers, everything they did, the time they spent on their work, and how much they charged for their services.

This outcome and partial denial of the appeal tracks nearly identical to a decision in a matter docketed at No. 2021-0001, and decided May 4, 2021.¹⁰ In that matter, the same Requesters challenged the same redactions to the same kinds of records, albeit for a slightly different time period. The Requester therein did not contest the Appeal Officer’s decision.

THERE IS NO REASON TO DISTURB THE HOUSE’S FINAL RESPONSE

In their appeal, Requesters assert four challenges to the House’s attorney-client and work-product redactions. First, Requesters suggest the House had to provide evidence supporting its redactions with its final response. This is incorrect. An agency need only provide “specific reasons for the denial” in its final RTKL response. 65 P.S. §67.903(2); *see also id.*, §67.901 (requiring a “response”). Evidence is required later, during the RTKL

¹⁰ *See Decision dated May 4, 2021 to Appeal No. 2021-0001 ACA*

appeal. *See id.*, §67.708, §67.1101, §67.1102; *McGowan*, 103 A.3d at 381 (the RTKL charges an “appeals officer with the obligation of determining, in the first instance, whether an agency has met its burden of proof”); *Pa. State Police v. Kim*, 150 A.3d 155, 157 (Pa. Commw. 2016) (“The agency bears the burden of substantiating its denial on appeal to [the appeals officer] by a preponderance of the evidence.”). Here, the House has provided more than sufficient evidence to the Appeals Officer, in the form of the House’s Affidavits, and thus has proved the redactions were proper.

Second, Requesters ask for *in camera* review and an order for the House to submit Bates-stamped documents and an exemption log. These steps are unnecessary and unreasonable, given the explanation and detail included in the House’s Affidavits. As the Commonwealth Court has explained, “where an agency sufficiently explains the basis for nondisclosure through an affidavit, a log or *in camera* review may not be necessary.” *UnitedHealthcare of Pa. v. Pa. Dep’t of Human Servs.*, 187 A.3d 1046, 1060 (Pa. Commw. 2018) (holding these steps unnecessary, given agency affidavits); *Chambersburg Area Sch. Dist. v. Dorsey*, 97 A.3d 1281, 1289-91 (Pa. Commw. 2014) (affirming trial court’s rejection of request for agency to produce unnecessary exemption log); *see also Office of Governor v. Scolforo*, 65 A.3d 1095, 1103 n.13 (Pa. Commw. 2013) (noting that an exemption log “may not be a practical approach in view of the records requested” and that sometimes “agencies may proffer generic determinations for nondisclosure”). Here, the House’s sworn Affidavits show that the witnesses performed redactions in good faith and redacted only items legitimately protected under applicable law.

In camera review and a log would also put an undue burden on the House and the Appeals Officer, as the House's Affidavits explain. As noted, the House produced over 600 pages, most of which have many redactions. The documents thus would necessitate creation of an extensive log with hundreds or thousands of repetitive entries. It is unclear if the House could accomplish such an immense undertaking within the relevant RTKL timeframe and the resulting log would not be useful.

Such an undertaking would merely repeat attorney-client and work product claims, time after time, line after line, page after page, that are already evident and obvious from the records produced. *Compare Schackner v. Edinboro Univ.*, 2020 WL 1983761, *5 (Pa. Commw. Apr. 27, 2020) (holding an exemption log "unnecessary" for hundreds of records repeatedly redacted "only as to personal identifiers and disability status when the redactions are clear from review of the redacted records themselves").

Third, Requesters suggest there are some inconsistencies among the redactions. This is mostly based on supposed differences between the redactions here and those in the documents produced in their prior request (at issue in Appeal No. 2021-0001). But Requesters did not prevail in the prior matter and did not seek review there, so they cannot resurrect their issues with the prior redactions now. And, while Requesters relatedly contend that the purpose of an attorney's engagement can never be considered privileged, Pennsylvania law refutes that argument. *See, e.g., Levy ii*, 65 A.3d at 371-72 (recognizing that client identities and the subject matter of an engagement may be privileged and

affirming the Commonwealth Court’s approval of redactions of “lines of text involving the ‘specific nature of representation’”).

Variations in the redactions should not come as a surprise. The *Levy* decisions leave room for differing interpretations about the precise scope of required invoice redactions. And when several people review over 600 pages and apply countless redactions, a handful of minor discrepancies is only natural. Each person involved still did his or her level best to get the redactions right.

Nothing here suggests bad faith or otherwise undermines the fact that those involved were careful and conscientious in their redaction efforts.¹¹ Moreover, the Requesters’ argument does not change the simple fact that they were given every page of documentation they requested and were entitled to receive under the RTKL.

III. CONCLUSION

In sum, the redactions were proper in all respects under the RTKL. The House ORO issued a proper denial in response to Request because the agency must redact certain details, including the specific description of a legal service provided, the subject of a memorandum, the identity of a person called, the nature of the research performed, or identification of the trial attended. Additionally, the agency must redact any references to the client’s motive for seeking counsel and any legal advice, strategy, or confidential communications. The agency must in fact redact any reference to an attorney’s mental

¹¹ Nor could these circumstances support a waiver finding. *See, e.g., Bagwell*, 103 A.3d at 417-20 (rejecting claim of subject matter waiver as a result of disclosure of attorney-client privileged material in RTKL matter); *Board of Suprvs. of Milford Twp. v. McGogney*, 13 A.3d 569, 573-74 (Pa. Commw. 2011) (holding privilege not waived as for inadvertently disclosed attorney invoices in RTKL matter).

impressions and legal strategies, theories, opinions, and conclusions. Thus, the redactions to the requested document are permitted and / or required under the RTKL.

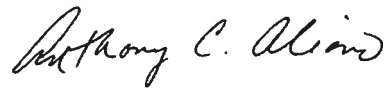
Accordingly, the Denial was proper and the Appeal fails. If you choose to file an appeal to this Denial, you must do so in writing within thirty (30) days of the mailing date noted herein, addressed as follows:

**Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 2100
P.O. Box 69185
Harrisburg, PA 17106-9185**

ORDER

AND NOW, this 19th day of January, 2022, upon consideration of the subject appeal,
the Denial is AFFIRMED.

BY APPEALS OFFICER

A handwritten signature in cursive script that reads "Anthony C. Aliano".

Anthony C. Aliano, Esq.

cc: Daniel Coleman, Esq.
Rodney A. Corey, Esq.