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In the Commonwealth Court of Pennsylvania

No. 142 CD 2022

SAM JANESCH and ANGELA COULOUMBIS,

Petitioners,

v.

PENNSYLVANIA HOUSE OF REPRESENTATIVES,

Respondent.

BRIEF OF RESPONDENT, PENNSYLVANIA HOUSE OF REPRESENTATIVES

On appeal from the January 19, 2022 decision
of the Appeals Officer, at No. 2021-0002 ACA

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SCOPE AND STANDARD OF REVIEW

The standard of review is *de novo* and scope of review is plenary. *Markey v. Treasury Dep't*, 2022 WL 1669093, *2 n.4 (Pa. Commw. May 26, 2022). But this Court still may rely on the Appeals Officer's findings. The Right-to-Know Law allows for "the adoption of the appeals officer's factual findings and legal conclusions when appropriate." *Technology & Entrepreneurial Ventures Law Grp., PC v. Pa. State Police*, 2021 WL 5997396, *2 n.4 (Pa. Commw. Dec. 20, 2021) (quoting *ACLU v. Pa. State Police*, 232 A.3d 654, 662-63 (Pa. 2020)).

QUESTIONS INVOLVED

1. Did the Pennsylvania House of Representatives satisfy its Right-to-Know Law obligations by producing more than 600 pages in response to Petitioners' request and presenting three detailed and sworn witness affidavits to substantiate its attorney-client and work-product redactions?

   Answered in the affirmative by the Appeals Officer.

2. Did the House properly redact the subject matter from a few documents where those redactions were needed to preserve the attorney-client privilege?

   Answered in the affirmative by the Appeals Officer.

STATEMENT OF THE CASE

This is a Right-to-Know Law case where two requesters sought, and the Pennsylvania House of Representatives produced, documents relating to the House's outside counsel engagements. There is no debate that the House produced every page the requesters asked for—607 in total. The House redacted these materials to shield sensitive attorney-client, work-product, and personal financial information. It justified these redactions with three detailed and sworn affidavits from knowledgeable witnesses. Even as redacted, the pages still reveal copious details of the attorneys' services and fees. Thus, the House's production both meets the Right-to-Know Law's transparency goal and preserves the attorney-client privilege—the "most revered" of our common law privileges.

A. Petitioners submit a Right-to-Know request to the House.

In October 2021, the requesters (Petitioners here) submitted a Right-to-Know Law request to the House. They asked for:

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

(R. 2a.)

B. The House produces more than 600 pages to Petitioners.

The House timely issued its final response granting the request in part and denying it in part. (R. 4a-6a.) The House produced 607 pages of attorney invoices, engagement letters, and expense reports. (*Exhibit A* to Pets.' Br. at 2.) The pages were provided in PDF format, consistent with customary maintenance of the documents. The House redacted selected portions of the documents to shield information protected by the attorney-client privilege and work-product doctrine, as required by the decisions in *Levy v. Senate of Pennsylvania*. The House's redactions also covered the law firms' financial information relating to billing and payment.

C. The Appeals Officer rules in the House's favor.

Petitioners took an appeal to the Appeals Officer. (R. 8a-12a.) They did not assert any pages were missing from the production. They did not assert any challenge relating to the expense reports. And they did not challenge the redactions for personal financial information.

Petitioners disputed only redactions of attorney-client and work-product information from the attorney invoices and engagement letters. They asserted inconsistencies among the redactions and that the House should have included

evidence to justify its redactions with its final response. (R. 10a, 11a.) But they have dropped these issues in their brief to this Court, and thus have waived them.[1]

The Appeals Officer notified the House of the appeal and directed it to file a position statement. (R. 247a.) The House timely did so, submitting a thorough letter brief and detailed, sworn affidavits from three knowledgeable witnesses: (1) Daniel W. Coleman, CORE Legal Counsel for the House; (2) Charlene A. Bashore, Senior Legal Counsel and Caucus Open Records Officer for the House Republican Caucus; and (3) Matthew S. Salkowski, Senior Legal Counsel for the House Democratic Caucus. (R. 232a-243a, 249a-269a.) Petitioners submitted neither a letter brief nor an affidavit.

After considering the parties' submissions, the Appeals Officer issued a timely 15-page decision. (*Exhibit A* to Pets.' Br.) The Officer found the House had shown its redactions were appropriate. He declined to conduct *in camera* review or order the House to prepare an exemption log because he found the

[1] With good reason, as they lacked merit. First, the evidence showed the redactions were consistent and the individuals performing them were careful, conscientious, and acted in good faith. (R. 249a-269a.) Second, the RTKL does not require an agency to include evidence with its final response. It must provide only the "specific reasons for the denial" at that time. 65 P.S. §67.903(2). Evidence comes later, during the appeal. *Id.*, §§67.1101 to 1102.

House's affidavits were sufficiently detailed. (*Id.* at 11-12.) The Appeals Officer thus sustained the House's final response to Petitioners' request.

D. Petitioners appeal to this Court.

Petitioners then appealed to this Court. The House now timely submits its merits brief and asks this Court to affirm the Appeals Officer's decision.

SUMMARY OF THE ARGUMENT

This Court should find that the Pennsylvania House of Representatives complied with the Right-to-Know Law. The House produced every document Petitioners requested: more than 600 pages of attorney fee invoices, engagement letters, and expense reports. The House's production revealed to the Petitioners the services the House's attorneys provided and what they charged for their work.

The documents were redacted only for what the law says must be withheld—in particular, information protected by the attorney-client privilege, a "revered" and "deeply rooted" protection. The House's detailed affidavits show its personnel meticulously adhered to the redaction rules laid out by this Court and the Supreme Court in *Levy v. Senate of Pennsylvania*. The opinions there hold that general descriptions of legal services may be disclosed, but other details must be redacted. *Levy* also allows for the redaction of a client's identity and the subject matter of an engagement in some cases. The House's affidavits explain how it carefully followed *Levy*'s guidance here. Those submissions also show that a privilege log and *in camera* review are not warranted in this case.

The documents produced, even as redacted, still offer a wealth of details. They show the names of every one of the House's outside lawyers, the work they were hired to do, the work they actually did, the time they spent on their work, the

hourly rates they charged, and the amounts they invoiced for their services. Petitioners thus have it exactly wrong in claiming they lack even "general" or "basic" information about the House's outside counsel arrangements. The House gave them all that information—and much more. Far from "frustrating" the Right-to-Know Law's transparency goal, the House fulfilled it. Petitioners have all they need for their reporting—as proven by their series of detailed articles examining the House's outside counsel arrangements and its expenditures.

For these reasons, detailed below, the Court should affirm the Appeals Officer's decision.

ARGUMENT

A. The Right-to-Know Law and *Levy* decisions require redaction of attorney invoices and engagement letters.

The Pennsylvania Supreme Court has repeatedly emphasized "that the attorney-client privilege is deeply rooted in our common law and is the most revered of our common law privileges." *Levy v. Senate of Pa.*, 65 A.3d 361, 368 (Pa. 2013) ("*Levy II*") (cleaned up). Its purpose "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* (quoting *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 47 n.1 (Pa. 2011)). Given the importance of the privilege, a "broader range of derivative protection is appropriate to facilitate open communication." *Levy v. Senate of Pa.*, 34 A.3d 243, 248 (Pa. Commw. 2011) ("*Levy I*").

The work-product doctrine is even broader than the attorney-client privilege. *Levy v. Senate of Pa.*, 94 A.3d 436, 443 (Pa. Commw. 2014) ("*Levy III*"). It covers "any material prepared by the attorney in anticipation of litigation, regardless of whether it is confidential." *Id.* (cleaned up); *see also Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 415-17 (Pa. Commw. 2014) (holding doctrine applies even beyond anticipated litigation). Its purpose "is to guard the mental processes of an attorney, providing a privileged area within which" the attorney can "analyze and

prepare" his or her case. *Levy III*, 94 A.3d at 443 (citation omitted). The doctrine forbids disclosure of wide swaths of information—including anything reflecting an attorney's mental impressions, strategies, research, theories, opinions, conclusions, memoranda, notes, and summaries. *Id.*

The Right-to-Know Law "specifically exempts privileged documents from disclosure." *Levy II*, 65 A.3d at 368 (citing 65 P.S. §67.102 & §67.305). Privileged material includes information covered by the attorney-client privilege and work-product doctrine. *Id.* (citing 65 P.S. §67.102). And while an agency has the discretion to disclose exempt documents, that leeway does not extend to privileged material. It never may be disclosed. *Id.* (citing 65 P.S. §67.506(c)(2)). And if a document includes a combination of privileged and non-privileged information, the agency must redact the privileged information before disclosure. 65 P.S. §67.706.

The decisions in *Levy v. Senate of Pennsylvania* explain the portions of an attorney's invoice that are protected by the attorney-client privilege and work-product doctrine in Right-to-Know cases. They protect "the specific descriptions of legal services, such as the subject of the memo, who was called, the nature of the researched performed, [and] identification of the trial attended." *Levy III*, 94 A.3d at 444 n.9. Similarly, "descriptions of legal services that address the client's motive for seeking counsel, legal advice, strategy, or other confidential

communications are undeniably protected." *Levy II*, 65 A.3d at 373. If "invoices contain any references to confidential communications, those references will be redacted." *Levy I*, 34 A.3d at 254; *id.* at 252 (stating same).

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

To sum up, an agency may disclose an attorney fee invoice under the Right-to-Know Law, but only to the extent of its general description of the service performed—such as drafting a memorandum, making a telephone call, performing research, or attending a trial. The agency must redact further details—including the specific description of a legal service provided, the subject of a memorandum, the identity of a person called, the nature of the research performed, or identification of the trial attended. And, of course, the agency must redact any

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

B. Petitioners misconstrue the *Levy* opinions.

Petitioners argue the above discussion—which quotes from the *Levy* decisions—"pushes" them "too far." (Br. at 23.) Petitioners could be taken as suggesting that specific descriptions of legal services may not be privileged. (*Id.* at 24.) That is not what the *Levy* opinions say. This Court did not mince words; it found the attorney-client privilege and work-product doctrine protect "the specific descriptions of legal services"—without exception. *Levy III*, 94 A.3d at 444 n.9. That conclusion tracks the Supreme Court's earlier holding that particular "descriptions of legal services … are undeniably protected." *Levy II*, 65 A.3d at 373. As a result, that material "will be redacted." *Levy I*, 34 A.3d at 254, 252.

The *Levy* opinions provide straightforward redaction guidance. They draw a clear-cut distinction between generalities (drafting a memorandum, making a telephone call, performing research, attending a trial) and more sensitive and confidential particulars. The *Levy* decisions provide needed precision to guide the work of different people performing thousands of similar document redactions.

Petitioners' suggested reformulation of *Levy*, on the other hand, would blur what is now a bright line. The Court should decline their invitation to do so.

C. The House's redactions were appropriate under *Levy*.

The evidence here shows the House carefully followed *Levy*. The unrebutted record consists of affidavits[2] from three knowledgeable House witnesses: (1) CORE Legal Counsel for the House; (2) Senior Legal Counsel and Caucus Open Records Officer for the House Republican Caucus; and (3) Senior Legal Counsel for the House Democratic Caucus. (R. 249a-269a.) These sworn statements "should be accepted as true," as there is no evidence of bad faith. *McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. 2014) (citation omitted). They show that the House took its redaction responsibilities seriously and studiously followed this Court's and the Supreme Court's guidance. The affidavits are more than enough to meet the preponderance of the evidence standard, "the lowest evidentiary standard"—"tantamount to a more likely than not

[2] Petitioners recognize there is "no question" that affidavits may be used in RTKL matters. (Br. at 16); *see Heavens v. Pa. Dep't of Envtl. Prot.*, 65 A.3d 1069, 1073-74, 1076-77 (Pa. Commw. 2013) (explaining that agencies may use affidavits in RTKL matters and that the agency's affidavits proved its attorney-client privilege claims); *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. 2011) (same); *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. 2011) (same); *Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. 2010) (same).

inquiry." *Smith v. Pa. Dep't of Envtl. Prot.*, 161 A.3d 1049, 1059 n.10 (Pa. Commw. 2017); 65 P.S. §67.708(a)(2) (stating preponderance standard).

As explained in the affidavits, House personnel thoroughly searched House files for potentially responsive outside attorney invoices, engagement letters, expense reports, and other documents. (R. 250a ¶¶6-9, 257a ¶¶6-9, 265a ¶¶6-9.) The assembled documents consisted of 607 pages of attorney fee invoices, engagement letters, and expense reports for the requested periods from several outside law firms. (R. 250a ¶10, 257a ¶10, 265a ¶10.) Those firms were engaged as legal counsel for the House or a constituent part of the House. (R. 250a ¶11, 257a ¶11, 265a ¶11.)

House personnel reviewed the assembled materials to determine the documents and portions of documents subject to Right-to-Know disclosure. (R. 250a ¶12, 257a ¶12, 265a ¶12.) Upon review, it was determined that the documents contained three types of information excluded from Right-to-Know disclosure: information protected by the attorney-client privilege; information protected by the work-product doctrine; and personal financial information. (R. 250a-251a ¶13, 258a ¶13, 265a-266a ¶13.)

To determine what material had to be withheld on attorney-client and work-product grounds, the House followed this Court's and the Pennsylvania Supreme

Court's directions and guidance from the opinions in *Levy v. Senate of Pennsylvania*. (R. 251a ¶¶14-15, 258a ¶¶14-15, 266a ¶¶14-15.) (As discussed above, *Levy* permits disclosure of general descriptions of attorney services, but precludes disclosure of further details.) The assembled invoices and letters were reviewed and redacted consistent with the *Levy* decisions. (R. 251a ¶¶16-17, 258a ¶¶16-17, 266a ¶¶16-17.) Given the volume of documentation involved, House personnel had to invest considerable time and effort to complete the necessary redactions. (R. 251a ¶18, 258a-259a ¶18.)

The redactions for the attorney-client privilege and work-product doctrine were made mainly to the narrative entries of the attorney fee invoices and in the body of certain engagement letters. (R. 251a ¶19, 259a ¶19, 266a ¶18.) This content was written by or at the direction of outside House lawyers, and thus were written communications by attorneys to their clients. (R. 252a ¶¶20-21, 259a ¶¶20-22, 266a-267a ¶¶19-20.) As the witnesses explain in detail, those items were redacted because the redacted information constituted a protected attorney-client communication, attorney work-product information, or both. (R. 252a ¶¶22-26, 259a-260a ¶¶23-27, 267a ¶¶21-25.)

None of the attorney-client and work-product redactions reflect purely factual information or any other type of information not subject to an exemption or other protection under the Right-to-Know Law. (R. 252a ¶27, 260a ¶28, 267a

¶26.) Nor have the redacted items been disclosed to a third party or otherwise publicly disclosed, as the House always rigorously protects and maintains as confidential all this information under the attorney-client privilege and work-product doctrine. (R. 252a-253a ¶¶28-29, 260a ¶¶29-30, 267a ¶¶27-28.)

For these reasons, the House asserts that its production complies with Pennsylvania law. It produced everything within its possession, custody, and control (607 pages of attorney fee invoices, engagement letters, and expense reports) and redacted only what the law says must be withheld. (R. 253a ¶¶33-34, 260a ¶¶34-35, 267a ¶¶30-31.) This plainly meets the low bar set by the preponderance of the evidence standard.

The documents Petitioners have received explain to them—and, by extension, the public—the nature of the attorneys' services and the fees they charged. This meets the Right-to-Know Law's transparency goal. *See Levy III*, 94 A.3d at 444 ("Where, as here, the taxpayers are footing the bill for the legal services, they are entitled to know the general nature of the services provided for the fees charged.").

What is more, Petitioners have access to publicly filed documents in House litigation matters, including pleadings, briefs, and other materials submitted to the courts. Petitioners thus have a clear picture of the activities of House outside

counsel and know the names of all the outside lawyers, everything they did, the time they spent on their work, and how much they charged for their services.

D. Petitioners' challenge to the House's affidavits fails.

The affidavits plainly are detailed enough. But Petitioners still disagree, declaring these statements "vague and conclusory"—in an argument that is, itself, vague and conclusory. (Br. at 16-18.) They do not explain what is wrong with the affidavits in any depth. Petitioners instead offer a surface-level critique, asserting that a few cherry-picked lines are "boilerplate" while ignoring the dozens of other paragraphs in the affidavits describing the facts in painstaking detail. Petitioners even level the wild, unsupported accusation that the witnesses acted in bad faith and redacted "indiscriminately." (Br. at 21.)

What is more, Petitioners rely on inapt decisions—central among them *Pennsylvania Department of Education v. Bagwell*, 131 A.3d 638 (Pa. Commw. 2016). (Br. at 18-19.) Petitioners argue the House's affidavits share the same weaknesses as the one in *Bagwell*. But the short affidavit there lacked detail; it included only a general statement that the documents included privileged communications. 131 A.3d at 657-58. And it was necessarily vague, as nobody at the agency had reviewed the records to determine which exemptions applied or redactions should be made to each document. *Id.* at 657. That led this Court to "find it perplexing that the [agency] claims unspecified records are privileged

while simultaneously admitting it did not review the records." *Id.* at 658. Under those circumstances, the Court found the agency's affidavit insufficient.

Petitioners' other cases are like *Bagwell*. They involved perfunctory, cookie-cutter affidavits that the Court rightly found wanting. *See, e.g.*, *Cal. Univ. of Pa. v. Schackner*, 168 A.3d 413, 421-22 & n.12 (Pa. Commw. 2017) (holding insufficient a 1-sentence affirmation that documents included "privileged communications with [the agency's] legal counsel regarding the investigation and related matters"); *Office of the Dist. Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1134-35 & n.15 (Pa. Commw. 2017) (same; 6-paragraph affidavit lacking details; trial court also allowed agency to supplement the record, but it failed to do so); *Pa. State Police v. Muller*, 124 A.3d 761, 764-65 & n.3 (Pa. Commw. 2015) (same; 3-paragraph "verification" with "no detail" and "no explanation" stating only that the witness determined a document was exempt); *Office of Governor v. Scolforo*, 65 A.3d 1095, 1103-04 (Pa. Commw. 2013) (same; exemption was addressed in 2 conclusory sentences with "no further specifics").

The House's submissions are worlds apart from the feeble affidavits that this Court has rejected. Here, the comprehensive affidavits contain many specifics, including:

- The witness' background and responsibilities;

- The witness' understanding and familiarity with the request;

- The steps taken to identify document custodians;

- The work done to search for and assemble potentially responsive documents;

- An identification of the types of documents that were assembled;

- The name of every law firm that provided services to the House during the relevant period;

- The types of protected information found in the documents;

- The witness' familiarity with the *Levy* decisions and the guidance they provide for attorney-client and work-product redactions;

- A detailed description of the specific kinds of attorney-client and work-product information found in the documents;

- The specific locations of the redacted attorney-client and work-product within the documents;

- How long the witness and others spent redacting the materials;

- A sworn affirmation that the redacted information only includes protected information—not unprotected information (such as purely factual information);

- A sworn affirmation that the redacted information has not been publicly disclosed and is maintained in confidence; and

- A description of the process for assembling, processing, and producing the redacted documents to the requesters.

(R. 249a-269a.)

These submissions are the equal of—or superior to—affidavits this Court has specifically approved in prior cases. *See, e.g.*, *Brown v. Pa. Dep't of State*, 123 A.3d 801, 803-04 & n.4 (Pa. Commw. 2015) (cited by Petitioners; approving witnesses' identical, 4-sentence affidavits); *Smith v. Pa. Dep't of Envtl. Prot.*, 161 A.3d 1049, 1062 (Pa. Commw. 2017) (same; affidavits stated simply that the records depicted requests for legal advice, "contain the mental impressions, conclusions, opinions, and written work-product created by the [agency] counsel regarding the issues for which legal advice was sought," and had not been disclosed to any third party); *Schneller v. City of Phila.*, 2014 WL 309593, *3-*4 (Pa. Commw. Jan. 28, 2014) (same; affidavit merely recited the prongs of the attorney-client privilege standard and included an affirmation that the documents were privileged); *Dages v. Carbon Cty.*, 44 A.3d 89, 91, 93 (Pa. Commw. 2012) (same; affidavits stated only that the agency directed the lawyer to perform legal research, the lawyer provided the research, the agency and lawyer communicated confidentially, the research was privileged, and that the privilege was not waived).

In sum, the House's meticulous affidavits prove the redactions were appropriate and comply with this Court's decisions. It is hard to imagine what else

the witnesses could have said in their statements to justify their redactions (short of disclosing privileged material and waiving the privilege). Put simply, the House's submissions are adequate. The Court should sustain them.

E. A privilege log and *in camera* review are not warranted.

Petitioners admit that "the RTKL does not mandate privilege logs." (Br. at 21 n.8.) But they ask the Court to order the House to prepare one anyway. And they also ask for *in camera* review. (Br. at 19-20, 27.) These steps are unneeded here, given the detail included in the House's affidavits.

This Court holds that "where an agency sufficiently explains the basis for nondisclosure through an affidavit, a log or *in camera* review may not be necessary." *UnitedHealthcare of Pa. v. Pa. Dep't of Human Servs.*, 187 A.3d 1046, 1060 (Pa. Commw. 2018) (holding these steps unnecessary, given agency affidavits); *Chambersburg Area Sch. Dist. v. Dorsey*, 97 A.3d 1281, 1289-91 (Pa. Commw. 2014) (affirming trial court's rejection of request for agency to produce unnecessary exemption log); *see also Office of Governor v. Scolforo*, 65 A.3d 1095, 1103 n.13 (Pa. Commw. 2013) (noting that an exemption log "may not be a practical approach in view of the records requested" and that sometimes "agencies

may proffer generic determinations for nondisclosure").[3] Here, the House has sufficiently explained the basis for nondisclosure by providing detailed affidavits. These statements show the House performed redactions in good faith and shielded only items legitimately protected under applicable law.

A privilege log and *in camera* review also create unnecessary burdens, as the witnesses here explain. (R. 254a ¶¶37-42, 261a ¶¶38-43, 268a ¶¶34-38.) The House produced more than 600 pages. Most pages have many redactions. Thus, the documents here would require creation of an extensive log with thousands of repetitive entries.[4]

Petitioners do not explain how a privilege log would be useful to them. It would not be. A log would merely repeat attorney-client and work-product claims—time after time, line after line, page after page—that are already obvious from the records produced. *Compare Schackner v. Edinboro Univ.*, 2020 WL 1983761, *5 (Pa. Commw. Apr. 27, 2020) (holding an exemption log "unnecessary" for hundreds of records repeatedly redacted "only as to personal

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[3] Petitioners make 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—even though Petitioners cite a decision (*Scolforo*) stating that very holding.

[4] Petitioners assert this burden is irrelevant. (Br. at 19.) But the case they cite for support says burden "may be considered as a factor" in an overbreadth assessment. *Dep't of Envtl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. 2012).

identifiers and disability status when the redactions are clear from review of the redacted records themselves"). Such a repetitive log would provide no meaningful benefit to Petitioners.[5]

F. Client identities and subject matters may be redacted.

Petitioners also question whether a client's identity or the subject matter of an attorney's engagement can ever be privileged. (Br. at 17-18, 24-25.) But the Supreme Court's opinion in *Levy* refutes both contentions. The court held that "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." *Levy II*, 65 A.3d at 372; *accord U.S. v. Liebman*, 742 F.2d 807, 808-10 (3d Cir. 1984). As for whether the subject matter of an attorney's engagement can be privileged, the answer there, too, was "yes," as the court approved the redaction of "seven lines of text involving the 'specific nature of representation'" from an attorney's engagement letter. *Levy II*, 65 A.3d at 372.

[5] Petitioners' request for a log could have made more sense when they claimed inconsistencies among the redactions. But they dropped that argument, so their request for a log makes even less sense now.

G. The Sunshine Act does not apply here.

Lastly, Petitioners argue the Right-to-Know Law redactions here were improper under a separate law—the Sunshine Act. (Br. at 25-26.) This argument fails for at least three reasons.

First, and fundamentally, nothing in the Sunshine Act overrides the controlling language of the Right-to-Know Law in this context. *See, e.g.*, *Highlands Sch. Dist. v. Rittmeyer*, 243 A.3d 755, 763-64 (Pa. Commw. 2020) (rejecting a RTKL requester's attempt to use the Sunshine Act to generate a conflict triggering disclosure of records expressly exempt from disclosure by the RTKL); *cf. Getek v. City of Chester*, 3 Pa. D. & C.4th 74, 78 (Com. Pl. Del. 1989) ("The Right to Know Act is not superseded by the Sunshine Act.").

Second, even assuming Sunshine Act application, Petitioners do not identify a provision of that enactment showing any redaction here was incorrect. Nor can they, as the Sunshine Act specifically shields attorney-client communications from disclosure. *See* 65 Pa.C.S. §708(a)(4) (permitting an agency to meet in executive session to "consult with its attorney ... regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed"); *Trib Total Media, Inc. v. Highlands Sch. Dist.*, 3 A.3d 695, 701 (Pa. Commw. 2010) (an "agency's statutory authorization [under the Sunshine Act] to privately consult with counsel ... regarding litigation strategy or

information reflects the policies embodied in the attorney-client privilege, which protects confidential communications between a client and lawyer"). The Sunshine Act's protection of attorney-client communications extends to an attorney's invoices. *See Schenck v. Twp. of Center*, 893 A.2d 849, 855 (Pa. Commw. 2006) ("we hold that the description of litigation-related services in a solicitor's invoice is not accessible under either the [Right-to-Know] Act or the Sunshine Act in the absence of consent from the client").

Third, the case Petitioners rely on, *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305 (Pa. Commw. 1993), does not help them. It addressed a Sunshine Act-specific statute requiring an agency to announce "the reason for holding [an] executive session." *Id.* at 306. There is no analog to this provision in the Right-to-Know Law.

The question in *Reading Eagle* was how much information an agency must announce about a pending lawsuit during a public meeting before going into executive session with its attorney to talk in confidence about the lawsuit. This Court held the Act required disclosure of only "the names of the parties, the docket number of the case, and the court" for existing lawsuits and the "nature of the complaint" for unfiled grievances. Any other details were confidential because "the public would be better served" by "a private discussion of the matter." The Court explained 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 306-07.

Even assuming the Sunshine Act's application, the redactions here—and, by extension, the *Levy* opinions—dovetail with *Reading Eagle*. The *Reading Eagle* decision permits disclosure of basic information about a lawsuit at a public meeting. The *Levy* decisions similarly permit disclosure of basic information about the engagement and payment of outside lawyers. But both *Reading Eagle* and *Levy* require privileged information to be kept confidential. The redactions here follow these principles. Thus, nothing in *Reading Eagle* suggests any error in the redactions in this case.

CONCLUSION

For these reasons, respondent, Pennsylvania House of Representatives, requests that the Court affirm the Appeals Officer's decision.

Respectfully submitted,

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Pennsylvania House of Representatives

Dated: July 18, 2022

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/s/ Karl S. Myers
Karl S. Myers

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