

IN THE SENATE OF PENNSYLVANIA

Appeal of Swift on behalf of
The *Times-Tribune*

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Senate RTK Appeal 03-2015

FINAL DETERMINATION
January 11, 2016

Statement of Facts

On October 12, 2015, Robert Swift¹ on behalf of the *Times-Tribune* (the Requester) submitted a request for documents, via email, addressed to the Senate’s Open Records Officer. He requested the following: “records of per diems and expenses for lodging and meals for all senators from July 1, 2015 through Oct. 8, 2015.” Senate RTKL Request No. 1510131001, Oct. 12, 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 RTKL).

By email communication dated October 15, 2015, the Senate Open Records Officer, citing 65 P.S. § 67.902, notified the Requester that an extension was necessary to respond to his request due to bona fide and specified staffing limitations, as well as to the extent/nature of the request itself. Senate Open Records Officer Initial Response to RTK Request No. 1510131001, Oct. 15, 2015.

The Senate Open Records Officer, therefore, responded to the request via email on October 27, 2015. In her response, she provided records from July 1, 2015 to October 9,

¹ On the face of the appeal the requester states his editor, Charles Schillinger, will handle the appeal. From the signature, it is unclear which individual signed the appeal (Mr. Swift or Mr. Schillinger). The RTKL provides the “requester” may file the appeal. 65 P.S. § 67.1101(a). It is noteworthy that the OOR has accepted appeals filed by individuals who are journalists and filing on behalf of their employer newspaper. Don Spatz and the Reading Eagle v. City of Reading, OOR Dkt. AP 2013-0210, April 5, 2013. In that case, the OOR declined to strike the appeal despite the fact that the initial requester (Mr. Spatz) and the appellant (the *Reading Eagle*) are not the same because the reporter was acting in his role as journalist on behalf of the newspaper. *Id.* at FN 3. The OOR declined to take such a “technical view of the facts.” *Id.* We are presented with similar facts here. Although not binding, decisions of the OOR are persuasive authority in Senate RTKL appeals. See 65 P.S. §§ 67.503, 67.1310(a); Bowling v. Office of Open Records, 75 A.3d 453, 457 (Pa. 2013).

2015, which she concluded were responsive to his request. In those records, she made limited redactions on the basis of legislative privilege.² Senate Open Records Officer Response to RTK Request No. 1510131001, Oct. 27, 2015.

On November 5, 2015 the Requester erroneously³ filed an appeal to the Senate Open Records Officer's decision with the Office of Open Records, which office, on November 10, 2015, issued a Final Determination transferring the appeal to this Office. Office of Open Records, Final Determination, Dkt. No. AP 2015-2527; see 65 P.S. § 67.503.

On November 13, 2015, this Office notified the Senate Open Records Officer, Donetta M. D'Innocenzo, of the appeal, and by separate letter, set forth a briefing schedule for the parties. 65 P.S § 67.1102(a)(1).

On November 23, 2015, the Senate Open Records Officer filed a Memorandum of Law in support of her redactions. In her memo, the Open Records Officer maintains that upon review of the responsive records, she discovered information within these legislative records "that provided specific legislative activities of members of the Senate of Pennsylvania." Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, p. 3. Claiming same is protected by legislative privilege, she redacted the protected information from the records being provided in response to the request. Id. The Open Records Officer further maintains that her counsel verbally notified staff of each member concerning these redactions. Id. She responded to the request and made limited redactions on pages 19, 33, 37 and 39. Id.

² The record contains a memo from the Requester to Charles Schillinger (his editor) stating that these redactions were based on legislative privilege and that the "Senate has historically involved privilege when names of constituents are involved." Swift email to Schillinger, Nov. 4, 2015.

³ The OOR has no jurisdiction to hear a RTKL appeal involving a legislative agency; the Senate is a legislative agency. See 65 P.S. §§ 67.102, 67.503.

In her Memorandum of Law, the Open Records Officer also explains that on November 4, 2015 her counsel received a call from the Requester concerning the records provided and the redactions to same. Her counsel explained to the Requester that “legislative privilege applied to the limited redacted records as the details involved legislative activities of members – including individuals with whom members met and/or the specific legislative topics.” Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, p. 3.

Based on this conversation, the Senate Open Records Officer provided an updated response to the Requester along with the records as they were originally provided. In her response, the Open Records Officer explained her limited redactions to the records:

As provided for by Section 305(b)(2) and Section 706, limited information was redacted from the financial records as it is protected by legislative privilege and specifically as to whom the member met with and the topic – as this information relates to legislative activities. Legislative privilege has long been recognized. Legislative privilege is in both the federal and state constitutions and has been affirmed by the courts. (Pennsylvania State Constitution – Article 2, Section 15, Privileges of members.) This privilege is essential in carrying out legislative activities...

Id. at 4.

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 some support in the appeal itself. He generally averred the following: (1) the Senate incorrectly redacted information; (2) the records are public records in the possession of the Senate; (3) the records do not qualify for any exemptions under section 708 of the Act; (4) the records are not protected by any privilege; (5) the records are not exempt under any Federal or State law or regulation; (6) the request was sufficiently specific. The Requester

more specifically argued that based on his November 4 conversation with counsel, it is likely the Senate is relying on section 708(b)(29), which is in error. He maintains this section is inapplicable because the requested information (expense reports) is not constituent correspondence or an accompanying document to same. Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1510131001, Nov. 5, 2015. Rather, he maintains, these requested documents are a financial record releasable as a public record under the Act. *Id.* Finally, the requester argues the redactions appear broader than allowed by the Act, but he provides no support for this position. *Id.*

Discussion

This appeal presents the following question for review: whether the Senate Open Records Officer, when responding to a request under the RTKL, properly redacted limited information contained in legislative records of the Senate, because such information is protected by legislative privilege.

For the reasons that follow, the decision of the Senate Open Records Officer is affirmed, as the redacted information is protected by legislative privilege.

Legislative Records

First, it is undisputed that the requested records are legislative records under the Act, because they are financial records as defined in the RTKL.

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).

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).

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).

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.

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.3d 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.

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. 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.⁴ 65 P.S. § 67.102.

⁴ “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.

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

Here, it is undisputed that the records requested – “records of per diems and expenses for lodging and meals for all senators from July 1, 2015 through Oct. 8, 2015” – are financial records as defined in the Act. The Senate Open Records Officer acknowledged this in her response and provided same to the Requester with limited redactions.

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- (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 (emphasis added)

Redactions

The Senate Open Records Officer produced the requested financial records of the Senate reflecting the per diems and expenses for lodging and meals for all senators from July 1, 2015 through October 8, 2015; however, asserting legislative privilege, she redacted information revealing the individuals with whom senators met and the specific legislative issue or issues they discussed. Therefore, the question that remains is whether the Senate Open Records Officer properly redacted limited information from the responsive records because that information is protected by legislative privilege. The answer must be yes.

The Senate Open Records Officer acted properly in redacting this information because it is protected by legislative privilege and such redactions are allowed for by the RTKL. Therefore, her decision must be affirmed.

Section 706 of the RTKL permits a legislative agency to redact information from a responsive record if that information is not subject to access. 65 P.S. § 67.706. Information not subject to access includes privileged information. 65 P.S. § 67.305(b)(2). The RTKL defines "privilege" as "the attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." 65 P.S. § 67.102. Importantly, an agency has no discretion to release a document when it is privileged. 65 P.S. § 67.506(c)(2). It follows that if the information contained in the redactions is protected by legislative privilege, it is likewise protected from disclosure under the RTKL. See Levy v. Senate of PA, 65 A.3d 361, 368 (Pa. 2013), *substituted opinion*, 94 A.3d 436 (Pa. Commw. Ct. 2014), *appeal denied*, 106 A.3d 727 (Pa. 2014).

The burden is on the agency to prove by a preponderance of the evidence that a legislative record is exempt from public access. 65 P.S. § 67.708(a)(2). Therefore, pursuant to Section 706, an agency is required to explain the reasons for its redaction of a record, as such redaction constitutes a partial denial. See 65 P.S. § 67.706; In re Carl Prine and the Pittsburgh Tribune-Review v. Green Tree Borough, OOR Dkt. AP 2009-1009, Feb. 5, 2010.

The Senate Open Records Officer has met this burden.

In her Memorandum of Law, the Senate Open Records Officer, citing sections 102 and 303 of the RTKL, maintains the Senate, as a legislative agency, is required to provide legislative records in accordance with the RTKL. Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, p. 6, 11. However, she further maintains that while the legislative intent of the RTKL is for the Senate to release these records, it was also the intent of the Act to permit the Senate to deny access to records that are protected by a privilege. Id. at 7, 11. She acknowledges the Senate bears the burden to show by a preponderance of the evidence that the legislative records are protected – in full or in part – by a privilege in accordance with section 305 of the Act. Id. at 7.

The Senate Open Records Officer released the requested records and made limited redactions to same on the basis of legislative privilege. She maintains that requiring access to the redacted information in the legislative records would contravene the legislative privilege and the RTKL itself. Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, p. 11.

The Senate Open Records Officer argues that legislative privilege enables members of the General Assembly to conduct their legislative activities and fulfill their legislative duties without interference from the courts. Id. at 7.

This privilege, she maintains, is based in the Speech and Debate Clause (the “Clause”) of the Pennsylvania Constitution, which provides:

The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach of surety of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

PA Const. Art. II, Sec. 15. Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, p. 7. The Clause, the Senate Open Records Officer argues, prohibits inquiry into things done and said in the Senate and House in the performance of official duties, because it is essential to protect the “integrity of the legislative process by insuring the independence of individual legislators.” PA School Boards Ass’n. v. Commw. Ass’n. of School Administrators, 805 A.2d 476, 486 (Pa. 2002) (citing Powell v. McCormack, 395 U.S. 486, 502-03 (1969)); PA AFLCIO by George v. Commw., 691 A.2d 1023, 1034 (Pa. Commw. Ct. 1997), *aff’d*, 757 A.2d 917 (Pa. 2000) (quoting U.S. v. Brewster, 408 U.S. 501, 507 (1972)). Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, pp. 7-8. This immunity, she maintains, “insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation.” PA School Boards Ass’n, 805 A.2d at 485 (quoting Powell, 395 U.S. at 503). Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, p. 8.

The Senate Open Records Officer, citing Consumers Education and Protective Ass’n v. Nolan, 386 A.2d 675, 681 (Pa. 1977), explains that this privilege protects legislators from interference with their “legitimate legislative activities” and that any civil or criminal suit brought against a legislator for an action falling within the “legitimate legislative sphere” must be dismissed. Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, p. 7.

She maintains this immunity is “absolute” as to the actions of the legislators that fall within this legislative sphere. Consumer Party of PA v. Commw., 507 A.2d 323, 331 (Pa. 1986), *abrogated on other grounds*, Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commw., 877 A.2d 383 (Pa. 2005) (citations omitted).

The Senate Open Records Officer maintains the redacted information – names of individuals with whom senators met and the topics they discussed – fall within the legislative sphere and, are therefore, protected by the privilege. The sphere of activity, she argues, is not limited to floor debates on proposed legislation or to conduct that actually takes place in the Capitol. Harristown Dev. Corp. v. DGS, 580 A.2d 1174 (Pa. Commw. Ct. 1990), *reversed on other grounds*, 614 A.2d 1128 (Pa. 1992) (holding a state senator was legislatively immune from a suit in connection with his requests for information from a nonprofit corporation); Melvin v. Doe, 48 D. & C. 4th (C.P. Allegh. 2000) (quashing the subpoena of a state senator to attend and testify at a deposition about his activities in filling a judicial vacancy). Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, p. 8. The Senate Open Records Officer asks for a broad interpretation of the privilege to protect legislators from judicial interference with their activities that fall within the legislative sphere. Smolsky v. PA General Assembly, 34 A.3d 316 (Pa. Commw. Ct. 2011), *aff'd*, 50 A.3d 1255 (Pa. 2012). Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, p. 9.

She further maintains that to determine what constitutes activity within the legislative sphere it is proper to look to how the federal courts have interpreted the Speech and Debate Clause. Nolan, 368 A.2d at 680 (holding there is no basis for distinguishing the scope of the Speech and Debate Clause in the Pennsylvania Constitution from that in the U.S. Constitution). Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, p. 8.

Finally, the Senate Open Records Officer argues the RTKL itself specifically envisions and allows for redaction of privileged information:

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access...

65 P.S. § 67.706. This language, read together with the Act's definition of legislative record as well as with section 305 of the Act, the Senate Open Records Officer maintains, supports her position that the redactions here were proper. Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, pp. 8-9.

The Senate Open Records Officer justified these redactions to the Requester via her counsel and in her supplemental response of November 5, as well as in her Memorandum of Law. The Senate Open Records Officer explained the basis for these redactions in her November 5 correspondence to the Requester:

As provided for by Section 305(b)(2) and Section 706, limited information was redacted from the financial records as it is protected by legislative privilege and specifically as to whom the member met with and the topic - as this information relates to legislative activities. Legislative privilege has long been recognized. Legislative privilege is in both the federal and state constitutions and has been affirmed by the courts...

Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, Exhibit D. The Senate Open Records Officer explained in her Memorandum of Law that she reached out to the Requester with this information as a written follow-up to her counsel's telephonic conversation with the Requester on November 4 about the redactions. Senate Open Records Officer Memorandum of Law, Nov. 23, 2015 at 3. The Requester also

memorialized this conversation in a November 4 email to his editor, which is also part of the record here.

The Senate Open Records Officer argues that Levy is analogous to the extent that it allows for limited redactions when a privilege attaches. Levy v. Senate of PA, 34 A.3d 243 (Pa. Commw. Ct. 2011), Levy v. Senate of PA, 65 A.3d 361 (Pa. 2013); Levy v. Senate of PA, 94 A.3d 436 (Pa. Commw. Ct. 2014). Specifically, she maintains Levy is applicable because the Court there approved redactions of descriptions of legal services in financial records where the descriptions “specify the issues or laws researched by the attorneys, specify the services provided and the names of individuals with whom the attorney communicated” because these descriptions have the “potential to reveal the confidential communications shared by attorney and client, the motive of the client in seeking representation and litigation strategy.” Levy v. Senate of PA, 34 A.3d 243 (Pa. Commw. Ct. 2011); Levy v. Senate of PA, 65 A.3d 361 (Pa. 2013) and Levy v. Senate of Pa, 94 A.3d 436 (Pa. Commw. Ct. 2014). Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, pp. 9-10. She maintains that, similarly, disclosing the names of the individuals with whom the senators met and the topics they discussed has the “real potential” to reveal the topic of legislation a senator may be considering for legislative action, and such information therefore deserves the protection of the legislative privilege. Senate Open Records Officer Memorandum of Law, Nov. 23, 2015, p. 10.

The Requester did not provide a Memorandum of Law in support of his appeal and, as summarized above, provided only conclusory support for his position that the redactions were improper.⁵

Legislative Privilege

Elected members of the Pennsylvania General Assembly are entitled to the privileges and immunities set forth in the Speech and Debate Clause of the Pennsylvania Constitution. Firetree, Ltd. v. Fairchild, 920 A.2d 913, 919 (Pa. Commw. Ct. 2007), *appeal denied*, 946 A.2d 689 (Pa. 2008). The Clause provides:

The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach of surety of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

PA Const. Art. II, Sec. 15. The privilege protects against “inquiry into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for those acts.” Sweeney v. Tucker, 375 A.2d 698, 704 (Pa. 1977) (citations omitted); Consumer Party of PA v. Commw., 507 A.2d 323, 330 (Pa. 1986), *abrogated on other grounds*, Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commw., 877 A.2d 383 (Pa. 2005).⁶ The scope of this clause has not been distinguished from that of the federal clause; to the contrary, Pennsylvania courts have sought guidance from federal

⁵ It is questionable whether the Requester’s general averments in his appeal meet the requirements of the RTKL for stating the “grounds upon which the requester asserts that the record is a ...legislative record...” 65 P.S. § 67.1101(a). See Padgett v. PSP, 73 A.3d 644, 646-47 (Pa. Commw. Ct. 2013); see also, Saunders v. PA Dept. of Corrections, 48 A.3d 540, 542-43 (Pa. Commw. Ct. 2011).

⁶ It is important to note that consistent with the recognition of this constitutional privilege, the RTKL expressly exempts from disclosure draft bills and resolutions, as well as records that reflect the internal, predecisional deliberations relating to legislation and the strategy to be used to develop and adopt legislation – all of which are integral to the legislative process. 65 P.S. § 67. 708(b)(9), (10).

cases interpreting the federal clause. Consumers Education & Protective Ass'n v. Nolan, 368 A.2d 675, 680-81 (Pa. 1977); Sweeney, 375 A.2d at 703-04; Firetree, 920 A.2d at 920.

Legislative privilege has long been recognized in this Commonwealth. Geyer's Lessee v. Irwin, 4 U.S. 107 (Pa. 1790) (holding that "a member of the general assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him...And,...that upon principle, his suits cannot be forced to a trial and decision, while the session of the legislature continues"); Consumers Education & Protective Ass'n, 368 A.2d at 680-81 (holding the privilege applied to the actions of the President of the Senate and to the Senate's Chair of its Rules and Executive Nominations Committee when they were acting during session and in committee on an executive nomination) ; Firetree, 920 A.2d at 920-21 (holding legislative privilege applied to a representative's actions seeking input from his constituents because talking to constituents is a "core legislative function") (citing DeSimone, Inc. v. Phila. Authority for Industrial Development, 2003 Phila. Ct. Com. Pl. LEXIS 27, 2003 WL 21390632 (C.P. Phila. 2003)); Commw. v. Orie, 88 A.3d 983, 1011-12 (Pa. Super. Ct. 2014), *appeal denied*, 99 A.3d 925 (Pa. 2014) (holding the privilege did not require "blanket suppression" of documents, many of which were non-legislative, that were seized pursuant to search warrants, but also allowing for Orie to assert the privilege during trial if there was a dispute as to whether the document was legislative).

The purpose of the privilege is to protect the integrity and independence of the legislature, which "reinforces the separation of powers that is fundamental to the structure of both the federal and state governments." Larsen v. Senate of PA, 152 F.3d 240, 249 (3d Cir. 1998), *cert. denied*, Larsen v. Afflerbach, 525 U.S. 1145 (1999) (citations omitted);

Sweeney, 375 A.2d at 703 (citations omitted); Vieth v. Commw. of PA, 67 Fed. Appx. 95, 99 (3d Cir. 2003), *cert. denied*, Republican Caucus of the PA House of Representatives v. Vieth, 540 U.S. 1016 (2003) (citing U.S. v. Brewster, 408 U.S. 501, 507 (1972)). The privilege ensures that legislators are free to represent the interests of their constituents without fear they will later be called into court for that representation. Consumers Education & Protective Ass'n, 368 A.2d at 680-81; Sweeney, 375 A.2d at 703 (citations omitted); Firetree, 920 A.2d at 919; Vieth, 67 Fed. Appx. at 99; Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998) (“the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability.”) (citation omitted); see Larsen, 152 F.3d at 250 (“An additional purpose of legislative immunity is to shield the legislature from the delay and disruption that a lawsuit can bring.”). The privilege is not to make legislators “super-citizens”; therefore, “the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.” Brewster, 408 U.S. at 516-17.

The privilege affords absolute immunity from liability for legislative acts and is broadly construed to effectuate its purposes. Gallas v. Supreme Court of PA, et al., 211 F.3d 760, 773 (3d Cir. 2000) (emphasis added) (citations omitted); Consumers Education & Protective Ass'n, 368 A.2d at 680-81; Sweeney, 375 A.2d at 703-04 (citations omitted). When applicable, the privilege protects against civil and criminal actions, and against actions brought by private individuals, as well as by the Executive Branch. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502-03 (1975) (citations omitted).

To determine if an act is “legislative” courts examine the nature of the act, not the motive or intent of the official performing the act. Firetree, 920 A.2d at 920 (citation omitted); Gallas, 211 F.3d at 773 (citations omitted); see Brewster, 408 U.S. at 508 (citation

omitted). Legitimate legislative activity is more than floor debate on proposed legislation, and is not confined to conduct that occurs only in the State Capitol Building. Firetree, 920 A.2d at 920; Larsen, 152 F.3d at 251 (citations omitted); Brewster, 408 U.S. at 515 (citation omitted). But, the activity must be more than just related to the legislative process. Brewster, 408 U.S. at 516.

For the privilege to attach the conduct need not literally be speech or debate; rather, the conduct must fall within the “legitimate legislative sphere.” Consumers Education & Protective Ass’n, 368 A.2d at 681; Sweeney, 375 A.2d at 703-04; Firetree, 920 A.2d at 920.

The Pennsylvania Supreme Court has defined the breadth of this immunity as follows:

The immunity of the legislators must be ***absolute*** as to their actions within the ‘legitimate legislative sphere.’ To accomplish this we must not only insulate the legislator against the results of litigation brought against him for acts in the discharge of the responsibilities of his office, but also relieve him of the responsibility of defending against such claims.

Firetree, 920 A.2d at 919-20 (emphasis in original) (quoting Consumer Party of PA v. Commw., 507 A.2d 323, 331 (Pa. 1986), *abrogated on other grounds*, Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commw., 877 A.2d 383 (Pa. 2005)) (citation omitted). The privilege provides not only immunity from suit or oral testimony but also protects documents from discovery when those documents contain information that is the result or product of activity within the legitimate legislative sphere. McNaughton v. McNaughton, 72 Pa. D. & C. 4th 363, 369 (C.P. Dauph. 2005) (citations omitted).

The Third Circuit test for determining what constitutes activity within the legislative sphere is twofold: (1) the act must involve a policy-making decision of a general scope; and, (2) the act must be “procedurally legislative” which means “passed by means of established legislative procedures.” Firetree, 920 A.2d at 920 (citing Gallas, 211 F.3d at 774); Orie, 88

A.3d at 1012 (citation omitted). The privilege does not prohibit inquiries into “activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself.” Orie, 88 A.3d at 1012 (citations omitted). Further, the privilege does not protect all conduct “relating to the legislative process.” Id. (citation omitted).

Examples of activity falling within the legislative sphere include: (1) the passage of legislation, Smolsky v. PA General Assembly et al., 34 A.3d 316, 321 (Pa. Commw. Ct. 2011), *aff'd*, 50 A.3d 1255 (Pa. 2012); (2) participation in committee and floor proceedings with respect to the passage or rejection of legislation or with respect to any other matters the constitution places in the jurisdiction of the legislature, Pilchesky v. Rendell, et al., 932 A.2d 287, 289 (Pa. Commw. Ct. 2007), *aff'd*, 946 A.2d 92 (Pa. 2008) (citation omitted); (3) communications between a senator and any other person regarding filling judicial vacancies, Melvin v. Doe, 48 Pa. D. & C. 4th 566, 576 (C.P. Allegh. 2000); (4) voting on the seating of senators, Jubelirer, et al. v. Singel, et al., 638 A.2d 352, 356-57 (Pa. Commw. Ct. 1994); (5) meeting with others to discuss legislative matters, Firetree, 920 A.2d at 921, DeSimone, 2003 Phila. Ct. Com. Pl. LEXIS 27 at *19-21; and, (6) business telephone calls made by members of the General Assembly, Uniontown Newspapers, Inc., et al. v. Roberts, 777 A.2d 1225, 1233 (Pa. Commw. Ct. 2001), *aff'd in part and rev'd in part*, 839 A.2d 18 (Pa. 2003), *on remand*, 893 A.2d 846 (Pa. Commw. Ct. 2006), *aff'd*, 909 A.2d 804 (Pa. 2006).

Moreover, federal courts have found the following activities to fall within the sphere: (1) voting for a resolution, subpoenaing and seizing property and records for a committee hearing, preparing investigative reports, addressing a congressional committee, speaking before the legislative body during session, allocation of funds by leadership pursuant to constitutional authority, McNaughton v. McNaughton, 72 Pa. D. & C. 4th at 370,

378 (citations omitted), see Brewster 408 U.S. at 516, FN 10, Powell v. McCormack, 395 U.S. 486, 502 (1969); (2) PA senators engaged in impeachment proceedings, Larsen, 152 F.3d at 251; (3) legislative “fact-finding”/conversations and meetings between a legislator and others, Virgin Islands v. Lee, 775 F.2d 514, 521 (3d Cir. 1985) (“[F]act-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation.”); (4) telephonic communications between Congressmen⁷, In re Grand Jury Investigation into Possible Violations of Title 18, 587 F.2d 589, 594 (3d Cir. 1978); and, (5) investigations via committee by a legislature, Tenney, et al. v. Brandhove, 341 U.S. 367, 377-78 (1951), *rehearing denied*, 342 U.S. 843 (1951) and Eastland, 421 U.S. at 504 (“the power to investigate is inherent in the power to make laws because ‘[a] legislative body cannot legislate wisely or effectively in the absence of information...’”) (citations omitted).

Examples of activity outside the legitimate legislative sphere include: (1) service by a legislator on the Board of PHEAA because such service is not an integral part of the deliberative process of enacting legislation (instead, it is administration of a public corporation), Parsons, et al. v. PHEAA, 910 A.2d 177, 187-88 (Pa. Commw. Ct. 2006), *appeal denied*, 917 A.2d 316 (Pa. 2007); (2) participation by legislative employees in unconstitutional activities (they are responsible for their actions, even if an action against the legislator is barred), Sweeney, 375 A.2d at 704; (3) performance of legitimate “errands” for constituents, making appointments with government agencies, assistance securing government contracts, preparation of newsletters/news releases, and delivering speeches

⁷ The federal court declined to decide the issue of whether telephone calls between a Congressman or his staff with an outsider to gather information to be considered when voting for or drafting legislation is protected by the privilege. In re Grand Jury, 587 F.2d at 595; *contra* Uniontown Newspapers, 777 A.2d at 1233.

outside of Congress, McNaughton v. McNaughton, 72 Pa. D. & C. 4th at 370, 373 (citing Brewster, 408 U.S. at 512); (4) sending out documents and questionnaires to constituents and others, McNaughton v. McNaughton, 72 Pa. D. & C. 4th at 374 (citations omitted); (5) calendars and date books of a legislator insofar as they reflect appointments that are political rather than legislative in nature, McNaughton v. McNaughton, 72 Pa. D. & C. 4th at 374-75; (6) calendars and date books of a legislator that only reflect the existence of legislative meetings and tasks, McNaughton v. McNaughton, 72 Pa. D. & C. 4th at 374-75; (7) bank statements, cancelled checks, check registers and expense account documentation, because these are only “casually or incidentally” related to the legislative process, McNaughton v. McNaughton, 72 Pa. D. & C. 4th at 375; (8) legislator’s actions of selectively or conditionally distributing his phone records, Uniontown Newspapers, Inc., et al. v. Roberts, 839 A.2d 185, 194-95 (Pa. 2003), *on remand*, 893 A.2d 846 (Pa. Commw. Ct. 2006), *aff’d*, 909 A.2d 804 (Pa. 2006); and, (9) taking a bribe for the purpose of having the legislator’s official conduct influenced, U.S. v. Brewster, 408 U.S. at 526.

Importantly, the Pennsylvania Supreme Court has opined that “nothing is more within the legitimate legislative sphere than **the process leading up to** and the passage of legislation.” Consumer Party of PA, 507 A.2d at 331 (emphasis added) (citation omitted); Kennedy, et al. v. Commw., et al., 546 A.2d 733, 735-36 (Pa. Commw. Ct. 1988). To that end, talking to constituents and others about their concerns with respect to legislative matters falls within the legislative sphere; these conversations are a “core” legislative function. Firetree, 920 A.2d at 921; see Lee, 775 F.2d at 521 (“Legislators must feel uninhibited in their pursuit of information, for ‘a legislative body cannot legislate wisely or effectively in

the absence of information respecting the conditions which the legislation is intended to affect or change..." (citation omitted).

In Firetree, the Commonwealth Court concluded seeking input from constituents was a legitimate legislative activity and deserving of the protection of the privilege. The Court concluded such activity was more than ancillary to the legislative process and furthered the purpose of the privilege to protect the integrity of the legislative process:

Representative Fairchild is a member of the General Assembly, and as such, he is entitled and obligated to seek input from constituents about their concerns; such concerns lie at the core of proposed legislation. **Indeed, nothing is more basic to the independence and integrity of the legislature than its ability to pass legislation.**

Firetree, 920 A.2d at 921-22 (emphasis added) (citations omitted).

The Firetree court noted its conclusion was consistent with DeSimone, where the Philadelphia trial court concluded a City Councilman's similar conversations were protected by the privilege:

[I]t is clear that the 'sphere of legislative activity' extends much farther than merely the debating and drafting of laws. Clearly, there could be no more of an 'integral step in the legislative process' than a public official's right to speak on behalf of his constituency. Government officials are frequently called upon to be ombudsmen for their constituents. In this capacity, they intercede, lobby, and generate publicity to advance their constituents' goals..."This kind of petitioning may be nearly as vital to the functioning of a modern representative democracy as petitioning that originates with private citizens.' **To hold [the Councilman] liable because his actions were not within the 'four corners of legislative activity,' ... belies the purpose of legislative immunity, namely to 'ensure that legislators are free to represent the interests of their constituents without fear that they will be later called to task in courts for that representation.'**

DeSimone, 2003 Phila. Ct. Com. Pl. LEXIS 27 at *19-21 (emphasis added) (citations omitted).

Similarly, the Commonwealth Court concluded that telephone calls made by a legislator are within the legitimate legislative sphere:

Included within the legislative process is drafting legislation and debating bills on the floor of the House. However, we believe that the 'sphere of legislative activity' extends much farther than merely the debating and drafting of laws. It is not uncommon for legislators to spend a majority of time speaking with other lawmakers and constituents, which includes telephone conversations, regarding proposed legislation or other matters of concern...there needs to be protection of 'the integrity of the legislative process,' [therefore] discussions with other lawmakers and constituents is surely included within the ambit of 'legislative process.'

Uniontown Newspapers, 777 A.2d at 1233.

It is within this legal framework that this appeal is analyzed. It follows that for legislative privilege to apply in this instance, the activity of meeting with individuals to discuss legislative matters must be within the legitimate legislative sphere.

After considering the nature of the activity in question the conclusion which must be reached is that the activity of meeting with individuals to discuss legislative matters falls squarely within the sphere of legitimate legislative activity, and therefore, deserves the absolute protection afforded by the privilege. To conclude otherwise would contravene the purpose of the privilege to protect the integrity of the legislative process. Our courts have recognized the process "leading up to" the passage of legislation is sacrosanct. Therefore, the activity in question is precisely the kind that deserves the protection of the privilege, as it is a "core" legislative function for a legislator and his staff to meet with individuals about legislative matters. To deny the protection of the privilege for such activity renders the privilege meaningless and dilutes the effectiveness of the legislature. Such meetings are more than just related to the legislative process; they are an integral part of the legislative process itself. For without such meetings and information-gathering, a legislator would not be able to effectively represent his constituents. He would be inhibited from making informed votes and participating in meaningful debate on proposed legislation. Moreover,

this denies constituents the representation they deserve and expect by hindering the ability of their elected representatives to meet and gather information on these legislative matters.

Further, the activity of meeting with others on legislative matters is more analogous to the types of protected activities recognized by our courts (passage of legislation, communications between legislator and others concerning filling judicial vacancies, voting, investigating) than to those that are not protected, because these meetings are essential to the legislative process. The instances where the activity was held to be outside the legitimate legislative sphere were either casually or incidentally related to the legislative process or not related at all (such as service on a board/public corporation, performance of legislative "errands" for constituents, making appointments with government agencies, assisting securing government contracts or preparing newsletters, political business, bribery). The activity in question – meeting with others to discuss legislative matters – is so much more than incidental to the legislative process. It lies at the heart of the process.

It follows that the activity of meeting with others to discuss legislative matters is within the sphere of legitimate legislative activity and deserving of all the protections afforded by the legislative privilege.

Here, the Senate Open Records Officer redacted the information that is protected by this privilege, but the Requester argues these redactions are "broader than for which the law allows." The Requester, however, offers no legislative or judicial authority to support his position despite being given the opportunity to do so.

Requester's argument is without merit. These limited redactions were proper and limited in scope as they consisted only of information protected by the legislative privilege.

The Senate Open Records Officer provided numerous pages of responsive records to the Requester. She only redacted information that is protected by legislative privilege -- information which would have revealed the individuals with whom the senators met and the legislative matters they discussed.

Finally, the Requester, in his appeal document, argues the Senate will likely rely upon the exemption contained in section 708(b)(29) for withholding the requested information. That section provides an exemption for:

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 Requester was erroneous in his assumption, as the Senate Open Records Officer did not rely upon that exemption when responding to the Request. Instead, she relied on legislative privilege to withhold limited information from the responsive documents. However, the Requester is correct that the financial records at issue are not "correspondence" as described in section 708(b)(29); therefore, that exemption is inapplicable here.

It follows that the Senate Open Records Officer acted properly in redacting limited information from the responsive documents because that information is protected by legislative privilege. Accordingly, the decision of the Senate Open Records Officer is affirmed.

IN THE SENATE OF PENNSYLVANIA

Appeal of Swift on behalf of
The *Times-Tribune*

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Senate RTK Appeal 03-2015

FINAL DETERMINATION
January 11, 2016

ORDER

AND NOW, this 11th day of January 2016, the decision of the Senate Open Records Officer is affirmed, as the redacted information is protected by legislative privilege.



Megan Martin
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.