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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 160 CD 2022

ANGELA COULOUMBIS and SAM JANESCH,

Petitioners,

v.

SENATE OF PENNSYLVANIA,

Respondent.

PRINCIPAL BRIEF OF RESPONDENT SENATE OF PENNSYLVANIA

Appeal from the January 28, 2022 Final Determination of the Appeals Officer appointed by the Legislative Reference Bureau at RTKL Appeal No. 2021-2, affirming the partial grant and partial denial of Senate RTK Request 2110151229.

Matthew H. Haverstick (No. 85072)
Mark E. Seiberling (No. 91256)
Miranda Dang (No. 330908)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000 | Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
mseiberling@kleinbard.com
mdang@kleinbard.com

Attorneys for Respondent Senate of Pennsylvania

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I. INTRODUCTION

In October 2021, Petitioners Angela Couloumbis and Sam Janesch (collectively, "Petitioners") submitted a request under Pennsylvania's Right-to-Know Law ("RTKL") to Respondent Senate of Pennsylvania (the "Senate"), seeking primarily attorney engagement letters and legal invoices of outside attorneys paid by the Senate for the 2021 calendar year. In response, the Senate provided Petitioners with 1,039 pages of records free of charge, with some of those records containing certain limited, targeted redactions based on privilege.

Petitioners then appealed those limited redactions made by the Senate based on privilege, seeking production of *all* of the records in unredacted form and/or *in camera* review of the records. An independent Appeals Officer from the Legislative Reference Bureau was appointed to adjudicate the appeal, who, in a thorough and well-reasoned Final Determination, affirmed the Senate's limited and targeted redactions on privilege grounds without the need for a hearing or *in camera* review of the records.

Petitioners have now again appealed the Senate's limited and targeted redactions based on privilege to this Court, but this time

Petitioners have narrowed their appeal to only 24 pages of redacted records for which they seek *in camera* review by the Court. But, as the Appeals Officer concluded, *in camera* review of the redacted records "would be inappropriate and unnecessarily intrude upon privilege." Indeed, as the Appeals Officer found, the Senate's comprehensive Privilege Log, along with the multiple, detailed Attestations submitted from each of the respective privilege holders within the Senate, clearly establish the application of the attorney-client privilege and the attorney-work product doctrine to each of the redacted records, without the need to conduct invasive *in camera* review.

In addition, the Senate's Privilege Log and the detailed Attestations provided by the relevant privilege holders also conclusively establish the application of the speech and debate privilege to 21 of the 24 redacted records identified by Petitioners on appeal.

Accordingly, each of the limited and targeted redactions to the 24 pages of redacted records identified by Petitioners on appeal should be upheld and affirmed solely on the record of this appeal and the Appeals Officer's Final Determination. To the extent that the Court believes *in camera* review may be warranted for some or all of the 24 pages of

redacted records, this appeal can and should be remanded back to the Appeals Officer to conduct such a limited *in camera* review for all applicable privileges.

II. COUNTER-STATEMENT OF QUESTION INVOLVED

Did the Senate of Pennsylvania sufficiently support and establish as a matter of law—through its legal submissions, a comprehensive privilege log, and three supporting attestations from the relevant privilege holders—its limited, targeted redactions based on privilege to the 24 pages of attorney engagement letters and legal invoices identified by Petitioners on appeal, such that *in camera* review of the 24 pages of records is unwarranted?

Suggested Answer: Yes.

III. COUNTER-STATEMENT OF THE CASE

A. The Senate produces 1,039 pages of records with limited, targeted redactions.

On October 15, 2021, the Open Records Officer for the Senate received a RTKL request via email from Petitioners, seeking primarily attorney engagement letters and legal invoices of outside attorneys retained by the Senate, its members, and employees for the 2021 calendar year. *See* R.002a.

On October 19, 2021, the Senate sent an interim response to Petitioners, advising that a 30-day extension of time was necessary because, among other things, certain records potentially responsive to the request required redaction. *See* R.007a-R.008a. Thirty days later, on November 19, 2021, the Senate sent a final response to Petitioners, granting Petitioners access to 1,039 pages of records, but denying the request to the extent that the 1,039 pages of records contained certain limited, targeted redactions. *See* R.004a-R.007a. Petitioners received the 1,039 pages of records free of charge and were provided a share file link to download the more than 1,000 pages of responsive records. *See id.*

In response to Petitioners' RTKL request, the Senate did not withhold a single record in its entirety from the 1,039 page production. *See id.* Rather, some of the records produced to Petitioners were minimally redacted for one of three reasons: (1) federal tax identification numbers protected from disclosure by 26 U.S.C. § 6103(a); (2) confidential personal identification numbers protected from disclosure by 65 P.S. § 67.708(b)(6)(i)(A); or (3) attorney-client privileged information and/or attorney work-product protected from disclosure by 65 P.S. § 67.305(b)(2) and the Supreme Court of Pennsylvania's decisions in *Levy v. Senate of Pa.*, 65 A.3d 361, 373 (Pa. 2013), and *BouSamra v. Excela Health*, 210 A.3d 967, 976 (Pa. 2019). *See id.*

All of the redactions made to the records produced in response to Petitioners' RTKL request were done in consultation with, and approval by, Counsel for the Senate Chief Clerk, Chief Counsel for the Senate Democratic Leader, General Counsel for the Senate Republican Caucus, and the Secretary of the Senate. *See* R.0312a-R.0346a. Only the confidential and privileged portion of the record was redacted and no publicly available information, such as names of cases filed on publicly

available state or federal court dockets, were redacted from the records. *See id.* There were no wholesale or blanket redactions to the more than 1,000 pages of records produced to Petitioners. *See id.* And the dates of work, attorneys' names, the number of hours worked, hourly rates, and amounts billed for services rendered were not redacted. *See id.*

B. Petitioners appeal the limited redactions made by the Senate based on privilege.

On December 8, 2021, Petitioners filed an appeal from the Senate's final response, challenging only those limited redactions made based on privilege. *See* R.010a-R.014a. Petitioners' appeal sought that the limited "redactions be unveiled" in their entirety or, in the alternative, "*in camera* review of the records at issue." R.014a.

The day after Petitioners' appeal was filed, the Senate Secretary, who serves as the appeals officer for Senate RTKL appeals, recused herself and referred the appeal to the Legislative Reference Bureau ("LRB") for adjudication. *See* 1/28/22 Final Determination (F.D.) at 4. The LRB then appointed Suellen M. Wolfe, Esquire as the Appeals Officer to hear the appeal. *See id.*

On appeal, the Appeals Officer permitted the parties "to submit a memorandum of law or any other evidentiary documentation in support

of the appeal." F.D. at 4. In response, the Senate submitted: (1) a Memorandum of Law in Opposition to Appeal with multiple exhibits: (2) a comprehensive Privilege Log of all redacted records produced to Petitioners; and (3) detailed Attestations from Michael A. Sarfert, Esquire, C.J. Hafner, II, Esquire, Crystal H. Clark, Esquire, and Secretary Megan Martin in support of their privilege assertions. *See* R.208a-R.362a. In addition to asserting that the records were appropriately redacted based on the attorney-client privilege and/or the attorney-work product doctrine, the Senate also asserted on appeal that many of the same redactions were appropriate and justified based on the speech and debate privilege.[1] Petitioners submitted no additional evidence or documents to the Appeals Officer in support of their appeal. *See* F.D. at 4.

[1] The RTKL expressly defines "privilege" to include: "The attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, [and] *the speech and debate privilege*[.]" 65 P.S. § 67.102 (emphasis added). Moreover, it is well-established that, under the RTKL, an agency is permitted to assert exceptions on appeal not asserted in the agency's initial denial. *See Levy*, 65 A.3d at 374.

C. The Appeals Officer affirms the limited redactions based on privilege and rejects Petitioners' request for *in camera* review.

On January 28, 2022, the Appeals Officer issued a Final Determination affirming the limited, targeted redactions made by the Senate to the records produced to Petitioners based on privilege. Specifically, the Appeals Officer concluded that: "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 production 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." F.D. at 16-17.[2] In reaching this conclusion, the Appeals Officer recognized that: "The redactions made to the 1,000-plus pages of records produced to [Petitioners] were targeted to those portions of the records containing descriptions of

[2] Although the Appeals Officer affirmed the redactions based on the attorney-client privilege and the attorney-work product doctrine, the Appeals Officer still addressed the application of the speech and debate privilege in her Final Determination. *See* F.D. at 10-11. Specifically, the Appeals Officer stated that Petitioners failed to "provide[] any factual basis for objecting" to the Senate's "characterization" that "the redactions, based on 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." *Id.* at 11.

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." *Id.* at 16.

The Appeals Officer also expressly rejected Petitioners' request for *in camera* review of the redacted records, holding that: "In this appeal, in-camera inspection would be inappropriate and unnecessarily intrude upon privilege." F.D. at 8. In so holding, the Appeals Officer stated that she "conducted a line-by-line review of the produced documents" and determined that "[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[.]'" *Id.* at 7 (citations omitted). In reaching this determination, the Appeals Officer noted that she "also considered the detail of information presented about the redacted portions of the documents, including [the Senate's] logs and affidavits."[3] *Id.* at 8.

[3] Petitioners had previously appealed nearly identical redactions made to attorney engagement letters and legal invoices of outside attorneys retained by the Senate, its members, and employees for the 2019 calendar year. In a Final Determination issued on March 30, 2021, the same Appeals Officer affirmed those

D. Petitioners have now limited their appeal to 24 pages of redacted records.

Despite initially challenging on appeal to the Appeals Officer *all* of the redactions made to the 1,039 pages of records based on privilege, Petitioners have now limited and narrowed their appeal in this Court to only 24 specific pages of redacted records. *See* Pet.Br. at 15-16; R.364a-R.387a. These 24 pages of redacted records include attorney engagement letters and legal invoices from 9 different law firms. *See id.* All 24 pages of records include redactions made based on the attorney-client privilege and attorney-work product doctrine. *See id.* In addition, 21 of the 24 pages of records also include redactions made based on the speech and debate privilege.[4] *See* R.367a-R.387a.

Within those 24 pages of redacted records, Petitioners also have now limited and narrowed their appeal in this Court to only those redactions made to the "captions of invoices" and the scope of work/subject matter of attorney engagement letters. *See* Pet.Br. at 15-

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limited, targeted redactions based on privilege, also without the need for *in camera* review of the records. *See* R.230a-R.241a. Petitioners did not appeal that prior Final Determination to this Court. *See id.*

[4] Notably, 2 of the pages of redacted records relate to a joint representation of both the Senate Republican Caucus and the House Republican Caucus by the same outside law firm. *See* R.381a-R.382a.

16; R.364a-R.387a. Indeed, unlike their initial appeal, Petitioners are no longer challenging those redactions made to the billing detail or descriptions of services rendered within the legal invoices. *See id.* Rather, Petitioners are now only challenging the redacted "captions" of 13 legal invoices and the redacted scope of work/subject matter of 11 engagement letters. *See id.* As stated by Petitioners, they are now only challenging "one to two redacted phrases" within each of the 24 specifically-identified records for purposes of this appeal. Pet.Br. at 16.

IV. SUMMARY OF ARGUMENT

Under the RTKL, a legislative agency, such as the Senate, can meet its burden of establishing that a record is exempt from disclosure on privilege grounds through either testimonial affidavits/attestations *or* a privilege log. Here, the Senate has done both. Indeed, the Senate has produced both a comprehensive Privilege Log and it has submitted detailed, supporting Attestations from the relevant privilege holders to conclusively establish, by a preponderance of the evidence, that the 24 pages of redacted records identified by Petitioners on appeal are exempt from disclosure based on: (1) the attorney-client privilege; (2) the attorney-work product doctrine; and (3) the speech and debate privilege.

Given that the Senate has sufficiently met its burden of establishing all three applicable privileges through its Privilege Log *and* Attestations, *in camera* review is unnecessary and, if anything, would inappropriately intrude upon those established privileges. Nevertheless, to the extent the Court believes *in camera* review may be necessary or warranted here, the Court should simply remand the matter back to the Appeals Officer for *in camera* review of only those 24 pages of redacted records identified by Petitioners on appeal.

V. ARGUMENT

A. The Senate met its burden of establishing all applicable privileges to the 24 pages of redacted records identified by Petitioners on appeal.

As a "legislative agency" under the RTKL, the Senate is required to "provide legislative records in accordance with th[e] act," including any "financial records.[5]" *See* 65 P.S. §§ 67.102, 303(a). The Senate, however, is prohibited from providing any records that are "protected by a privilege," which records are specifically exempt from disclosure under the RTKL without any agency discretion. *See id.* at §§ 67.305(b)(2), 506(c). To the extent that a "legislative record" contains information that is "protected by a privilege" and information that is otherwise "subject to access," the RTKL permits the redaction of the "information which is not subject to access." *See id.* at § 67.706.

Under the RTKL, the Senate has "[t]he burden of proving that a legislative record is exempt from public access" on privilege grounds "by a preponderance of the evidence." 65 P.S. § 67.708(a)(2). "The preponderance of the evidence standard, which is the lowest evidentiary

[5] A "financial record" is defined under the RTKL to include "[a]ny account, voucher or contract dealing with" either "the receipt or disbursement of funds by an agency" or "an agency's acquisition, use or disposal of services, supplies, materials, equipment or property." 65 P.S. § 67.102.

standard, is tantamount to a more likely than not inquiry." *Smart Commc'ns Holding, Inc. v. Wishnefsky*, 240 A.3d 1014, 1026 (Pa. Cmwlth. 2020) (internal quotations omitted). One method an agency may use in meeting the burden of proof that a record is exempt from disclosure is through relevant and credible testimonial affidavits or attestations. *Payne v. Pa. Dep't of Health*, 240 A.3d 221, 226 (Pa. Cmwlth. 2020); *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Cmwlth. 2011). In addition, 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 that a record is exempt from disclosure, particularly where the information in the log is bolstered with averments in an attestation. *Smith on behalf of Smith Butz, LLC v. Pa. Dep't of Env't Prot.*, 161 A.3d 1049, 1059 n.5 (Pa. Cmwlth. 2017).

Here, as detailed below, the Senate—through its legal filings, its production of a comprehensive Privilege Log, and its submission of detailed, supporting Attestations from the relevant privilege holders—has met its burden of proving, by a preponderance of the evidence (i.e., "more likely than not"), that the 24 pages of redacted records identified

by Petitioners on appeal are exempt from public access based on: (1) the attorney-client privilege/work product doctrine; and (2) the speech and debate privilege.[6] *See* R.207a-R.362a.

1. All 24 pages of records were properly redacted based on the attorney-client privilege/work product doctrine.

On appeal, Petitioners have specifically challenged the Senate's redactions to the captions of invoices and the scope of work/subject matter of attorney engagement letters within 24 pages of records produced to them based on the attorney-client privilege and attorney-work product doctrine. *See* Pet.Br. at 15-16; R.364a-R.387a. According to Petitioners, "[t]he 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'" or "'the mental impressions' of any attorney involved." Pet.Br. at 17. However, as the

[6] In an acknowledgment of how thorough and comprehensive the Senate's Privilege Log and Attestations are, Petitioners concede in their Brief that they "have narrowed the scope of their appeal to [only] the redactions found on" 24 pages of records "[b]ased on the Senate's privilege log and attestations." Pet.Br. at 15.

Senate's comprehensive Privilege Log and the three[7] detailed, supporting Attestations from the relevant privilege holders make plain, the limited redactions made to the 24 pages of records were *not* done merely to protect "the most basic, general information" as Petitioners contend. *Id.* at 22. Rather, as the Appeals Officer concluded, these 24 pages of records were narrowly redacted under the "guidelines envisioned in *Levy*[8] and the *BouSamra* rules" to protect information "unquestionably" protected by the attorney-client privilege and attorney-work product doctrine. F.D. at 16-17 (footnote added).

(a) The Senate's Privilege Log and Attestations explain and justify the limited redactions.

In order to meet its burden that the 24 pages of records were properly redacted based on the attorney-client privilege and the

[7] The Senate originally submitted *four* Attestations to support all of the redactions made to the 1,039 pages of records produced to Petitioners in response to their RTKL request. *See* R.312a-R.346a. However, because Petitioners have now limited their appeal to a 24-page subset of those records, and none of those 24 pages of redacted records are related to the Senate Secretary, the Attestation of Secretary Megan Martin can be disregarded for purposes of this appeal. *See* R.335a-R.337a.

[8] *Levy* stands for the general proposition in the RTKL context that generic descriptions of legal services included in attorney invoices (such as "memo regarding," "call to," or "research regarding") are not covered by the umbrella of the attorney-client privilege, but that specific descriptions that would reveal attorney-client communications are protected (such as the subject of the "memo," who the "call" was to, or the nature of the "research" performed). *See* 94 A.3d at 444; 65 A.3d at 373.

attorney-work product doctrine, the Senate has provided both a comprehensive Privilege Log *and* three Attestations from Counsel to the Senate Chief Clerk (the "Sarfert Attestation"), the Chief Counsel to the Senate Democratic Leader (the "Hafner Attestation"), and the General Counsel to the Senate Republican Caucus (the "Clark Attestation"). *See* R.312a-R.334a; R.338a-362a. As required by the RTKL, the Sarfert, Hafner and Clark Attestations are "detailed, nonconclusory, and submitted in good faith." *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013).

Each of the Sarfert, Hafner and Clark Attestations, which were submitted by licensed Pennsylvania attorneys, sets forth, in detail, that the affiant: (1) represents the respective privilege holder; (2) consulted with, and approved of, the Senate's limited redactions to the records based on the attorney-client privilege and/or attorney-work product doctrine; (3) reviewed and verified the accuracy of the Senate's Privilege Log and its contents; and (4) believes each redaction was appropriate and justified based on the attorney-client privilege[9] and attorney-work

[9] A party claiming a record is privileged under the attorney-client privilege must establish the following four elements: (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

product doctrine.[10] *See* R.312a-R.334a; R.338a-346a. The Sarfert, Hafner and Clark Attestations alone are sufficient to support and justify the limited redactions made to the 24 pages of records challenged by Petitioners on appeal. *See Levy*, 65 A.3d at 373 (holding that in RTKL context "descriptions of legal services that address the client's motive for seeking counsel, legal advice, strategy, or other confidential communications are undeniably protected under the attorney client privilege").

Yet, Petitioners argue on appeal that "the Senate's proffered evidence as to the attorney-client and work-product privileges is vague and conclusory," and, in particular, that the Senate's Attestations are allegedly not "specific" enough when it comes to explaining or justifying the redactions made to the captions of 13 legal invoices or the scope of

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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 at 983. Upon that showing, the burden shifts to the party seeking disclosure, who must then explain why the communication at issue should not be privileged. *Id.*

[10] The attorney work product doctrine prevents the disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. *BouSamra*, 210 A.3d at 976. "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." *Id.*

work/subject matter of 11 engagement letters. Pet.Br. at 18-19. But, in making this argument, Petitioners ignore and fail to acknowledge that the Hafner and Clark Attestations both directly explain the basis and justification for the redactions made to the invoice captions and to the scope of work/subject matter of the engagement letters. *See* R.312a-R.334a. In doing so, the Hafner and Clark Attestations differentiate between records involving public litigations and those involving non-public representations. *See id.*

With regard to public litigations, the Hafner and Clark Attestations explain: "In circumstances where outside counsel has been retained on a matter and that representation has been made public through legal filings in particular legal cases, [the Senate does] not redact the subject matter on which legal counsel has been retained within the engagement letter, or in the file name on the invoices pertaining to that matter." R.313a; R.329a. But, "where the representation is not otherwise a matter of public record in a court of law," such as in outside counsel's "assistance with research on potential future legislation, discussion of the merits of possible litigation, [or] evaluation of legal theories relating to the day-to-day business of the

Senate," the Senate "redacts the subject matter of an engagement from its engagement letters and the file name assigned by outside counsel in most circumstances." R.314a; R.329a-R.330a. In particular, the Hafner and Clark Attestations explain that, "where the subject matter of an engagement is specific enough so as to disclose the [] motive for seeking legal counsel, the nature of the advice being provided, our legal strategies, or any other confidential communications, [the Senate has] requested the redaction of the engagement letter and/or the file name assigned by outside counsel."[11] R.314a; R.330a. However, the Hafner and Clark Attestations specifically note that, "where the subject matter of an engagement is broad or general in scope, no redactions were made

[11] The Hafner and Clark Attestations further explain that, "if the description of a specific engagement would have been subject to an appropriate redaction in a line of a legal invoice on the basis of the attorney-client privilege, then a redaction to the engagement letter or the file name assigned by counsel's firm would be similarly appropriate." R.314a; R.330a. On this point, the Clark Attestation provides the following specific example:

> If an engagement letter between an attorney and client identified the engagement as being related to "medical marijuana," the firm's file name is "Medical Marijuana Questions," the first line in the invoice is "email with client re: medical marijuana concerns," and the second line is "research re: medical marijuana cases," all four underlined provisions should be appropriately redacted pursuant to the attorney-client privilege and/or work product doctrine. Redactions were made to engagement letters and invoices consistent with this example by the Senate Republican Caucus.

R.314a (underlining in original).

to the engagement letter or file name even if the representation was not otherwise public." R.315a. R.330a.

Contrary to the argument of Petitioners, the Senate did *not* redact any "vague" or "general information" from the engagement letters or invoices contained in the 24 pages of records identified by Petitioners on appeal, and the unrebutted Sarfert, Hafner and Clark Attestations submitted by the Senate conclusively establish this fact.[12] *See* R.312a-R.334a; R.338a-346a. Indeed, as the Appeals Officer concluded, the information revealed in the Sarfert, Hafner and Clark Attestations *and* the Senate's Privilege Log,[13] when combined with the redacted records

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[12] Petitioners contend that the Senate has "historically asserted the attorney-client privilege over exceedingly vague and general information found in engagement letters and invoice captions," and cites to a single Kleinbard LLC engagement letter that was initially produced in redacted form in response to one RTKL request and then produced in unredacted form in response to a second RTKL request from the same Petitioners a year later. Pet.Br. at 18. However, this lone example cited by Petitioners is actually evidence of how the Senate is continually reviewing and updating its redactions to ensure that, "where the subject matter of an engagement is broad or general in scope, no redactions [are] made to the engagement letter or file name even if the representation [is] not otherwise public." R.315a. R.330a. Indeed, after the engagement letter with Kleinbard was re-reviewed in response to Petitioners' second RTKL request, the subject matter of the engagement—"constitutional issues"—was deemed broad and general in scope, such that it was produced in unredacted form to Petitioners. If anything, this example runs directly counter to Petitioners' argument on appeal that the Senate redacts "vague" or "general information" from its engagement letters or invoices.

[13] Petitioners take issue with the fact that many of the entries on the Senate's Privilege Log identify "the subject matter of the outside attorney's work" only as a "legislative matter." Pet.Br. at 19 n.10. But, as detailed *infra*, this is because 21 of

themselves, "unquestionably illustrates" that the redactions made to the 24 pages of records challenged by Petitioners on appeal were proper and justified based on the attorney-client privilege and the attorney-work product doctrine. F.D. at 16-17. And the Sarfert, Hafner and Clark Attestations "provide additional assurance that the redacted portions constitute 'privilege' as defined under the RTKL."[14] *Id.* at 16.

(b) The Sunshine Act is inapplicable to the Senate's privilege assertions under the RTKL.

Petitioners argue that, because "Pennsylvania courts have repeatedly affirmed that the RTKL and the Sunshine Act are to be read *in pari materia*," this Court's decision in *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305 (Pa. Cmwlth. 1993), is "instructive" on

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the 24 pages of records identified by Plaintiffs on appeal were also redacted based on the speech and debate privilege.

[14] Petitioners claim that "[t]he 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 modicum of information about the subject area of representation without violating a privilege." Pet.Br. 19-20. Not only has the Senate provided Petitioners with more than "a modicum of information about the subject area of representation" in the 1,039 pages of records already produced to them, but the prior Final Determination by the Senate Appeals Officer referenced by Petitioners related to "sexual harassment complaints" expressly noted that "the engagement letter, vouchers and supporting documentation" related to "legal assistance" provided "investigating" those "sexual harassment complaints" would need to be "pulled, copied and *reviewed for redaction*" based on privilege. *Appeal of St. Hilaire*, Senate RTK Appeal 01-2018, F.D. at 5 (Feb. 26, 2018).

whether the Senate's privilege assertions were proper. Pet.Br. at 20-22. Petitioners' reliance on the Sunshine Act for purposes of this appeal, however, is misplaced for a number of reasons.

First, as the Appeals Officer held, "[t]he 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." F.D. at 12. Thus, absent a public meeting, the Sunshine Act is wholly inapplicable here.

Second, unlike the Sunshine Act, the RTKL has specific provisions defining "privilege" and exempting records "protected by a privilege" from disclosure under the RTKL, even on a discretionary basis. *See* 65 P.S. §§ 67.102, 305(b)(2), 506(c); *see also* 1 Pa.C.S. § 1933 ("Particular controls general"). And the Supreme Court of Pennsylvania has provided ample guidance to the bench and bar on the application of the attorney-client privilege and attorney-work product doctrine under the RTKL. *See Levy*, 65 A.3d at 373; *BouSamra*, 210 A.3d at 976. As the Appeals Officer concluded, "those [specific] standards apply in this appeal" as opposed to any generic, unspecific concepts from the Sunshine Act. F.D. at 12.

Third, the *Reading Eagle* case relied upon by Petitioners is inapposite. Indeed, privilege was not even at issue in the *Reading Eagle* case. In *Reading Eagle*, the newspaper brought an action against Reading City Council, alleging that the Sunshine Act requires City Council to publicly announce specific details of a litigation before retiring to a private executive session to discuss the litigation. 627 A.2d at 306. City Council contended that simply stating the executive session was "for litigation" was sufficient under the Sunshine Act, whereas the newspaper contended that more specific information about the litigation was required to be announced, such as the names of the parties, the docket number of the case and the court in which it was filed. *Id.* at 306-07. This Court agreed, holding that, when a closed executive session is called by an agency to discuss litigation, the Sunshine Act requires that the general nature of the litigation be announced. *Id.* at 307. In so holding, however, the *Reading Eagle* Court did not even consider, let alone address, the application of, or concerns raised by, any privileges. *See id.* Rather, the *Reading Eagle* Court simply held that such a general announcement is what was required by the plain

language of Section 708(b), 65 Pa.C.S. § 708(b), of the Sunshine Act. *See* 627 A.2d at 308.

Fourth, and finally, even though it is inapposite, the Senate has actually complied with the requirements of *Reading Eagle* under the Sunshine Act. Indeed, with regard to any publicly-filed litigation, the Senate has provided the names of the parties, the docket number of the case and the court in which it was filed, as suggested in *Reading Eagle*. *Id.* at 306-07. And, again, the Senate did *not* redact any "vague" or "general information" from the engagement letters or invoices contained in the 24 pages of records identified by Petitioners on appeal. *See* R.312a-R.334a; R.338a-362a.

2. 21 of the 24 pages of records were properly redacted based on the speech and debate privilege.

Petitioners challenge the Senate's assertion of the speech and debate privilege over 21 of the 24 pages of records identified by Petitioners on appeal. *See* Pet.Br. at 22-23. However, as the Senate's Privilege Log and the Clark and Sarfert Attestations make plain, "the redactions, based on the speech and debate privilege,[15] were limited to

[15] The speech and debate privilege protects legislators from judicial interference with their "legitimate legislative activities." *Consumers Educ. and*

those portions of the records containing descriptions of legal work performed within the sphere of legislative activity and confidential communications with legal counsel concerning legislative matters." F.D. at 11 (footnote added). And, as the Appeals Officer correctly concluded, Petitioners "have not provided any factual basis for objecting to this characterization."[16] *Id.*

(a) The codified speech and debate privilege applies in the RTKL context.

Petitioners baldly contend that somehow the speech and debate privilege does not apply in the RTKL context, despite being a codified "privilege" in the express text of the RTKL, 65 P.S. § 67.102. *See* Pet. Br. at 14-15, 22-23. In support of this contention, Petitioners partially

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Protective Ass'n v. Nolan, 368 A.2d 675, 680-81 (Pa. 1977). "Legitimate legislative activity extends beyond floor debate on proposed legislation, and it is not confined to conduct that actually occurs in the State Capitol building." *Firetree, Ltd. v. Fairchild*, 920 A.2d 913, 920 (Pa. Cmwlth. 2007). Rather, the protections of the speech and debate privilege "also extend to 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 Pa. v. Commonwealth*, 177 A.3d 1000, 1003 (Pa. Cmwlth. 2017) (internal quotations omitted).

[16] Petitioners did not challenge or appeal the Senate's assertion of the speech and debate privilege before the Appeals Officer. Rather, as the Appeals Officer expressly acknowledged, Petitioners "only [sought] review from the RTKL Officer's redactions which are based on the 'attorney-work product doctrine' and 'attorney-client privilege.'" F.D. at 13.

quote a footnote from *League of Women Voters v. Commonwealth*, 178 A.3d 737, 767 n.38 (Pa. 2018), stating, that: "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." Pet.Br. 15, 23. But, in making this argument, Petitioners rely on out-of-context dicta from the *League of Women Voters* case, ignore the plain text of the RTKL, and minimize a prior Final Determination from the Senate Appeals Officer, which post-dated *League of Women Voters*, and specifically applied the speech and debate privilege in the RTKL context to uphold certain limited redactions made to Senate expense records.

First, and most basically, the speech and debate privilege clearly applies in the RTKL context because it is an express "privilege" provided for in the plain language of the RTKL. Indeed, the RTKL defines the term "privilege" to include "the speech and debate privilege." 65 P.S. § 67.102. Thus, the availability of the speech and debate privilege in the RTKL context is without question.

Second, the *League of Women Voters* case actually supports the application of the speech and debate privilege in the RTKL context. In

the *League of Women Voters* case, petitioners brought an action challenging the constitutionality of the Pennsylvania Congressional Redistricting Act of 2011. *See* 178 A.3d at 741. As part of that constitutional challenge, petitioners served notice of intent to serve subpoenas on several "current and/or former employees, legislative aides, consultants, experts, and agents" of the General Assembly. 177 A.3d at 1006. In response, the legislative respondents objected to the subpoenas on the grounds that the information sought was privileged under the Speech and Debate Clause of Article I, Section 15 of the Pennsylvania Constitution. *See id.* This Court agreed with the legislative respondents and quashed the subpoenas, holding that, because the activities of state legislators and their staff related to the consideration and passage of the Act "fall within the sphere of [] legitimate legislative activity," the Court "lacks the authority under the Speech and Debate Clause of the Pennsylvania Constitution to compel the production of the documents sought" by the petitioners. *Id.* at 1005-06.

The petitioners in *League of Women Voters* subsequently appealed the merits of their constitutional challenge to the Pennsylvania

Supreme Court, but they did not appeal the original quashal of the subpoenas by this Court. *See* 178 A.3d at 741. Acknowledging that the issue of application of the speech and debate privilege was not before it, the Supreme Court noted: "[W]e need not resolve the question of whether our Speech and Debate Clause confers a privilege protecting this information from discovery and use at trial in a case, such as this one, involving a challenge to the constitutionality of a statute." *Id.* at 767 n. 38. Although the Supreme Court footnoted, in dicta, its skepticism of this Court's prior speech and debate privilege ruling, the Supreme Court did not (and procedurally could not) reverse this Court's privilege ruling in *League of Women Voters*. *See id.* Thus, this Court's discussion and application of the speech and debate privilege in *League of Women Voters* remains good law and is instructive here.[17] *See* 177 A.3d at 1005-06.

[17] Petitioners also cite to a footnote from a Final Determination issued by the Office of Open Records ("OOR") that references and quotes the Supreme Court's footnote in *League of Women Voters*. *See* Pet.Br. at 23 n.12 (quoting *Spatz v. Phila. Gas Works*, OOR Dkt. AP 2021-0718, F.D. at 6 n.6 (Sept. 22, 2021)). But, contrary to Petitioners' characterization, the *Spatz* appeal did not "involve" the application of the speech and debate privilege, as the agency involved in the *Spatz* appeal abandoned the assertion of the speech and debate privilege and did not include it in its privilege log. *See id.* Moreover, the Senate, which was initially involved in the *Spatz* appeal and made the initial assertion of the speech and debate privilege, "withdrew from participation in the [] matter" before the OOR. *See id.*

Third, and finally, more than two years after the Supreme Court's decision in *League of Women Voters*, the Senate Appeals Officer issued a Final Determination, which expressly acknowledged the Supreme Court's footnote in *League of Women Voters*, yet still applied the speech and debate privilege in the context of a RTKL appeal. *See* R.243-R.281 (*Appeal of Bumsted, et al.*, Senate RTK Appeal 02-2020 (Apr. 2, 2020)). In that prior Final Determination, the requesters (which included Petitioner Couloumbis) challenged similar, limited redactions made by the Senate to information revealing the individuals with whom Senators met and the specific legislative issue or issues they discussed. *See* R.251a. In upholding and affirming the redactions based on the speech and debate privilege, the Senate Appeals Officer, after conducting a lengthy review of the speech and debate privilege and its application under the RTKL, concluded that "the activity of legislative staff meeting with individuals to discuss legislative matters falls squarely within the sphere of legitimate legislative activity, and,

therefore, deserves the absolute protection afforded by the privilege."[18] R.273a.

Accordingly, not only is the speech and debate privilege a statutorily-codified privilege within the express text of the RTKL, it has continued to be applied and upheld in the RTKL context even after the Supreme Court's decision in *League of Women Voters*.

(b) The Senate's Privilege Log and Attestations explain and justify the limited redactions.

In order to meet its burden that 21 of the 24 pages of records identified by Petitioners on appeal were properly redacted based on the speech and debate privilege, the Senate has provided both a comprehensive Privilege Log *and* two Attestations from Counsel to the Senate Chief Clerk (the "Sarfert Attestation") and General Counsel to the Senate Republican Caucus (the "Clark Attestation"). *See* R.312a-R.327a; R.338a-R.362a.

Each of the Sarfert and Clark Attestations, sets forth, in detail, that the redactions done were narrow and limited to only: (1)

[18] In a similar RTKL appeal that pre-dated *League of Women Voters*, the Senate Appeals Officer also reached the same conclusion in applying the speech and debate privilege to uphold certain limited redactions made to Senate expense records. *See* R.283a-R.310a. (*Appeal of Swift*, Senate RTK Appeal 03-2015 (Jan. 11, 2016)).

"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," and (2) "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." R.324a-R.327a; R.345a-R.346a. The Sarfert and Clark Attestations alone are sufficient to support and justify the limited redactions made to the 21 pages of records challenged by Petitioners on appeal. And, as the Appeals Officer concluded, Petitioners have offered nothing to rebut or counter the Sarfert and Clark Attestations. *See* F.D. at 11.

Petitioners' only challenge to the substance of the Sarfert and Clark Attestations on appeal is that they allegedly "are boilerplate recitations of the basic parameters on the speech-and-debate privilege[.]" Pet.Br. at 22. But this is a mischaracterization and over-simplification of the Sarfert and Clark Attestations, as each Attestation clearly states that the limited redactions were done to protect

"confidential communications with legal counsel concerning legislative matters." R.327a; R.346a.

Unlike the *League of Women Voters* case or the Senate Appeals Officer's prior Final Determination in *Appeal of Bumsted*, this appeal involves the application of the speech and debate privilege to *attorney* communications concerning legislative matters. Just as *Appeal of Bumsted* held that it is a "core" legislative function for legislators and their staff to meet with individuals to discuss legislative matters, it is equally a "core" legislative function for legislators and their staff, along with institutional officers and their staff acting on behalf of the Senate, to communicate with their attorneys and legal counsel to discuss legislative matters. *See* R.243-R.281. Such communications with legal counsel to discuss legislative matters are more than just related to the legislative process; they are an integral part of the legislative process itself. *See id.*

Accordingly, the protections afforded by the speech and debate privilege must be applied equally to communications with attorneys and

legal counsel to discuss legislative matters, and the Sarfert and Clark Attestations conclusively support such an application.[19]

B. As the Appeals Officer concluded, *in camera* review of the 24 pages of redacted records identified by Petitioners on appeal would be "inappropriate and unnecessarily intrude upon privilege."

Petitioners contend that the 24 pages of redacted records that they have identified on appeal should be submitted to this Court in unredacted form for *in camera* review. *See* Pet.Br. at 15-22. However, as the Appeals Officer properly concluded, "in-camera inspection would be inappropriate and unnecessarily intrude upon privilege." F.D. at 8.

It is well-established that, where an agency sufficiently explains the basis for nondisclosure through an attestation, a privilege log, or both, *in camera* review is not necessary. *See UnitedHealthcare of Pa., Inc. v. Pa. Dep't of Hum. Servs.*, 187 A.3d 1046, 1060 (Pa. Cmwlth. 2018). Here, as detailed at length above, the Senate's Privilege Log *and*

[19] The Senate's underlying process for redaction based on the speech and debate privilege is the same as outlined *supra* with regard to the attorney-client privilege. Where the subject matter of an engagement is specific enough so as to disclose confidential communications with legal counsel concerning legislative matters, the Senate redacts the engagement letter and/or the file name assigned by outside counsel. Likewise, if the description of a specific engagement would have been subject to an appropriate redaction in a line of a legal invoice on the basis of the speech and debate privilege, then a redaction to the engagement letter or the file name assigned by counsel's firm would be similarly appropriate.

the Sarfert, Hafner and Clark Attestations from the relevant privilege holders more than sufficiently establish the application of the attorney-client privilege and the attorney-work product doctrine to all 24 pages of redacted records challenged by Petitioners on appeal, and the speech and debate privilege to 21 pages of those same records.[20]

Indeed, as the Appeals Officer concluded, "the detail of information presented about the redacted portions" of the records in the Senate's Privilege Log and supporting Attestations compels such a conclusion. *See* F.D. at 8. Moreover, as the Appeals Officer also concluded, a "line-by-line review" of 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[.]'" F.D. at 7 (quoting *Levy*, 65 A.3d at 373). As such, *in camera* review of

[20] Petitioners offer no legal basis for this to Court to conduct *in camera* review of the 24 pages of redacted records, other than to second-guess the Senate's Privilege Log, the three Attestations and the Appeal Officer's Final Determination. But second-guessing credible factual Attestations and sound legal rulings is not, and must not, be the role of this Court.

the unredacted records by this Court is unnecessary and would be unduly intrusive by a co-equal branch of government.[21]

To the extent the Court believes *in camera* review may be necessary or warranted here (which, again, it is not), the Court should simply remand the matter back to the Appeals Officer for a limited, *in camera* review of the 24 pages of redacted records identified by Petitioners on appeal. This would be particularly pragmatic here, given that Petitioners have previously requested (and were denied) *in camera* review by the Appeals Officer. *See McGowan v. Pa. Dep't of Env't Prot.*, 103 A.3d 374, 387 (Pa. Cmwlth. 2014) (remanding matter to OOR to conduct *in camera* review of DEP records where requester previously requested *in camera* review before OOR).

In doing so, however, the Court would need to clearly direct that any remand to the Appeals Officer for *in camera* review must include a review for *all* applicable privileges, including the attorney-client

[21] Given the separation of powers principles on which the speech and debate privilege is grounded, *in camera* review by this Court would be particularly intrusive, and arguably unconstitutional, with regard to the 21 redacted records identified by Petitioners on appeal over which the speech and debate privilege has been asserted. *See Com., ex rel. Jiuliante v. Cty. of Erie*, 657 A.2d 1245, 1251 (Pa. 1995) ("A basic precept of our form of government is that the executive, the legislature and the judiciary are independent, co-equal branches of government.").

privilege, attorney-work product doctrine, and the speech and debate privilege. And any proposed *in camera* review by the Appeals Officer must be strictly limited only to the 24 pages of redacted records identified by Petitioners on appeal.[22] *See* R.364a-R.387a.

VI. CONCLUSION

Through its production of 1,039 pages of unredacted or, at most, minimally redacted records to Petitioners, the Senate has more than sufficiently met the "RTKL's remedial purpose" of allowing "the public to scrutinize the activity of its government and to hold its elected representatives accountable for, among things, their use of the public fisc." Pet.Br. at 11. With this appeal, Petitioners are again attempting to circumvent those "privileges" that have been expressly established and protected from disclosure by the RTKL in the name of "transparency." But those "privileges" must be recognized and honored where, as here, they have been clearly established by the Senate through its legal filings, its production of a comprehensive Privilege

[22] While it is true that this Court conducted *in camera* review of the records at issue in *Levy*, the *Levy* appeal involved broad, blanket redactions of legal invoices. *See* 65 A.3d at 477. This appeal, however, concerns a limited number of targeted redactions made in accordance with the holding in *Levy*, and for which the Appeals Officer would be better suited to review *in camera*.

Log, and its submission of detailed, supporting Attestations from the relevant privilege holders.

Just as the Appeals Officer affirmed the Senate's limited, targeted redactions to the 24 pages of records identified by Petitioners on appeal, this Court also should affirm those same redactions, without the need to conduct *in camera* review. To the extent that the Court believes *in camera* review may be warranted (which it is not), this appeal should simply be remanded back to the Appeals Officer to conduct an *in camera* review of only the 24 pages of redacted records for all applicable privileges.

Respectfully submitted,

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/s/ Mark E. Seiberling
Matthew H. Haverstick (No. 85072)
Mark E. Seiberling (No. 91256)
Miranda Dang (No. 330908)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
mseiberling@kleinbard.com
mdang@kleinbard.com

Attorneys for Respondent
Senate of Pennsylvania

WORD COUNT CERTIFICATION

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Dated: July 18, 2022

/s/ Mark E. Seiberling

Matthew H. Haverstick (No. 85072)
Mark E. Seiberling (No. 91256)
Miranda Dang (No. 330908)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140
Eml: mseiberling@kleinbard.com

Attorneys for Respondent
Senate of Pennsylvania