



LEGISLATIVE REFERENCE BUREAU

ROOM 641 MAIN CAPITOL BUILDING
HARRISBURG, PENNSYLVANIA 17120-003

IN THE MATTER OF
APPEAL OF
COULOUMBIS,
Petitioners

v.

SENATE OF PENNSYLVANIA,
Respondent

Re: RTKL No. 05-2023 (Remand)

REPORT and RECOMMENDATIONS

on REMAND

from

Angela COULOUMBIS and Sam JANESCH,
Petitioners

v.

SENATE OF PENNSYLVANIA,

Respondent

300 A.3d 1093 (Pa. Commw. Ct. 2023)

I. INTRODUCTION

Petitioners filed for review of the final determination of the Legislative Reference Bureau Appeals Officer, who affirmed a partial denial by Pennsylvania Senate Open Records Officer of request for Senate records sought under Right-to-Know Law (RTKL).

The Commonwealth Court remanded this case to the Legislative Reference Bureau

(LRB) to hold an *in camera* review to determine whether the subject matters contained in the engagement letters and invoice captions identified in the Reproduced Record from pages 364a to 387a are exempt from disclosure under either the attorney-client or work-product privileges. The Court Order instructs the LRB not to address whether any redactions are supported by the speech and debate privilege. The LRB is required to issue a determination regarding the validity of the Senate's redactions within 180 days of the date of the Court Order dated July 18, 2023.

Pursuant to the Court Order, the Senate was ordered to produce to the LRB for *in camera* inspection unredacted copies of the responsive documents challenged in this appeal. Those documents which the LRB determines are protected by those privileges are not to be unredacted to the Petitioners.

II. FACTUAL BACKGROUND

On appeal to the Commonwealth Court, Petitioners asserted the LRB erred in concluding that the Senate's redactions of documents relating to outside attorneys' services from engagement letters and invoice captions were proper under the RTKL. At the Commonwealth Court, Petitioners narrowed the scope of their appeal, challenging only the redactions made to 24 of the 1,039 pages produced. On July 18, 2023, the Final Determination of the LRB Appeals Officer, dated January 28, 2022, was vacated by Order of the Commonwealth Court in *Couloumbis v. Senate of Pennsylvania*, 300 A.3d 1093 (Pa. Commw. Ct. 2023) and the case was remanded to the LRB to hold an *in camera* review of privilege redactions in the captions identified in the Reproduced Record from pages 364a to 387a.

On July 26, 2023, a submission schedule for the Senate to submit documents to the LRB was set for a deadline of August 25, 2023. On August 25, 2023, the Senate supplemented the record with three new attestations in support of the privilege redactions. A secure Sharefile link to download the records subject to *in camera* review in both redacted and unredacted form was

received by the LRB.

On September 27, 2023, a submission schedule for the Petitioners to submit documents set a deadline for October 16, 2023. The Petitioners did not submit additional documents for this Report.

III. ISSUES PRESENTED

The Commonwealth Court remanded this petition to the LRB to determine whether redaction of subject matters in the captions of engagement letters and attorney invoices is appropriate and whether new attestations submitted by the Senate in support of the privilege redactions made in the Reproduced Record from pages 364a to 387a, declaring reasons why attorney-client privilege applied to redactions of records, are sufficiently detailed to establish applicability of attorney-client and work-product privileges to the redactions.

IV. APPLICABLE LAW

Privileged documents are excluded from the definition of “public record” under the RTKL. 65 P.S. § 67.102. The RTKL defines privilege to include “[t]he attorney[]work product doctrine, [and] the attorney-client privilege....” *Id.* The LRB, a Commonwealth legislative agency, is prohibited from releasing a privileged record. 65 P.S. § 67.506 (c)(2).

The RTKL permits the redaction of “information which is not subject to access,” including information protected by privilege. 65 P.S. § 67.706. In determining whether a record is exempt from disclosure under the RTKL, exemptions from disclosure must be narrowly construed. *Janesch v. Pennsylvania House of Representatives*, 299 A.3d 1030, 1036-37 (Pa. Commw. Ct. 2023) (*Janesch*); *Office of District Attorney of Philadelphia v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (*Bagwell 2017*) (citations omitted), *allocatur denied per curiam*, 174 A.3d 560 (Pa. 2017); 65 Pa. Stat. Ann. § 67.708.

A. ATTORNEY-CLIENT PRIVILEGE

The determination of the applicability of the attorney-client privilege does not turn on the category of the information, such as a client’s identity or address, or the category of a document, such as whether it is an invoice or fee agreement; instead, the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege. *Levy v. Senate*, 65 A.3d 361, 373 (Pa. 2013) (*Levy I*); *Janesch* at 1038. The attorney-client privilege protects specific descriptions of legal services from disclosure including the “mental impressions, theories, notes, strategies, research and the like” created by an attorney in the course of professional duties, particularly in anticipation or prevention of litigation. *Levy v. Senate*, 94 A.3d 436, 444 (Pa. Commw. Ct. 2014) (*Levy III*) (quoting *Heavens v. Pa. Dep’t of Env’tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013)), *allocatur denied*, 106 A.3d 727 (Pa. 2014); *Janesch* at 1040-41.

The privilege is limited to communications related to the legal advice sought by the client. *Levy v. Senate*, 34 A.3d 243 (Pa. Commw. Ct. 2011) (*Levy II*), *aff’d in part and rev’d in part*, *Levy I* at 383. A disclosure may not compromise the protection of the confidential information. *Janesch* at 1041; 65 P.S. § 67.708. In contrast, general descriptions of legal services, e.g., that a lawyer made a telephone call, sent an email, drafted a pleading, or sat in conference with other lawyers or the client, are not protected.

Senior Judge Kelley, Special Master in *Levy II*, provided the general parameters of the privilege:

To the extent that the documents specify the issues or laws researched by the attorneys, specific services provided and the names of individuals with whom the attorneys communicated, the Special Master agrees that such information has the potential to reveal the confidential communications shared by attorney and client, the motive of the client in seeking representation and litigation strategy, and is privileged.

Levy II at 257; *see also Couloumbis v. Senate*, 300 A.3d 1093, 1103 n.10 (Pa. Commw. Ct. 2023).

To establish the application of the attorney-client privilege, an agency must demonstrate the following: (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 by the client. *Levy I* at 365; *Janesch* at 1038-39.

B. WORK-PRODUCT PRIVILEGE

The work-product privilege provides broader protection than the attorney-client privilege.

The [privilege] protects any material prepared by the attorney in anticipation of litigation, regardless of whether it is confidential. The underlying purpose of the work product [privilege] is to guard the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case. The purpose is not to shield mundane and uninforming entries in billing records, such as the bare fact that a telephone conference occurred.

Levy III at 446 (citations omitted) (internal quotation marks omitted); *Janesch* at 1039 (citations omitted) (internal quotation marks omitted).

General descriptions such as drafting a memo, making a telephone call, performing research and observing a trial that reflect work performed but, without further detail, do not reveal an attorney's mental impressions, theories, notes, strategies, research and the like are unprotected general descriptions of legal services. *Levy III* at 444. Disclosure of the general tasks performed in connection with the fee charged reveals nothing about litigation strategy. *Id.*; *Janesch* at 1039-40. Rote entries regarding the general nature of legal services performed are not protected under the work-product privilege. *Levy III* at 444; *Janesch* at 1040.

C. SUPPLEMENTAL RECORDS IN SUPPORT OF PRIVILEGE REDACTIONS

Pa. Dep't of Educ. v. Bagwell considered the validity and sufficiency of an affidavit submitted by the Department of Education (Department) to establish the applicability of the attorney-client and work-product privileges to documents requested under the RTKL. 131 A.3d 638, 644, 646 (Pa. Commw. Ct. 2016) (*Bagwell 2016*). The Department submitted an affidavit in support of its privilege claims. *Bagwell 2016* at 657. The affidavit, characterized as “conclusory and vague,” did not sufficiently establish that the unreviewed and unproduced documents were protected by the attorney-client or work product privileges. *Bagwell 2016* at 658.

Bagwell 2017 further distinguishes affidavits:

A local agency may provide affidavits to detail the search its RTKL officer conducted for documents responsive to a RTKL request and the justification, if applicable, for any exemption from public disclosure or privilege relied upon for denying a requester access to responsive documents. Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory 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 at 1130 (citations omitted); *Heavens*, 65 A.3d at 1073.

The general purpose of *in camera* review and the production of a privilege log is to provide the requester and/or the court with enough information to determine whether withholding or redacting was appropriate in asserting attorney-client or work-product privileges under the RTKL. *Janesch* at 1043; 65 P.S. 67.708.

Janesch addressed supplemental records as follows:

Here, the Affidavits are not analogous to those at issue in *Bagwell 2016*. All three of the House’s affiants included specific factual material detailing their search for responsive documents, their knowledge of the *Levy* decisions, their (days-long) personal review of responsive documents, and the specific categories of items they redacted. This is not

a situation where, as in *Bagwell 2016*, the responding agency guessed as to the responsive documents' contents and submitted an affidavit that merely tracked the elements of the relied-upon privileges. Although the House did not submit a privilege log, no document was withheld in its entirety on the basis of privilege. The documents all have been produced and contain more than sufficient unredacted information to give ample context clues identifying the nature of the redacted information and the ground(s) upon which the redactions were made. Thus, we conclude that the Affidavits, coupled with the responsive documents themselves, adequately establish the applicability of the attorney-client and work product privileges to the House's redactions.

Janesch at 1042; see also *Heavens*, 65 A.3d at 1076-77.

Janesch, turning to the companion Senate case, *Couloubis*, observed that the Senate:

categorically redacted all subject matters from its document production and produced affidavits and a privilege log to support its redactions. Although the supporting affidavits suggested that the Senate did not make blanket redactions of subject matters, the documents produced indicated to the contrary. We accordingly concluded that remand for *in camera* review of certain redactions specifically challenged by Requesters was necessary to determine if they were supported by any of the privileges asserted by the Senate.

Janesch at 1043 n.19.

In *Couloubis*, the court determined that the redactions claimed to be appropriate on the basis of both the attorney-client and work-product privileges could not be made because the privilege log submitted by the Senate consisted of general statements that the engagement letters and invoices contained "confidential communications with client for purposes of securing legal advice." *Couloubis* at 1105 (quoting R.R. 350a-61a).

For this review, the Senate produced to the LRB for *in camera* inspection copies of the 24 pages and three attestations in support of the redactions. The attestants, Commonwealth licensed attorneys and staff members of the Senate, each relate that overly broad redactions were avoided. The attestants maintain confidential and privileged portions content contained in the engagement letters and invoices of outside counsel for the Senate Republican Caucus, Senate Chief Clerk and Senate Democratic Caucus were narrowly redacted based on the attorney-client privilege and/or attorney work-product doctrine.

The attestants' typical review consisted of determining whether the representation is publicly known or otherwise in the public domain, such as through public legal filings in a pending or existing legal case. If so, the subject matter contained in the engagement letter or invoice is not redacted. If the representation is not publicly known or not otherwise in the public domain, such as a representation to research or advise on proposed legislation, then, following the guidance of the Pennsylvania courts in the *Levy* cases, the redactions are made based on the attorney-client privilege and/or work-product doctrine on a case-by-case basis and only where the subject matter is specific enough so as to disclose the motive for seeking legal counsel.

The attestations state that the redactions from 367a to 382a of the Reproduced Record are limited to the specific motive in retaining the law firms and the specific nature of legal advice provided by the law firms as outside legal counsel. “[T]he redactions to the subject matter... at 367a to 382a of the Reproduced Record are the same, and no different than, redacting the phrase ‘specific legal issue’ from an entry of ‘legal advice re: *specific legal issue*’ in the description of legal services section of an engagement letter or a law firm invoice, which, as Petitioners conceded on appeal, would be appropriate and justified pursuant to the *Levy* decisions.” Attestation of Crystal H. Clark, Esquire, 4-5 (Aug. 16, 2023); see *Couloumbis* at 1100-01 (citing *Levy III* at 444 n.9).

V. SECURE SHAREFILE LINK DOCUMENT ANALYSIS (367a to 382a of the Reproduced Record)

The agency asserting a privilege bears the burden of proof to demonstrate by sufficient facts that the privilege applies. *Janesch* at 1036; *Levy II* at 249 (citing, in part, *Department of Transportation v. Office of Open Records*, 7 A.3d 329, 335 (Pa. Commw. Ct. 2010)); 65 P.S. §

67.708(a)(1).

A preponderance of the evidence is such evidence as would lead a factfinder to find that the existence of a contested fact is more probable than the nonexistence of the contested fact. *Pennsylvania Office of Attorney General v. Bumsted*, 134 A.3d 1204, 1210 n.12 (Pa. Cmwlth. 2016). Further, given the overarching purposes of the RTKL to provide access to government information and increase official accountability, “in determining whether a record is exempt from disclosure under the RTKL, exemptions from disclosure must be narrowly construed so as to not frustrate the remedial purpose of the RTKL.” *Office of the District Attorney of Philadelphia v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Cmwlth. 2017) (citation omitted) (*Bagwell 2017*).

The Senate notes that on appeal, Petitioners limited their challenges to only the redactions of the subject matter contained in the engagement letters captions and invoice captions identified in the Reproduced Record from pages 364a to 387a (emphasis added by LRB). Petitioners waived their challenges to the redactions of the specific descriptions of legal services performed in those same records. *Couloumbis* at 1098.

The records produced by the Senate to the LRB disclose only the captions in the engagement letters and invoice captions in unredacted form. *Couloumbis* at 1106. The remaining content of the documents received in the secure Sharefile Link Documents is redacted as originally produced.

The caption is the introductory part of a court paper stating the names of the parties, the name of the court, the docket or file number, and a description of the paper. Fed. R. Civ. P. 10(a); Pa.R.A.P. 904(b); Pa.R.C.P. 1018; *Black’s Law Dictionary* 262 (11th ed. 2019). With this direction, the captions of the engagement letters and invoices identified in the Reproduced Record from pages 364a to 387a were examined on a document-by-document basis. See Attachment A; *Janesch* at 1041.

Couloubis provides guidance that the example of evaluating the applicability of privilege in an engagement letter, invoice, and file name to include “medical marijuana” is inapposite. *Couloubis* at 1105. The court relates that “medical marijuana” does not reveal privileged information such as mental impressions of an attorney or motive for the legal engagement. *Id.* With this direction, the captions in the Reproduced Record from pages 364a to 387a were examined for exposure of privileged information primarily motive or mental impressions.

Attachment A, Comments, reflect the primary assertions of the Attestants, and the conclusion of the Appeals Officer.

CONCLUSION

For the foregoing reasons, the Senate may redact the captions in Reproduced Records 378a and 380a and not disclose these captions to the Petitioners because they are protected by privilege (Attachment B).

The Senate may not unredact the captions in Reproduced Records 350a, 365a, 370a, 371a, 372a, 373a, 374a, 375a, 376a, 383a, 384a, 385a, 386a and 387a because they contain general statements and are not protected by privilege (Attachment C).

The Senate may not redact the captions in Reproduced Records 364a, 366a, 367a, 368a, 369a, 377a, 379a, 381a and 382a because they were correctly not redacted in the original reproduced record and not protected by privilege (Attachment D).

The Senate may appeal any directed disclosure in accordance with the Right-to-Know Law, Act of February 14, 2008, P.L.6, 65 P.S. §§ 67.101-67.3104.

FINAL DETERMINATION ISSUED AND DELIVERED U.S. MAIL and
ELECTRONICALLY ON DECEMBER 19, 2023.

/s/ Suellen M. Wolfe
Suellen M. Wolfe, Appeals Officer

Attachment A

(Record by Record Analysis)

Reproduced Record	Produced Record	Description	Attestant	Conclusion
364a	0073	Engagement letter: Senate Democratic Caucus to Greenberg Traurig (06/28/2019)	Attestant: redaction limited to specific motive; mental impressions.	No redaction in caption of document of record.
365a	0193	Appendix A : Contract for legal services: Senate Democratic Caucus to Myers Brier & Kelly, LLP-Appendix A (03/31/2021)	Attestant: redaction limited to specific motive; mental impressions.	Unredact: Caption reflects general statement. <i>Couloumbis</i> at 1105.
366a	0235	Engagement letter: DeForest Koscelnik & Berardinelli to Senate Democratic Caucus (09/30/2021)	Attestant: redaction limited to specific motive; mental Impressions.	No redaction in caption of document of record.
367a	0631	Engagement letter: Kleinbard LLC to Senate Majority Caucus (01/09/2020)	Attestant: redaction limited to specific motive; legal advice.	No redaction in caption of document of record.
368a	0635	Engagement letter: Kleinbard LLC to Senate Majority Caucus (10/22/2020)	Attestant: redaction limited to specific motive; legal advice.	No redaction in caption of document of record.
369a	0639	Engagement letter: Kleinbard LLC to Senate Majority Caucus (03/22/2021)	Attestant: redaction limited to specific motive; legal advice.	No redaction in caption of document of record.
370a	0644	Invoice: Kleinbard LLC to Senate Majority Caucus (01/20/2021)	Attestant: redaction limited to specific motive; legal advice.	Unredact: Caption reflects general

				statement. <i>Couloumbis</i> at 1105.
371a	0647	Invoice: Kleinbard LLC to Senate Majority Caucus (11/17/2020)	Attestant: redaction limited to specific motive; legal advice.	Unredact: Caption reflects general statement. <i>Couloumbis</i> at 1105.
372a	0649	Invoice: Kleinbard LLC to Senate Majority Caucus (06/30/2021)	Attestant: redaction limited to specific motive; legal advice.	Unredact: Caption reflects general statement. <i>Couloumbis</i> at 1105.
373a	0652	Invoice: Kleinbard LLC to Senate Majority Caucus (06/30/2021)	Attestant: redaction limited to specific motive; legal advice.	Unredact: Caption reflects general statement. <i>Couloumbis</i> at 1105.
374a	0654	Invoice: Kleinbard LLC to Senate Majority Caucus (06/23/2021)	Attestant: redaction limited to specific motive; legal advice.	Unredact: Caption reflects general statement. <i>Couloumbis</i> at 1105.
375a	0656	Invoice: Kleinbard LLC to Senate Majority Caucus (06/30/2021)	Attestant: redaction limited to specific motive; legal advice.	Unredact: Caption reflects general statement. <i>Couloumbis</i> at 1105.
376a	0658	Invoice: Kleinbard LLC to Senate	Attestant: redaction limited	Unredact: Caption reflects

		Majority Caucus (06/30/2021)	to specific motive; legal advice.	general statement. <i>Couloumbis</i> at 1105.
377a	0776	Engagement letter: Saxton & Stump to Senate Republican Caucus (12/31/2020)	Attestant: redaction limited to specific motive; legal advice.	No redaction in caption of document of record.
378a	0785	Engagement letter: Dilworth Paxson LLP to Senate Republican Caucus (01/26/2021)	Attestant: redaction limited to specific motive; legal advice.	Redact: Caption reflects specific motive.
379a	0794	Engagement letter: McNees Wallace & Nurick to Senate Republican Caucus (02/17/2021)	Attestant: redaction limited to specific motive; legal advice.	No redaction in caption of document of record.
380a	0797	Invoice: McNees Wallace & Nurick to Senate Republican Caucus (03/03/2021)	Attestant: redaction limited to specific motive; legal advice.	Redact: Caption reflects specific motive.
381a	0868	Engagement letter: Obermayer to Senate Republican Caucus (05/12/2021)	Attestant: redaction limited to specific motive; legal advice.	No redaction in caption of document of record.
382a	0874	Invoice: Obermayer to Senate Republican Caucus (06/24/2021)	Attestant: redaction limited to specific motive; legal advice.	No redaction in caption of document of record.
383a	1010	Engagement letter: Cozen O'Connor to Senate Chief Clerk (04/02/2021)	Attestant: redaction limited to specific motive; legal advice.	Unredact: Caption reflects general statement. <i>Couloumbis</i> at 1105.
384a	1013	Invoice: Cozen O'Connor to Senate Chief Clerk (05/19/2021)	Attestant: redaction limited to specific motive; legal advice.	Unredact: Caption reflects general

				statement. <i>Couloumbis</i> at 1105.
385a	1014	Invoice: Cozen O'Connor to Senate Chief Clerk (05/19/2021)	Attestant: redaction limited to specific motive; legal advice.	Unredact: Caption reflects general statement. <i>Couloumbis</i> at 1105.
386a	1020	Invoice: Cozen O'Connor to Senate Chief Clerk	Attestant: redaction limited to specific motive; legal advice.	Unredact: Caption reflects general statement. <i>Couloumbis</i> at 1105.
387	10211	Invoice: Cozen O'Connor to Senate Chief Clerk	Attestant: redaction limited to specific motive; legal advice.	Unredact: Caption reflects general statement. <i>Couloumbis</i> at 1105.

ATTACHMENT B

CAPTIONS THAT MAY NOT BE DISCLOSED (REDACT)

378a	380a
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ATTACHMENT C

**CAPTIONS THAT MAY BE DISCLOSED IN THEIR
ENTIRETY (UNREDACT)**

365a	370a	371a
372a	373a	374a
375a	376a	383a
387a	385a	386a
384a		

ATTACHMENT D

CAPTIONS DISCLOSED IN THE ORIGINAL RECORD

(REMAIN UNREDACTED)

364a	366a	367a
368a	369a	377a
379a	381a	382a