

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 160 C.D. 2022

ANGELA COULOUMBIS *and*
SAM JANESCH,
Petitioners,

v.

SENATE OF PENNSYLVANIA,
Respondent.

REPLY BRIEF OF PETITIONERS

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

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INTRODUCTION

The Senate of Pennsylvania and its elected members routinely hire outside attorneys and law firms at taxpayer expense. Pennsylvanians are entitled to know about the legal services their tax dollars are being spent on, and the Right to Know Law (“RTKL”) provides them a means of obtaining that important information.

In response to the instant RTKL request, the Senate produced more than 1,000 pages of engagement letters, invoices, and other billing records related to its hiring of outside attorneys. The records contain many thousands of redactions based on assertions of the attorney-client privilege, the attorney work-product privilege, and the speech-and-debate privilege. Petitioners challenge a small number of the Senate’s redactions to engagement letters or invoice captions that appear to conceal information about the general subject matter of an outside law firm’s engagement. While such general information is highly unlikely to fall within the ambit of one of the Senate’s asserted privileges, it is information that goes to the heart of the RTKL’s remedial purpose: access to it would allow the public to scrutinize the activity of its government and to hold its elected representatives accountable for, among other things, their use of public funds. *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, Petitioners ask this Court to conduct an *in camera* review of a limited number of those redactions.

ARGUMENT

The Senate argues that *in camera* review is unnecessary. Principal Br. of Resp't at 35–36 (“Resp.”). In the alternative, the Senate contends that any *in camera* review should be conducted by the Senate Appeals Officer on remand. Both arguments are wrong. First, *in camera* review of the limited number of redactions identified by Petitioners is necessary to ensure that the Senate is not improperly invoking the attorney-client, work-product, or speech-and-debate privileges to withhold information from the public. Second, this Court may conduct an *in camera* review in the first instance, and a remand to the Appeals Officer would result in unnecessary delay in direct conflict with the letter and intent of the RTKL.

I. *In camera* review is warranted.

As this Court has recognized, “*in camera* review provides an essential check against the possibility that a privilege may be abused.” *Off. of Open Recs. v. Center Twp.*, 95 A.3d 354, 367 (Pa. Commw. Ct. 2014) (citing *Levy v. Senate of Pa.*, 34 A.3d 243, 246 (Pa. Commw. Ct. 2011) (“*Levy I*”), *aff’d in part and rev’d in part on other grounds by Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013) (“*Levy II*”). Moreover, the Pennsylvania Supreme Court has recognized that *in camera* review is appropriate in cases implicating RTKL exemptions, as well as claims of privilege such as those asserted in this case. *ACLU of Pa. v. Pa. State Police*, 232

A.3d 654, 670 (Pa. 2020) (holding Commonwealth Court committed reversible error for failure to conduct *in camera* review and remanding for *in camera* review).

In camera review is necessary here because, for the records Petitioners have identified, the Senate’s privilege assertions are vague and conclusory. While the Senate argues its redactions do not cover general information, Resp. at 26, it is impossible to tell which, if any, of the Senate’s asserted justifications for invoking the attorney-client and work-product privileges apply to the redactions found in the 24 pages identified by Petitioners. R.364a–387a. The privilege log entries corresponding with those redactions are too vague (see chart below). That is why Petitioners seek this Court’s review of those redactions.

<i>Record (Bates No.)</i>	<i>Privilege Log Entry</i>
R.364a (0073)	R.349a
R.365a (0193)	R.350a
R.366a (0235)	R.350a
R.367a (0631)	R.355a
R.368a (0635)	R.355a
R.369a (0639)	R.355a
R.370a (0644)	R.355a
R.371a (0647)	R.355a
R.372a (0649) (Caption only)	R.355a
R.373a (0652) (Caption only)	R.355a
R.374a (0654) (Caption only)	R.355a
R.375a (0656) (Caption only)	R.355a
R.376a (0658) (Caption only)	R.355a

<i>Record (Bates No.)</i>	<i>Privilege Log Entry</i>
R.377a (0776)	R.357a
R.378a (0785)	R.357a
R.379a (0794)	R.357a
R.380a (0797)	R.357a
R.381a (0868)	R.359a
R.382a (0874)	R.359a
R.383a (1010)	R.361a
R.384a (1013)	R.361a
R.385a (1014) (Caption only)	R.361a
R.386a (1020)	R.361a
R.387a (1021) (Caption only)	R.361a

In camera review also is warranted based on the Senate’s assertions of the speech-and-debate privilege. Petitioners do not argue that the speech-and-debate privilege is inapplicable in the RTKL context. But, as Petitioners have explained, the Pennsylvania Supreme Court has cast considerable doubt on the Senate’s interpretation of the scope of that privilege. *See League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 767 n.38 (Pa. 2018) (cautioning against reliance on *League of Women Voters of Pa. v. Commonwealth*, 177 A.3d 1000 (Pa. Commw. Ct. 2017) in determining the scope of the speech-and-debate privilege). And, in any event, the Senate’s asserted justifications for invoking the speech-and-debate privilege do nothing more than parrot the Senate’s preferred definition of that privilege. Thus, even assuming, *arguendo*, that the Senate is right about the scope

of the privilege, it still has not carried its burden of establishing that the privilege applies and justifies the redactions at issue.

The Senate suggests, in a footnote, that *in camera* review of the material over which it has asserted the speech-and-debate privilege is “arguably unconstitutional.” Resp. at 37 n.21. But the Senate’s only citation in support of that suggestion is a case that did not involve the speech-and-debate privilege. *Id.* (citing *Commonwealth ex rel. Jiuliante v. Cnty. of Erie*, 657 A.2d 1245, 1251 (Pa. 1995)). Moreover, the notion that Chapter 13 courts are constitutionally barred from determining whether the legislature has properly invoked the speech-and-debate privilege is incompatible with the Pennsylvania Supreme Court’s holding that “Chapter 13 courts are the ultimate finders of fact and . . . are to conduct full *de novo* reviews of appeals from decisions made by RTKL appeals officers.” *Bowling v. Off. of Open Recs.*, 75 A.3d 453, 474 (Pa. 2013).

II. This Court has the authority to—and should—review the Records identified by Petitioners *in camera*; remand to the Appeals Officer would thwart timely access to the Records.

This Court has the authority to review the records *in camera* in the first instance; it need not wait on the Senate Appeals Officer. *See Cnty. of Berks v. Pa. Off. of Open Recs.*, 204 A.3d 534, 545 (Pa. Commw. Ct. 2019) (“[C]ourts have authority to order *in camera* review in an appeal from an OOR decision if they conclude that the OOR record is inadequate.”); *Bowling*, 75 A.3d at 466 n.14 (the

“*de novo* standard of review permits the court to determine the case *anew*, including matters pertaining to testimony and other evidence” (citing *Commonwealth v. Emerick*, 96 A.2d 370, 373–74 (Pa. 1953)); *Dep’t of Transp. v. Off. of Open Recs.*, 7 A.3d 329, 332 n.2 (Pa. Commw. Ct. 2010) (“The RTKL does not prohibit [a] Court from considering evidence that was not before the OOR.”).

Indeed, in a previous case involving Senate legal bills, contracts and payment records, the Commonwealth Court ordered *in camera* review by Senior Judge James R. Kelley, acting as special master for the *en banc* panel. *See Levy I*, 34 A.3d at 246. Senior Judge Kelley’s report (appended to the opinion) discussed his review of a binder containing both redacted and unredacted versions of the documents in question. *See id.* at 257.

Rather than this Court conducting an *in camera* review—or appointing a special master to conduct the review, as was done in *Levy I*—the Senate posits that this appeal could “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.” Resp. at 39. But a remand is unnecessary and would cause undue delay. A remand would also be contrary to the remedial purpose of the RTKL, which envisions a scheme of prompt disclosure of public records, aided by the timely and thorough submission of evidence at the fact-finding stage. *See* 65 P.S. § 67.1101(b)(1) (requiring the Office of Open Records appeals officer to issue a

final determination within 30 days); *id.* §§ 67.1301(a), 67.1302(a), 67.1303(b) (giving the parties 30 days thereafter to appeal to the Commonwealth Court or a Court of Common Pleas, which reviews the record and issues findings of facts and law).

Contrasting the RTKL with its more restrictive predecessor sheds further light on the RTKL's purpose of facilitating timely, efficient access to records. Under the Right-to-Know-Act ("RTKA") in effect until 2002, requesters bore the burden of justifying why they were entitled to records, instead of the other way around. *Bowling*, 75 A.3d at 455. Agencies had no deadlines for responding to records requests. *Id.* If the agency denied a request, a requester could only challenge that denial by filing a lawsuit. *Id.* Even after the General Assembly amended the law in 2002 to impose response deadlines on agencies, requesters still bore the burden of justifying access and still had to file a lawsuit to obtain impartial, third-party review of denials. *Id.* The RTKA thus encouraged litigation, which created substantial delays and burdens on requesters and thereby discouraged appeals and created significant barriers to public access and accountability. With the RTKL's 2008 enactment, the General Assembly sought to remedy this flawed system and significantly expand access to public records by, among other things, imposing strict time limits in the text of the law. *Id.* at 457.

In keeping with this statutory scheme, the Pennsylvania Supreme Court has repeatedly recognized that speedy resolution of disputes over public access to records is a fundamental feature of the remedial RTKL. *See Bowling*, 75 A.3d at 473 (noting “the General Assembly’s goal in the RTKL of ensuring swift determinations”); *Levy II*, 65 A.3d at 382 (citing “the overriding legislative intent of transparency of government and speedy resolution of requests”). To accept the Senate’s position in this case would be to undermine those important reforms and unduly delay access to public records. Sending this case back to the Appeals Officer would accomplish nothing but unnecessary delay; this Court has the authority to review the records *in camera* and render a decision in a timely and efficient manner in harmony with both the letter and remedial intent of the RTKL.

CONCLUSION

Petitioners respectfully request that the Court vacate the Appeals Officer’s determination of January 28, 2022 in part; 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 identified by Petitioners for *in camera* review by this Court; and, following that *in camera* review, order the Senate to produce unredacted versions of the records to Petitioners, to the extent that the Senate’s redactions are not justified by the attorney-client, work-product, or speech-and-debate privilege.

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 1774 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: August 1, 2022

/s/ Paula Knudsen Burke

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PROOF OF SERVICE

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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