

IN THE MATTER OF  
APPEAL OF  
COULOUMBIS, Requesters

v.

RTKL Appeal No. 2021-1  
(Senate RTKL Request 2012291018)

SENATE OF  
PENNSYLVANIA,  
Legislative Agency

## FINAL DETERMINATION

### INTRODUCTION

Angela Couloumbis, Brad Bumsted and Sam Janesch, of Spotlight PA (Requesters) submitted a request to the Senate of Pennsylvania (Senate) pursuant to the Act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* (RTKL), seeking “invoices, bills or other financial statement” and “engagement letters or retainer letters” for the calendar year 2019. The Senate’s open records officer (Senate RTKL Officer) denied the request and Requesters appealed. For the reasons stated in this Final Determination, the appeal is denied and the Senate is not required to take any further action on the request.

### FACTUAL BACKGROUND

On December 29, 2020, the Requesters submitted an RTKL request to the Senate RTKL Officer via electronic transmission reading as follows:

*Under the Pennsylvania Right-to-Know Law, we are requesting the following:*

- 1) Invoices, bills or other financial statements reflecting payment, and explanation of that payment, for legal work performed by outside law firms or individual lawyers hired or retained by any Senate employee or Senator. Requesters define outside law firms or lawyers as any legal professional not employed directly by the Senate of Pennsylvania. Requesters seek these invoices, bills or statements submitted for payment to the Senate for calendar year 2019.*
- 2) Engagement or retainer letters signed by any Senate employee or Senator to provide legal services (by an individual attorney or a law firm) to Senate-run offices or operations, Senate Caucuses, Senate employees or Senators. Requesters seek these engagement or retainer letters for calendar year 2019.*

On January 5, 2021, the Senate transmitted a received notice to the Requesters via electronic transmission explaining an extension was necessary to respond to the request as the response requires redaction of a record and timely response to the request for access could not be accomplished due to bona fide and specified staffing limitations. The extension of time for response with the accommodation provided by the 30-day extension was February 5, 2021. *See*, 65 P.S. § 67.902.

On February 5, 2021, the Senate RTKL Officer granted the request in part and denied the request in part. The Senate provided 1,061 pages of information to the Requesters. The Senate information contained three sets of redactions made pursuant to 65 P.S. § 67.706. The redacted content was denied based on a determination that the requested “reports” are not within the definition of a "legislative record" as provided for in the RTKL. 65 P.S. § 67.102.

The first set of redactions was the Federal Tax Identification Number found within financial records. The next set of redactions were the bank account numbers and routing information characterized as protecting a "confidential personal identification number." The final set of redactions was redacted information protected under the

privileges of "attorney-work product doctrine" and "attorney-client privilege.”

The Requesters were notified of the right to appeal. 65 P.S. § 67.903. The Senate RTK Officer appointed the Secretary of the Senate to serve as Appeals Officer. The Requesters filed an appeal on March 1, 2021, via electronic transmission through its attorney, Paula Knudsen Burke of the Reporters Committee for Freedom of the Press.

On March 1, 2021, the recusal of the Appeals Officer prompted the transfer of this appeal and its corresponding record to the Pennsylvania Legislative Reference Bureau (LRB) which agreed to assign an Appeals Officer.

On March 2, 2021, the parties were notified that Kristin M. Kayser of the LRB would serve as the Appeals Officer. In accordance with regulations of the LRB, 101 Pa. Code § 31.21 *et. seq.*, Appeals Officer Kayser issued instructions to the parties to submit supplemental information by March 10, 2021.

According to the regulations of the LRB, the provisions of 2 Pa.C.S. Cha. 5, Subch. A (relating to practice and procedures of Commonwealth agencies) and Cha. 7, Subch. A (relating to judicial review of Commonwealth agency action), apply to RTKL appeals. 101 Pa. Code § 31.21(b)(1). The Administrative Agency Law, 2 Pa.C.S. § 101 *et seq.*, permits all relevant evidence of reasonably probative value to be received in adjudication. 2 Pa.C.S. § 505. In addition, all parties are afforded opportunity to submit briefs prior to adjudication by a Commonwealth agency. 2 Pa.C.S. § 506.

In this appeal the following was submitted to the LRB:

- The Requesters submitted its appeal together with the record from the Senate RTKL request.
- The Senate submitted a Senate Privilege Log of the redacted records, four attestations from the relevant privilege holders and a brief in opposition to the appeal.

- A link to a program called "Mimecast" reflected the 1,000plus pages, some containing redactions, which had been provided to the Requesters along with the Senate Final Determination.

On March 11, 2021, the parties were notified by the Director of the LRB that Appeals Officer Kayer was replaced by Suellen M. Wolfe, who would serve in the position of Appeals Officer for the remainder of this proceeding.

In its appeal, Requesters called for the "Senate appeals officer designee to conduct both an in camera review and a hearing, and at the conclusion of the review, allow access to the redacted portions." On March 22, 2021, Appeals Officer Wolfe denied Requesters' request for an in camera review and a hearing through notification via electronic transmission.

#### LEGAL ANALYSIS

In 2008, the Pennsylvania General Assembly enacted the RTKL<sup>1</sup> providing for the method of access to a legislative record and setting the criteria to determine whether information is protected from disclosure. The objective of the RTKL "is to empower citizens by affording them access to information concerning the activities of their government," to promote openness to official government information in order to prohibit secrets, scrutinize the actions of public officials and to make public officials accountable for their actions. *SWB Yankees LLC v. Wintermantel*, 615 Pa. 640, 662, 45 A.3d 1029, 1042 (2012); *Office of the District Attorney of Philadelphia v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. 2017), *appeal denied*, 643 Pa. 669, 174 A.3d 560 (2017).

According to its legislative history, the purpose of the RTKL, the predecessor to

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<sup>1</sup> Act of February 14, 2008, P.L.6, No. 3, 65 P.S. §§ 67.101-67.3104, as amended. The RTKL replaced the Right to Know Law, 65 P.S. §§ 66.1-66.4 (repealed Feb. 14, 2008, eff. Jan. 1, 2009).

the RTKL, was to “strike the veil of secrecy from [those] . . . government departments and agencies” that have become so far removed from the electoral process that public oversight is necessary to keep them in check. Pennsylvania Legislative Journal, Session 1957, No. 35, April 10, 1957, 2186; *Wiley v. Woods*, 393 Pa. 341, 348, 141 A.2d 844, 848 (1958) (stating that the RTKL was enacted to “enlarge the rights of the general public for the examination and inspection of public records”).

The RTKL imposes a statutory duty on a legislative agency to release certain records by stating that “[a] legislative agency shall provide legislative records in accordance with this act.” 65 P.S. § 67.303(a). The terms “legislative agency” and “legislative record” are defined in the RTKL. 65 P.S. § 67.102. The Senate is specifically identified in the definition of legislative agency.<sup>2</sup>

Upon the denial by an RTKL officer of a written request for access to a record, a Requester may file an appeal. 65 P.S. § 67.1101. The appeal is required to state the grounds upon which the Requester asserts that the record is a public record, legislative record or financial record and address any grounds stated by the agency for delaying or denying the request. 65 P.S. § 67.1101(a)(1).

In their request to the Senate, the Requesters sought redacted information from some of the pages which were obscured based on three categories of redaction. These categories were Federal Tax ID numbers found within financial records; obscured bank account numbers and routing information and lastly, matters protected under the privileges of “attorney-work product doctrine” and “attorney-client privilege.” In this appeal, Requesters only seek review of the last set of redactions. The Senate open records

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<sup>2</sup> “Legislative agency.” Any of the following: (1) The Senate. 65 P.S. § 67.102).

officer stated this category of information was obscured to redact information protected under the privileges of "attorney-work product doctrine" and "attorney-client privilege."

A legislative record in the possession of a legislative agency is presumed to be available in accordance with the RTKL, 65 P.S. § 67.305(a). However, this presumption does not apply if the record is protected by a privilege. 65 P.S. § 67.305(b)(2).

“Privilege” means the attorney-work product doctrine, the attorney-client privilege, ... or other privilege recognized by a court interpreting the laws of this Commonwealth. 65 P.S. § 67.102.

The burden of proving a privilege rests on the party asserting it. *Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. 2015) (*Davis*) . An agency bears the burden of proving the application of any of the exceptions within the RTKL by a preponderance of the evidence. 65 P.S. § 67.708. One method an agency uses in meeting the burden of proof that a record is exempt from disclosure under the RTKL is testimonial affidavits. *Payne v. Pa. Dep’t of Health*, 240 A.3d 221 (Pa. Commw. 2020).

In this appeal, the Senate produced and submitted a comprehensive Senate Privilege Log accompanied by four Affidavits identified as Counsel to the Senate Chief Clerk, Chief Counsel to the Senate Democratic Leader, General Counsel to the Senate Republican Caucus, and the Assistant Secretary for the Senate. The Senate affidavits describe the records and the activities pertaining to law practices undertaken to support privilege and appropriate redactions. *See, ACLU of Pa. v. Pa. State Police*, 232 A.3d 654, 669 (Pa. 2020).

To establish that the attorney-client privilege applies to requested records, the agency claiming the privilege must demonstrate: (1) the asserted holder of the privilege is

or sought to become a client; (2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; (3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and (4) the privilege has been claimed and is not waived. *Bousamra v. Excelsa Health*, 210 A.3d 967, 983 (Pa. 2019) (*Bousamra*); *see*, 42 Pa.C.S. § 5928; *see also*, *Davis*, 122 A.3d at 1191-92.

The attorney-client privilege covers “not only confidential client-to-attorney communications, but also confidential attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.” *Levy v. Senate of Pa.*, 34 A.3d 243, 245 (Commw. 2011) (citing the opinion in *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011), *aff’d in part* and *rev’d in part*, 619 A.3d 586, 593 (Pa. 2013) (*Levy*)).<sup>3</sup>

A privilege log, which typically lists the date, record type, author, recipients, and a description of the withheld record, can serve as sufficient evidence to establish an exemption under RTKL, especially where the information in the log is bolstered with averments in an affidavit. *Smith on behalf of Smith Butz, LLC v. Pa. Department of Environmental Protection*, 161 A.3d 1049, 1058 n.5 (Pa. Commw. Ct. 2017). Three of the affiants in this appeal are licensed Pennsylvania attorneys and the fourth is an associate of the attorneys. The attestations from the respective Affiants confirm the status as the holder of a privilege or one who is in the process of becoming a client. These

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<sup>3</sup>On Remand to *Levy v. Senate of Pa.*, 94 A.3d 436 (Pa. Comm. 2014); *Appeal denied*, *Levy v. Senate of Pa.*, 630 Pa. 738 (Pa. 2014); *Levy v. Senate of Pa.*, 2014 WL 129222 (Pa.Comm. 2014); Opinion withdrawn, *Levy v. Senate of Pa.*, 2014 WL 792120, Pa.Comm. 2014); Opinion superseded on reargument, *Levy v. Senate of Pa.*, 94 A.3d 436 (Pa.Comm. 2014); *Appeal denied*, *Levy v. Senate of Pa.*, 630 Pa. 738 (Pa. 2014).

attestations clearly reflect the "ultimate goal" of each redacted communication was securing either an opinion of law, legal services or assistance in a legal matter. *Davis*, 122 A.3d at 1192.

Under the RTKL, privilege includes not only the attorney-client privilege but also the attorney-work product. The Requesters challenge the Senate's application of the "attorney-work product doctrine." This doctrine teaches that it is "closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation." *See Nat'l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. 2001).

The work-product doctrine offers broad protection to the mental impressions, theories, notes, strategies, research and the like created by an attorney in the course of his or her professional duties, particularly in anticipation or prevention of litigation. Under the RTKL and similar to the attorney-client privilege, the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked. *Bousamra* at 982; *Heavens v. Pa. Dep't of Env'tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. 2013).

"The purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation." *Bousamra* at 976. The Senate's Affidavits offer insight into the mechanism made to conceal the mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories of attorneys identified on the Senate Privilege Log.

Pertaining to the redacted documents, the Log notes: "Bates numbers, types of



record, records' dates, authors, recipients, descriptions and the legal basis for redaction (Attorney-Client Privilege/Attorney Work Product (65 P.S. § 67.305(b)(2)).” Combining the information revealed in the Log with the actual redacted documents unquestionably illustrates that the redactions made to the 1,061 pages of records produced to Requesters based on the attorney-client privilege, attorney work product doctrine were limited and focused. The *Bousamra* rule was implemented in the redactions effectuated by the Senate. Accordingly, Requesters' appeal that the redactions are not protected on the basis of the attorney-client privilege and the attorney work product doctrine is denied.

In addition to the attorney-client privilege and attorney work product doctrine, the Senate Privilege Log reflects three sets of redactions which are made on the employee discrimination/sexual harassment materials exception. The RTKL exempts “from access by a requester” those “documents related to discrimination or sexual harassment” that “relat[e] to an agency employee.” 65 P.S. § 67.708(b)(7)(vii). The Senate explains that these limited redactions pertain to three sets of records that relate to employment discrimination and/or sexual harassment investigations involving and taken under the rules and policies of the Senate. To support its redactions, the Senate cites *Duquette v. Palmyra Area School District*, OOR Dkt. AP 2017-0372, slip op. at 25 (OOR Nov. 6, 2017).

Under the RTKL, an agency is permitted to assert exceptions on appeal not asserted in the agency's initial denial. *Levy*, 619 A.3d 586 at 606-07. The Requesters received the opportunity to address this additional privilege argument but did not address the 65 P.S. § 67.708(b)(7)(vii) exception. As the Senate attestations and an examination

of the Senate Privilege Log clarify, some of the redactions are justifiably based on the employee discrimination/sexual harassment materials exception.

The RTKL also lays down rule that, upon satisfaction of the three of the four prongs of the *Bousamra* test, the presumption of disclosure does not apply and burden shifts to the party seeking disclosure to explain why the communication at issue should not be privileged. *See*, 65 P.S. § 67.305(b).

The content of the Requesters' appeal does not elaborate on the *Bousamra* fourth prong, *i.e.*, the waiver of the privilege. No evidence has been introduced that the redacted information has been shared with an adversary or otherwise disclosed. The attestations also confirm that no waiver was made. Accordingly, the privilege has not been waived.

The redactions made to the 1,000-plus pages of records produced to Requesters were targeted to those portions of the records containing descriptions of specific legal work performed, legal strategy, confidential communications between the attorney and client, legal advice provided, matters assigned for legal review and research, and specific types of legal research conducted. *Grega v. Weatherly Area School District*, OOR Dkt. AP 2021-0057, slip op. at 4-8 (OOR Mar. 3, 2021); *Campbell v. Pennsbury School District*, OOR Dkt. AP 2018-2171, slip op. at 4-7 (OOR Feb. 14, 2019); *Chirico v. Cheltenham Township School District*, OOR Dkt. AP 2018-0351, slip op. at 4-8 (OOR Apr. 23, 2018).

Examination of the redacted portion of the pages confirms that the Requesters were denied access only to the information which is not subject to access. The Senate RTK Officer marked the instances in which it alleges these privileges are applicable by superimposing "Redaction code § 67.305(b)(2)" on certain lines of the engagement letters

and invoices outlining the billable hours. In contrast, the content of the Senate Privilege Log and pages from the “Mimecast” link reflect a number of the legal invoices revealing the names and parties involved in the litigation (e.g., Markham, Bangura, Brouillette, Wayne Land and Mineral Group, Liggins-McCoy, UPMC, etc.). In accordance with the RTKL provisions, the Senate correctly redacted from the record the information which is not subject to access, and its response granted access to the information which is subject to access. 65 P.S. § 67.706.

The Requesters argue that the Senate Appeals Officer marked numerous pages with "Redaction code § 67.305(b)(2)" but did not provide any exemption index explaining whether each instance of "Redaction code § 67.305(b)(2)" was for attorney-work product doctrine or attorney-client privilege. The shortcomings of Requesters’ argument are clear. Under the RTKL, “privilege” means the attorney-work product doctrine, the attorney-client privilege, ... *or* other privilege recognized by a court interpreting the laws of this Commonwealth. 65 P.S. § 67.102 (emphasis added); *Lundy v. Manchel*, 865 A.2d 850, 856-57 (Pa. Super. 2004). Public information was not redacted from the 1,061 pages of records produced to Requesters, plus the affidavits provide additional assurance that the redacted portions were “privileged” as defined under the RTKL. *See Sherry v. Radnor Township School District*, 20 A.3d 515, 520-21 (Pa. Commw. 2011) *appeal denied*, 612 Pa. 710, 31 A.3d 292 (2011). An agency is not required to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record. 65 P.S. § 67.705.

The “burden of proving that a record of a ... local agency is exempt from public

access shall be on the ... local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). A preponderance of the evidence is such evidence as would lead a fact-finder to find that the existence of a contested fact is more probable than the nonexistence of the contested fact. *Pa. Office of Attorney General v. Bumsted*, 134 A.3d 1204, 1210 n.12 (Pa. Commw. 2016); *Pa. State Troopers Association v. Scolforo*, 18 A.3d 435, 438 - 439 (Pa. Commw. 2011). In this appeal, based on the record submitted and the legal analysis, the Senate has carried its burden of proof.

### CONCLUSION

For the foregoing reasons, Requesters' appeal is denied and the Senate is not required by the RTKL to take any further action. This Final Determination is binding on all parties. Within 30 days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court of Pennsylvania. 65 P.S. § 67.1301(a). If a party appeals, it must serve notice of the appeal to all other parties and the LRB. Pursuant to section 1303(a) of the RTKL, LRB has the right to respond. 65 P.S. § 67.1303(a).

FINAL DETERMINATION ISSUED and DELIVERED on March 30, 2021.

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/s/ Suellen M. Wolfe, Appeals Officer