

IN THE COMMONWEALTH COURT  
*of* PENNSYLVANIA  
NO. 1425 CD 2022

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ANGELA COULOUMBIS,  
SPOTLIGHT PA,  
SAM JANESCH, *and*  
THE CAUCUS,  
*Petitioners,*

v.

PENNSYLVANIA OFFICE OF GENERAL COUNSEL (OOR),  
*Respondent.*

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**PRINCIPAL BRIEF OF PETITIONERS**

ON APPEAL FROM THE FINAL DETERMINATION OF THE OFFICE OF OPEN  
RECORDS (AP NO. 2022-0621)

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## **STATEMENT OF JURISDICTION**

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

## **ORDER UNDER REVIEW**

Petitioners seek review of the final determination of the Office of Open Records (“OOR”) in Appeal No. 2022-0621 (Nov. 21, 2022), attached hereto as Exhibit A.

## SCOPE AND STANDARD OF REVIEW

“[A] court reviewing an appeal from an OOR hearing officer is entitled to the broadest scope of review.” *Bowling v. Off. of Open Recs.*, 990 A.2d 813, 820 (Pa. Commw. Ct. 2010), *aff'd*, 75 A.3d 453 (Pa. 2013). As to legal questions, the standard of review is plenary. *Padgett v. Pa. State Police*, 73 A.3d 644, 646 n.3 (Pa. Commw. Ct. 2013). As to factual questions, the reviewing court “independently reviews the OOR’s orders and may substitute its own findings of fact for that of the agency.” *Bowling*, 990 A.2d at 818.



## QUESTIONS INVOLVED

*Question*

In response to Petitioners' Right to Know request, the Office of General Counsel produced invoices it received from private law firms between 2019 and 2021. The Office redacted the captions of these invoices. Did the Office meet its burden of establishing that the redacted contents of the invoice captions are privileged or otherwise exempt from disclosure under the Pennsylvania Right to Know Law?

*Suggested Answer* No.

## STATEMENT OF THE CASE

### I. Form of Action

This matter arises under the Pennsylvania Right to Know Law (“RTKL”), codified at 65 P.S. §§ 67.101–67.3104. It comes before the Court on petition for review of the final decision of the OOR in appeal number 2022-0621.

### II. Procedural History

On January 11, 2022, Petitioners Angela Couloumbis, Spotlight PA, Sam Janesch, and The Caucus submitted a request (the “Request”) under the RTKL to the Office of General Counsel (“Office” or “OGC”).<sup>1</sup> R.1a. On February 18, 2022, the Office granted in part and denied in part the Request. R.3a–4a.

On March 10, 2022, Petitioners appealed to the OOR. R.7a–10a. The appeal was stayed while the parties pursued mediation. R.11a. On September 20, 2022, the OOR lifted the stay and re-opened the record. R.13a.

On November 21, 2022, the OOR issued a final determination affirming the Office’s partial denial of the Request. Ex. A at 7–8. Petitioners sought reconsideration on December 14, 2022, R.23a, which the OOR rejected as

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<sup>1</sup> During the course of this litigation, Petitioner Janesch, who was formerly employed by Petitioner The Caucus, moved to a different news organization, where he continues to report on politics.

untimely, R.25a. Petitioners filed a Petition for Review with this Court on December 21, 2022.

### **III. Prior Determinations**

The Office's February 18, 2022 response to the Request is reproduced at R.3a. The OOR's November 21, 2022 determination affirming the Office's response is attached hereto as Exhibit A. No court has issued a prior determination in this matter.

### **IV. Facts**

The Office of General Counsel regularly hires private law firms. These law firms bill the Office for their services, and the Office pays them with taxpayer dollars.

Petitioners are journalists and newspapers that provide Pennsylvania residents with valuable information on the workings of their government. Together, Petitioners have extensively covered Pennsylvania agencies' use of taxpayer funds for legal services, including both chambers of the Pennsylvania General Assembly.<sup>2</sup> Pursuant to the RTKL, Petitioners asked the Office to

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<sup>2</sup> See Angela Couloumbis, Brad Bumsted & Sam Janesch, *Pa. lawmakers black out details of why they spent tax dollars, claiming 'legislative privilege'*, Spotlight PA (Feb. 27, 2020), <https://perma.cc/BQ8V-2UQP>; Angela Couloumbis & Sam Janesch, *Privileged Information: Pennsylvania lawmakers spend millions of taxpayer dollars each year on private lawyers, but rarely disclose who required representation – and why*, Spotlight PA (Oct. 12, 2021), <https://perma.cc/H7ET-GR2H>; Sam Janesch & Angela Couloumbis, *Pa.*

produce “[e]ngagement letters, retainer letters, contracts, invoices and any other financial documents detailing an agreement or payment for legal services by an outside individual attorney or law firm for departments under the governor’s jurisdiction . . . for calendar years 2019, 2020 and 2021.”<sup>3</sup> R.1a.

In response, the Office produced 170 pages of invoices furnished by outside law firms (the “Invoices”). R.26a–195a. The Invoices contained thousands of redactions. *Id.* These redactions, according to the Office, concealed “personal identification information” and information “protected by the attorney-client or attorney work product or executive privileges.” R.3a–4a. Especially germane here, the Office entirely redacted the subject matter of every Invoice—*i.e.*, the information “typically located near the top of each individual invoice and preceded with ‘RE:’ or ‘In the Matter of’ or ‘Project:’” (hereinafter, the “Invoice Captions”). R.7a.

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*lawmakers hand out millions in public contracts to law firms that fill their campaign coffers*, Spotlight PA (Oct. 13, 2021), <https://perma.cc/KRZ8-GQGT>; Angela Couloumbis & Sam Janesch, *Pa. legislature’s redacted legal bills flout court ruling, leave taxpayers guessing*, Spotlight PA (Jan. 11, 2022), <https://perma.cc/5FFN-H5UN>.

<sup>3</sup> Petitioners Angela Couloumbis and Sam Janesch are also Petitioners in two pending RTKL matters involving access to the legal billing records of the Pennsylvania Senate and House of Representatives: *Couloumbis v. Senate*, 160 C.D. 2022; and *Janesch v. House*, 142 C.D. 2022.

Petitioners appealed to the OOR, challenging the Office’s wholesale redaction of the Invoice Captions. *Id.* Petitioners did not appeal redactions made to the narrative line-entries in the bodies of the Invoices. *Id.*; Ex. A at 2 n.2. Nor did Petitioners appeal the redaction of personal identification information. R.7a.

The parties entered the OOR’s mediation program. R.11a–12a. Ultimately, however, the parties reached an impasse, and the OOR re-opened the proceedings.<sup>4</sup> R.13a. After the OOR re-opened the proceedings, the Office submitted two documents in support of the challenged redactions: a “position statement” prepared by the Office’s deputy general counsel, R.14a–17a; and an “affirmation” prepared by the Office’s open records officer, R.18a–20a (the “Eisenstein Affirmation”). In its position statement, the Office maintained that the Eisenstein Affirmation “established” that “the redacted information” was “protected by the attorney-client and attorney work-product privileges.” R.15a. Additionally, in a footnote, the Office asserted that it was “precluded from releasing information” in invoices furnished by two outside law firms—

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<sup>4</sup> As a result of the parties’ mediation, the Office produced 192 pages of contracts with outside law firms. These contracts consisted almost entirely of boilerplate terms, contained no relevant redactions, and are not at issue in this appeal. They are reproduced in Part 2 of the Certified Record submitted by the OOR, at pages 30 to 221.

“Klehr Harrison and Obermayer Maxwell”—“by virtue of the investigatory nature of the engagement, and by operation of law.” R.16a n.1. The Office did not assert that its redactions were justified by “executive privileges.”

*Compare R.14a–17a with R.4a.*

The OOR affirmed, concluding that the Eisenstein Affirmation established that the Invoice Captions were subject to the attorney-client and work-product privileges. Ex. A at 7. The OOR did not review the Invoice Captions *in camera*, *id.* at 3; nor did it reach the Office’s additional justifications for redacting the captions of the Klehr Harrison and Obermayer Maxwell Invoices, *id.* at 7. Petitioners timely sought this Court’s review.

### **SUMMARY OF THE ARGUMENT**

From 2019 to 2021, the Office paid large sums of taxpayer money to private attorneys. Pennsylvanians have the right to know why. To find out, Petitioners—journalists and news organizations who report on the workings of the Pennsylvania government—submitted a Right to Know request for the Invoices. Public access to records like the Invoices is one of the core reasons the RTKL exists: to allow Pennsylvanians to look closely at how their government spends their money.

Although the Office produced the Invoices, it extensively redacted the Invoice Captions. These redactions frustrate the remedial purpose of the

RTKL: they prevent the public from understanding how and for what purpose the Office allocated taxpayer money to outside legal engagements. The Office claims that all of the redacted information in the Invoice Captions reflects privileged attorney-client communications and/or work-product. This claim is facially implausible. As a rule, private law firms do not put privileged information in the captions of invoices. For several private law firms to include privileged information in the caption of every invoice sent to the Office over the course of three years—as the Office maintains—would be a stunning anomaly.

The record contains no credible evidence to support the Office’s claim. On the contrary, the only evidence produced by the Office in support of its redactions—the Eisenstein Affirmation—is vague and conclusory: it repeatedly paraphrases the standards governing the attorney-client and work-product privileges, yet never explains with any particularity why those privileges apply to each of the Invoice Captions. Indeed, the Affirmation appears to focus on the line-items of the Invoices, which are not at issue.

The Office also asserts that some of the redacted information in the Invoice Captions is subject to the criminal investigative exemption. This assertion fares even worse than the Office’s privilege claims. The Office has produced no evidence that the criminal investigative exemption applies to any

of the Invoice Captions. Instead, it has simply quoted (with a few slight variations) the RTKL’s definition of the criminal investigative exemption. That is as conclusory as it gets.

Because the Office’s proffered evidence is vague and conclusory, it fails as a matter of law to establish that the Office’s redactions are permissible under the RTKL. The record reveals no logical or plausible basis for the Office’s refusal to disclose general information about private law firms’ lucrative, taxpayer-funded engagements with an agency of the Commonwealth. The Court should hold that the Office has not met its burden of proof and order the Office to produce the Invoices with unredacted captions.

## **ARGUMENT**

### **I. The RTKL must be interpreted to maximize access to public records—especially financial records.**

The General Assembly enacted the RTKL to “empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). In the Court’s words, the RTKL is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions.” *Bowling v. Off. of Open Recs.*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010). To effectuate these goals, courts “must” interpret the statute “to



maximize access to public records.” *McKelvey v. Pa. Dep’t of Health*, 255 A.3d 385, 400 (Pa. 2021); accord *Dep’t of Pub. Welfare v. Eiseman*, 125 A.3d 19, 29 (Pa. 2015).

Like all public records laws, the RTKL contains exceptions. It does not require the government to release information that is “protected by a privilege,” 65 P.S. § 67.305, or that otherwise falls under one of the statute’s enumerated exemptions, 65 P.S. § 67.708. When the government withholds information responsive to a Right to Know request, it must prove by a preponderance of the evidence that at least one such exception applies. *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 656 (Pa. Commw. Ct. 2015) (“*Bagwell 2015*”). In determining whether the government has carried its burden, the RTKL’s exceptions “must be narrowly construed.” *Off. of Dist. Att’y of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (“*Bagwell 2017*”); see also *Off. of Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commw. Ct. 2013) (“*Scolforo*”). Otherwise, the exceptions would threaten to “frustrate the remedial purpose of the” law. *Bagwell 2017*, 155 A.3d at 1130.

Ensuring that “officials [are] accountable for their use of public funds” is a signature part of the RTKL’s remedial purpose. *Off. of Governor v. Donahue*, 98 A.3d 1223, 1254 (Pa. 2014) (Stevens, J., concurring). That is why the RTKL places so much emphasis on access to financial records. See *City of*

*Harrisburg v. Prince*, 219 A.3d 602, 617–18 (Pa. 2019) (observing that “the General Assembly sought to ensure the disclosure of financial records . . . even if those records would be exempt from disclosure if they were not financial in nature”); see *Levy v. Senate of Pa.*, 94 A.3d 436, 439 (Pa. Commw. Ct. 2014) (“*Levy 2014*”) (describing legal bills produced by legislative agency as “financial records”). But financial records cannot facilitate public oversight when, as here, they tell the public only that money was spent—omitting *why*. Cf. *Pa. State Police v. McGill*, 83 A.3d 476, 480 (Pa. Commw. Ct. 2014) (“[C]itizens have a right to know how their tax dollars are being allocated to public safety to determine if the amount is too much or too little.”). Put differently, knowing that the Office hired private attorneys using taxpayer money is of limited value if the public remains in the dark as to the general subject matter of the attorneys’ engagements. In this way, the effect of the Office’s redactions is to scuttle the intent of the RTKL. As explained below, the Office’s evidence in support of its redactions falls well short of justifying this effect.

**II. The Office failed to establish that the redacted portions of the Invoice Captions are subject to the attorney-client and/or work-product privilege.**

**A. It is facially implausible that the caption of every invoice the Office received from an outside law firm between 2019 and 2021 contains information subject to the attorney-client or work-product privilege.**

Attempting to support its redaction of the Invoices, the Office invokes the attorney-client and work-product privileges. R.14a–16a, 19a–20a; 65 P.S. § 67.305. Those privileges are a poor fit with the Invoice Captions—*i.e.*, the information “typically located near the top of each individual invoice and preceded with ‘RE:’ or ‘In the Matter of’ or ‘Project:’.” R.7a; *see also* Ex. A at 2 n.2. On any standard legal invoice, this is bookkeeping data: it merely identifies the engagement to which the invoice pertains, either by docket number, case name, or general subject matter—none of which is generally subject to the attorney-client or work-product privilege. *See* R.7a. Indeed, it would be illogical and contrary to longstanding industry practice for the caption of a legal invoice to contain information subject to the attorney-client or work-product privilege; the Office’s assertion that *all* of the Invoice Captions contain information subject to at least one of those privileges is extraordinary.

Consider, first, the work-product privilege. The work-product privilege applies to “the mental impressions of a party’s attorney or his or her

conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” *Bagwell 2017*, 155 A.3d at 1133 (citation omitted). Its underlying purpose “is to guard the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client’s case.” *Levy 2014*, 94 A.3d at 443 (citation omitted). Law firms do not include their attorneys’ opinions, notes, or memoranda, or other work-product in the captions of their invoices; doing so would be impractical, irresponsible, and pointless. There is no reason to believe that *all* of the law firms involved here—Klehr Harrison; Obermayer Maxwell; Blank Rome; Pepper Hamilton; Myers, Brier & Kelly; Peer, Gan & Gisler; and Kirkland & Ellis—deviated from this industry practice by wedging their attorneys’ mental impressions into the captions of *every* invoice sent to the Office between 2019 and 2021.

It would be equally shocking for all of the law firms involved here to have included attorney-client privileged communications in *every* caption of *every* invoice sent to the Office between 2019 and 2021. Information is subject to the attorney-client privilege only when “the asserted holder of the privilege is or sought to become a client;” “the person to whom the communication was made is a member of the bar of a court, or his or her subordinate;” “the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, for the purpose of securing an opinion

of law, legal services or assistance in a legal matter;” and “the claimed privilege has not been waived by the client.” *Bagwell 2015*, 131 A.3d at 656 (citation omitted). In considering these elements, courts must “construe the [attorney-client] privilege narrowly to ‘appl[y] only where necessary to achieve its purpose.’” *In re Est. of McAleer*, 248 A.3d 416, 425–26 (Pa. 2021) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). Put differently, courts must construe the attorney-client privilege such that it “protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.” *Fisher*, 425 U.S. at 403.

The information typically contained in the captions of legal invoices—case names, docket numbers, and other indications of the general subject matter of an engagement—falls well outside these parameters. As this Court has observed, disclosing the subject matter of a legal engagement (among other things) “normally does not reveal the content of communications from the client.” *Levy v. Senate of Pa.*, 34 A.3d 243, 253 (Pa. Commw. Ct. 2011), *rev’d in part on other grounds*, 65 A.3d 361 (Pa. 2013) (quoting Restatement (Third) of the Law Governing Lawyers § 69 cmt. g (Am. L. Inst. 2000)). That observation accords with consensus. In the words of the D.C. Circuit, “[c]ourts have consistently held that the general subject matters of clients’ representations are not privileged.” *United States v. Legal Servs. for N.Y.C.*, 249

F.3d 1077, 1081 (D.C. Cir. 2001); *see also Avgoustis v. Shinseki*, 639 F.3d 1340, 1344 (Fed. Cir. 2011) (stating that “no court of appeals has held that disclosure of the general subject matter of a billing statement” violates the attorney-client privilege); *Clarke v. Am. Com. Nat’l Bank*, 974 F.2d 127, 129 (9th Cir. 1992) (“[T]he general purpose of the work performed [is] usually not protected from disclosure by the attorney-client privilege.”).

The Sunshine Act, which must be read *in pari materia* with the RTKL, *Off. of Gen. Counsel v. Bumsted*, 247 A.3d 71, 81 (Pa. Commw. Ct. 2021), provides further guidance. Interpreting the Sunshine Act, this Court has held 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. *Reading Eagle Co. v. Council of Reading*, 627 A.2d 305, 307 (Pa. Commw. Ct. 1993). Specifically, when a 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.* The same sort of general information is typically contained in the captions of legal invoices.

For the avoidance of doubt, Petitioners do not argue that information in the captions of legal invoices can *never* be privileged—only that it is exceedingly rare. As a rule, attorneys and law firms endeavor to carefully limit the amount of privileged information included in even the line-items of invoices. Placing privileged information in the *captions* of invoices bespeaks either prodigiously unusual circumstances or distressing carelessness. That multiple reputable law firms, engaged to work on “a wide variety of matters,” R.19a, would include privileged information in the caption of every invoice sent to the Office over the course of three years beggars belief. Yet that is what the Office contends. The Office’s evidence in support of this unlikely contention does not withstand even passing scrutiny—as Petitioners explain below.

**B. The Eisenstein Affirmation contains only vague, conclusory statements about the application of the attorney-client and work-product privileges to the Invoices.**

To prove that the attorney-client and work-product privileges apply to the Invoice Captions, the Office relies on the Eisenstein Affirmation. R.18a–20a. “Testimonial affidavits found to be relevant and credible *may* provide sufficient evidence” to carry the government’s burden under the RTKL.<sup>5</sup>

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<sup>5</sup> Petitioners concede, for purposes of this appeal, that the Eisenstein Affirmation functions as a testimonial affidavit.

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

The Eisenstein Affirmation fails to carry the Office’s burden because it does not describe “with any particularity” how either the attorney-client privilege or the work-product privilege “supports non-disclosure or redaction” of the Invoice Captions. *Bagwell 2015*, 131 A.3d at 658. In asserting the attorney-client and work-product privileges, the Affirmation treats the Invoices as an undifferentiated mass, making no distinctions between engagements, law firms, or—most significant—the portions of the Invoices in dispute. *City of Pittsburgh v. Murray*, No. 1194 C.D. 2020, 2022 WL 1087006, at \*6 (Pa. Commw. Ct. Apr. 12, 2022) (unpublished) (“An affidavit or testimony offered in support of a claimed exemption must be specific enough to permit OOR or a reviewing court to evaluate how the exemptions apply to *particular documents*.” (emphasis in original)); *see also Scolforo*, 65 A.3d at 1104 (explaining that agency affidavit supporting invocation of deliberative-process privilege “must



be specific enough to permit the OOR or this Court to ascertain how disclosure of the entries would reflect the internal deliberations on those subjects”).

Indeed, none of the Affirmation’s twenty numbered paragraphs explicitly refers to the captions of the Invoices. R.18a–20a. By contrast, at least five numbered paragraphs—8, 9, 12, 13, and 14—obviously refer to line-items in the bodies of the Invoices. R.19a–20a. Paragraph 9, for instance, asserts that the Office “le[ft] intact *for each line* the type of work being conducted, such as a telephone call, email, or meeting.” R.19a (emphasis added). This assertion cannot refer to the Invoice Captions because the Office did not leave any portions of the Invoice Captions “intact”; nor do invoice captions typically recount the details of “telephone call[s], email[s], or meeting[s].” *Id.* Likewise, the captions of legal invoices do not “detail[] legal advice, and/or strategy” (paragraph 8); “reveal[] the attorney’s legal strategies on varied issues” (paragraph 12); provide “details” of legal issues (paragraph 13); or list “the names of individuals with whom counsel communicated” (paragraph 14). *Id.* Such information *may* be found in the line-items of legal invoices, but the line-items of the Invoices are not at issue here.

Relatedly, the Affirmation’s invocations of the attorney-client and work-product privileges are vague and conclusory. R.19a–20a. Even the most descriptive paragraphs of the Affirmation “merely parrot” the legal standards

governing the claimed privileges. *Bagwell 2015*, 131 A.3d at 659. Put differently, the Affirmation quotes or paraphrases some of the standards governing the attorney-client and work-product privileges, but says nothing about *why* those standards favor application of the privileges to each of the Invoice Captions. Paragraph 6, for instance, asserts that the Office’s redactions comport with the Pennsylvania Supreme Court’s guidance in *Levy v. Senate of Pennsylvania*, 65 A.3d 361 (Pa. 2013). R.19a. Paragraph 7 asserts that “all redactions were necessary to prevent disclosure of the client’s motive for seeking counsel, legal advice, strategy, or other confidential information.” *Id.* Paragraph 15 asserts that neither of the privileges has been waived.<sup>6</sup> R.20a. These paragraphs, like the Affirmation as a whole, “merely track[] the language of the exception[s]” at issue, *Pa. State Police v. Muller*, 124 A.3d 761, 765 (Pa. Commw. Ct. 2015), failing to “draw a logical connection between the nature of the records and the substance of the exemption,” *Murray*, 2022 WL 1087006, at \*5.<sup>7</sup> Consequently, they are “insufficient to demonstrate that the responsive records are exempt from disclosure.” *Muller*, 124 A.3d at 765.

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<sup>6</sup> Paragraph 11 is syntactically garbled, which makes it difficult to understand. R.19a. To the extent that it has any meaning, it appears to say substantially the same thing as paragraph 15.

<sup>7</sup> Paragraph 10 is similarly ineffective. It claims that “[t]o provide further justification for each redaction would require the Office to provide information that is itself subject to the attorney-privilege and its disclosure/production

The Court has previously held that attestations containing greater detail than the Eisenstein Affirmation failed to carry an agency's burden of proof under the RTKL. For example, in *Bagwell 2015*, the government relied in part on the attorney-client and work-product privileges to justify the denial of a Right to Know request. *Bagwell 2015*, 131 A.3d at 645. To sustain its invocation of the privileges, the government submitted an affidavit stating, among other things, that:

[t]he records responsive to [the] request that are in [the Pennsylvania Department of Education]'s possession include communications made only between myself, members of the Governor's cabinet and executive offices, and attorneys in [the Office of General Counsel] and contain the mental impressions and/or opinions of those attorneys pertaining to issues presented to them for the purpose of seeking legal services or assistance in legal matters relating to my activities as Secretary of Education and as a [Pennsylvania State University] Board member, and members of the Governor's cabinet and executive offices, and which were not for the purpose of committing a crime or tort.

Attestation of Ronald J. Tomalis, Reproduced Record 37a–40a, *Bagwell 2015*, No. 1617 C.D. 2014 (Feb. 9, 2015), <https://perma.cc/9Q7R-5TFQ>. This affidavit, held the Court, was “conclusory and vague,” and therefore

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would violate said privilege.” R.19a. This tautological proposition is not evidence that the Invoice Captions are privileged; rather, it is a proffered explanation for the *absence* of evidence.

insufficient to carry the agency’s burden. *Bagwell 2015*, 131 A.3d at 658. The Eisenstein Affidavit contains even less detail than the affidavit at issue in *Bagwell 2015*. See R.18a–20a; see also, e.g., *Cal. Univ. of Pa. v. Schackner*, 168 A.3d 413, 422 (Pa. Commw. Ct. 2017) (holding that agency failed to establish existence of attorney-client privilege based on affidavit containing at least as much detail as Eisenstein Affirmation); *Scolforo*, 65 A.3d at 1104 (holding that agency failed to establish existence of deliberative-process privilege based on affidavit containing greater detail than the Eisenstein Affirmation). The result here should be the same.

All told, the Office’s vague, conclusory assertions fall well short of establishing that the Invoice Captions are uniformly subject to the attorney-client and/or work-product privilege. The OOR erred as a matter of law in holding otherwise.

**III. The Office failed to establish that the redacted portions of the Klehr Harrison and Obermayer Maxwell Invoice Captions are subject to the criminal investigative exemption.**

In tandem with its unavailing invocations of the attorney-client and work-product privileges, the Office contends that some of the Invoices—those originating with the law firms Klehr Harrison and Obermayer Maxwell—are exempt from disclosure because they “specifically detail work performed on criminal investigations and detail the initiation, progress or result of such

investigations.”<sup>8</sup> R.20a. This bald assertion, which appears in paragraph 16 of the Eisenstein Affirmation, *id.*, is both facially implausible and wholly conclusory. It is facially implausible because it is inconceivable that any of the Invoice Captions “*detail* work performed on criminal investigations.” *Id.* (emphasis added). The contents of the Invoice Captions consist of a few words—a sentence at most. It is impossible that they contain any appreciable amount of detail on a criminal investigation.

Paragraph 16 is wholly conclusory in that it “merely tracks the language of the exception.” *Muller*, 124 A.3d at 765. Indeed, paragraph 16 does little more than repeat, almost verbatim, the text of 65 P.S. § 67.708(b)(16)(vi)(A), which exempts from disclosure records that would “[r]eveal the institution, progress or result of a criminal investigation.” *Id.* This is precisely the sort of “bare, conclusory statement[]” that the Court has held to be “insufficient” to carry an agency’s burden under the RTKL. *Muller*, 124 A.3d at 766; *see also Scolforo*, 65 A.3d at 1103 (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records.”).

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<sup>8</sup> Invoices from Klehr Harrison and Obermayer Maxwell represent 47 pages (27.6%) of the Invoices. R.26a–61a (Klehr Harrison); R.95a–100a, 190a–194a (Obermayer Maxwell).

Along similar lines, paragraph 17 makes the cryptic claim that “an order of court prohibits the Office for [*sic*] disclosing further information about” the Klehr Harrison and Obermayer Maxwell Invoices. R.20a; *see also* R.16a n.1 (“With respect to the invoices of Klehr Harrison and Obermayer Maxwell, the Office is also precluded from releasing information by virtue of the investigatory nature of the engagement, and by operation of law.”). This appears to be a reference to 65 P.S. § 67.708(b)(16)(iv), which exempts from disclosure “[a] record that includes information made confidential by law or court order.” *Id.* Here, again, the Office offers no justification for nondisclosure beyond a “bare, conclusory” statement that “merely tracks the language of the [claimed] exception.” *Muller*, 124 A.3d at 765–66. For all the reasons stated above, that is not sufficient to carry the Office’s burden.

Finally, the Office’s halfhearted assertion of the criminal investigative exemption casts further doubt upon its claim that the attorney-client privilege applies to the entirety of the Invoice Captions. Faced with an assertion of the attorney-client privilege in the context of a grand jury investigation into alleged wrongdoing by state officials, the Pennsylvania Supreme Court has explained that the privilege “must be analyzed differently in the government context than in the private sector.” *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 219–20 (Pa. 2014) (describing Pa. R. Prof. Conduct 1.13, cmt. 6); *id.*

at 221 (collecting “persuasive” federal authorities and stating that “where the ‘client’ is actually the state government or its agency,” the attorney-client privilege does not apply “as it normally applies in the private sector”).

Namely,

where the agency itself, its employees and officials, are being investigated by the Commonwealth itself, in grand jury proceedings, through the office of the chief enforcement officer of the Commonwealth, due to suspicion of wrongdoing, it is crucial to be mindful that the actual client of the agency’s lawyers in such circumstances is the public. **It follows that the only proper manner of considering the privilege in these circumstances is that the client-citizenry has impliedly waived the attorney-client privilege that might otherwise shield from revelation evidence of corruption and criminal activity.**

*Id.* at 223–24 (emphasis added). Put differently, where a criminal investigation involves a government official or entity, the scope of the attorney-client privilege—whether the privilege may properly be asserted—depends in part on (a) the type of investigation at issue and (b) the role played by the proponent of the privilege in said investigation. *Id.* Nothing in the record remotely enables Petitioners or the Court to make those fundamental determinations, underscoring the inadequacy of the Office’s evidentiary showing.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse the OOR and order the Office to produce the Invoices with unredacted captions.

Dated: March 22, 2023

/s/ Paula Knudsen Burke

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## CERTIFICATES OF COMPLIANCE

I hereby certify that:

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Dated: March 22, 2023

*/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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