

IN THE COMMONWEALTH COURT  
OF PENNSYLVANIA  
NO. 160 C.D. 2022

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ANGELA COULOUMBIS *and*  
SAM JANESCH,  
*Petitioners,*

v.

SENATE OF PENNSYLVANIA,  
*Respondent.*

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**PRINCIPAL BRIEF OF PETITIONERS**  
ON APPEAL FROM THE DETERMINATION OF THE SENATE APPEALS OFFICER  
IN RTKL APPEAL No. 2021-2

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## **STATEMENT OF JURISDICTION**

Appellate jurisdiction lies with this Honorable Court pursuant to 65 P.S. § 67.1301(a), 42 Pa.C.S. § 763(a)(2), and Rule 1511 of the Pennsylvania Rules of Appellate Procedure.

## ORDER UNDER REVIEW

Petitioners seek review of the final determination of the Senate Appeals Officer (“AO”) in Appeal No. 2021-2 (Jan. 28, 2022), attached hereto as Exhibit

A. The text of the relevant order is as follows:

For the foregoing reasons, Requesters’ appeal is denied and the Senate is not required by the RTKL to take any further action. This Final Determination is binding on all parties. Within 30 days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court of Pennsylvania. 65 P.S. § 67.1301(a). If a party appeals, it must serve notice of the appeal to all other parties and the LRB. 65 P.S. § 67.1303(a). Pursuant to the statute, the LRB has the right to respond. *Id.*

FINAL DETERMINATION ISSUED and  
ELECTRONICALLY DELIVERED on January 28, 2022.

/s/ Suellen M. Wolfe  
Suellen M. Wolfe, AO

***(FULL ORDER APPENDED AS EXHIBIT A)***



## SCOPE AND STANDARD OF REVIEW

This Court exercises plenary review over legal questions arising from the Commonwealth's Right to Know Law. *Padgett v. Pa. State Police*, 73 A.3d 644, 646 n.3 (Pa. Commw. Ct. 2013). When, as here, the Court considers an appeal from the decision of a legislative agency pursuant to 65 P.S. § 67.1301, the Court “independently review[s] the agency’s orders, and [it] may substitute [its] own findings of fact.” *Levy v. Senate of Pa.*, 94 A.3d 436, 440 n.7 (Pa. Commw. Ct. 2014).

## QUESTIONS INVOLVED

*Question*

Did the Senate properly redact general information concerning the subject matter of outside attorneys' services from engagement letters and invoice captions?

*Suggested Answer* No.

## STATEMENT OF THE CASE

### I. Form of action

This matter arises under the Pennsylvania Right to Know Law (“RTKL”), codified at 65 P.S. §§ 67.101–67.3104. It comes before the Court on petition for review of the decision of the RTKL AO designated by the Senate of Pennsylvania. 65 P.S. § 67.1301(a).

### II. Procedural history

On October 15, 2021, pursuant to the RTKL, Petitioners submitted a request for records (the “Request”) to the Senate of Pennsylvania. R.002a. By email dated November 19, 2021, the Senate responded that it had granted in part and denied in part the Request. R.005a. On December 8, 2021, Petitioners timely appealed the Senate’s response to the Senate Appeals Officer (“AO”).<sup>1</sup> R.010a. On January 28, 2022, the AO issued a determination affirming the partial denial of the Request. Exhibit A. Thereafter, on February 25, 2022, Petitioners filed in this Court a Petition for Review of the AO’s determination.

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<sup>1</sup> The AO is a Senate employee tasked with receiving and determining appeals of the Senate’s RTKL decisions. 65 P.S. § 67.503(c)(2)(i). The AO’s role is thus analogous to the role of the Office of Open Records (“OOR”). Here, the Senate AO recused herself, and Petitioners’ appeal was transferred to the Pennsylvania Legislative Reference Bureau. R.211a. Suellen M. Wolfe, an attorney with the Legislative Reference Bureau, therefore served as the AO for purposes of this matter. *Id.*

### III. Prior determinations

The Senate's November 19, 2021 response is reproduced at R.003a. The AO's January 28, 2022 determination affirming the Senate's response is reproduced as Exhibit A. No court has issued a prior determination in this matter.

### IV. Facts

#### A. Petitioners submitted an RTKL request seeking the Senate's legal billing records.

Petitioners are seasoned investigative reporters who have provided years-long, in-depth coverage of the Pennsylvania legislature and its spending habits, including a close focus on expenditures by the House and Senate on legal fees.<sup>2</sup> This year, they were presented a national Freedom of Information award for their work on unearthing legislative spending practices.<sup>3</sup>

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<sup>2</sup> See Angela Couloumbis, Brad Bumsted & Sam Janesch, *Pa. lawmakers black out details of why they spent tax dollars, claiming 'legislative privilege'*, Spotlight PA (Feb. 27, 2020), <https://perma.cc/BQ8V-2UQP>; Angela Couloumbis & Sam Janesch, *Privileged Information: Pennsylvania lawmakers spend millions of taxpayer dollars each year on private lawyers, but rarely disclose who required representation – and why*, Spotlight PA (Oct. 12, 2021), <https://perma.cc/H7ET-GR2H>; Sam Janesch & Angela Couloumbis, *Pa. lawmakers hand out millions in public contracts to law firms that fill their campaign coffers*, Spotlight PA (Oct. 13, 2021), <https://perma.cc/KRZ8-GQGT>; Angela Couloumbis & Sam Janesch, *Pa. legislature's redacted legal bills flout court ruling, leave taxpayers guessing*, Spotlight PA (Jan. 11, 2022), <https://perma.cc/5FFN-H5UN>.

<sup>3</sup> Christopher Baxter, *Spotlight PA wins national award for investigation into the Pennsylvania legislature's hidden spending*, Spotlight PA (Apr. 6, 2022), <https://perma.cc/YAZ8-YC5L>.

The Senate regularly hires outside attorneys. *See supra* note 2. So do its elected members and its employees. *Id.* These outside attorneys bill the Senate for their services, and the Senate pays them with taxpayer dollars. *Id.*

Pursuant to the RTKL, Petitioners asked the Senate to produce various records related to its legal bills, including:

- 1) Invoices, bills, vouchers, or other financial statements reflecting payment, and explanation of that payment, for legal work performed by outside law firms or individual lawyers hired or retained by any Senate employee or the Senate. Requesters define outside law firms or lawyers as any legal professional not employed directly by the Senate. Requesters seek these invoices, bills or statements submitted for payment to the Senate from 1/1/2021 to 10/15/2021.
- 2) Engagement or retainer letters signed by any Senate employee or Senate member to provide legal services (by an individual attorney or a law firm) to Senate-run offices or operations, Senate Caucuses, Senate employees or Senate members. Requesters seek these engagement or retainer letters for the following time period: 1/1/2021 to 10/15/2021.
- 3) Expense reports detailing all payments for legal services to outside law firms or individual lawyers hired by the Senate for the period of 1/1/2021 to 10/15/2021. These expense reports should cover payments made from all Senate accounts and include the following details: payee, name of the senator or staff member to whom the payment applies, voucher number, date incurred, date paid, amount and description.
- 4) Any additional spreadsheets, lists, logs or other documents kept internally within the Senate for financial record-keeping purposes that identify the legal engagements, law firms, case numbers or purposes of the engagements.

R.002a.

**B. The Senate released responsive records with extensive redactions.**

The Senate granted in part and denied in part the Request. R.005a. The Senate partially granted the Request insofar as it produced 1,039 pages of responsive records (the “Records”). R.010a. The Records contained legal contracts or engagement letters, lists of legal expenses, and legal invoices.

The Senate partially denied the Request insofar as it made thousands of redactions to the Records.<sup>4</sup> The Senate informed Petitioners that some of these redactions obscured information protected by the attorney-client privilege, attorney work-product privilege, or both; others, according to the Senate, obscured financial information, such as tax identification numbers and bank account numbers.<sup>5</sup>

R.011a.

**C. Petitioners appealed certain redactions to the Senate AO.**

Petitioners appealed the partial denial of their Request to the Senate AO. Petitioners explained that they did not object to the redaction of personal financial information. R.011a. Petitioners did, however, challenge the propriety of certain redactions based on the attorney-client privilege and/or work-product privilege. In

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<sup>4</sup> The RTKL states that the government’s redaction of information in responsive records “shall be deemed a denial.” 65 P.S. § 67.706.

<sup>5</sup> Herein, because the RTKL’s definition of “privilege” includes the attorney work-product doctrine, 65 P.S. § 67.102, Petitioners use the term “work-product privilege.”

particular, Petitioners pointed out that, in several cases, the Senate had redacted the portions of engagement letters and invoice-captions that typically contain only broad information about the subject matter of an attorney’s engagement—*e.g.*, “constitutional issues.”<sup>6</sup> R.012a. Such information, Petitioners argued, is not subject to either the attorney-client privilege or the work-product privilege. R.011a–013a. For support, Petitioners relied principally on the Pennsylvania Supreme Court’s interpretation of the RTKL in *Levy v. Senate of Pennsylvania*, 65 A.3d 361 (Pa. 2013), and this Court’s interpretation of the Sunshine Act in *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305 (Pa. Commw. Ct. 1993). Petitioners also noted that, historically, the Senate’s privilege assertions under the RTKL had been inconsistent and overbroad, R.012a, and provided illustrative exhibits, R.121a–206a. Petitioners ultimately asked the AO either to (a) order the Records released immediately in unredacted form or (b) hold a hearing and review the Records *in camera*.<sup>7</sup> R.014a.

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<sup>6</sup> Petitioners submitted exhibits to the AO showcasing the types of redactions to which they objected. R.15a.

<sup>7</sup> Petitioners also objected to Kleinbard LLC’s representation of the Senate in this matter because it was among the firms whose records were subject to the Request and redactions at issue. The AO concluded that Kleinbard was not required to withdraw its representation. *See* Exhibit A at 6-7. Petitioners no longer seek review of that portion of the AO’s determination.

The Senate submitted a memorandum of law in response to Petitioners' appeal. R.207a. Therein, the Senate reiterated its contention that it had properly redacted the Records pursuant to the attorney-client and work-product privileges. R. 212a. The Senate added that "many of the records produced to [Petitioners] were also redacted on [the] basis of the speech and debate privilege." R.224a. In support of its response, the Senate submitted to the AO four attestations, R.311a, and a privilege log, R.347a.

**D. The AO affirmed.**

The AO affirmed the partial denial of the Request. Specifically, the AO concluded that the redactions found in the produced engagement letters and invoice captions "were based on attorney-client 'privilege' or attorney-work product doctrine." Ex. A at 16–17. The AO did not address the application of the speech-and-debate privilege, hold a hearing, or review the Records at issue *in camera*. See *generally* Exhibit A.



## SUMMARY OF THE ARGUMENT

In response to Petitioners' RTKL Request, the Senate has produced over 1,000 pages of engagement letters, invoices, and other billing records related to its hiring of outside attorneys. The produced records contain many thousands of redactions. To justify these redactions, the Senate variously asserts the attorney-client privilege, the work-product privilege, and the speech-and-debate privilege.

Petitioners challenge a small subset of the Senate's redactions. Specifically, Petitioners challenge the Senate's redaction of engagement letters or invoice captions that appear to conceal only general information about the subject matter of an outside firm's engagement. Such general information is highly unlikely to convey client confidences or otherwise fall within the ambit of one of the Senate's asserted privileges. On the other hand, such information goes the heart of the RTKL's remedial purpose: it allows the public to scrutinize the activity of its government and to hold its elected representatives accountable for, among other things, their use of the public fisc. *See Bowling v. Off. of Open Recs.*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010). To ensure that the Senate's redactions comport with the RTKL, the Court should review *in camera* the narrow set of redactions now at issue.

## ARGUMENT

### I. Legal standards.

The RTKL is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions.” *Bowling*, 990 A.2d at 824. Courts “must” therefore interpret the RTKL so as “to maximize access to public records.” *McKelvey v. Pa. Dep’t of Health*, 255 A.3d 385, 400 (Pa. 2021).

Consistent with its purpose, the RTKL states that a record in an agency’s possession “shall be presumed to be a public record.” 65 P.S. § 67.305. This presumption has limits: the law does not require an agency to release information that is “protected by a privilege,” 65 P.S. § 67.305, or that otherwise falls into one of the statute’s enumerated exemptions, 65 P.S. § 67.708. But as this Court has explained, the RTKL’s limits on disclosure “must be narrowly construed.” *Off. of Dist. Att’y of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (“*Bagwell 2017*”); *see also Off. of Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commw. Ct. 2013) (“*Scolforo*”). Otherwise, they would threaten to “frustrate the remedial purpose of the” law. *Bagwell 2017*, 155 A.3d at 1130.

When the government asserts a privilege over records responsive to an RTKL request, it bears the burden of proving by a preponderance of the evidence that the privilege applies. *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 656 (Pa.

Commw. Ct. 2015) (“*Bagwell 2015*”). “Testimonial affidavits found to be relevant and credible may provide sufficient evidence” to carry the government’s burden. *Brown v. Pa. Dep’t of State*, 123 A.3d 801, 804 (Pa. Commw. Ct. 2015) (citation omitted). Such affidavits “must,” however, “be detailed, nonconclusory, and submitted in good faith.” *Id.* (citation omitted). “[C]onclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL.” *Bagwell 2017*, 155 A.3d at 1130.

Here, the Senate asserts that it redacted the Records to conceal information subject to the attorney-client privilege, the work-product privilege, and the speech-and-debate privilege. R.211a. To establish that the information it redacted from the Records is subject to the attorney-client privilege, the Senate had to prove four elements. *Bagwell 2015*, 131 A.3d at 656. First, the Senate had to establish “that the asserted holder of the privilege is or sought to become a client;” second, “that the person to whom the communication was made is a member of the bar of a court, or his or her subordinate;” third, “that the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, for the purpose of securing an opinion of law, legal services or assistance in a legal

matter;” and fourth, “that the claimed privilege has not been waived by the client.”<sup>8</sup>  
*Id.* (citation omitted).

To establish that the information it redacted from the Records is subject to the work-product privilege, the Senate must “demonstrate that the [withheld information would] reveal the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” *Bagwell 2017*, 155 A.3d at 1133 (citation and internal quotation marks omitted). This requirement stems from “[t]he underlying purpose of the work product doctrine,” which “is to guard the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client’s case.” *Levy v. Senate of Pa.*, 94 A.3d 436, 443 (Pa. Commw. Ct. 2014) (citation omitted).

To establish that the information it redacted from the Records is subject to the speech-and-debate privilege, the Senate must, at minimum, establish that the information concerned activity “within the sphere of legitimate legislative activity.” *League of Women Voters of Pa. v. Commonwealth*, 177 A.3d 1000, 1003 (Pa. Commw. Ct. 2017) (“*League of Women Voters I*”) (citation and internal quotation marks omitted). Petitioners are unaware of any decision of a

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<sup>8</sup> “If the agency proves the first three prongs of the test, the burden shifts to the challenger to prove that the privilege was waived under the fourth prong.” *Cal. Univ. of Pa. v. Schackner*, 168 A.3d 413, 421 (Pa. Commw. Ct. 2017).

Pennsylvania court applying the speech-and-debate privilege in the RTKL context.<sup>9</sup> *See League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 767 n.38 (Pa. 2018) (“*League of Women Voters II*”) (“This Court has never interpreted our Speech and Debate Clause as providing anything more than immunity from suit, in certain circumstances, for individual members of the General Assembly.”).

**II. Petitioners challenge only a small subset of the Senate’s redactions, and the Court should order that the relevant pages of the Records be produced for *in camera* review.**

Based on the Senate’s privilege log and attestations, Petitioners have narrowed the scope of their appeal to the redactions found on the following 24 pages of the Records:

<b>R.</b>	<b><i>Bates No.</i></b>	<b><i>Privileges Asserted</i></b>
364a	0073	AC WP
365a	0193	AC WP
366a	0235	AC WP
367a	0631	AC WP SD
368a	0635	AC WP SD
369a	0639	AC WP SD
370a	0644	AC WP SD
371a	0647	AC WP SD
372a	0649 (Caption only)	AC WP SD

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<sup>9</sup> The Senate AO has, in the past, considered the speech-and-debate privilege in the context of the RTKL, *see* R.256a–279a, though it did not do so here.

<b>R.</b>	<b><i>Bates No.</i></b>	<b><i>Privileges Asserted</i></b>
373a	0652 (Caption only)	AC WP SD
374a	0654 (Caption only)	AC WP SD
375a	0656 (Caption only)	AC WP SD
376a	0658 (Caption only)	AC WP SD
377a	0776	AC WP SD
378a	0785	AC WP SD
379a	0794	AC WP SD
380a	0797	AC WP SD
381a	0868	AC WP SD
382a	0874	AC WP SD
383a	1010	AC WP SD
384a	1013	AC WP SD
385a	1014 (Caption only)	AC WP SD
386a	1020	AC WP SD
387a	1021 (Caption only)	AC WP SD

Each page contains, in relevant part, one to two redacted phrases. For example, Record 0193 is a “Scope of Work” appended to a contract between the Senate Democratic Caucus and the law firm Myers, Brier, and Kelly, LLP. R.350a, 365a. It contains less than one line of substantive content: “Advice relating to [redacted].” In relevant part, the Senate Democratic Caucus’s attestant describes this record as an “[e]ngagement letter . . . reflecting confidential communications with client for purposes of securing legal advice and describing legal services performed regarding same.” R.332a. Similarly, Record 0639 is a March 22, 2021 engagement letter between the Senate Majority Caucus and the

law firm Kleinbard LLC. R.369a. It contains approximately one line of redacted content: “You have engaged the Firm to represent the Majority Caucus of the Senate of Pennsylvania with regard to the [redacted].” R.369a. In relevant part, the Senate Republican Caucus’s attestant describes this record as an “[e]ngagement letter . . . reflecting confidential communications with client for purposes of securing legal advice regarding legislative matter and describing legal services performed regarding same.” R.319a.

The Court should order the Senate to produce these pages and the others identified above in unredacted form for *in camera* review. *See Pa. State Police v. Off. of Open Recs.*, 5 A.3d 473, 477 (Pa. Commw. Ct. 2010) (requiring agency to supplement the record so as to enable *in camera* review); *Levy v. Senate of Pa.*, 65 A.3d 361, 373 (Pa. 2013) (approving this Court’s appointment of a Special Master to conduct “careful line-by-line analysis of the content of the invoices”). The Court’s *in camera* review is warranted for at least two reasons:

1. The type of general information typically contained in engagement letters and the captions of invoices is unlikely to reveal “a fact of which the attorney was informed by the client, without the presence of strangers, for the purpose of securing an opinion of law, legal services or assistance in a legal matter.” *Bagwell 2015*, 131 A.3d at 656 (citation omitted). Such information is even less likely to reveal “the mental impressions” of any attorney involved. *Id.* at 657 (citation

omitted). Thus, the attorney-client and work-product privileges are unlikely to apply to information found in the engagement letters and invoice captions at issue here—particularly if the privileges are, as they must be, narrowly construed.

To illustrate: the Senate has historically asserted the attorney-client privilege over exceedingly vague and general information found in engagement letters and invoice captions. For instance, the Senate acknowledges that, in response to a previous RTKL request, it invoked the attorney-client privilege over the phrase “legal assistance [with] constitutional issues” in an engagement letter. *See* R.219a; *compare* R.122a, *with* R.131a. This history casts doubt on the Senate’s assertion that all of the redactions now at issue “contain[] descriptions of specific legal work performed, legal strategy, and confidential communications between the attorney and client.” R.218a. “Constitutional issues,” after all, is far too broad a description to reveal meaningful information about the contents of an attorney-client communication; it could encompass anything from federal jurisdiction over riparian-rights disputes to the common-law roots of the Pennsylvania Constitution’s habeas clause.

Underscoring the importance of searching review, when it comes to the redactions challenged here, the Senate’s proffered evidence as to the attorney-client and work-product privileges is vague and conclusory. For instance, Crystal H. Clark, General Counsel to the Pennsylvania Senate Republican Caucus, attests



that the Senate asserted the attorney-client privilege over “communications related to facts of which the attorneys at the identified law firms were informed by the Senate Republican Caucus or member/employee . . . for the purpose of securing either an opinion of law, legal services or assistance regarding the identified subject matter.”<sup>10</sup> R.323a–324a. Such a hodgepodge of potential justifications is insufficient to establish the existence of any privilege. *Cf. Scolforo*, 65 A.3d at 1104 (holding agency’s affidavit failed to establish existence of deliberative-process privilege when it merely contained “a list of subjects to which internal deliberations may have related”). That the Senate cannot be more specific without revealing client confidences beggars belief. The Senate’s previous disclosure of RTKL responses providing information about legal assistance involving sexual harassment complaints demonstrates that the agency can provide at least a

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<sup>10</sup> For almost all of the redactions at issue, the subject matter of the outside attorney’s work is “identified” only as a “legislative matter.” The privilege-log entries for 22 of the 24 pages at issue read: “Engagement letter and legal invoices reflecting confidential communications with client for purposes of securing legal advice regarding legislative matter and describing legal services performed regarding same[.]” *See* R.350a–361a. Notably, when it comes to a law firm’s assistance with legislative matters, the line between “legal advice” and other forms of assistance, such as political or policy analysis, is likely to blur—and so, consequently, is the applicability of the attorney-client privilege. *See, e.g., In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998) (holding attorney-client privilege not applicable to lawyer’s “advice on political, strategic, or policy issues”).

modicum of information about the subject area of representation without violating a privilege.<sup>11</sup>

This Court’s opinion in *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305, 307 (Pa. Commw. Ct. 1993), is instructive, particularly as Pennsylvania courts have repeatedly affirmed that the RTKL and the Sunshine Act are to be read *in pari materia*. See *Off. of Gen. Counsel v. Bumsted*, 247 A.3d 71, 81 (Pa. Commw. Ct. 2021). *Reading Eagle* concerned a provision of the Sunshine Act that permits an agency to hold an “executive”—*i.e.*, closed—session when the agency intends to “consult with its attorney or other professional advisor regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed.” 65 Pa.C.S. § 708(a)(4). According to the Sunshine Act, when an agency intends to hold an executive session, its reason for doing so “must be announced” to the public in advance. *Id.* § 708(b).

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<sup>11</sup> In a February 26, 2018 decision, the Senate AO noted that the Senate had provided a “report of financial records relative to a legal engagement letter where legal assistance was provided in regards to investigating sexual harassment complaints filed in 2016 and the only year for which there are financial records responsive to your request.” Final Determination at 5, *Appeal of St. Hilaire*, Senate RTK Appeal 1-2018 (Feb. 26, 2018), [https://www.secretary.pasen.gov/Resources/documents/RTKL/2018\\_01\\_RTK%20St.%20Hilaire%20Final%20Determination%20and%20Order.pdf](https://www.secretary.pasen.gov/Resources/documents/RTKL/2018_01_RTK%20St.%20Hilaire%20Final%20Determination%20and%20Order.pdf). The Senate also indicated copies of the related engagement letter, vouchers, and supporting documentation were available. *Id.*

The question in *Reading Eagle* was whether an agency satisfied the notice requirement of section 708(b) when it announced that it would hold an executive session “to discuss matters of litigation.” *Reading Eagle*, 627 A.2d at 306 (internal quotation marks omitted). This Court answered “no.” The Court recognized that “if knowledge of litigation strategy, of the amount of settlement offers or of potential claims became public, it would damage the municipality’s ability to settle or defend those matters and all the citizens would bear the cost of that disclosure.” *Id.* at 307. Nevertheless, the Court held that “the reasons stated by the public agency must be specific, indicating a real, discrete matter that is best addressed in private.” *Id.* The Court therefore affirmed that “when announcing executive sessions,” an agency “must spell out in connection with existing litigation the names of the parties, the docket number of the case and the court in which it is filed.” *Id.* at 306. Likewise, “[i]n connection with identifiable complaints or threatened litigation,” an agency “must state the nature of the complaint, but not the identity of the complainant.” *Id.*

Just as the information at issue in *Reading Eagle* was necessary to achieving the purposes of the Sunshine Act, the information at issue here is necessary to achieving the purposes of the RTKL. The public needs to know the general subject matter of the Senate’s legal engagements in order to “scrutinize the actions of public officials” and to “make public officials accountable for their actions”—the

RTKL’s central aims. *Bowling*, 990 A.2d at 824. Public scrutiny can have only a limited effect if the Senate is permitted to conceal from the public even the most basic, general information about its reasons for engaging outside attorneys.

2. The two Senate attestations that address the speech-and-debate privilege—the Clark Attestation and the Sarfert Attestation—do so in an entirely conclusory manner and rely on a dubious construction of the privilege.

Both the Clark Attestation and the Sarfert Attestation assert that the Senate’s speech-and-debate redactions “were narrow and limited to only ‘legitimate legislative activities’ involving ‘fact-finding, information gathering, and investigative activities, which are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation.’” R.327a, 346a (quoting *League of Women Voters I*, 177 A.3d at 1003). Both attestations go on to assert that the Senate’s speech-and-debate redactions “were limited to those portions of the records containing descriptions of specific legal work performed within the sphere of legislative activity and confidential communications with legal counsel concerning legislative matters.” *Id.*

There are at least two problems with these assertions. First, they are boilerplate recitations of the basic parameters of the speech-and-debate privilege—as the privilege was construed in *League of Women Voters I*, 177 A.3d at 1003. That alone makes them insufficient to carry the Senate’s burden. *Bagwell 2015*,

131 A.3d at 659; *see also Pa. State Police v. Muller*, 124 A.3d 761, 765 (Pa. Commw. Ct. 2015) (“[A]n affidavit which merely tracks the language of the exception it presupposes is insufficient to demonstrate that the responsive records are exempt from disclosure.”) (citing *Scolforo*, 65 A.3d at 1103–04). Second, the Pennsylvania Supreme Court has “caution[ed] against reliance” on *League of Women Voters I* in determining the scope of the speech-and-debate privilege. *League of Women Voters II*, 178 A.3d at 767 n.38.<sup>12</sup> The Senate’s attestations do exactly that.

## CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court vacate in part the AO’s determination of January 28, 2022; hold that the Senate failed to establish that the speech-and-debate privilege justifies the redactions at issue; order the Senate to produce unredacted versions of the records at issue for *in camera* review; and, following *in camera* review, order the Senate to produce unredacted versions of the records at issue, to the extent that the Senate’s redactions are not justified by either the attorney-client or work-product privilege.

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<sup>12</sup> In an Office of Open Records final determination that involved—in part—the speech-and-debate privilege, the OOR noted that “[w]hile the RTKL defines the term ‘privilege’ to include the speech and debate privilege, the Pennsylvania Supreme Court has never adopted any such privilege and has disapproved of the Commonwealth Court’s implication that any such testimonial privilege exists.” Final Determination at 6 n.6, *Spatz v. Phila. Gas Works*, Dkt. AP 2021-0718 (Pa. Off. Open Recs. Sept. 22, 2021) (internal citation omitted).

## CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This filing complies with the word count limit set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Based on the word-count function of Microsoft Word, the filing contains 4609 words.

2. This filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: June 14, 2022

/s/ Paula Knudsen Burke

Paula Knudsen Burke  
REPORTERS COMMITTEE FOR  
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I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

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Paula Knudsen Burke  
REPORTERS COMMITTEE FOR  
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PA ID: 87607

**EXHIBIT A:  
DETERMINATION OF SENATE AO**





## LEGISLATIVE REFERENCE BUREAU

ROOM 641 MAIN CAPITOL BUILDING  
HARRISBURG, PENNSYLVANIA 17120-0033

IN THE MATTER OF  
APPEAL OF  
COULOUMBIS  
Requester

v.

RTKL Appeal No. 2021-2  
(Senate RTK Request 2110151229)

SENATE OF PENNSYLVANIA  
Legislative Agency

### FINAL DETERMINATION

#### INTRODUCTION

Angela Couloumbis, of Spotlight PA, and Sam Janesch, of The Caucus (Requesters) submitted a request to the Senate of Pennsylvania pursuant to the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law, 65 P.S. § 67.101 et seq. (RTKL), seeking “invoices, bills or other financial statements,” “engagement letters or retainer letters,” “expense reports” and “spreadsheets, lists, logs” for the period of 01/01/2021 to 10/15/2021. The Senate Open Records Officer (RTK Officer) granted the request in part and denied the request in part. Requesters appealed. For the reasons stated in this Final Determination, the appeal is denied, and the Senate is not required to take any further action on the request.

#### FACTUAL BACKGROUND

On October 15, 2021, the Requesters submitted an RTKL request to the Senate’s RTK Officer via electronic transmission reading as follows:

*Under the Pennsylvania Right-to-Know Law, we are requesting the following:*

*1)Invoices, bills, vouchers, or other financial statements reflecting payment, and explanation of that payment, for legal work performed by outside law firms or individual lawyers hired or retained by any Senate employee or the Senate. Requesters define outside law firms or lawyers as any legal professional not employed directly by the Senate. Requesters seek these invoices, bills or statements submitted for payment to the Senate from 1/1/2021 to 10/15/2021.*

*2)Engagement or retainer letters signed by any Senate employee or Senate member to provide legal services (by an individual attorney or a law firm) to Senate-run offices or operations, Senate caucuses, Senate employees or Senate members. Requesters seek these engagement or retainer letters for the following time period: 1/1/2021 to 10/15/2021.*

*3)Expense reports detailing all payments for legal services to outside law firms or individual lawyers hired by the Senate for the period of 1/1/2021 to 10/15/2021. These expense reports should cover payments made from all Senate accounts and include the following details: payee, name of the senator or staff member to whom the payment applies, voucher number, date incurred, date paid, amount and description.*

*4)Any additional spreadsheets, lists, logs or other documents kept internally within the Senate for financial record- keeping purposes that identify the legal engagements, law firms, case numbers or purposes of the engagements.*

On October 19, 2021, the Senate gave notice to the Requester via electronic transmission that an extension was necessary to respond to its request as the response requires redaction of the records. Timely response to the request for access could not be accomplished due to bona fide and specified staffing limitations. The extension of time for response with the accommodation, provided by the 30-day extension in 65 P.S. § 67.90, was to November 21, 2021.

On November 19, 2021, the RTK Officer granted the request in part and denied the request in part. The Senate provided a report for each caucus and the institutional offices. The report was followed by copies of engagement letters and financial records covered within that report. In total, 1039 pages were provided electronically to the Requesters.

The Senate supported its redactions in consideration of *Levy v. Senate of Pa.*, 65 A.3d 361, 373 (Pa. 2013), *allocator denied*, 106 A.3d 727 (Pa. 2014)(*Levy*) and *BouSamra v. Excelsa*

*Health*, 210 A.3d 967 (Pa. 2019), *appeal after remand*, 2021 WL 6052296 (Pa. Super Ct. Dec. 21, 2021)(*BouSamra*). The response of the RTK Officer, dated November 19, 2021, continued with an explanation of its denial regarding redacted information. An explanation of three sets of redactions was provided to the Requesters:

Redaction of *the Federal Tax Id # found within the financial records, as it is protected under 26 U.S.C. § 6103(a) (IRS Code provision prohibiting disclosure of “return information”). The EIN Number is found and redacted from within the records (Redaction code “§67.305(b)(3)”*).

Redaction of *the bank account numbers and routing information and was done so as a “confidential personal identification number” (Redaction code “67§708(b)(6)(i)(A)”*).

Redaction of *information protected under the privileges of “attorney-work product doctrine” and/or “attorney-client privilege”. These redactions are found within the lines of the engagement letters and invoices outlining the billable hours (Redaction code “§67.305(b)(2)”*).

The Requesters were notified of the rights to appeal the partial denial under 65 P.S. § 67.903. The RTK Officer appointed the Secretary of the Senate to serve as Appeals Officer.

The Requesters filed an appeal on December 8, 2021, via electronic transmission. The Senate Appeals Officer recused herself from resolving the appeal on December 9, 2021. On the same date, the Pennsylvania Legislative Reference Bureau (LRB) agreed to determine the appeal and the Senate transferred the record. The parties were notified of the transfer of the appeal to the LRB by Vincent C. DeLiberato, Jr., Director, on December 10, 2021. The undersigned, Suellen M. Wolfe, (Appeals Officer) was appointed as the Appeals Officer in this appeal.

On December 15, 2021, pursuant to 65 P.S. § 67.1101(b), Requester Angela Couloumbis filed an agreement to extend the filing date for the Final Determination in this appeal to January 31, 2022.

According to the regulations of the LRB, the provisions of 2 Pa.C.S. Chapter 5,

Subchapter A and Chapter 7, Subchapter A (relating to Administrative Agency Law) apply to Right-to-Know appeals. 101 Pa. Code § 31.21(b)(1). The Administrative Agency Law permits all relevant evidence of reasonably probative value to be received in adjudication. 2 Pa.C.S. § 505. In addition, all parties are afforded opportunity to submit briefs prior to adjudication by a Commonwealth agency. 2 Pa.C.S.A. § 506.

On December 18, 2021, and in accordance with regulations of the LRB, 101 Pa. Code § 31.21, a schedule for documents to be submitted in the appeal was established with instructions to serve the other party. Pursuant to the schedule, the RTK Officer was permitted to submit a memorandum of law or any other evidentiary documentation in support of the appeal by the close of business on Monday, December 27, 2021. The Requesters were permitted to file a response by close of business on January 4, 2022.

The attorneys for the RTK Officer, Kleinbard LLC, filed an additional document in support, “Memorandum of Law in Opposition to Appeal” on December 27, 2021. The filing also includes six exhibits; OOR Privilege Log; Attestation of Crystal H. Clark; Attestation of Megan Martin; Attestation of C.J. Hafner II; and Attestation of Michael A. Sarfert.

On January 5, 2021, Requesters informed this Appeals Officer that no additional evidence or documents would be submitted in this Appeal. On this date and at the same time, the Requesters raised a purported conflict. As was apparent on December 27, 2021, the RTK Officer employed Kleinbard LLC to represent the Senate in this appeal. Requesters correctly identified Kleinbard LLC as “one of the eight firms whose work was redacted in the public records.” As such, the Requesters submit that the law firm, Kleinbard LLC, has a direct stake in the outcome this appeal. The Requesters asked that Kleinbard LLC recuse itself from representing the RTL Officer in this specific matter. Kleinbard LLC refused citing Rule 1.7 of the Pennsylvania Rules

of Professional Conduct.

On January 6, 2022, this appeals officer advised the parties that Kleinbard LLC was permitted to continue to represent the RTK Appeals Officer. The parties were informed that the purported conflict will be discussed in this Final Determination.

#### LEGAL ANALYSIS

In 2008, the Pennsylvania General Assembly enacted the RTKL<sup>1</sup> providing for the method of access to legislative records and setting the criteria to determine whether information is protected from disclosure. The objective of the RTKL "is to empower citizens by affording them access to information concerning the activities of their government," to promote openness to official government information in order to prohibit secrets, scrutinize the actions of public officials and to make public officials accountable for their actions. *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012); *Office of District Attorney of Philadelphia v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017), *allocatur denied*, 174 A.3d 560 (2017) *per curiam*.

According to its legislative history, the purpose of the RTKL, the predecessor to the RTKL, was to “strike the veil of secrecy from certain . . . governmental departments and agencies” that have become so far removed from the electoral process that public oversight is necessary to keep them in check. Pennsylvania Legislative Journal, Session 1957, Vol. 35, No. 55, May 27, 1957, 2186; *see also, Wiley v. Woods*, 141 A.2d 844, 848 (1958) (stating that the RTKL was enacted to “enlarge the rights of the general public for the examination and inspection of public records”).

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<sup>1</sup> Act of February 14, 2008, P.L.6, No.3, 65 P.S. §§ 67.101-67.3104, as amended. The RTKL replaced the Right to Know Law, 65 P.S. §§ 66.1 *et. seq.* (repealed Feb. 14, 2008, eff. Jan. 1, 2009).

## A. CONFLICT OF INTEREST

On December 27, 2021, documents were submitted by Kleinbard LLC in representation of the RTK Officer. Kleinbard is one of the eight firms whose work was partially redacted in the public records released to the Requesters. On January 5, 2022, Requesters objected to the representation of the RTK Officer by Kleinbard LLC.

The Requesters view these redactions as the “very heart of this appeal.” Requesters allege that Kleinbard LLC would be directly impacted by the outcome of this appeal as key portions of its records were among those redacted by the RTK Officer. They argue that Kleinbard LLC has a direct stake in the outcome of this appeal; therefore, engaging the firm to represent the RTK Officer presents a conflict. Requesters called for Kleinbard LLC to recuse itself from this specific appeal. Requesters did not offer any legal authority to support their contention of the Kleinbard LLC conflict.

On January 6, 2022, Kleinbard LLC refused to recuse itself or withdraw as counsel in this appeal.

This Appeals Officer is directed to the Pennsylvania Rules of Professional Conduct to resolve the Requesters’ allegation of conflict. Pennsylvania Rule of Professional Conduct 1.7 addresses conflicts of interest regarding current clients. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. Pa.R.P.C. 1.7.

Kleinbard’s representation of the RTK Officer is not “directly adverse” to another client. The representation of the public’s right to the redacted material is not the responsibility of this

law firm, and its right to shield the redacted material is entirely within its own legal rights. There has been no evidence presented that Kleinbard's responsibilities to other clients, a former client, a third person or by its own lawyers' personal interests are materially limited in this appeal. As such, Kleinbard LLC was permitted to continue to represent the RTK Officer.

#### B. IN-CAMERA REVIEW

The Requesters assert that an in-camera review of the documents will assist in identifying unprotected information. Pennsylvania courts conduct an in-camera review in order to preserve privileged material. The purpose of in-camera review is to determine whether documents are what the objecting party claims and whether the claimed privilege exists. *Fisher v. Erie Insurance Exchange*, 258 A.3d 451, 459 (Pa. Super. Ct. 2021). Additionally, the Commonwealth Court held that the Office of Open Records (OOR) has implied authority to order the production of requested solicitor's invoices for in-camera review to ascertain whether invoices constituted privileged material under the RTKL. *County of Berks v. Pa. Office of Open Records*, 204 A.3d 534, 547 (Pa. Commw. Ct. 2019). The OOR Appeals Officer acts in quasi-judicial capacity, serves as initial fact-finder, and is charged with duty to determine whether a privilege is applicable. *Id.* at 545. The authority to conduct in-camera review is reasonably derivative of statutory powers granted to an appeals officer in order to render an informed decision. *Id.* at 547, *see also*, 42 Pa.C.S.A. § 5928; 65 P.S. §§ 67.1101(b)(3), 67.1102(a)(2), (b)(2) and (3), 67.1310(a)(5); Pa.R.C.P. 4003.3.

This Appeals Officer conducted a line-by-line review of the produced documents. A focus on the redacted portion of each document verifies that the likely content of the shaded sections is subject to redaction as a description of “the client's motive for seeking counsel, legal advice, strategy, or other confidential communications....” *Levy*, 65 A.3d at 373; *see also*, *ACLU of Pa. v. Pa. State Police*, 232 A.3d 654 (Pa. 2020) memo. op. on remand, Pa. Commw. Ct. 2021, WL

5356532 (Nov. 17, 2021)(*ACLU of Pa*).

This Appeals Officer also considered the detail of information presented about the redacted portions of the documents, including logs and affidavits. In this appeal, in-camera inspection would be inappropriate and unnecessarily intrude upon privilege.

### C. *LEVY v. SENATE OF PENNSYLVANIA*

The tension between the RTKL and attorney-client privilege is reflected in this appeal. Both the Requesters and the Senate rely on *Levy* in support of their contentions. In *Levy*, the Supreme Court affirmed the opinion of the Commonwealth Court regarding the applicability of the attorney-client privilege to client identities and descriptions of legal services in the provisions of the RTKL. *Levy*, 65 A.3d at 383.

In *Levy*, the Supreme Court elaborated on the Commonwealth Court’s determination that general descriptions of legal services included in attorney invoices are not covered by the umbrella of the attorney-client privilege but that specific descriptions that would reveal attorney-client communications are covered. *Levy*, 65 A.3d at 363-364. The RTKL results in “ensuring expanded and expedited transparency in our government,” but it is also the “legislative intent to shield numerous categories and subcategories of documents from disclosure in order to protect, *inter alia*, the Commonwealth’s security interests and individuals’ privacy rights.” *Levy*, 65 A.3d at 382, citing 65 P.S. §§ 67.102, 67.305, 67.708(b).

The Pennsylvania Supreme Court’s guidance in *Levy* directs the following analysis.

### D. LEGAL ANALYSIS

#### 1. Attorney-Client Privilege

The purpose of the attorney-client privilege is to encourage clients to provide information freely to their attorneys to allow the attorney to give sound and informed advice to guide their



clients' actions in accordance with the law. *Levy*, 65 A.3d at 371. The attorney-client privilege covers “not only confidential client-to-attorney communications, but also confidential attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.” *Levy v. Senate of Pa.*, 34 A.3d 243, 245 (Pa. Commw. Ct. 2011) (citing *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011)), *aff'd in part and rev'd in part*, 65 A.3d 361, 383 (Pa. 2013).

To establish that the attorney-client privilege applies to requested records, the agency claiming the privilege must demonstrate: (1) the asserted holder of the privilege is or sought to become a client, (2) the person to whom the communication was made is a member of the bar of a court, or his subordinate, (3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and (4) the privilege has been claimed and is not waived. *BouSamra*, 210 A.3d 967, 982, n.14; *see*, 42 Pa.C.S.A. § 5928; *see also*, *Office of Governor v. Davis*, 122 A.3d 1185, 1191-92 (Pa. Commw. Ct.2015); *Bagwell v. Pa. Dept. of Educ.*, 103 A.3d 409, 420, n.12 (Pa. Commw. Ct. 2014) *allocator denied sub nom. Bagwell v. Pa. Dept. of Educ.*, *Pennsylvania State University*, 117 A.3d 1282 (Pa. 2015) (citing *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259 (Pa. Super. Ct. 2007), *per curiam*, 992 A.2d 65 (Pa. 2010); 42 Pa.C.S.A. § 5928.

## 2. Work-Product Doctrine

Under the RTKL, privilege includes not only the attorney-client privilege but also the attorney work-product.<sup>2</sup> 65 P.S. § 67.102, def. of “privilege.” The work-product doctrine offers broad protection to the mental impressions, theories, notes, strategies, research and the like

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<sup>2</sup> “Privilege.” The attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth. 65 § P.S. 67.102.

created by an attorney in the course of his or her professional duties, particularly in anticipation or prevention of litigation. Under the RTKL and similar to the attorney-client privilege, the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked.

*BouSamra* at 210 A.3d at 982; *Heavens v. Pa. Dept. of Environmental Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013).

"The purpose of the work-product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work-product was prepared in anticipation of litigation." *BouSamra* at 976. This doctrine teaches that it is "closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation." *Nat'l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001).

The RTKL lays down a rule that, upon satisfaction of the three of the four prongs of the *BouSamra* test, the presumption of disclosure does not apply, and burden shifts to the party seeking disclosure to explain why the communication at issue should not be privileged. 65 P.S. § 67.305(b).

The content of the Requesters' appeal does not elaborate on the *BouSamra* fourth prong, i.e., the waiver of the privilege. No evidence has been introduced that the redacted information has been shared with an adversary or otherwise disclosed. The attestations also confirm that no waiver was made. Accordingly, the privilege has not been waived.

### 3. Speech and Debate Privilege

In addition to the attorney-client privilege and attorney work-product doctrine, the RTK Officer argues that many of the redactions were appropriate and justified based on the

speech and debate privilege. The Speech and Debate Clause of the Pennsylvania Constitution provides:

The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach or surety of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

Pa. Const. Art. II, § 15.

The RTK Officer identifies a number of the records produced to Requesters that were redacted on basis of the speech and debate privilege and designated as “65 P.S. § 67.305(b)(2).” These redactions were characterized as narrow and limited to only “legitimate legislative activities” involving “fact-finding, information gathering, and investigative activities, which are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation.” *League of Women Voters of Pennsylvania v. Commonwealth*, 177 A.3d 1000, 1003 (Pa. Commw. Ct. 2017). The Senate RTK Officer presents that the redactions, based on the speech and debate privilege, were limited to those portions of the records containing descriptions of specific legal work performed within the sphere of legislative activity and confidential communications with legal counsel concerning legislative matters. The Requesters have not provided any factual basis for objecting to this characterization.

#### 4. The Sunshine Act

The Requesters argue that the Commonwealth Court has repeatedly endorsed the concept that the RTKL and the Sunshine Act – our state’s open records and open meetings laws – are in pari materia and “[t]herefore, they shall be construed together, if possible, as one statute.” *See Off. of Gen. Couns. v. Bumsted*, 247 A.3d 71, 81 (Pa. Commw. Ct. 2021), quoting *Silver v. Borough of Wilkinsburg*, 58 A.3d 125, 128 (Pa. Commw. Ct. 2012), *allocatur denied*, 76 A.3d

540 (2013).

The Sunshine Act, 65 Pa.C.S.A. §§ 701 - 716, requires agencies to deliberate and take official action on agency business in an open and public meeting. This appeal does not involve a public meeting. The Requesters' vision to utilize the Sunshine Act to further take issue with the privileges asserted is misplaced. The Requesters have utilized the RTKL to access documents from the RFK Officer. The Courts of Pennsylvania have instructed parties regarding privilege available under the RTKL. Those standards apply in this appeal.

#### E. THE REDACTED DOCUMENTS

The RTKL imposes a statutory duty on a legislative agency to release certain records by charging "[a] legislative agency shall provide legislative records in accordance with this act." 65 P.S. § 67.303(a). The terms "financial record," "legislative agency" and "legislative record" are defined in the RTKL. 65 P.S. § 67.102. The Senate is specifically identified in the definition of legislative agency.<sup>3</sup>

The presumption of availability of a legislative record "shall not apply if... the record is protected by a privilege." 65 P.S. § 67.305(b)(2). The burden of proving that a legislative record is exempt from public access shall be on the legislative agency receiving a request by a preponderance of the evidence. 65 P.S. § 67.708(a)(2). A preponderance of the evidence is such evidence as would lead a fact-finder to find that the existence of a contested fact is more probable than the nonexistence of the contested fact. *Pa. Office of Attorney General v. Bumsted*, 134 A.3d

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<sup>3</sup> "Financial record." Any of the following:

(1) Any account, voucher or contract dealing with:

(i) the receipt or disbursement of funds by an agency; or

(ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.

"Legislative agency." Any of the following: (1) The Senate

"Legislative record." Any of the following relating to a legislative agency or a standing committee, subcommittee or conference committee of a legislative agency: (1) A financial record.

65 P.S. § 67.102.

1204, 1210 n.12 (Pa. Commw. Ct. 2016); citing *Pa. State Troopers Association v. Scolforo*, 18 A.3d 435, 438 - 438-39 (Pa. Commw. Ct. 2011).

The record of this appeal includes RTK Request (10-15-21); RTKL Final and Interim Response (11-19-21); Appeal of Requesters (12-8-21); Exhibit A Redacted Purpose Examples; Exhibit B Inconsistent redaction – Kleinbard; Exhibit C Inconsistent redaction – McNeese; Memorandum of Law in Opposition to Appeal (12-27-21) and supporting exhibits; RTK Log for Redactions of Privileged and Exempted Records (RTK Request 2110151229); and affidavits of Clark, Hafner, Martin and Sarfert.

Requesters only seek review from the RTK Officer's redactions which are based on the "attorney-work product doctrine" and "attorney-client privilege."

The Supreme Court explains that the determination of the applicability of the attorney-client privilege does not turn on the category of the information, such as whether it is an invoice or fee agreement. *Levy*, 65 A.3d at 373. The Court couched the relevant question as whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege, such as descriptions of legal services, advice, or strategy. *Id.*

Requesters find fault with the RTK Officer's characterization of the text of the released documents as "furnishing the original contract, the firm, and the purpose/legal matter for which representation is being sought." Requesters' major objection appears to be the partial redaction of the "purpose" in the contracts. Requesters argue that the hiring of an attorney is not protected information and the engagement letter is a straightforward financial contract that is "highly unlikely" to contain mental impressions of an attorney or disclose specific legal strategy or research. Requesters provide an example on page 1 of Exhibit A, the engagement letter with the Greenberg Traurig law firm, which states:

*You have been retained to provide legal advice and representation to State Senator Sharif Street in ongoing [REDACTED].*

Requesters argue that the redaction as the protection of attorney-work product “strains credulity.” Letter of Angela Couloumbis and Sam Janesch, Dec 8, 2021 (Written Appeal).

Under the RTKL, the redaction requirement applies only to records that are public and contain information that is not subject to access. 65 P.S. §§ 67.706, 67.708. The mere fact of employment is not a confidential or privileged communication. *Levy*, 65 A.2d at 370. While a client’s identity is generally not privileged, the attorney-client privilege may apply in cases where divulging the client’s identity would disclose either the legal advice given or the confidential communications provided. *Id.* at 372.

The shortcoming of the Requesters of this challenge is clear. In the example given by the Requesters, the document identifies the name of the client and partially identifies the legal matter covered in the engagement. The redacted portion of the contract pertains to an “ongoing” legal matter. By its nature and over time, the description of a legal issue is likely to identify legal advice given or other confidential communications.

The Requesters also challenge the RTK Officer’s practice of “inconsistently applying redactions on documents.” The Requesters provide an example:

*In the response for 2019 legal expenses, an engagement letter dated Feb. 4, 2016 with the firm Kleinbard LLC redacted the purpose of the engagement (see Exhibit B, page 1). In the subsequent request and response for 2020 legal expenses, the same letter was provided but the purpose was not redacted. It read, “legal assistance regarding constitutional issues.” (see Exhibit B, page 10).*

Letter of Angela Couloumbis and Sam Janesch, Dec 8, 2021 (Written Appeal).

*Levy* directs a line-by-line review of billing records and the contents of documents to protect information covered by the attorney-client privilege.” *Levy*, 65 A.3d at 373. Accordingly, evaluation of privilege must focus on the four corners of each document. Requesters’ illustration

of “inconsistency” is a comparison of two distinct contracts. Each document must be evaluated independently of the other.

Under the RTKL, “privilege” means the attorney-work product doctrine, the attorney-client privilege, ... *or* other privilege recognized by a court interpreting the laws of this Commonwealth. 65 P.S. § 67.102 (emphasis added); *see also*, *Lundy v. Manchel*, 865 A.2d 850, 856-57 (Pa. Super. Ct. 2004)(*construing* 42 Pa.C.S.A. § 2503(9)). The RTK Officer marked the instances in which privileges are applicable by superimposing "Redaction code § 67.305(b)(2)" on certain lines of the engagement letters and invoices outlining the billable hours. The content of the Senate Privilege Log is a chart reflecting Bates No(s); Record Type(s); Record Date(s); Author(s); Recipient(s); Description and Legal Basis for Redaction - 65 P.S. § 67.305(b)(2). The “Descriptions” category is particularly informative as to the nature of content of the partially redacted document.

A privilege log, which typically lists the date, record type, author, recipients, and a description of the withheld record, can serve as sufficient evidence to establish an exemption under the RTKL, especially where the information in the log is bolstered with averments in an affidavit. *Smith on behalf of Smith Butz, LLC v. Pa. Department of Environmental Protection*, 161 A.3d 1049, 1058 n.5 (Pa. Commw. Ct. 2017). Testimonial affidavits are effective in meeting the burden of proof that a record is exempt from disclosure under the RTKL. *Payne v. Pa. Dep’t of Health*, 240 A.3d 221 (Pa. Commw. Ct. 2020).

In this appeal, the Senate produced four affidavits from individuals identified as General Counsel to the Senate Republican Caucus; Chief Counsel to the Senate Democratic Caucus; Secretary of the Senate; and Counsel to the Chief Clerk and RTK Officer. The Senate affidavits describe the records and the activities pertaining to law practices undertaken to support privilege

and appropriate redactions. See *ACLU of Pa.*, 232 A.3d at 669.

Three of the affiants in this appeal are licensed Pennsylvania attorneys and the fourth affiant is responsible for administering and managing all functions of the Senate. The attestations from the respective affiants confirm the status as the holder of a privilege. The attestations clearly reflect that the "ultimate goal" of each redacted communication was securing either an opinion of law, legal services or assistance in a legal matter. *Davis*, 122 A.3d at 1192. The affidavits make clear that the records contained communications for the purpose of providing professional legal advice concerning legal issues. They made clear that legal communication remained confidential and had not been disclosed to third parties that were not a part of the attorney-client relationship. 42 Pa.C.S. § 5928. These affidavits provide additional assurance that the redacted portions constitute "privilege" as defined under the RTKL. See *Sherry v. Radnor Township School District*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011), *appeal denied*, 612 Pa. 710, 31 A.3d 292 (2011).

The redactions made to the 1,000-plus pages of records produced to Requesters were targeted to those portions of the records containing descriptions of specific legal work performed, legal strategy, confidential communications between the attorney and client, legal advice provided, matters assigned for legal review and research, and specific types of legal research conducted. *Grega v. Weatherly Area School District*, OOR Dkt. AP 2021-0057, slip op. at 4-8 (OOR Mar. 3, 2021); *Campbell v. Pennsbury School District*, OOR Dkt. AP 2018-2171, slip op. at 4-7 (OOR Feb. 14, 2019); *Chirico v. Cheltenham Township School District*, OOR Dkt. AP 2018-0351, slip op. at 4-8 (OOR Apr. 23, 2018) .

Combining the information revealed in the record in this appeal with the actual redacted documents unquestionably illustrates that the redactions were based on attorney-client "privilege"



or attorney-work product doctrine. The redactions were limited and focused. The guidelines envisioned in *Levy* and the *BouSamra* rules were implemented in the redactions effectuated by the Senate.

## CONCLUSION

For the foregoing reasons, Requesters' appeal is denied and the Senate is not required by the RTKL to take any further action. This Final Determination is binding on all parties. Within 30 days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court of Pennsylvania. 65 P.S. § 67.1301(a). If a party appeals, it must serve notice of the appeal to all other parties and the LRB. 65 P.S. § 67.1303(a). Pursuant to the statute, the LRB has the right to respond. *Id.*

FINAL DETERMINATION ISSUED and ELECTRONICALLY DELIVERED on January 28, 2022.

/s/ Suellen M. Wolfe

Suellen M. Wolfe, Appeals Officer