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IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 142 C.D. 2022

SAM JANESCH *and*
ANGELA COULOUMBIS,
Petitioners,

v.

PENNSYLVANIA HOUSE OF REPRESENTATIVES,
Respondent.

REPLY BRIEF OF PETITIONERS

ON APPEAL FROM THE DETERMINATION OF THE HOUSE APPEALS OFFICER
IN RTKL APPEAL NO. 2021-0002 ACA

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INTRODUCTION

Between January and October 2021, members of the Pennsylvania House of Representatives spent huge sums of taxpayer money on outside law firms. Pennsylvanians are entitled to know why. And the Right to Know Law ("RTKL") gives the public a means of obtaining that information. To be sure, the RTKL does not give members of the press and public an absolute right to *all* information about the House's legal engagements: where such information is subject to the attorney-client or work-product privilege, the House may withhold it from the public. But the House's privilege assertions must be scrupulous, exacting, and supported by detailed evidence. Here, they fall far short of those requirements.

As explained below, the affidavits that the House submitted in support of its privilege assertions (the "Affidavits") are too vague to establish that the House complied with its legal obligations under the RTKL. Relatedly, the "bright line" rule upon which the House apparently relied when redacting the responsive records (the "Records") is contrary to law. This Court should order the Records released in full or, alternatively, remand with instructions for the House to produce detailed affidavits and a correspondingly detailed privilege log.

ARGUMENT

I. The Affidavits do not carry the House's burden.

The House argues that the Affidavits alone satisfy its burden of proving that the attorney-client and work-product privileges apply to the redacted material at

issue. Br. of Resp't Pa. House of Reps. at 17 ("Resp."). The House is wrong. As Petitioners have explained, the Affidavits do little more than recite (in various ways) the elements of the attorney-client and work-product privileges. *See* Principal Br. of Pet'rs at 16–19 ("Br."). That is not enough. *Pa. Dep't of Educ. v. Bagwell*, 131 A.3d 638, 658 (Pa. Commw. Ct. 2015) ("*Bagwell 2015*").

Perhaps to make the Affidavits seem more substantial than they are, the House presents a long, bulleted list of the information they contain. Resp. at 18–20. But this list proves Petitioners' point, not the House's. It largely consists of information about the House's search for the Records: the personnel who identified the Records, the quantity of Records they identified, and the amount of time they spent reviewing and redacting the Records. *Id.* Such information may be relevant to the adequacy of the House's search, but it does nothing to establish the elements of the attorney-client or work-product privilege.

While the Affidavits describe the House's search and recite the elements of the asserted privileges, they say precious little about *why* the asserted privileges purportedly apply to the redacted information. For example, describing the Records produced by CORE, the Coleman Affidavit makes it impossible to determine which privilege or privileges apply to which redactions, why any given privilege or privileges apply to any given redaction, or who holds the privilege or privileges with respect to any given portion of the Records:

17. Redactions were made for information not previously made publicly known and/or already available in the public sphere that disclosed: the reason for which the legal advice was sought; the nature of the legal advice rendered; the thinking, process, strategy, research, memoranda, opinions or mental impressions of the outside counsel in preparation of their work product; material prepared by the outside counsel in anticipation of litigation; and personal financial information. . . .

20. The narrative entries in the attorney fee invoices were written by or at the direction of the outside House lawyer referenced for each entry.

21. Put another way, each of these redacted items reflected a communication by an attorney to his or her client (the House, or a constituent part of the House). . . .

23. The redacted items reflect confidential communications between an attorney and his or her client that have not been shared with any third party or the general public.

24. Those items reflect a House client's request for or purpose to secure legal services, assistance, advice, or opinion and/or the attorney's provision of legal services, assistance, advice, or opinion to a House client.

25. Other redacted items reflect an attorney's preparation of material in connection with his or her legal work, or reflect the lawyer's mental impressions, internal thought processes, or legal strategies, theories, opinions, research, or conclusions.

26. Some of the redactions reflect both attorney-client communications and attorney work product.

27. None of the redactions reflect purely factual information or any other type of information not subject to an exemption or other protection under the RTKL.

28. None of the redacted items have been disclosed to a third party or otherwise publicly disclosed.

R.251a–252a; *see also* R.259a–260a (Bashore Affidavit, substantially the same); R.266a–267a (Salkowski Affidavit, substantially the same).

Petitioners quote these statements at length—rather than suggestively paraphrasing them, *see* Resp. at 19—because it is these statements on which the House relies to carry its burden. They are plainly boilerplate. Indeed, they are remarkably like those the Court rejected as insufficient in *Bagwell 2015*. *See Bagwell 2015*, 131 A.3d at 657–58 (describing insufficient affidavit). The House's Affidavits may be wordier than the affidavit at issue in *Bagwell 2015*, but they do not provide any greater detail about why the asserted privileges apply to the House's redactions. Tellingly, although the House observes that its own Affidavits are *longer* than those this Court has rejected in the past, it never clearly identifies how its asserted justifications for invoking the attorney-client and work-product privileges are *substantively* different or more detailed than the justifications that this Court has previously held inadequate.[1] Resp. at 18.

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[1] The House claims that the Affidavits "are the equal of—or superior to—affidavits this Court has specifically approved in prior cases," Resp. at 20, but its citations are inapposite, outdated, or both. *See Smith ex rel. Smith Butz, LLC v. Pa. Dep't of Env't Prot.*, 161 A.3d 1049, 1062 n.15 (Pa. Commw. Ct. 2017) (explaining that, in addition to affidavits, agency provided privilege logs in support of its privilege assertions); *Brown v. Pa. Dep't of State*, 123 A.3d 801, 804 (Pa. Commw. Ct. 2015) (decided pre-*Bagwell 2015*; explaining that the records at issue were exempt "by the very terms of [the] request"); *Schneller v. City of Phila.*, No. 595 C.D. 2013, 2014 WL 309593, at *3 (Pa. Commw. Ct. Jan. 28, 2014) (unpublished; decided pre-*Bagwell 2015*); *Dages v. Carbon Cnty.*, 44 A.3d 89, 93 (Pa. Commw. Ct. 2012) (decided pre-*Bagwell 2015*; containing no substantive

Given the general and conclusory contents of the Affidavits—including their failure to specify which privileges are being asserted as to which redactions, or who is the holder of the privilege in any given instance—the House's refusal to produce a privilege log is conspicuous. It offers several explanations, but all are flimsy. First, the House blames Petitioners for not "explain[ing] how a privilege log would be useful to them." Resp. at 22. This not only ignores the obvious benefits of a privilege log—*see* Br. at 20; *see also infra*—but also erroneously attempts to flip the burden of proof. The RTKL does not require requesters to prove they need a privilege log; it requires agencies to prove that they have complied with their disclosure obligations. *See, e.g.*, *Heavens v. Pa. Dep't of Env't Prot.*, 65 A.3d 1069, 1074 (Pa. Commw. Ct. 2013) ("Where the agency is asserting a privilege, the burden of proof is on the agency to demonstrate that the privilege applies."). Agencies often meet this requirement via a sufficiently detailed privilege (or exemption) log. *See* Br. at 19–20. The House could have done so here, but chose not to. *Cf. Pa. State Police v. Muller*, 124 A.3d 761, 766 (Pa. Commw. Ct. 2015) ("An agency is not entitled to ignore its burden to show an

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discussion of the requirements for affidavits submitted in support of privilege claims).

exemption from disclosure before OOR and rely on supplementation of the record in this Court to avoid the consequences of that conduct.").[2]

Second, the House asserts that even if it had created a privilege log, the log would have been repetitious and therefore valueless. Resp. at 22–23. Put differently, the House argues that a privilege log containing no more detail than the Affidavits would be no better than the Affidavits. *Id.* True enough. But the point of a privilege log is to provide, in an organized fashion, concrete detail about each assertion of privilege on a document-by-document basis—detail necessary to carry the House's burden. Even if some redactions had remained disputed, a reasonably detailed privilege log could have narrowed the scope of any further litigation.

Third, the House repeats its contention that creating a privilege log would be difficult. Resp. at 22. But as Petitioners have explained, an agency is not relieved of its legal burden to justify withholding records under the RTKL merely because complying with that legal requirement may be burdensome. Br. at 19–20. The House counters that the difficulty of responding to an RTKL request is one of the factors to be considered in determining whether the request is overbroad. Resp. at 22 n.4 (citing *Commonwealth, Dep't of Env't Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012)). This case, however, is not about whether Petitioners'

[2] If the Court gives the House another chance to meet its burden, it should instruct the House to produce a detailed privilege log.

Request was overbroad. If it were, the briefs would focus on how the Request was worded, and the question would be whether the Request sought "a clearly delineated group of documents." *Legere*, 50 A.3d at 265. It does, and the House has never argued otherwise. At issue is whether the House's *response* to the Request satisfies its burden under the RTKL. And there is no support for the House's suggestion that an agency's burden under the RTKL becomes lighter when, as here, the agency claims that satisfying it will require hard work. *See id.* at 266 ("There is simply nothing in the RTKL that authorizes an agency to refuse to search for and produce documents based on the contention it would be too burdensome to do so.").

Finally, the House faults Petitioners for "mak[ing] no mention of this Court's repeated holding that neither a log nor *in camera* review are needed when an agency submits a detailed affidavit." Resp. at 22 n.3. Again, the House misses the point. There is no question that, in some cases, a sufficiently detailed agency affidavit may make a privilege log unnecessary. This is not one of those cases. As Petitioners have explained, the House's Affidavits are not "detailed," *id.*, where it counts: they do not establish that the information redacted from the Records is attorney-client and/or work-product privileged.

II. The *Levy* Opinions do not create a "bright-line" rule.

As it did before the Appeals Officer, the House maintains that the *Levy* Opinions—*see* Br. at 21—categorically require the redaction of any and all information in legal billing records other than "generalities." Resp. at 12. That is not what the *Levy* Opinions say. Rather, the *Levy* Opinions make the unremarkable point that information subject to the attorney-client and/or work-product privilege is not subject to disclosure under the RTKL regardless of the form the information takes or the type of document in which it appears. *Levy v. Senate of Pa.*, 65 A.3d 361, 373 (Pa. 2013) ("*Levy II*") (stating that "the relevant question is" not the category of record at issue, but "whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege"). Thus, in *Levy II*, the Pennsylvania Supreme Court explained—clarifying certain dicta in *Levy v. Senate of Pennsylvania*, 34 A.3d 243 (Pa. Commw. Ct. 2011) ("*Levy I*")—that some information in an agency's legal billing records may be subject to the attorney-client or work-product privileges even though legal billing records are not the sort of document in which attorneys and clients typically exchange confidences or devise strategy. *Levy II*, 65 A.3d at 373. Simply put, what matters is not the type of document, but whether the agency can establish all elements of the asserted privilege. *Id.*

The House would transform this commonsense guidance into a sea change. According to the House, the *Levy* Opinions draw, for the first time, a "bright line" between two kinds of information in an agency's legal billing records: (1) generic descriptions of tasks performed, like "drafting a memorandum" or "making a telephone call"; and (2) everything else. Resp. at 12–13. And information in the "everything else" category, according to the House, must be redacted. *Id.*; *see also id.* at 15 ("*Levy* permits disclosure of general descriptions of attorney services, but precludes disclosure of further details."); *see* R.251a ("As I understand the decisions in *Levy*, the attorney-client privilege and work-product doctrine allow for disclosure of general descriptions of services provided, but preclude disclosure of further details."); R.258a (identical); R.266a (identical).

If the House were right, a legislative agency's legal billing records would be a unique category of documents—a category in which the attorney-client and work-product privileges incorporate a special "bright line" rule that does not apply anywhere else, and that the Pennsylvania Supreme Court cut from whole cloth in 2013. That cannot be. As the Pennsylvania Supreme Court has said, "the determination of the applicability of the attorney-client privilege does not turn on . . . the category of a document, such as whether it is an invoice or fee agreement." *Levy II*, 65 A.3d at 373; *see also Off. of the Dist. Att'y of Phila. v.*

Bagwell, 155 A.3d 1119, 1132 (Pa. Commw. Ct. 2017) ("*Bagwell 2017*") (stating that *Levy II* "disclaimed any *per se* application of the attorney-client privilege").

Seeking to defend its erroneous interpretation of the *Levy* Opinions, the House again advances a workload argument: asserting that the bright-line rule purportedly imposed by *Levy* "provide[s] needed precision to guide the work of different people performing thousands of similar document redactions." Resp. at 12. This argument is meritless. The House's proposed bright-line rule—which would maximize the House's ability to redact its legal billing records to the detriment of the taxpayers who pay those bills—doubtless would be convenient for the House and its personnel. But, in addition to the legal infirmities described above, the House's proposed rule is irreconcilable with both the Pennsylvania Supreme Court's instruction that courts "must" 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), and this Court's instruction that the RTKL's exceptions "must be narrowly construed," *Bagwell 2017*, 155 A.3d at 1130. Those instructions cannot be vitiated for the House's convenience.

III. The House's remaining arguments lack merit.

A. Petitioners do not seek to impose their own bright-line rules.

According to the House, Petitioners "question whether a client's identity or the subject matter of an attorney's engagement can ever be privileged." Resp. at 23 (citing Br. at 17–18, 24–25). Not so. As to client identities, Petitioners' brief

cites the "general rule"—which the Pennsylvania Supreme Court "reaffirm[ed]" in *Levy II*—"that client identities are not protected by the attorney-client privilege" unless those identities are subject to "specified exceptions." *Levy II*, 65 A.3d at 363. The House neither acknowledges this "general rule" nor attempts to establish that any of the relevant exceptions permit its redaction of client identities. *Id.*; *see* Br. at 17–18 (quoting examples from Affidavits).

Further, Petitioners do not question that the subject matter of an attorney's engagement may, in some instances, satisfy all the elements of the attorney-client or work-product privilege. Rather, Petitioners' brief explains that "the information *typically* contained in engagement letters and the captions of invoices . . . is *highly unlikely*" to satisfy the elements of either privilege, since it is usually too general to reveal any kind of confidence.[3] Br. at 24 (emphasis added). This underscores the failings of the House's Affidavits, which apply the same boilerplate privilege assertions to engagement letters, invoice captions, and narrative line-items, without differentiation. *See* R.249a–269a. The House offers no material response.

[3] Petitioners' brief includes a concrete example from the House's prior disclosures: "Education funding litigation." Br. at 24. The House ignores this example.

B. The Sunshine Act does not give rise to Petitioners' claims but is an instructive analog.

Finally, according to the House, "Petitioners argue the Right-to-Know Law redactions here were improper under a separate law—the Sunshine Act." Resp. at 24. But Petitioners do not bring a separate Sunshine Act claim; nor do Petitioners argue that any provision of the Sunshine Act either supersedes the RTKL or otherwise determines the outcome of this matter. *Cf.* Resp. at 24 (stating that "nothing in the Sunshine Act overrides the controlling language of the Right-to-Know Law in this context"). Petitioners say only what this Court has said as recently as 2021: that the RTKL and the Sunshine Act are *in pari materia*. *Off. of Gen. Counsel v. Bumsted*, 247 A.3d 71, 81 (Pa. Commw. Ct. 2021).

Interpreting the Sunshine Act, this Court has recognized that while a municipality may use a closed meeting to discuss certain litigation matters, so as not to "damage the municipality's ability to settle or defend" lawsuits, the municipality cannot withhold *everything*.[4] *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305, 307 (Pa. Commw. Ct. 1993). Specifically, when a

[4] The House cites *Schenck v. Township of Center*, 893 A.2d 849, 855 (Pa. Commw. Ct. 2006), for the proposition that "[t]he Sunshine Act's protection of attorney-client communications extends to an attorney's invoices." Resp. at 25. But as this Court has explained, *Schenck* "was decided under the now repealed Right to Know Act," and its "limited holding" has been "further tempered" by the Pennsylvania Supreme Court's rejection of "any *per se* application of the attorney-client privilege" in *Levy II*. *Bagwell 2017*, 155 A.3d at 1131–32.

municipality gives public notice that it will discuss litigation in a closed session, the municipality "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," a municipality "must state the nature of the complaint, but not the identity of the complainant." *Id.* This further undermines the erroneous "bright-line" rule the House purports to draw from the *Levy* Opinions.

CONCLUSION

For the reasons set forth above and in Petitioners' Principal Brief, this Court should reverse the Appeals Officer's decision of January 19, 2022 and order the House to produce the Records without redaction.

Alternatively, this Court should vacate the Appeals Officer's decision of January 19, 2022 and remand with instructions for the House to: (1) re-process the Records in accordance with the legal principles set forth in the Court's opinion; (2) produce new, Bates-stamped versions of the Records; and (3) produce affidavits and a Privilege Log that are sufficiently detailed to enable meaningful adversary testing and *in camera* review.

CERTIFICATES OF COMPLIANCE

I hereby certify that:

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Dated: August 1, 2022

/s/Paula Knudsen Burke

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