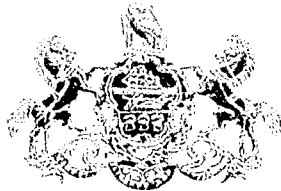


Appendix A



LEGISLATIVE REFERENCE BUREAU

ROOM 641 MAIN CAPITOL BUILDING
HARRISBURG, PENNSYLVANIA 17120-0033

**IN THE MATTER OF
APPEAL OF
COULOUMBIS,
Requester**

v.

**LRB Appeal 2023-01
(Senate RTK Appeal 01-2023)**

**SENATE OF
PENNSYLVANIA,
Legislative Agency**

FINAL DETERMINATION

INTRODUCTION

Angela Couloumbis of Spotlight PA (Requester) 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 “communications between any Senate employee or senator and the lobbyists Megan Crompton, Will Dando, Tommy Johnson, Chris Petrone, Joe Scarnati or Nick Varischetti” for the time period May 15, 2021, through the date the request was submitted. The Senate Open Records Officer (Senate RTKL Officer) denied the request and Requester 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 July 20, 2023, Senate RTKL Officer received a RTKL request from Requester via electronic transmission.¹ The request read as follows:

Requester seeks communications between any Senate employee or senator and the lobbyists Megan Crompton, Will Dando, Tommy Johnson, Chris Petrone, Joe Scarnati or Nick Varischetti. The time period for the records sought is 5/15/2021 through the date of this request. The topic of the request is any communications regarding these lobbyists' client, the City of DuBois (Dept of State lobbying ID P66779).

Key words for search include: grant, money, DuBois, Suplizio, DCED (or Department of Community and Economic Development).

Requester notes that although Sec. 708(b)(29) of the Right to Know Law exempts from disclosure correspondence that would identify a person seeking assistance or constituent services, Section 29 does not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbying disclosure).

The records described above are between Senate employees/Senators and a lobbyist under 65 Pa.C.S. Ch. 13A. The lobbyists named are all registered with the Department of State under the lobbying firm Allegheny Strategy Partners. Their lobbying IDs are: Crompton (L32049), Dandon (L42615), Johnson (L66513), Petrone (L66749), Scarnati (166511) and Varischetti (L66510).

Please provide the information in electronic format.

On July 26, 2023, Senate RTKL Officer denied the request.² The request was denied based on a determination that the requested records are not within the definition of a "legislative record" as provided for in the RTKL. 65 P.S. § 67.102.

Requester was notified of the right to appeal. 65 P.S. § 67.903. Senate RTKL Officer appointed Michael Gerdes to serve as Appeals Officer. Requester filed an appeal on July 27, 2023, via electronic transmission.³ In the appeal, Requester states:

¹ Requester's request is attached to this Final Determination and labeled "Requester's Request."

² Senate's response denying Requester's request is attached to this Final Determination and labeled "Senate's Denial."

³ Requester's appeal is attached to this Final Determination and labeled "Requester's Appeal."

The definition of "legislative record" within Section 102 of the Right to Know Law does not contain the word "email." However, there are nineteen categories of records that are considered "legislative records" and within those, there are certainly some emails that may be subject to disclosure.

For instance, a financial record (1) may be contained within an email. Financial records are the most broadly available category of records across all branches of government, including the legislature. If there are emails in the requested subject area concerning the expenditure of taxpayer money, they should be released.

Similarly, if emails in the requested subject area make offers of taxpayer money, they should also be released (the definition of "agency" includes a legislative agency and the definition of "financial record" includes an agency's receipt or disbursement of money, equipment, etc).

In addition, a co-sponsorship memo (4) could be contained within an email. For instance, a lobbyist could send an email with feedback about a co-sponsorship memo. "Legislative appointee" (16 and 17) could be contained within an email and exchanged between parties in the requested records. "Proposed regulations, etc" (18) may have been submitted by a lobbyist to a legislative agency regarding the requested subject area. "Public opinion" (19) about a certain subject could be contained within an email regarding the requested subject area.

In the Senate's denial letter of July 26, 2023, by simply stating that "emails" do not fall into the definition of a "legislative record," without any supporting attestation demonstrating a good faith search by the Senate using the requested search terms, the Senate has failed to uphold its duties under Sect. 901.

The Senate Appeals Officer should require the Senate to perform a good faith search and submit a detailed attestation and exemption log about what records may exist, and to explain with particularity which exemptions apply to specific records.

Finally, in terms of a plain language reading of the Right to Know Law, the legislative intent behind Sec. 708(b)(29) is quite clear. The legislature intended for communications between a constituent and a member of the General Assembly to be exempt.

Notably, however, the exception to the exemption clearly states that "This paragraph shall not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbying disclosure)." (emphasis added).

"Correspondence" is not defined in Sec. 102 of the Right to Know Law, but a basic and widely understood meaning of the noun "correspondence" is "communication by letters or email." Merriam-Webster Dictionary (2023).

On July 28, 2023, 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.⁴

On July 28, 2023, the parties were notified that Kristin M. Kayer of the LRB would serve as the Appeals Officer (LRB Appeals Officer).⁵ In accordance with regulations of the LRB, 101 Pa. Code § 31.21 *et seq.*, on July 31, 2023, LRB Appeals Officer established a schedule for documents to be submitted in the appeal with instructions to serve the other party.⁶ On August 4, 2023, upon request of counsel for the Senate, the schedule was modified.⁷

According to the regulations of the LRB, the provisions of 2 Pa.C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) and Ch. 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 the opportunity to submit briefs prior to adjudication by a Commonwealth agency. 2 Pa.C.S. § 506.⁸

On August 9, 2023, counsel for the Senate filed a letter brief in support of the Senate's position.⁹ On August 18, 2023, Requester filed a response in support of the

⁴ Letter recusing Senate Appeals Officer is attached to this Final Determination and labeled "Senate Appeals Officer Recusal Letter."

⁵ Letter assigning LRB Appeals Officer is attached to this Final Determination and labeled "LRB Appeals Officer Assignment Letter."

⁶ Submission schedule is attached to this Final Determination and labeled "Submission Schedule."

⁷ Modification of submission schedule is attached to this Final Determination and labeled "Modification of Submission Schedule."

⁸ Under 65 P.S. § 67.1102(a)(2), a hearing is held only at the discretion of the appeals officer. LRB Appeals Officer has determined that no hearing is necessary to resolve the appeal. No party has requested a hearing in this appeal.

⁹ Counsel for the Senate's letter brief is attached to this Final Determination and labeled "Senate's Brief."

Requester's position.¹⁰

LEGAL ANALYSIS

"[T]he objective of the Right-to-Know Law... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). Further, this important open-government law 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." *Pennsylvania State Police v. McGill*, 83 A.3d 476, 479 (Pa. Commonwealth 2014) (citing *Office of Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commonwealth 2013)).

In construing any statute, the intention of the General Assembly must be ascertained and given effect. The clearest indication of legislative intent is the plain language of a statute. *See Office of Governor v. Donahue*, 98 A.3d 1223, 1237-38 (Pa. 2014). When the words of a statute are clear and free from ambiguity, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. *See Levy v. Senate of Pennsylvania*, 65 A.3d 361, 380 (Pa. 2013). This case can be resolved by applying these legal principles to the factual situation.

The RTKL provides different types of access to different types of records of Commonwealth agencies, local agencies, legislative agencies and judicial agencies. Commonwealth agencies and local agencies are required to provide public records in accordance with the RTKL. 65 P.S. §§ 67.301 and 67.302. Judicial agencies are required to provide financial records in accordance with the RTKL. 65 P.S. § 67.304. Legislative

¹⁰ Requester's response is attached to this Final Determination and labeled "Requester's Response."

agencies are required to provide legislative records in accordance with the RTKL. 65 P.S. § 67.303.

The Senate is a legislative agency subject to the RTKL and, as such, is required to disclose its legislative records. 65 P.S. § 67.303(a). A legislative record in the possession of a legislative agency is presumed to be available in accordance with the RTKL unless an exemption applies. 65 P.S. § 67.305(b). Upon receipt of a request under the RTKL, a legislative agency is required to assess whether a record is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901.

Under the RTKL, legislative agencies are only required to provide statutorily defined legislative records. *See* 65 P.S. § 67.303(a). Legislative records are limited in scope and comprise only those records specifically designated as such in the RTKL. If the record or document sought does not satisfy the definition of a legislative record, there is no need to discuss whether the document is in the possession, custody or control of the legislative agency or whether there are exemptions to disclosure; in such a case, the record or document is not subject to disclosure under the RTKL.

Section 102 of the RTKL provides the following pertinent definition:

"Legislative record." Any of the following relating to a legislative agency or a standing committee, subcommittee or conference committee of a legislative agency:

- (1) A financial record.*
- (2) A bill or resolution that has been introduced and amendments offered thereto in committee or in legislative session, including resolutions to adopt or amend the rules of a chamber.*
- (3) Fiscal notes.*
- (4) A cosponsorship memorandum.*
- (5) The journal of a chamber.*
- (6) The minutes of, record of attendance of members at a public hearing or a public committee meeting and all recorded votes taken in a public committee meeting.*

- (7) *The transcript of a public hearing when available.*
- (8) *Executive nomination calendars.*
- (9) *The rules of a chamber.*
- (10) *A record of all recorded votes taken in a legislative session.*
- (11) *Any administrative staff manuals or written policies.*
- (12) *An audit report prepared pursuant to the act of June 30, 1970 (P.L. 442, No. 151) entitled, "An act implementing the provisions of Article VIII, section 10 of the Constitution of Pennsylvania, by designating the Commonwealth officers who shall be charged with the function of auditing the financial transactions after the occurrence thereof of the Legislative and Judicial branches of the government of the Commonwealth, establishing a Legislative Audit Advisory Commission, and imposing certain powers and duties on such commission."*
- (13) *Final or annual reports required by law to be submitted to the General Assembly.*
- (14) *Legislative Budget and Finance Committee reports.*
- (15) *Daily legislative session calendars and marked calendars.*
- (16) *A record communicating to an agency the official appointment of a legislative appointee.*
- (17) *A record communicating to the appointing authority the resignation of a legislative appointee.*
- (18) *Proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency.*
- (19) *The results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency.*

65 P.S. § 67.102. There are various forms of records of legislative agencies that fall within the definition of "legislative record." However, unless a record satisfies one of the enumerated forms, it is not required to be produced by a legislative agency under the RTKL.

In this case, under the original request, Requester seeks communications between Senate employees or Senators and certain lobbyists regarding the City of DuBois from May 15, 2021, to the time the request was submitted. Requester included key words for a search of the communications which included "grant, money, DuBois, Suplizio [and] DCED (or Department of Community and Economic Development)." On appeal, Requester asserts that email may contain legislative records such as financial records, cosponsorship

memorandums, records communicating to an agency the official appointment of a legislative appointee, records communicating to the appointing authority the resignation of a legislative appointee, proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency and the results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency.

In its brief, the Senate argues that in the original request, Requester did not request email or any of the specific legislative records listed in the appeal. The Senate argues that under case law, Requester is not permitted to change the request on appeal.

The Senate's argument is well taken, and Requester's explanation in the appeal has limited relevance. An appeal is constrained to analyzing the request as written, not as explained on appeal. *See Lemmon v. Borough of Paxtang*, OOR Docket No. AP 2022-2772, slip op. at 4-5 (Final Determination, March 3, 2023) (citing *Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commonwealth 2010)). Further, once a requester submits a request under the RTKL, a requester may not modify, explain or expand the original request on appeal. *See Smith Butz, LLC v. Department of Environmental Protection*, 142 A.3d 941, 945-46 (Pa. Commonwealth 2016) (citing *Department of Corrections v. Disability Rights Network of Pennsylvania*, 35 A.3d 830, 833 (Pa. Commonwealth 2012)). In *Butz*, the court reasoned that an agency makes its decision of accessibility of a record under the RTKL as the request is plainly written. *Id.* at 945. Under *Lemmon* and *Butz*, the explanation Requester gave on appeal is not permitted to alter the original request. Therefore, the primary issue is whether Requester's original request sought legislative records from the Senate.

As discussed above, unless a request satisfies one of the enumerated records under the definitions of “legislative record” under the RTKL, it is not required to be produced by a legislative agency under the RTKL. Here, Requester is not seeking access to a specific record. Rather, Requester is seeking access to an entirely new class of record, namely communications between Senate employees or Senators and lobbyists containing certain keywords. This class of record is not explicitly listed under the definition of “legislative record” under the RTKL. It is clear and unambiguous under the rules of statutory construction that it was not the intention of the General Assembly to make such a general class of records accessible “legislative records” under the RTKL.

Requester argues that under section 708(b)(29) of the RTKL, the General Assembly explicitly intended for correspondence between a member of the General Assembly and a principal or lobbyist to be subject to disclosure under the law, even if the correspondence is not a “legislative record” under the RTKL. However, the RTKL does not support this argument.

Section 708 of the RTKL creates exemptions for records that would otherwise be accessible records under the RTKL. Section 708(a) of the RTKL specifies that the burden is on a Commonwealth agency, local agency, judicial agency or legislative agency to prove that an otherwise accessible record under the act is exempt from public access. Section 708(b) of the RTKL lists 30 different types of records which are not accessible by the public. The exceptions to disclosure apply to public records, financial records of judicial agencies and legislative records which would otherwise be accessible. Importantly, as inferred by section 708(a) of the RTKL, a record must be determined to be a public record, financial record of a judicial agency or legislative record before it can be subject to an

exemption under section 708 of the RTKL.¹¹

Section 708(b)(29) of the RTKL makes an exception to disclosure for the following:

(29) Correspondence between a person and a member of the General Assembly and records accompanying the correspondence which would identify a person that requests assistance or constituent services. This paragraph shall not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbying disclosure).

65 P.S. § 67.708(b)(29). The first sentence denies access to constituent correspondence that is otherwise determined to be a public record, financial record of a judicial agency or legislative record. The second sentence, which provides an exception to the broader exception laid out in the first sentence, permits access to correspondence between a member of the General Assembly and a principal or lobbyist if the correspondence is a public record, financial record of a judicial agency or legislative record.

As determined above, communications between Senate employees or Senators and certain lobbyists are not a legislative record under the RTKL. Therefore, there is no need to analyze whether an exemption under section 708(b)(29) of the RTKL applies. Further, there is no indication that the General Assembly intended to transform otherwise inaccessible correspondence into legislative records through this exception provision.

¹¹ 65 P.S. § 67.708(a) states as follows:

(a) Burden of proof.--

(1) The burden of proving that a **record of a Commonwealth agency or local agency is exempt** from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.

(2) The burden of proving that a **legislative record is exempt** from public access shall be on the legislative agency receiving a request by a preponderance of the evidence.

(3) The burden of proving that a **financial record of a judicial agency is exempt** from public access shall be on the judicial agency receiving a request by a preponderance of the evidence.

(Emphasis added).

Requester raises a second issue on appeal, arguing that in failing to conduct a search using the requested search terms, the Senate has failed to uphold its duties under section 901 of the RTKL. Section 901 of the RTKL states:

Section 901. General rule.

Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request. All applicable fees shall be paid in order to receive access to the record requested. The time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency. If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied.

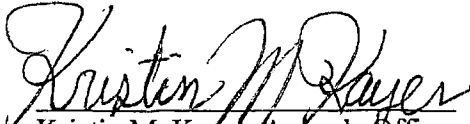
65 P.S. § 67.901. Under the section, an agency has a duty to determine, as promptly as possible under the circumstances, if the record requested is a public record, legislative record or financial record and whether the agency has possession, control or custody of the record. It has no other duty under section 901. In this case, the Senate determined that the record requested was not a legislative record under the RTKL. The Senate responded on July 26, 2023, which was within five business days of the receipt of the request on July 20, 2023. The Senate has complied with section 901 of the RTKL. There is no duty under section 901 of the RTKL to submit an attestation of a good faith search of records.

CONCLUSION

For the foregoing reasons, Requester's 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 MAILED: August 25, 2023.


Kristin M. Kayer, Appeals Officer