

IN THE SENATE OF PENNSYLVANIA

Appeal of Mahon

Senate RTK Appeal 01-2015

FINAL DETERMINATION
April 29, 2015

Statement of Facts

On March 9, 2015, Ed Mahon (the Requester) submitted a request for documents, via email, addressed to the Senate's open records officer. In this request, he requested the following:

[t]he Right-to-Know logs, including what was requested and the status of those requests, for the state Senate, covering the period of Jan. 1, 2014 through March 6, 2015. I am requesting these in electronic format, specifically as an Excel spreadsheet or comparable format.

If the estimated cost is expected to exceed \$25, please contact me in advance. Please advise me in advance of the estimated charges associated with fulfilling this request. Please send me a detailed and itemized explanation of those charges.

In the interest of expediency, and to minimize research and/or duplication burden on your staff, please send records electronically if possible. Since time is a factor, please communicate with me by telephone or this email address...

Since Section 3 of Pennsylvania's Right-to-Know Law says, "A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record," if this request is denied, please note the specific section of the law that proves that Right-to-Know logs are exempt or protected by privilege.

Senate RTKL Request No. 1503100923, Mar. 9, 2015. This request was made pursuant to the Right-to-Know Law, Act of February 14, 2008, P.L. 6, 65 P.S. § 67.101 *et seq.* (the Act or RTK Law).

By communication dated March 16, 2015, the Senate Open Records Officer denied access to the documents sought by the Requester in his request, Senate RTK Request No. 1503100923, finding that these documents are not legislative records under the Act. In her response, however, the Senate Open Records Officer did, in her discretion, citing 65 P.S. § 506(c), provide the Requester with a “summary of the number of requests filed since my response to your previous RTK Request which covered January 1, 2014 through December 31, 2014 (RTK Request 1502050902 Mahon).” That summary provided the following:

**Summary of Senate Right to Know Requests
Status Totals from 1/1/2015 to 3/16/2015**

<u>Status</u>	<u>Totals</u>
Closed	11
Denied	4
Denied-Referred	2
Open	5
GRAND TOTAL	22

Senate Open Records Officer Response to RTK Request No. 1503100923, Mar. 16, 2015.

By communication dated March 24, 2015, and received in the Office of the Senate Appeals Officer on March 31, 2015, the Requester timely appealed this denial of access. Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1503100923, Mar. 24, 2015.

On April 8, 2015, the Senate Open Records Officer filed a Memorandum of Law in support of her denial of access. The Open Records Officer maintains the clear and unambiguous intent of the Legislature in the RTK Law is to require the Senate Open Records Officer to provide access to legislative records. She maintains the documents requested are not legislative records as defined in the RTK Law; therefore, they are not releasable and there is no need to review whether the requested documents are covered by an exemption or protected by privilege or law. Senate Open Records Officer Memorandum of Law, April 8, 2015, pp. 1, 5-7. She further maintains the Senate is not required to release public records, which are separately and differently defined from legislative records. Id. at 6. The Open Records Officer also maintains the Requester cites to sections of the Act that are inapplicable to the Senate of Pennsylvania, such as section 305(a), which only applies to Commonwealth and local agencies. Id. at 5. For these reasons, she denied the request and asks that her decision be sustained. Id. at 7.

Although the Requester has not availed himself of the opportunity to file any further documentation or a Memorandum of Law to support his appeal, he did provide support in the appeal itself. He specifically averred the following:

Section 305 of Pennsylvania's Right-to-Know Law says, "A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record." The state Senate has not met the burden of proof that Right-to-Know logs are exempt or protected by privilege.

The state Senate cites section 102, and lists 19 items that are specifically named as legislative records. However, as Section 305 makes clear, records of an agency are presumed to be a public record. Section 102 contains no

language indicating that records not listed there are exempt from release, nor does it indicate that the records listed there are the only legislative records considered to be public.

Additionally, Section 102 does not in any way address records that are exempt from disclosure under the Right-to-Know Law. Section 708, which lists those exemptions, does not exempt Right-to-Know logs for the state Legislature from disclosure. Thus, those records are presumptively public records according to the law.

As the state Supreme Court has held, the objective of the RTKL “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)[.] (emphasis in original)

Knowing how an agency is responding to open records requests is critical to understand how that agency functions.

Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1503100923, Mar. 24, 2015.

Discussion

This appeal presents the following question for review: whether the documents requested, Senate Right-to-Know logs (RTK Law logs), are legislative records within the meaning of the RTK Law. The Requester maintains the documents he seeks constitute records that must be released under the Act. Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1503100923, Mar. 24, 2015. The Requester also maintains the Senate has not met its burden of proving the RTK Law logs are exempt from release or protected by privilege. Id. The Senate Open Records Officer concluded same are not releasable because the Senate is only required to release legislative records under the Act,

which these are not. Senate Open Records Officer Response to RTKL Request No. 1503100923, Mar. 16, 2015. Despite this conclusion, the Senate Open Records Officer exercised her discretion and released a summary of the number of RTK requests to the Requester. Id.

The RTK Law requires legislative agencies to provide legislative records in accordance with the Act. 65 P.S. § 67.303(a). It is presumed that a legislative record in the possession of a legislative agency will be available in accordance with the Act. 65 P.S. § 67.305(b). This presumption does not apply if the record is exempt under Section 708 of the Act, if the record is protected by a privilege, or if the record is exempt from disclosure under any other State or Federal law, regulation, or judicial order or decree. Id. Whether the requested record constitutes a legislative record is a preliminary issue that must be resolved before addressing whether any exceptions under the Act apply. Commw. of PA, Office of the Governor v. Bari, 20 A.3d 634, 640 (Pa. Commw. Ct. 2011). The burden is on the legislative agency to prove by a preponderance of the evidence that the legislative record is exempt from public access. 65 P.S. § 708(a)(2).

Here, the issue for determination is whether the requested documents, Senate RTK Law logs, are legislative records under the Act. For the reasons that follow, Senate RTK Law logs are not legislative records under the Act and the decision of the Senate Open Records Officer is sustained.

In analyzing this matter, we are guided by Pennsylvania's Statutory Construction Act, 1 Pa.C.S.A. § 1501 *et seq.*, which is clear that when interpreting and construing statutes courts must ascertain and effectuate the intent of the General Assembly. 1 Pa.C.S.A. § 1921(a); PA Gaming Control Bd. v. Office of Open Records, 103 A.3d 1276, 1284 (Pa. 2014). It is presumed the General Assembly does not intend an absurd, impossible, or unreasonable result. 1 Pa.C.S.A. § 1922(1).

The purpose of the RTK Law is to allow the public access to records that reveal the workings of state government. Askew v. Commw. of PA, Office of the Governor, 65 A.3d 989, 991-92 (Pa. Commw. Ct. 2013), *appeal denied*, 72 A.3d 604 (Pa. 2013) (citing Bowling v. Office of Open Records, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd*, 75 A.3d 453 (Pa. 2013)). Doing so empowers citizens and promotes access to official government information “to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions...” Id.

As with all questions of statutory construction and interpretation, the starting point is the plain language of the statute, because “[t]he clearest indication of legislative intent is generally the plain language of a statute.” Commw. of PA, Office of the Governor v. Donahue, 59 A.3d 1165, 1168 (Pa. Commw. Ct. 2013), *aff'd*, 98 A.3d 1223, 1237-38 (Pa. 2014). When the words of a statute are “clear and free from all ambiguity, the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit.” Honaman v. Twp. of Lower Merion, 13 A.3d 1014,

1020 (Pa. Commw. Ct. 2011), *appeal denied*, 31 A.3d 292 (Pa. 2011); 1 Pa.C.S.A. § 1921(b). Further, when the statutory language is unambiguous there is “no need to resort to other indicia of legislative intent...[thus] any further deliberation as to its meaning is unwarranted.” Donahue, 59 A.3d at 1168-69; see 1 Pa.C.S.A. § 1921(b)-(c).

Although the RTK Law must be liberally construed to effectuate its purpose, Barnett v. PA Dept. of Public Welfare, 71 A.3d 399, 403 (Pa. Commw. Ct. 2013) (citing Levy v. Senate of PA, 65 A.3d 361, 381 (Pa. 2013), *substituted opinion after remand*, 94 A.3d 436 (Pa. Commw. Ct. 2014), *appeal denied*, 106 A.3d 727 (Pa. 2014) (citations omitted)), matters not included in a statutory provision are deemed to be excluded. See 1 Pa.C.S.A. § 1903; Commw. of PA v. Zortman, 23 A.2d 519, 524 (Pa. 2011), *cert. denied*, 132 S. Ct. 1634 (U.S. 2012); Commw. of PA v. Ostrosky, 866 A.2d 423, 430 (Pa. Super. Ct. 2005), *aff'd*, 909 A.2d 1224 (Pa. 2006); see also, Commw. of PA, Office of the Governor v. Donahue, 59 A.3d 1165, 1168 (Pa. Commw. Ct. 2013), *aff'd*, 98 A.3d 1223, 1237-38 (Pa. 2014) (concluding the plain language of the RTK Law was unambiguous; therefore, the court did not expand the law to include agency personnel not specifically set forth in the statute)(citation omitted). Courts cannot “add, by interpretation, to a statute, a requirement which the legislature did not see fit to include.” The Summit School, Inc. v. PA Dept. of Education, 108 A.3d 192, 199 (Pa. Commw. Ct. 2015) (citing Shafer Electric & Construction v. Mantia, 96 A.3d 989, 994 (Pa. 2014) (quoting Commw. v. Rieck Investment Corp., 213 A.2d 277,

282 (Pa. 1965)). Similarly, courts cannot insert words that the Legislature failed to supply into a statute. PA Dept. of Health v. Office of Open Records, 4 A.3d 803, 812 (Pa. Commw. Ct. 2010).

Here, the relevant statutory provisions are clear and unambiguous; they specifically provide for different types of access to different types of records. For example, Commonwealth and local agencies are required to provide “public records” in accordance with the Act, while judicial agencies are required to release “financial records.” 65 P.S. §§ 67.301, 67.302, 67.304. And, legislative agencies are required to release “legislative records.” 65 P.S. § 67.303(a).

The Act defines the Senate as a legislative agency, 65 P.S. § 67.102; therefore, the Senate is required to release legislative records. 65 P.S. § 67.303(a). The Senate, however, is not required to create records that do not currently exist. It likewise is not required to compile or format records in a way it is not already currently compiling or formatting them. 65 P.S. § 67.705.

Importantly, by their very definitions, legislative records are not the same as public records; therefore, the Senate is required only to provide access to legislative records, not public records. See 65 P.S. §§ 67.102, 67.301, 67.302, 67.303.

Section 102 of the Act explicitly defines the term legislative record in a specific and exhaustive manner. There are nineteen different types of legislative

documents listed that would be accessible by the public as legislative records pursuant to the Act.¹ 65 P.S. § 67.102.

The Legislature, if it so intended, could have created a more expansive definition by including other items in the list, but it did not. Instead, it crafted a specific and exhaustive list of documents that would constitute legislative records under the Act, to further its goal of expanded government transparency through

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.
- (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.

public access to documents. See also, Levy v. Senate of PA, 65 A.3d at 381.

Therefore, following the maxim *expressio unius est exclusion alterius* (matters not included in a statutory provision are deemed to be excluded), the requested RTK Law logs, which are not listed in the Act, are not legislative records for purposes of the RTK Law. See 1 Pa.C.S.A. § 1903; Commw. of PA v. Zortman, 23 A.2d at 524; Commw. of PA v. Ostrosky, 866 A.2d at 430. This maxim “is one of longstanding application, and it is essentially an application of common sense and logic.” Commw. of PA v. Ostrosky, 866 A.2d at 430 (citation omitted). To find otherwise would render meaningless the General Assembly’s explicit and comprehensive list of legislative records in the Act. That result would be unreasonable and absurd, and therefore, must not have been the legislative intent in the Act. See The Summit School, Inc. v. PA Dept. of Education, 108 A.3d at 199.

It reasonably follows that the General Assembly did not intend to include RTK Law logs as legislative records, because these are not listed in the Act’s specific definition of a legislative record. This conclusion is consistent with recent RTK Law caselaw where the Commonwealth Court declined to expand the Act to include agency personnel not specifically set forth in the statute, Donohue, 59 A.3d at 1168-69, and is in accord with the principles of statutory construction applied in this Commonwealth.

Accordingly, the documents sought by the Requester, RTK Law logs, do not fall within the RTK Law’s clear and unambiguous definition of a legislative record. It

reasonably follows that it was not the intention of the General Assembly to make same into accessible legislative records under these provisions of the Act. The decision of the Senate Open Records Officer must, therefore, be sustained.²

Moreover, the Senate Open Records Officer is not required to examine whether a privilege, exemption or other legal protection applies to the requested documents because the documents are not legislative records under the Act. 65 P.S. §§ 67.102, 67.305(b).

Further, Requester's reliance on Section 305(a) of the Act is misplaced, because the Senate is only required to release legislative records under the Act, not public records. 65 P.S. §§ 67.303, 67.305(b).

Finally, although the Senate Open Records Officer exercised her discretion under the Act and released a summary of RTK Law requests, the Act does not mandate that she do so. The plain and unambiguous language of the Act provides the agency head "may" exercise her discretion and make otherwise exempt records available if: release is not prohibited by State or Federal law or regulation, or by judicial order or decree; the record is not protected by a privilege; and, if the agency head determines that "the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access." 65 P.S. § 67.506(c).

An agency may exercise such discretion, but it is not required to do so. PA Dept. of

² The OOR's recent decision, In re Wise and the Press and Journal v. Borough of Steelton, OOR Dkt. AP 2015-0257, 2015 PA O.O.R.D. LEXIS 312, Mar. 23, 2015, is distinguishable (public records were at issue, not legislative records) and not binding on the Senate. The OOR is only authorized to hear appeals for Commonwealth and local agencies, and an opinion from the OOR is purely advisory. 65 P.S. §§ 67.503, 67.1310(a); Bowling v. Office of Open Records, 75 A.3d 453, 457 (Pa. 2013).

Health v. Office of Open Records, 4 A.3d 803, 815 (Pa. Commw. Ct. 2010); see In re Palmer and The Philadelphia Inquirer v. PA Dept. of Public Welfare, OOR Dkt. AP 2014-1647, 2014 PA O.O.R.D. LEXIS 1246, *7, Nov. 21, 2014 . Here, the requested documents are not legislative records and therefore not releasable under the Act. Assuming *arguendo* they are legislative records that are exempt from disclosure, the Senate Open Records Officer is not required to release these under the discretionary provisions of Section 506.

Accordingly, the decision of the Senate Open Records Officer is sustained. The Requester is seeking access to documents that are not included in the RTK Law's clear and unambiguous definition of a legislative record. To release these documents would be to contravene the intent of the General Assembly. Therefore, the denial issued by the Senate Open Records Officer must be sustained. See Appeal of McManus, Senate RTK 01-2014, Appeal of Carollo, Senate RTK 02-2012; see also Appeal of Nicholas, Senate RTK 05-2009.

IN THE SENATE OF PENNSYLVANIA

Appeal of Mahon

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Senate RTK Appeal 01-2015

FINAL DETERMINATION
April 29, 2015

ORDER

AND NOW, this 29th day of April 2015, the decision of the Senate Open Records Officer is affirmed. The documents sought by the Requester are not legislative records and, thus, not accessible under the Right-to-Know Law.


Megan Totino Consedine
Senate Appeals Officer

APPEALING THIS DECISION TO COMMONWEALTH COURT

Within 30 days of the mailing date of this final determination, either party to this action may appeal the decision to the Commonwealth Court. 65 P.S. § 67.1301.

If you have any questions about the procedure to appeal, you may call the Prothonotary of the Commonwealth Court at 717-255-1600.