No. 1071 C.D. 2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ANGELA COULOUMBIS,

Petitioner-Appellant,

v.

SENATE OF PENNSYLVANIA,

Respondent-Appellee.

On Appeal from a Final Determination of the Legislative Reference Bureau, entered on Aug. 25, 2023, LRB Appeal 2023-01, Senate RTKL Appeal 01-2023

BRIEF FOR APPELLANT

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INTRODUCTION

Appellee the Pennsylvania State Senate, along with the Pennsylvania House of Representatives, amended the Commonwealth's Right to Know Law ("RTKL") in 2008 to, among other things, "make correspondence between legislators and lobbyists public documents." 2008 S. Legis. Journal, Reg. Sess. 1558 (Pa. Jan. 30, 2008) (statement of Sen. James Ferlo).[1] In negotiating the bill, legislative drafters carefully considered both the benefits of that transparency and the privacy of their constituents—and so added an exemption that protects "[c]orrespondence 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." 65 P.S. § 67.708(b)(29). But they built into that exemption an exception that specifically provided access to "correspondence between a member of the General Assembly and a principal or lobbyist" as defined by state law. *Id*. As the floor debate over the legislation made quite clear, legislators understood that emails to their offices might qualify for release under the amended RTKL—and

[1] *Available at*: https://www.legis.state.pa.us/WU01/LI/SJ/2008/0/Sj20080130.pdf#page=3.

wanted to protect private citizens, but not lobbyists, from that possible disclosure.

Given that clear text in the 2008 overhaul of the Right to Know Law, which Appellant Couloumbis and other Pennsylvania journalists covered extensively,[2] Ms. Couloumbis was particularly surprised when the State Senate's open records officer denied her request for a limited set of lobbyist emails as a categorical matter, without even undertaking the good faith search required by the RTKL. That categorical refusal to allow that *any* lobbyist emails or associated records could qualify for release depends on ignoring the plain text of the law, as well as prevailing canons of construction and the RTKL's legislative history. Despite that, when Ms. Couloumbis appealed through the Senate's own in-house open records office, the Legislative Reference Bureau affirmed that decision. But this Court has previously ensured that Appellee and its members abide by the laws they pass even when they would prefer not to, and it

[2] Angela Couloumbis, *Pa's new open-records law praised*, Phila. Inquirer (Feb. 15, 2008), https://www.inquirer.com/philly/news/local/20080215_Pa_s_new_open-records_law_praised.html (noting that "for the first time, the legislature will be subject to the open-records law"); Martha Raffaele, *Rendell signs open records into law*, The Mercury (Feb. 14, 2008), https://www.pottsmerc.com/2008/02/14/rendell-signs-open-records-into-law/.

should do so again here. On this issue of first impression, the Court should hold that emails from lobbyists to the Senate cannot be exempted from disclosure as an entire category, and remand for Appellee's records officer to identify responsive records and invoke individualized exemptions as applicable—as other government agencies do under Appellee's own amended RTKL statute.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the appeal from the Legislative Reference Bureau in this case pursuant to 65 P.S. § 67.1301(a) ("Commonwealth agencies, legislative agencies and judicial agencies").

DECISION UNDER REVIEW

Appellant seeks review of the Aug. 25, 2023 final determination of the Legislative Reference Bureau. That final determination is appended to this Brief as Appendix A, *see* Pa. R.A.P. 2111(b).

The relevant text of the opinion is:

"For the foregoing reasons, Requester's appeal is denied and the Senate is not required by the RTKL to take any further action."

STANDARD OF REVIEW

This Court undertakes plenary review over legal questions arising from the Commonwealth's Right to Know Law. *Padgett v. Pa. State Police*, 73 A.3d 644, 646 n.3 (Pa. Commw. Ct. 2013). When, as here, Ms. Couloumbis appeals from a decision of a legislative agency pursuant to 65 P.S. § 67.1301, this Court "independently review[s] the agency's orders," *Levy v. Senate of Pa.*, 94 A.3d 436, 440 n.7 (Pa. Commw. Ct. 2014), and it reviews orders presenting legal questions about public records requests *de novo*, *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1037 (Pa. 2012); *Bowling v. Office of Open Records*, 75 A.3d 453, 466 (Pa. 2013).

QUESTIONS INVOLVED

Did the Legislative Reference Bureau err by accepting the Senate's assertion that communications with lobbyists cannot be "legislative records" as a categorical matter, even though the RTKL exemption from disclosure for individual correspondence with members of the legislature specifically does not apply to correspondence with lobbyists, and thus

presumes that at least some of those records must be released under the law?

Proposed answer: Yes.

STATEMENT OF THE CASE

On July 20, 2023, reporter Angela Couloumbis of the non-profit, non-partisan statewide news outlet Spotlight PA submitted a RTKL request to the Senate of Pennsylvania, which sought, as relevant here,

> 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[.]

R.001a. As part of her request, Appellant specifically noted that § 708(b)(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)." *Id.* Furthermore, she provided the Department of State registration numbers for each of the named lobbyists, as well as the registration number for the "principal" (i.e., the client), the City of DuBois. *Id*.

Ms. Couloumbis submitted the request because of significant public interest in numerous financial improprieties, conflicts of interest, and questionable budgeting practices in the City of DuBois and overseen by its former city manager Herm Suplizio. Ms. Couloumbis and her colleagues at Spotlight PA have covered this story extensively, including reporting that DuBois "received far more in state grants than other Pennsylvania cities of similar size," and that both the Commonwealth and the United States had charged and were prosecuting Suplizio for allegedly stealing public money.[3] The public has a substantial interest in not only the underlying practices, but in state money allocated towards (or as a result of) the alleged misconduct, in the subsequent prosecution, and in any efforts undertaken by taxpayer-funded lobbyists hired by

[3] *See, e.g.*, Min Xian & Angela Couloumbis, *How a Pa. city manager allegedly stole thousands of taxpayer dollars with virtually no oversight*, Spotlight PA (Apr. 10, 2023), https://www.spotlightpa.org/statecollege/2023/04/pa-attorney-general-dubois-herm-suplizio-charges/; Min Xian & Angela Couloumbis, *'Richest Little City,' Herm Suplizio used charm, political muscle, and a community's trust to give DuBois, Pa., a dream makeover. But was it all a criminal house of cards?*, Spotlight PA (Nov. 9, 2023), https://www.spotlightpa.org/statecollege/2023/11/dubois-pennsylvania-herm-suplizio-fraud-corruption-attorney-general/; Min Xian & Angela Couloumbis, *Big bonuses, vast powers, and corruption charges: 5 takeaways from an investigation into DuBois' Herm Suplizio*, Spotlight PA (Nov. 23, 2023), https://www.spotlightpa.org/statecollege/2023/11/dubois-pennsylvania-herm-suplizio-corruption-takeaways/.

DuBois to obtain additional funding from the state or to influence the Commonwealth's prosecution of Suplizio.

In response, the Open Records Officer for the Senate quickly denied Ms. Couloumbis's request. R.003a. The Open Records Officer avowedly did not undertake a search for responsive records at all, instead citing 65 P.S. § 67.102 and its definition of "legislative record" to justify her determination that "the records requested, if any exist, are not included within the definition of legislative record." R.003a. This categorical determination supposedly justified the Open Records Officer's failure to undertake a good faith search, and her ultimate denial of the request.

Ms. Couloumbis, then *pro se*, appealed that denial on July 27, 2023, specifically citing the Senate's failure to undertake the good faith search, as well as the portion of the law that exempts constituent correspondence with legislators from release but pointedly excludes lobbyist communications from that exemption, 65 P.S. § 67.708(b)(29). R.005a–6a. The next day, the Senate Appeals Officer recused from the appeal, R.007a, and referred the appeal to the Legislative Reference Bureau.[4]

[4] The Senate Appeals Officer is a Senate employee tasked with receiving and determining appeals of the Senate's RTKL decisions. 65 P.S. § 67.503(c)(2)(i). For records requests to the Senate, the Senate

R.007a–8a. The Legislative Reference Bureau set a "submission schedule" for the parties to submit memorandums of law or other evidentiary documentation. R.009a–10a. In response to her appeal, the Senate filed a letter brief through outside counsel on Aug. 9, 2023. R.011a–19a. Ms. Couloumbis, still acting *pro se*, submitted a response to the Senate's letter brief on Aug. 18, 2023. R.020a.

Just one week later, on Aug. 25, 2023, the Legislative Reference Bureau issued the final determination on appeal. In that determination, the Legislative Reference Bureau adopted the Senate's position, observing that "[l]egislative records are limited in scope" and that "[i]f 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[.]" App. 6. In support, the Legislative

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Appeals Officer essentially plays the role of the Commonwealth's Office of Open Records. Here, the Senate Appeals Officer recused himself, and transferred Ms. Couloumbis's appeal to the Legislative Reference Bureau. An attorney with the Legislative Reference Bureau therefore served as the Senate Appeals Officer for purposes of this matter. *See id.* § 67.503(c)(1).

Reference Bureau held that the § 708(b)(29) exemption did not matter for this purpose because of its holding that the requested records were not "legislative records" at all. App. 9–10. The Legislative Reference Bureau also credited the Senate's argument that Ms. Couloumbis had not explicitly sought "emails," despite her accompanying list of suggested search keywords. App. 7–8.

Ms. Couloumbis timely filed a petition for review with this Court on Sept. 22, 2023. R.023a.

SUMMARY OF ARGUMENT

This Court should reverse the Legislative Reference Bureau and reject the Senate's insistence that correspondence, as a matter of category, cannot under any circumstances be subject to release under the RTKL. The plain text of the law—which exempts private constituent correspondence from release, but specifically excludes lobbyist communications from that exemption—does not support that interpretation. If this Court thinks that the law is at all ambiguous, however, all the tools that this Court turns to for statutory interpretation counsel against the Senate's position and the Legislative Reference

Bureau's conclusion, too. This includes widely accepted canons of construction, the legislative purpose, and the extensive legislative history. Indeed, the legislative history includes numerous examples of Appellee's own members acknowledging and even lauding their RTKL amendments' newly instituted access to exactly the sorts of records at issue here. On top of the text, canons of construction, and the legislative history, the law's general presumption of release counsels in favor of release here, too.

Even if this Court agrees with the Legislative Reference Bureau that the sorts of correspondence requested by Ms. Couloumbis are not legislative records, however, the Legislative Reference Bureau still erred by affirming because of the Senate's refusal to even undertake the good faith search required by law. Accepting the Appellee Senate's cramped view of legislative records subject to release, the fact remains that the requested correspondence—either in text, or through its attachments—could contain records that even the Senate would view as legislative records covered by the law. Of course, the Senate cannot even opine on that likelihood, precisely *because* of its failure to undertake the statutorily mandated good faith search. Regardless of the propriety of the

Senate's categorical interpretation, then, this Court should reverse for the Senate to undertake the good faith search and turn over records that even it acknowledges would qualify for release.

ARGUMENT

I. The Senate's categorical determination is wrong; at least some communications between lobbyists and legislators are subject to release under the RTKL.

The analysis of both the Senate Open Records Officer and the Legislative Reference Bureau depended on a two-part categorical determination. First, they determined that the requested emails could not possibly fall within § 102's definition of legislative records; second, and relatedly, they determined that emails or other communications between the Senate and lobbyists could not possibly even contain legislative records encompassed by Ms. Couloumbis's request. That categorical determination is wrong. First, the plain text of the law makes clear that at least some such communications are subject to release under the RTKL. Second, however, if this Court thinks that the text is at all ambiguous, it can turn to widely accepted canons of construction and other tools of statutory interpretation, which counsel that correspondence between the Senate and registered lobbyists may be

subject to release unless falling within an enumerated exemption. Third, if the plain text and normal interpretation tools are not enough to reach that result, the legislative history makes quite plain that Appellee itself, its members, and the House and its members, all understood that the RTKL would make at least some correspondence between legislators and lobbyists subject to release. Indeed, one trumpeted that very feature as a "cornerstone" of the bill. 2008 S. Legis. Journal, *supra*, at 1558 (statement of Sen. James Ferlo)[5]. And if the Court views this as a close case, the RTKL's remedial purpose and broad statutory presumption in favor of release of records would carry the day—as this Court has recognized repeatedly.

A. The text of the RTKL is clear: at least some of the requested communications may be subject to release.

As an initial matter, the text of the language of the RTKL is clear. The RTKL includes a broad presumption of release for legislative records, *see* 65 P.S. § 67.708(a)(2); *see also* Section I.D., *infra*, and a list of specifically enumerated exemptions to that otherwise broad presumption

[5] *See supra* note 1.

of release. One of the exemptions bears directly upon the request here: § 708(b)(29), which in its entirety reads:

> 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) (emphasis added).

By its plain text, this provision does two things. For one, it confirms that "[c]orrespondence between a person and a member of the General Assembly and records accompanying the correspondence," *id.*, fall within the category of legislative records that might possibly be subject to release under the RTKL. If such correspondence did not fall within that category, Appellee and the House of Representatives would not and need not have included a limiting exception to protect individual privacy.[6]

[6] Indeed, the § 708(b)(29) exception suggests that even correspondence between private citizens and members of the General Assembly could be subject to release under the RTKL, so long as such correspondence either alone or with redactions would not "identify a person that requests assistance or constituent services." *Id.*

For another, it explicitly excludes lobbyist communications with members of the General Assembly from the § 708(b)(29) exemption to release. That exclusion is clear, is straightforward, and reflects a considered decision to cross-reference other provisions of Commonwealth law related to lobbyists. In amending the RTKL to add the § 708(b)(29) exemption, the legislature referenced 65 Pa. C.S. Ch. 13A, a separate transparency and accountability law known as the Lobbying Disclosure Law. The drafting legislature would have had great familiarity with the Lobbying Disclosure Law, because many of the very members who amended the RTKL passed the Lobbying Disclosure Law on November 1, 2006.[7] Having debated and passed the Lobbying Disclosure Law just two years before, the 2008 legislators knew exactly what law they cross-referenced; in § 13A02 ("Statement of Intent and Jurisdiction"), the Lobbying Disclosure Law states, in part: "The ability of the people to exercise their fundamental authority and to have confidence in the integrity of the processes by which laws are made and enforced in this Commonwealth *demands that the identity and scope of activity of those*

[7] That law replaced a prior version that the Supreme Court of Pennsylvania struck down in 2002. *See Gmerek v. State Ethics Comm'n*, 807 A.2d 812 (Pa. 2002).

who are paid to influence the actions of the General Assembly and the Executive Department be publicly and regularly disclosed." 65 Pa. C.S. § 13A02(a) (emphasis added). The cross-reference underscores the meaning of the clear text of the lobbyist exclusion to the § 708(b)(29) exemption.

The exclusion for lobbyist communications also makes perfect sense given the same provision's different treatment of non-lobbyist individual communications. The text of the law frames the exclusion to protect the privacy of individuals who might disclose personal information as part of attempts to seek "assistance or constituent services." 65 P.S. § 67.708(b)(29). But lobbyists do not contact legislators to seek constituent services; they are paid to influence legislation and other official actions on behalf of their principals and clients. The legislature, including Appellee and its members, made a considered (and understandable) choice to protect the privacy of individuals seeking aid in private matters, but to ensure transparency into the legislative process that affects all residents of the Commonwealth. *See* Section I.B., *infra*. This is the most natural reading of the RTKL, and of the RTKL together with the § 708(b)(29) exemption for communication with members of the legislature,

that exemption's specific exclusion of lobbyist communications, and the exemption's cross-reference to the Lobbying Disclosure Law.

B. Statutory interpretation tools suggest that at least some of the requested emails contain information for which the RTKL allows (and requires) release.

If this Court believes that the text is ambiguous, however, widely accepted canons of construction and other tools of statutory interpretation demonstrate that the legislature intended that the RTKL would provide for release of at least some communications between members and lobbyists. Both the text and the statutory purpose—separate from the clear legislative history, *see* Section I.C., *infra*—confirm that lawmakers intended to increase transparency. And "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a). In considering the text and stated statutory intent behind the law itself, if this Court believes that there are inconsistencies between § 708(b)(29)'s explicit carve-out to allow release of lobbyist communications with legislators and § 102's list of legislative records, it may look to "familiar canons of construction" to assist its analysis. *Dubose v. Quinlan*, 173 A.3d 634, 643 (Pa. 2017). And if it comes to it, several widely accepted canons

of construction—including but not limited to the *expressio unius* canon, the whole act canon, and the rule against surplusage—only underscore the conclusion that at least some of the records at issue here are subject to release.

First, the *expressio unius* canon counsels in favor of Ms. Couloumbis's interpretation of the statute. The *expressio unius* canon directs that "inclusion of a specific matter in a statute implies the exclusion of other matters"—and our courts have long looked to this canon to help interpret statutes. *E.g. Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1223 (Pa. 2002) (citing *Pane v. Commonwealth, Dep't of Highways*, 222 A.2d 913, 915 (Pa. 1966)). Relatedly, as some other sources discuss and apply this canon, "the specific controls over the general." *McCloskey v. Pa. Pub. Util. Comm'n*, 255 A.3d 416, 437 (Pa. 2021) (Saylor, J., dissenting) (discussing that canon of construction after dissenting as to majority view that text was unambiguous). Applied here, this canon counsels rejection of the Senate's insistence that the more general list of categories of legislative records, *see* 65 P.S. § 67.102, controls over the far more specific text of the § 708(b)(29) exception. The inclusion of a specific exemption for certain types of legislator-constituent

correspondence, and an even more specific exception to that exemption for legislator-lobbyist correspondence, implies the exclusion of the Senate's proposed and far more general exemption from release for *all* communications with Appellee and its members, to say nothing of such a broad exemption from release for all communications with lobbyists in particular. This canon, applied here, precludes Appellee's interpretation of the RTKL that would exclude all such correspondence from release.

Second, the whole act canon counsels in favor of Ms. Couloumbis's interpretation of the statute. The whole act canon, as its name suggests, directs that "a consideration of the whole act" can help interpret otherwise ambiguous provisions—as the Supreme Court of Pennsylvania has long and repeatedly recognized. *E.g. Baker v. Kirschnek*, 176 A. 489, 491 (Pa. 1935) (citation omitted). "The whole act must be construed together and its declared purpose should guide us in its construction." *Beltonen v. Gruca & Cozel*, 94 Pa. Super. 32, 35 (1928). Here, this canon strongly counsels in favor of rejecting Appellee's proposed interpretation of "legislative record." For one thing, the whole act contains a set of exemptions that pointedly do not provide for the shielding of correspondence with the General Assembly by registered lobbyists. For

another, it counsels against Appellee's interpretation because the declared purpose of the act in question is to increase transparency and includes a broad presumption of release for legislative records. *See* Section I.D., *infra*. And beyond that, as noted in Section I.A., it also cross-references the Lobbying Disclosure Law and its stated purpose to bring transparency to lobbying activities—another portion of the code that this Court considers in assessing any ambiguous meaning here. *See Office of Gen. Counsel v. Bumsted*, 247 A.3d 71, 81 (Pa. Commw. Ct. 2021) (reading the RTKL *in pari materia* with other transparency statutes across the code). Reading the whole RTKL act and the whole Commonwealth code together precludes the idea that lobbyist correspondence with the General Assembly could categorically not be—or categorically not even at least include—legislative records.

Third, the rule against surplusage counsels in favor of Ms. Couloumbis's interpretation. The rule against surplusage directs that in interpreting statutes, "[t]he legislature . . . is presumed not to intend any statutory language to exist as mere surplusage, and, accordingly, courts must construe a statute so as to give effect to every word." *Commonwealth v. Ostrosky*, 909 A.2d 1224, 1232 (Pa. 2006); *see also*

Holland v. Marcy, 883 A.2d 449, 456 (Pa. 2005) (observing that courts must give meaning to every word in a statute). The Pennsylvania Supreme Court has actually referred to this canon, which ensures that "no provision is mere surplusage," as a "bedrock principle of statutory construction." *Commonwealth v. Gilmour Mfg. Co.*, 822 A.2d 676, 679 (Pa. 2003). This canon is also codified in Pennsylvania law. *See* 1 Pa. C.S. § 1921(a). Appellee's proposed interpretation of the RTKL—that correspondence of the sort requested by Ms. Couloumbis does not qualify as legislative records at all—would render the § 708(b)(29) exemption entirely superfluous. If such correspondence with the General Assembly could never be released under any circumstances as a categorical matter, what function would the exemption protecting correspondence with the General Assembly that would identify someone seeking constituent services serve? For that provision to have any effect, correspondence with the General Assembly must be subject to release under at least some circumstances.

C. The legislative history directly contradicts the Senate's suggested interpretation.

If this Court has any doubts about the plain text, or about the interpretation dictated by canons of construction, a close read of the

legislative history of the RTKL's 2008 amendments only underscores that at the time of its enactment, Appellee and its members—along with the House and its members—understood the amendments to make at least some legislator correspondence available to the public. Several aspects of the legislative history demonstrate this, including but not limited to: first, the manner in which the legislature added the § 708(b)(29) exemption—and the lobbyist communications exception to the exemption—during the process; second, drafters and negotiators specifically and repeatedly articulating their understanding and expectation that "some e-mails will be open to the public, depending on what their subject matter is," during floor debate, *see infra* p. 28; third, specific statements by sponsors and other drafters noting the public interest in release of exactly the sorts of lobbyist communications at issue here, because of their influence on the legislative process; and fourth, the legislature adding a presumption of legislative record availability mid-drafting. Taken together, the full legislative history reveals that Appellee expected at least some communications between lobbyists and its offices to become public, and expected record-by-record assessments to determine whether some other exemption might apply.

1. The method of adding the exemption for communication by private citizens seeking constituent services that might identify those citizens.

The General Assembly added the § 708(b)(29) exemption during the drafting process. Such mid-drafting amendment, when accompanied by legislative history suggesting legislators undertook any such change deliberately, is strong evidence of legislative intent. *See Pa. State Police v. Cantina Gloria's Lounge, Inc.*, 639 A.2d 14, 17–18 (Pa. 1994). "[T]he legislature cho[o]s[ing] to revise statutory language evidences an assessment . . . that the language originally used was not achieving its intended purpose or was producing results that conflicted with the original intent." *Commonwealth v. Vasquez*, 726 A.2d 396, 399 (Pa. Super. Ct. 1999). Indeed, "the purpose of amendments" is to "clarify what the governing legislature body intended from the outset," including in reference to issues that surface during debate and negotiations. *Clipper Pipe & Serv., Inc. v. Ohio Cas. Ins. Co.*, 115 A.3d 1278, 1284 (Pa. 2015). Mid-process amendments, then, matter a lot.

And here, the process of adding the § 708(b)(29) amendment confirms that legislators added it in recognition that communications with legislators might become public. The RTKL initially passed the

Senate—the first chamber in which it passed—without the § 708(b)(29) exemption for constituent communications with legislators. *See* S.B. 1, Printer's No. 1583, Reg. Sess. (Pa. Nov. 27, 2007) (as amended on third consideration).[8] Even as it passed the bill, Appellee's members articulated both their knowledge (and pride) that attempts to influence legislators might become public, and their concern for the privacy of constituents—but not lobbyists. Senator Robert Mellow, for example, observed that "I think it is extremely important that the people know exactly what is taking place legislatively, how access to the wide range of governmental issues are dealt with, and what is taking place here in Harrisburg and back in our legislative offices." 2007 S. Legis. Journal, Reg. Sess. 1406–07 (Pa. Nov. 28, 2007).[9] But he went on to note specifically the concern for private constituents, who might reveal sensitive subjects while seeking services:

> I understand fully that there are certain things that have to be protected. There are issues of confidentiality when people want to come into your office and talk to you about some

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[8] *Available at*: https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2007&sessInd=0&billBody=S&billTyp=B&billNbr=0001&pn=1583.

[9] *Available at*: https://www.legis.state.pa.us/WU01/LI/SJ/2007/0/Sj20071128.pdf#page=3.

> problems that they have within their families or with government in its own right. Some of those particular areas must be protected to protect the privacy of the constituency that we represent. But by and large, Madam President, this is the people's business. None of us owns this business in our own right, and therefore, we and the people of our constituencies have the right to know exactly what is taking place through the proper type of open records law, and I think we have taken a major step in the right direction.

Id. at 1407. He made no mention of a need to protect lobbyists.

The House, which immediately took up the bill after the Senate's passage, shared Senator Mellow's concern—and amended the bill accordingly. But even the manner of amendment reflects the expectation that communications with legislators might become public, and the particular concern only for private citizens. Initially, the House added the text that eventually became the standalone § 708(b)(29) exemption as a third subsection of the already-written § 708(b)(28) exemption that protects information identifying a person applying for or receiving various forms of social services or public benefits, *see* 65 P.S. § 67.708(b)(28)(i)–(ii). S.B. 1, Printer's No. 1646, Reg. Sess. (Pa. Dec. 10, 2007) (as amended on second consideration by House of

Representatives).[10] This placement reflected a clear view of the drafters that the concern with such communications possibly becoming public was the same as the concern one would have with private citizens' benefits applications becoming public—it might compromise individual privacy on matters of no legitimate public interest, and would provide no window into the legislative process or other public matters.

Even more indicative of the concern animating what became the § 708(b)(29) exemption: that initial addition to § 708(b)(28) did not include the explicit lobbyist carve-out. It originally exempted any record or information "IDENTIFYING A PERSON THAT REQUESTS ASSISTANCE OR CONSTITUENT SERVICES FROM A MEMBER OF THE GENERAL ASSEMBLY." *Id*. When the House passed the bill after significant and illuminating floor debate, *see* Section I.C.2, *infra*, and returned the amended bill to the Senate, Appellee bumped that language out to its own standalone exemption—what became § 708(b)(29). *See* S.B. 1, Printer's No. 1704, Reg. Sess. (Pa. Jan. 28, 2008) (Senate amendments

[10] *Available at*: https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2007&sessInd=0&billBody=S&billTyp=B&billNbr=0001&pn=1646.

to House amendments).[11] In doing so, the Senate also specifically added, for the first time, the exception to the exemption that is relevant here: "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[.]" *Id*. That addition—and the addition of the already-discussed cross-reference to the Lobbying Disclosure Law—makes quite clear not only that the full legislature understood the need to protect private constituents, but also that the full legislature understood the possibility that lobbyist communications might fall within the exemption, and specifically wanted to reject that. That resulting language remained untouched when the Senate concurred in the version of the bill with the House amendments, through slight additional House amendments, and of course, in the version of the bill that became law. *See* 65 P.S. § 67.708(b)(29).

[11] *Available at*: https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2007&sessInd=0&billBody=S&billTyp=B&billNbr=0001&pn=1704.

2. Members specifically discussed the understanding that at least some of their communications would become public.

The explicit statements during the floor debate over the RTKL and its amendments make quite clear that Appellee and its members, and the House and its members, understood that at least some communications with members would become public through the RTKL as they'd written it. The House amended the original RTKL bill that passed the Senate in several ways that improved public access, most of which were incorporated into a wide-ranging full-bill amendment offered by Rep. Timothy Mahoney. In the substantial debate occasioned by Rep. Mahoney's amendment, including numerous members questioning Rep. Mahoney about his amendment's text and effects, both other members and Rep. Mahoney specifically discussed the issue of communications to and from legislators. Rep. William Gabig, for example, asked "[o]n the e-mail issue" whether a Senate amendment possibly having an "exclusion of all our e-mails" from release was operative, and, if it was, whether Rep. Mahoney's amendment would "change that or does [it] not speak to that

at all?" 2007 H.R. Legis. Journal, Reg. Sess. 2819 (Pa. Dec. 10, 2007).[12] Rep. Mahoney responded that "the Senate bill never had an exclusion, and the amendment does not change that." *Id*. After some additional back and forth, in an attempt to clarify for the whole chamber, Rep. Gabig ultimately concluded: "So some e-mails are going to be subjected to your amendment, or to SB 1 as amended by your amendment; some e-mails will be open to the public, depending on what their subject matter is; and some will not be, if it is exempted under the subject matter. Are we getting that straight?" *Id*. To which Rep. Mahoney responded, "Correct, Mr. Speaker." *Id*. Rep. Mahoney's amendment later passed unanimously—reflecting broad ratification of that understanding and of the compromise struck during negotiations.

That sense of the members—that some communications might become public depending on the subject matter, and some might not—permeated the floor debate over the bill. And Ms. Couloumbis of course agrees that not *all* communications with legislators are public under the law. For one thing, the § 708(b)(29) exemption excludes any that would

[12] *Available at*: https://www.legis.state.pa.us/WU01/LI/HJ/2007/0/20071210.pdf#page=11.

identify constituents seeking services. For another, multiple members offered amendments that would have done functionally that—i.e., make "all of our e-mails . . . subject to the request of anybody, at any time, as a public record"—and those amendments did not pass. 2007 H.R. Legis. Journal, *supra*, at 2864 (statement of Rep. Daylin Leach).[13] But the discussion before and after one such amendment offered by Rep. John Yudichak got voted down specifically noted that members rejected it because it transgressed the "very well-crafted compromise" reached by the House's lead negotiator and many other members, whereby "there are certain defined public records and if they happen to be e-mail, then they are recoverable, and if you can provide them in another form, then you can provide it in that form and meet any request for that information. That is a reasonable approach to take." *Id*. If anything, other aspects of the floor debate underscore this, too. Most notably, members even thought to discuss the mechanics of record retention, in light of the amount of junk emails they received from lobbyists. *See id.* at 2820 (question of Rep. Douglas Reichley) ("[W]hile we are on the subject of the e-mails . . . [c]an you explain to me, under your amendment, what kinds

[13] *See supra* note 12.

of e-mails to a legislator would be required to be retained for publication purposes and what would not[?]"). This question only makes sense in the context of members' understanding that at least some emails would be subject to release.

And crucially, the Senate understood the deal when the House returned the amended bill for the Senate to re-pass it. In his concluding remarks not long before the final passage of the version of the bill that became the enacted RTKL, Senator Ferlo referred to "the notable compromise amendments" during the drafting process, including one that would "make correspondence between legislators and lobbyists public documents." 2008 S. Legis. Journal, *supra*, at 1558.[14] Taken together, the statements, questions, summaries, and ultimately, the articulated compromises on the part of Appellee's members and members of the House all reflect the shared understanding that the sorts of records at issue in Ms. Couloumbis's request could become public under the RTKL unless some exemption applied to bar release.

[14] *See supra* note 1.

3. Members specifically contrasted the need for privacy of constituent requests for services with the importance of transparency into lobbyists' efforts to influence legislation and official actions.

The legislative history also explains why the § 708(b)(29) exemption would exempt some private constituent communications from release but make lobbyist communications available. Private communications from Commonwealth residents would often reveal sensitive information required to receive individualized constituent services—all fairly excluded from public release. Lobbyists, however, seek to influence legislation and other official actions, and both the legislative process itself and attempts to influence it fall within the heartland of the public interest. Senator Ferlo, for example, discussed the different public interest in lobbyist communications. Referring to the part of the RTKL making these communications available as "a cornerstone piece of legislation," he pointed to the benefit of shedding light upon "the relationship that lobbyists and lobbying organizations, organizations that have professional paid lobbyists, the significant role they play in the drafting, formulation, and passage of pieces of legislation in lobbying

both Houses of the Capitol." 2008 S. Legis. Journal, *supra*, at 1558.[15] Earlier in the process, Senator Dominic Pileggi discussed how "openness builds trust in government" and the need of the public to "review government actions, to understand what government does, to see when government performs well, and when government should be held accountable." 2007 S. Legis. Journal, *supra*, at 1405–06.[16] Senator Anthony Hardy Williams echoed this, observing that one of the benefits of the RTKL's increase in access to records would be that the public could "have confidence in their government and confidence in those leaders, to know what they are talking about, to know why they are talking about it, and ultimately, to be confident in the decisions that we make and represent in this legislative Chamber." *Id.* at 1406. And Senator Robert Mellow similarly explained that "there should be very, very little withheld from the voting public, because none of us owns the government," and expressed his view that the bill could (and would) make sure that "people know exactly what is taking place legislatively, how access to the wide range of governmental issues are dealt with, and what

[15] *See supra* note 1.

[16] *See supra* note 9.

is taking place here in Harrisburg and back in our legislative offices." *Id.* at 1406–07. Virtually every legislator to speak on the issue noted the clear public interest in learning about lobbyist communications with legislators and their offices.

4. The House amended the legislation pre-passage to include a presumption of release of legislative records.

At the outset of the RTKL amendment process, and even in the version of the bill initially passed by Appellee and its members, the RTKL did not contain a presumption of release for legislative records (or judicial records). This stood in stark contrast to the presumption of release that applied to other forms of public records at Commonwealth agencies. But the House recognized that and fixed it; when the House got the bill from the Senate, one of the first things that it did was add text requiring that "[a] legislative record in the possession of a legislative agency and a financial record in the possession of a judicial agency shall be presumed to be available to the public[.]" *See supra* S.B. 1, Printer's No. 1646 (as amended on second consideration by House of Representatives).[17] Indeed, this presumption could have been the reason that the House added text

[17] *See supra* note 10.

to § 708(b)(28) that later became standalone exemption § 708(b)(29), *see* Section I.C.1, *supra*—with the presumption of release, the onus fell more heavily upon Appellee and its members to articulate the exemptions from release clearly.

And if anything, the legislature understood how to make clear exemptions from release when they thought warranted. The definition of "legislative record" does not explicitly include draft bills, but the Senate still included a different § 708(b) exemption from release for draft bills, including even draft versions of local ordinances. *See* S.B. 1, Printer's No. 1553, Reg. Sess. (Pa. Nov. 14, 2007) (Senate re-reported as amended);[18] 65 P.S. § 67.708(b)(9). And, in an objectively funny revision, the Senate similarly changed the definition of legislative record during its amendment process even prior to the bill going to the House so that they would not have to reveal members' rates of committee attendance. *See supra* S.B. 1, Printer's No. 1583 (as amended on third consideration).[19] Instead of doing any of these things for their communications with

[18] *Available at*: https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2007&sessInd=0&billBody=S&billTyp=B&billNbr=0001&pn=1553.

[19] *See supra* note 8.

lobbyists, they made explicitly clear that those were not subject to an exemption, *see* Section I.A–I.B & I.C.1, *supra*, and articulated their understanding that at least some of those records would be subject to release, *see* Section I.C.2, *supra*. Particularly given the changes to include a presumption of release for legislative records, Appellee's proposed interpretation and the Legislative Reference Bureau's adoption of the same—that we must presume, instead, that correspondence with the legislature and any attached or incorporated documents could *never* be legislative records—cannot stand up to scrutiny.

D. If this were a close case, the RTKL's remedial nature and broad presumption of release would carry the day.

This Court and the Supreme Court of Pennsylvania have repeatedly addressed one of the biggest changes wrought by the 2008 RTKL amendments: its broad presumption in favor of release of records. The 2008 amendments "significantly expanded public access to governmental records . . . with the goal of promoting government transparency." *Levy v. Senate of Pa.*, 65 A.3d 361, 368 (Pa. 2013). This includes legislative records; "Section 305(b) provides that a 'legislative record in the possession of a legislative agency . . . shall be presumed to be available in accordance with this act,'" absent some privilege. *Id.*

(quoting 65 P.S. § 67.305(b)). Particularly relevant here, the RTKL and the cases interpreting it recognize that as an agency—such as Appellee—seeks to deny release, the statutory bases upon which it seeks to do so should be construed in favor of release. *E.g. Pa. State Police v. Grove*, 161 A.3d 877, 892 (Pa. 2017) (explaining that because of the "RTKL's goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed" (quoting *Office of the Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015))). While this Court and the Supreme Court of Pennsylvania have generally discussed narrow statutory construction in the context of ensuring that agencies do not widen the § 708(b) exemptions, that is because agencies seeking to deny release generally rely on an exemption (or a privilege). *See Grove*, 161 A.3d at 892; *Davis*, 122 A.3d at 1191. In general, this Court has explained that "all records in the possession of an agency are presumed 'public' unless they are: (1) exempted by Section 708 of the RTKL; (2) protected by privilege; or (3) exempted 'under any other Federal or State law or regulation or judicial order or decree.'" *Pa. State Police v. McGill*, 83 A.3d 476, 479 (Pa.

Commw. Ct. 2014) (quoting 65 P.S. § 67.305(a) and citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commw. Ct. 2013)).

That principle of construing the RTKL statute in favor of release bears directly upon this case. The Senate's gambit here—insisting that records in its possession are not actually records at all, rather than seeking to invoke an exemption, a privilege, or another provision of law—if endorsed by this Court, would augur all sorts of mischief in the future. Why would any agency attempt to carry its burden to prove by a preponderance of evidence an exemption sufficient to overcome the presumption of release, 65 P.S. § 67.708(a), if it could merely argue as a matter of law that the records in its possession cannot be subject to release at all? Why would an agency conduct the required good faith search, 65 P.S. § 67.901, or comply with its responsibility to redact protected information in otherwise responsive material, 65 P.S. § 67.706, if it could simply short-circuit the whole process at the outset? And why would an agency put such determinations on the record—which would allow the statutorily authorized appeal to the Office of Open Records (or the Legislative Reference Bureau), and then to the courts of the Commonwealth, on the prescribed timeline—if it could draw out the

entire process and stymie release? This Court should reject that out of hand.

II. Even if the Senate's interpretation were correct, the Senate did not undertake a good faith search for records it would acknowledge are qualifying legislative records.

Appellee's categorical interpretation is incorrect for all the reasons discussed. But Appellee's categorical belief that none of the records responsive to Ms. Couloumbis's request could possibly be legislative records—and the Legislative Reference Bureau's adoption of that interpretation—caused the Legislative Reference Bureau to make a reversible error even if this Court believes that emails to legislators, as a matter of category, are never subject to release. Under Appellee's own interpretation of the RTKL, records that the Senate believes are not legislative records may nevertheless *contain* legislative records subject to release. We cannot know, here, whether any do, because Appellee failed to undertake the good faith search for legislative records required by law. The Legislative Reference Bureau's affirmance of that decision itself amounts to reversible error.

The RTKL contains a requirement that within the prescribed time after a request, the recipient of the request must undertake a good faith

search for responsive records. 65 P.S. § 67.901; *see also, e.g.*, *Office of the Dist. Att'y of Phila. v. Bagwell*, 155 A.3d 1119 (Pa. Commw. Ct. 2017). That search is not optional. "Under the RTKL, an agency bears the burden of demonstrating that it has reasonably searched its records to establish that a record does not exist." *Dep't of Lab. & Indus. v. Earley*, 126 A.3d 355, 357 (Pa. Commw. Ct. 2015). Indeed, the failure to undertake such a search is one of the few bases upon which a requester may eventually recover fees from an agency under the RTKL, which does not generally allocate fees to successful requesters. *See Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 243 A.3d 19, 34 (Pa. 2020);[20] *see also Cal. Univ. of Pa. v. Bradshaw*, No. 1491 C.D. 2018 (Pa. Commw. Ct. Oct. 13, 2021) (Brobson, J.). Good faith searches matter even—perhaps especially—when the agency receiving a request intends to litigate some aspect of denying the request, because undertaking the search (and providing at least some responsive records or otherwise sharpening the issues) may have the benefit of "short-circuiting the ensuing litigation."

[20] "[A]n abnegation of mandatory duties by an agency, including performance of a detailed search and review of records to ascertain if the requested material exists, or if any exclusion may apply, prior to denial of access will support a finding of bad faith." *Id*. at 25.

Id. at *14–15. Appellee well knows this, having previously litigated all the way to the Supreme Court of Pennsylvania multiple issues involving requests for legislative records that it did not want to release. *E.g. Levy*, 65 A.3d at 368. Just last year, this Court addressed Appellee's wrongful noncompliance with a different open records request by Ms. Couloumbis. *See Couloumbis v. Senate of Pa.*, 300 A.3d 1093 (Pa. Commw. Ct. 2023).

The Senate's refusal to undertake the good faith search here has caused exactly that problem in this case. Even accepting Appellee's erroneous categorical determination at face value—that the § 102 definition of "legislative records" must be finely parsed to prevent release, despite the plain text of § 708(b)(29), canons of construction, the legislative history, and the presumption of release and remedial purpose—it is substantially likely that at least some of the requested communications are or contain records that fall explicitly within that enumerated list. This Court has previously addressed the need to look individually at highly analogous records that serve multiple purposes or functions, rather than treat them as a category. The Court observed that "calendar entries" that a requester sought from the Office of the Governor "may contain the topic of the meeting, along with specific points that are

to be discussed, or proposed actions, along with a list of the individuals scheduled to attend the meeting" in explaining why it rejected a categorical determination that applied to all requested calendar entries. *Scolforo*, 65 A.3d at 1101. It noted that even if "information appearing on calendars [does] not contain information subject to protection, we must look at the substance of the information and not the form in which the information is placed." *Id*.

That principle works just as well for emails as it does for calendar entries. The requested communications here, including their attachments and other associated information, might contain information subject to some other exemption, or they might contain information subject to release under the Senate's own narrow definition of "legislative record." The categories of "legislative record" include "(1) [a] financial record," 65 P.S. § 67.102, which itself incorporates a separate multi-part definition, *id*. They also include "(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) [f]iscal notes," and 16 other categories, through and including "(19) [t]he results of public opinion surveys, polls, focus groups,

marketing research or similar efforts designed to measure public opinion[.]" *Id*. All of those types of records are exactly the sorts of things that registered lobbyists—such as those identified in Ms. Couloumbis's request to the Appellee Senate—would include, attach, and discuss in correspondence with members of the legislature. Lobbyists regularly share and comment on bill texts; regularly exchange, discuss, and characterize polling and other measures of public opinion about pending government actions; and, in the context of this request about underlying financial improprieties in DuBois, may well have included, attached, and discussed information that would fall within the definition of a financial record or one of the other explicit categories that the Senate concedes are legislative records. The Senate cannot disclaim that likelihood because it never checked; the Legislative Reference Bureau erred by affirming anyway. At the very least, this Court must remand for a good faith search for legislative records responsive even to the Senate's own cramped (and erroneous) view of the scope of legislative records.

CONCLUSION

For the foregoing reasons, the judgment of the Legislative Reference Bureau should be reversed.

Date: Feb. 9, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

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CERTIFICATE OF SERVICE

I hereby certify that on this day I have caused a true and correct copy of the foregoing Brief of Appellant to be served via email and PACFile on the following, as required by Pa. R.A.P. 121(c)(4):

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