IN THE SENATE OF PENNSYLVANIA

Appeal of Scolforo	:	Senate RTK Appeal 01-2009
Appeal of Scolforo	:	Senate RTK Appeal 02-2009

OPINION
February 24, 2009

Statements of Fact

By letter dated January 1, 2009 addressed to Senator Dominic Pileggi, Mr. Mark Scolforo (Appellant), a reporter with the Associated Press, sought access to any correspondence between the Senator and any registered lobbyists that occurred during calendar year 2008. An identical letter and separate request was sent to Senator Robert J. Mellow on January 1, 2009 seeking the same access to any correspondence between the Senator and any registered lobbyists that occurred during calendar year 2008. These requests were made pursuant to the recently enacted Right-to-Know Law, Act of February 14, 2008, P.L. 6, 65 P.S. §67.101 et seq. (the Act).

Senators Pileggi and Mellow do not serve as open records officers for the Senate of Pennsylvania. Appellant's requests were forwarded to the Senate's

Open Records Officer, W. Russell Faber. By e-mail correspondence dated January 9, 2009, the Open Records Officer denied both of Appellant's requests.

By identical letters dated January 26, 2009, Appellant has appealed both denials to this office. Since these two appeals present identical factual situations and identical issues at law, they have been consolidated for disposition.

Discussion

These two appeals are the first to be considered pursuant to the new Act. They present questions of statutory construction.

The Act provides different types of access to different types of records of Commonwealth agencies, local agencies, legislative agencies and judicial agencies. These appeals deal solely with access provided by legislative agencies to legislative records.

No body of jurisprudence interpreting this Act has been developed. However, in construing any statute, it is a basic premise of law that the intention of the General Assembly must be ascertained and given effect. Craley v. State Farm Fire and Casualty Co., 586 Pa. 484, 895 A.2d 530 (2006). The legislative intent is best gleaned from the clear and plain language of the statute. Bowser v. Blom, 569 Pa. 609, 807 A.2d 830 (2002). And, "... when the words of a statute are clear and free from all ambiguity, they are presumed to be the best indication

of legislative intent." Walker v. Eleby, 577 Pa. 104 at 123, 842 A.2d 389 at 400 (2004). These cases can be resolved by applying these legal principles to the existing factual situation.

Section 102 of the Act defines the Senate as a "legislative agency." Section 303(a) of the Act states that, "A legislative agency shall provide legislative records in accordance with this act." The Act is clear and unambiguous. If the correspondence between Senators Pileggi or Mellow and registered lobbyists during calendar year 2008 are legislative records, then Appellant should be granted access to such records.

Section 102 of the Act defines the term "legislative record" in a very specific and exhaustive manner. There are nineteen different types of legislative documents listed which would be accessible by the public as legislative records pursuant to the Act.[1]

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[1] "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.

Nowhere in this list of accessible legislative records is found the mention of correspondence between members of the Senate and registered lobbyists. It would seem clear and unambiguous that it was not the intention of the General Assembly to make such a general class of records into accessible legislative records under these provisions of the Act. If specific correspondence between a member of the Senate and a registered lobbyist would fall within one of the specifically enumerated types of legislative records in an ancillary way, then that

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(9) The rules of a chamber.

(10) A record of all recorded votes taken in 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.

correspondence must be made available to the public by the Senate's Open Records Officer. For example, such correspondence could well be part of the Journal of the Senate. Such is not the case in this instance. Rather, Appellant is seeking access to an entirely new class of record clearly not within the purview of any definition of a legislative record.

Appellant has not availed himself of the opportunity to file any further documentation or a memorandum of law to support his appeal. However, his letter of appeal urges that section 708 (b)(29) of the Act should be read to supplement and expand the definition of legislative records to include another class or type of record. I cannot agree.

Section 708, entitled "Exceptions for public records", enumerates 30 different types of records which will not be accessible by the public. This section of the law is designed explicitly and exclusively to limit access to certain records. These exceptions are not confined to legislative records. Rather, all of the exceptions apply to any public records, legislative records or judicial records which otherwise would be accessible as public records, legislative records or judicial records. In other words, a record must first be a public record, a legislative record or a judicial record as those terms are defined in the Act before it can be subject to an exception.

Section 708 (b)(29) specifically excepts:

> "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)."

The first sentence clearly denies access to constituent correspondence which would otherwise be considered either a public record, a legislative record or a judicial record. Although constituent correspondence, like correspondence between members of the Senate and registered lobbyists, does not fall within the definition of a legislative record, it is very likely that such correspondence exists in the possession of Commonwealth agencies or local agencies. It would most likely be considered an accessible public record but for this exception in the Act.

The second sentence, limited to the specific paragraph of the section, provides an exception to the broader exception and permits a greater access to certain specific correspondence between members of the General Assembly and registered lobbyists if that correspondence first qualifies as a public record, a legislative record or a judicial record. Such correspondence could qualify as a public record and therefore be accessible to the public. This opinion has already determined that such lobbyist correspondence alone does not constitute an accessible legislative record. There is no indication that the General Assembly intended in any way to add another definition of legislative record in this paragraph.

Further evidence of legislative intent is also found by again looking to Chapter 3 of the Act which provides for access to legislative records. Section 303(b) of the Act states, inter alia, "A legislative record in the possession of a legislative agency... shall be presumed to be available in accordance with this Act. The presumption shall not apply if: (1) the record is exempt under section 708..." This evidences an intent that section 708 be read to limit access to records which are already legislative records rather than granting an increased access to an entirely new class of records not already defined as legislative records.

This opinion has already determined that, in the first instance, correspondence between a member of the Senate and a lobbyist is not in and of itself a legislative record as that term is defined in the Act. Exception provisions of the Act cannot be applied to transform such records into accessible legislative records. Therefore, the denials issued by the Senate's Open Records Officer must be sustained.

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ORDER

AND NOW, this 24th day of February, 2009, the decision of the Senate's Open Records Officer is sustained. Appellant is denied access to correspondence between Senators Pileggi or Mellow and any registered lobbyists occurring during calendar year 2008.

Mark R. Corrigan
Senate Appeals Officer