

# Right-to-Know Law

## New Case Provides Relief for Municipalities Responding to its Requests

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**O**n April 24, 2013, the Pennsylvania Supreme Court issued what will undoubtedly prove to be a landmark decision affecting how municipalities are required to respond to requests under the Right-to-Know Law (RTKL). In *Levy v. Senate of Pennsylvania*, No. 44 MAP 2012 (Pa. 2013), the Court clarified the appropriate use of attorney-client privilege as an exemption for public disclosure under the RTKL. More importantly the Court reversed the per se waiver rule promulgated by the Commonwealth Court in *Signature Information Solutions, LLC v. Aston Township*, 995 A.2d 510 (Pa. Commw. Ct. 2010).

In *Levy*, a reporter sought documents relating to the representation of certain members of the senate and senate staff by outside counsel from the Pennsylvania Senate, including billing records from the outside attorneys. The Senate initially denied the request and claimed the requested documents were exempt from disclosure as attorney-client privileged. On appeal from the denial of the initial record request, the Senate claimed the requested documents were subject to additional exemptions, including attorney-work product, grand-jury secrecy and the criminal investigation exemption. On direct appeal from the determination of the Senate Open Records Appeal Officer, the Commonwealth Court applied its per se waiver rule, and held that the Senate had waived any additional exemptions by not raising

them in its initial written response. The Commonwealth Court ordered that certain documents, not otherwise within the scope of attorney-client privilege, be produced in response to the request. The Senate sought review in the Supreme Court.

The Supreme Court first reaffirmed the general rule that client identities are not protected by attorney-client privilege, but added that this rule is abrogated if exposing an identity will divulge otherwise protectable information. Similarly, the Court held that general descriptions of legal services included in attorney invoices are not protected by attorney-client privilege unless, again, a particular description would reveal protectable information.

More importantly, the Court addressed the per se waiver rule created by the Commonwealth Court in *Signature Information Solutions*. Under the per se waiver rule, an agency defending a challenge to its Right-to-Know response was precluded from raising exemptions that, although applicable, were not raised by the Right-to-Know Officer in the initial written response. Under the Commonwealth Court's rule, the failure to cite an applicable exemption in the initial written response served as a waiver of that exemption for appeal purposes. The Supreme Court disagreed, ending the short-lived reign of the *Signature Information Solutions* per se rule. Instead, the Supreme Court made clear that a failure to state an applicable exemption in an initial response does not act as a waiver of

such exemptions on appeal.

The *Levy* decision relieves some of the heavy burden borne by public agencies in responding to requests for records under the RTKL. The RTKL generally requires a local agency to respond to a request for information within five days of receiving the request, unless a legal review is necessary or another extraordinary circumstance is created by the request. Local open records officers often respond to routine requests without any advice from counsel, and often such responses are not exhaustive. Previously, the simple omission of a legitimate basis to deny a record request in the initial response, notwithstanding that the omitted reason may be that the document is exempt from disclosure (and thus not a public record at all), rendered the record disclosable because of the omission. Under the rule announced in *Levy*, if a public agency fails to include an exhaustive list of the applicable exemptions, it will not preclude the opportunity to raise any applicable exemption on appeal.

Public agencies should, nevertheless, still include any and all exemptions that may apply in their initial Right-to-Know responses and are encouraged to include language stating that the response is without waiver to assert other exemptions that are not listed but may be applicable.

Agencies are also encouraged to consult legal counsel in responding to Right-to-Know requests, to ensure that a response appropriately excludes protected and exempt materials. ■