IN THE SENATE OF PENNSYLVANIA

Appeal of Pellington	:	**Senate RTK Appeal 02-2016**

FINAL DETERMINATION
January 20, 2017

Statement of Facts

By email dated December 12, 2016 addressed to the Senate Open Records Officer, Mr. Corey Pellington (the Requester) sought access to email correspondence of Senator Scott Wagner and his chief of staff with certain individuals concerning certain matters. Specifically, the Requester sought the following:

> any email records that include the below list of individuals, topics, and keywords sent to and from Senator Scott Wagner and his personnel, including but not limited to Chief of Staff Jason High, as well as emails received or sent from the personal email accounts of Senator Wagner (srw@comcast.net) and Jason High in which official business was conducted:
>
> Governor Tom Wolf
> Senator Scott Wagner
> Senator Lisa Baker
> Senator Christine Tartaglione
> Senator Pat Browne
> Secretary Kathy Manderino
> Sara Goulet
> Tom Herman
> Press Secretary Jeffrey Sheridan
> Department of Labor & Industry
> Unemployment Call Center
> Unemployment Compensation Service Centers

Taxpayers
Unions
Service Employees International Union (SEIU) Local 668
Lancaster
Altoona
Allentown
Senate Republican Caucus
Senate Labor & Industry Committee
Senate Appropriations Committee
House Bill 2375
Senate Bill 1335
$57.5 million
Funding
Shutdown
Layoff
Closure
Furlough
Blame
Fault
Responsible
Campaign
Political
Governor
Gubernatorial
Candidacy
Primary Challenge
Challenger
October 19, 2016
November 30, 2016
December 19, 2016.

Senate RTK Law Request No. 1612121427, Dec. 12, 2016. 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 email communication dated December 16, 2016, the Senate Open Records Officer denied access to the records requested by the Requester, stating, "the records to which you requested access under the Right-To-Know Law, 'emails'[,] do not fall within the statutory definition of legislative record." Senate Open Records Officer Response to RTKL Request No. 1612121427, Dec. 16, 2016. The Open Records Officer also referenced in her decision, and attached to it for review by the Requester, copies of two (2) Final Determinations issued by the Senate in prior, similar appeals where the requester was denied access to correspondence and emails because such are not legislative records under the RTK Law. Id.

By email dated December 22, 2016, the Requester timely appealed this denial of access. On December 27, 2016, this Office notified the Senate Open Records Officer of the appeal, and by separate letter, set forth a briefing schedule for the parties. 65 P.S § 67.1102(a)(1).

On January 4, 2017, the Senate Open Records Officer filed a Memorandum of Law in support of her denial of access. The Open Records Officer set forth several arguments in support of her decision to deny access to the requested emails.

First, the Open Records Officer maintains the appeal should be dismissed because the Requester did not comply with the requirements of the RTK Law when he failed to state why the requested emails are legislative records and when he failed to address the grounds for denial of access. Senate Open Records Officer, Memorandum of Law, Jan. 4, 2017, p. 3.

Alternatively, the Open Records Officer maintains that if the appeal is not dismissed, then her decision should be upheld because emails are not legislative records as defined in the Act. Senate Open Records Officer, Memorandum of Law, Jan. 4, 2017, p. 3.

In support of her arguments, the Open Records Officer avers that legislative records are not the same as public records under the RTK Law and the Senate is only required to release legislative records. Id. Further, the Open Records Officer maintains the Requester's appeal does not offer any reasons to support that emails are legislative records under the RTK Law. Id. at 5. The Open Records Officer also maintains the Requester did not offer any reasons why the two (2) cited decisions of the Senate Appeals Officer, which addressed the email correspondence issue, should be overturned. Id.

Moreover, the Open Records Officer argues the Requester's reliance on the fact that Senator Wagner has filed a RTK Law request with an executive branch agency is misplaced. She maintains the Senator's request for those executive branch records, which are different from legislative records, is inapplicable because the RTK Law sets forth different standards of release depending upon the type of record being requested. Id. at 5-6.

Finally, the Open Records Officer avers that even if the requested emails are legislative records under the RTK Law, they are still not releasable for two additional reasons: (1) they are protected by legislative privilege; and, (2) they are

protected because the records are internal, predecisional deliberations of the Senate. The Open Records Officer maintains the protections afforded by Pennsylvania's Speech and Debate Clause should be widely construed to "protect legislators from judicial interference with their legitimate legislative activities; even where the activity questioned is not literally speech or debate," so long as it falls within the legitimate legislative sphere. Senate Open Records Officer, Memorandum of Law, Jan. 4, 2017, p. 6-9 (citations omitted). Therefore, the requested emails are protected by legislative privilege. Id. at 9. Further, she maintains the emails, which are communications between a Senator and his staff, are not subject to release because such communications are internal, predecisional deliberations. Id.

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 a brief statement of support in the appeal itself. In his appeal, the Requester did not address the Senate Open Records Officer's grounds for denying his request nor did he state any legal grounds upon which he believes the requested emails constitute legislative records. He also did not address the two (2) decisions the Open Records Officer supplied, which address the issue of whether email communications are legislative records under the Act. Rather, the Requester makes generalized arguments in support of his appeal that he should have access to the requested emails. He argues the "citizens of the commonwealth have a right to know what led to his [Senator Wagner's] decision to force the furlough of [certain]

employees. The denial of access to emails with specific and clear definition is in clear disregard for the virtue of the law and citizens' ability to check the power of government." Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1612121427, Dec. 22, 2016, p. 1. The Requester further maintains that denying his request perpetuates "a culture in which legislative officials operate in the shadows" and "allows Wagner to keep discussions made over tax-payer funded mechanisms private and begs the questions as to whether the public good has been served, as there is no ability for the citizenry to ensure those conversations aren't political in nature." Id. The Requester also maintains Pennsylvanians "deserve to know if this visit [by Wagner] was an attempt to campaign on the public dime." Id. Further, the Requester argues that if Senator Wagner is allowed by law to make RTKL requests, then so too, is the Requester. Id. at 1-2. Finally, the Requester states that he "request[s] a copy of all emails within the scope of the definitions set in Right to Know request 1612121427." Id.

Discussion

This appeal presents a question of whether email correspondence from and to Senate members and staff are "legislative records" within the meaning of the Right-to-Know Law. The RTK Law requires legislative agencies to provide legislative records in accordance with the Act. 65 P.S. § 67.303(a). It is presumed 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. 65 P.S. § 67.305(b). 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).

Dismissal on Procedural Grounds

Before addressing the merits of this appeal, the Senate Open Records Officer's procedural issue must first be resolved. The Open Records Officer maintains this appeal should be dismissed for noncompliance with the provisions of the Act. Specifically, the Open Records Officer avers the Requester's appeal is deficient in two respects. First, the Requester failed to state why the requested emails are legislative records. And, second, he failed to address the Open Records Officer's grounds for denial of access.

The RTK Law requires a requester to include in the appeal "the grounds upon which the requester asserts that the record is a public record, legislative record or financial record" and further requires that the requester "shall address any grounds stated by the agency for delaying or denying the request." 65 P.S. § 67.1101(a)(1). When a requester fails to state why the requested records are releasable records

under the Act, his appeal is properly dismissed. Padgett v. PA State Police, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013); see In re Robert Brown v. Westtown-East Goshen Regional Police Dept., OOR Dkt. AP 2017-0020, Jan. 6, 2017. Further, when a requester fails to address the agency's grounds for denial of access to the requested records, that appeal is also properly dismissed. Padgett, 73 A.3d at 647; Dept. of Corrections v. OOR, 18 A.3d 429, 433-34 (Pa. Commw. Ct. 2010) (finding that, based on the "clear and unambiguous" language of Section 1101(a), it is both "appropriate" and "statutorily required" that a requester address the agency's grounds for denying the request); see In re Robert Brown v. Westtown-East Goshen Regional Police Dept., OOR Dkt. AP 2017-0020, Jan. 6, 2017; Lybrand v. PA Dept. of Corrections, OOR Dkt. AP 2016-2027, Jan. 5, 2017; Holloway v. PA Dept. of Corrections, OOR Dkt. AP 2016-2021, Jan. 5, 2017; Caliman v. City of Phila., Dist. Attorney, OOR Dkt. AP 2016-2051, Dec. 21, 2016. The requester is not required to prove anything in his appeal; rather, he must identify the "defects" in an agency's stated reasons for denying the request. Dept. of Corrections, 18 A.3d at 434.

For an appeal to be legally sufficient under this provision of the Act, at a minimum, the requester's appeal "must address any grounds stated by the agency...for denying the request." Padgett, 73 A.3d at 647 (citation omitted); see Saunders v. Dept. of Corrections, 48 A.3d 540, 542-43 (Pa. Commw. Ct. 2012). Moreover, if an agency sets forth exemptions that apply and prevent disclosure, then the requester must also state why the requested records do not fall under the

asserted exemptions, and thus, that the records are releasable records under the Act. Padgett, 73 A.3d at 647 (citation omitted). In Padgett, the requester did not explain the public nature of the records or claim the records were public. Further, he did not address the PSP's reasons for withholding the records. Padgett, 73 A.3d at 647. Rather, the requester generally stated the RTK Law exceptions do not apply. The Court concluded such generalized statements do not satisfy the requirements of Section 1101(a). Id.; see Dept. of Corrections, 18 A.3d at 433-34 (finding the statement in the requester's appeal that the "above PA right to know requests are public" did not satisfy the requirement of addressing the agency's grounds for denial of the request).

Importantly, a requester's motivation for making his request is not relevant and the requester's explanation of why he believes the agency should release the records to him does not satisfy the requirements of Section 1101(a) of the Act. Padgett, 73 A.3d at 647. In Padgett, the Court was not compelled by the requester's argument that he was entitled to the records because they were related to a criminal investigation in which he was a party. See also, LeGrande v. Dept. of Corrections, 920 A.2d 943, 950 (Pa. Commw. Ct. 2007); *appeal denied*, 931 A.2d 659 (Pa. 2007) (court is bound by language in the RTK statute despite compelling public policy arguments) (citation omitted).

Therefore, for this appeal to proceed under the Act, at a minimum, the Requester must have stated the grounds upon which he believes the emails are

legislative records and subject to release, and he must also have addressed the Open Records Officer's reasons for denying his request. Generalized assertions that the requested emails should be released are not sufficient under the Act.

Here, the Requester failed to satisfy either requirement of the Act. He did not state why the requested emails are legislative records subject to release and he did not address the Open Records Officer's grounds for denying his request. Instead, he provided various, generalized reasons why the emails should be released, but these generalized averments do not meet the requirements of the Act. Although these are compelling public policy arguments that further the purposes of the RTK Law to promote transparency and accountability of government, they alone are not enough. Neither a requester's motivation for making a request nor his explanation of why he believes an agency should release records is enough to meet the Act's requirements. Further, the Requester failed to address the two (2) Senate decisions provided by the Open Records Officer, which address whether emails are legislative records under the RTK Law, and to state why these decisions are inapplicable or distinguishable or should be reversed. The Requester's general averments, along with his singular statement that he "request[s] a copy of all emails within the scope of the definitions set in Right to Know request 1612121427[,]" are not sufficient to meet the requirements of the Act. The Requester is required to state why the requested emails are legislative records and to address the grounds for denial of access. He met neither requirement under the Act.

It follows that this appeal is dismissed as insufficient; the Requester failed to state why the requested records are legislative records, and the Requester also failed to address the Senate Open Records Officer's grounds for denying access.

Legislative Records

Assuming *arguendo* this appeal is sufficient, we turn next to the merits of the appeal. The issue is whether email correspondence from and to Senate members and staff are legislative records as defined in the RTK Law.

The Requester maintains the requested email correspondence must be released under the Act because to do otherwise disregards the "virtue of the law and citizens' ability to check the power of government." The Senate Open Records Officer maintains the email correspondence is not releasable because the Senate is only required to release legislative records under the Act and the language of the Act is clear that email correspondence falls outside the Act's definition of "legislative record." For the reasons that follow, the decision of the Senate Open Records Officer is sustained because the requested emails are not legislative records as defined in the RTK Law.

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); Levy v. Senate of Pennsylvania, 65 A.3d 361, 380

(Pa. 2013), *reargument granted, in part, opinion withdrawn*, 2014 Pa. Commw. LEXIS 127 (Pa. Commw. Ct. Feb. 27, 2014), *substituted opinion*, 94 A.3d 436 (Pa. Commw. Ct. 2014), *appeal denied*, 106 A.3d 727 (Pa. 2014). It is presumed the General Assembly does not intend an absurd, impossible, or unreasonable result. 1 Pa.C.S.A. § 1922(1). It follows that, in this case, it must be ascertained whether it was the intent of the legislature to include email correspondence within the Act's definition of "legislative record." The answer to that question must be no.

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." Levy, 65 A.3d at 380; 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, 65 A.3d at 381) (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, Donahue, 59 A.3d at 1168, *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 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).

Finally, although a requester may make compelling public policy arguments in support of his request, these alone cannot be considered. Courts are bound by "the definitional limitations found within the statutory language of the Law [RTK Law] itself as set out by the General Assembly and interpreted by the Pennsylvania Supreme Court." LeGrande v. Dept. of Corrections, 920 A.2d 943, 950 (Pa. Commw. Ct. 2007); *appeal denied*, 931 A.2d 659 (Pa. 2007).

Here, the relevant statutory provisions are clear and unambiguous; they specifically provide for different types of access to different types of records by different agencies. 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. Further, 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.

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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.
(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.

The Legislature, if it so intended, could have created a more expansive definition by including other items in the list, such as emails, 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, the email communications sought by the Requester do not fall within the RTK Law's clear and unambiguous definition of a legislative record. Nowhere in this comprehensive list of accessible legislative records is found the mention of email correspondence from and to members of the Senate and staff. Because email correspondence is not enumerated as one of the nineteen categories of information constituting a legislative record, it reasonably follows that it was not the intention of the General Assembly to make such correspondence into accessible legislative records under the Act. Just as the RTK Law was not expanded to include agency personnel not listed in the statute, so too, here the language of the RTK Law defining a legislative record is plain and unambiguous, and as such, should not be expanded to encompass items the legislature chose not to include in the Act.

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(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

Moreover, the Requester's reliance on the fact that Senator Wagner submitted a RTK Law request to an executive branch agency is misplaced. The Requester argues that because Senator Wagner requested documents he, too, should be able to do so. There is nothing to prevent the Requester from making requests under the RTK Law. When he makes such requests to the Senate, the Senate, as a legislative agency, is only required to release legislative records in accordance with the Act, which the requested emails are not. 65 P.S. §§ 67.102, 67.303. If the Requester requests documents of the executive branch, then different provisions of the Act will apply. There is simply no merit to this argument.

In summary, the Requester is seeking access to documents that are not included in the Act'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 Miller, Senate RTK 01-2013 (sustaining the decision of the Senate Open Records Officer that emails are not legislative records as defined in the RTK Law); Appeal of Carollo, Senate RTK 02-2012 (sustaining the decision of the Senate Open Records Officer that correspondence to/from Senators and/or staff is not a legislative record under the RTK Law); see also Appeal of Nicholas, Senate RTK 05-2009.

Legislative Privilege

The Senate Open Records Officer also maintains that even if the requested emails are legislative records under the Act, they are still not releasable because they are protected by legislative privilege. The Open Records Officer raised this issue in her Memorandum of Law and gave a succinct summary of legislative privilege as it is applied in this Commonwealth. She did not, however, apply her analysis with specificity to the content of the requested emails. Instead, she generally maintains all requested emails are protected by the privilege in order to protect the integrity of the legislative process.

The Requester did not address this argument, as he did not file any additional documentation or a Memorandum of Law to support his appeal.

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), *reargument denied en banc*, 2007 Pa. Commw. LEXIS 239 (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, 408-09 (Pa. 2005); Lincoln Party v. General Assembly, 682 A.2d 1326, 1333 (Pa. Commw. Ct. 1996).[2] 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 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 "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

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[2] It is important to note that consistent with the recognition of this constitutional privilege, the RTK Law 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).

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), *writ of habeas corpus dismissed, certificate of appealability denied*, Orie v. Zappala, U.S. Dist. LEXIS 34585 (W.D. Pa. March 17, 2016) (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 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, 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 Congressmen[3], In re Grand Jury Investigation into Possible Violations of Title 18,

[3] 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

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 outside of Congress, 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, 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

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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.

legislative in nature, 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, 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, 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, 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 (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 (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 (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. The Requester, in his RTK Law request, sought various emails "in which official business was conducted." Senate RTKL Request No. 1612121427, Dec. 12, 2016. It follows that for legislative privilege to apply in this instance, the activity of a Senator or his staff corresponding "official business" via email 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 a Senator or his staff corresponding "official business" via email falls within the sphere of legitimate legislative activity, and therefore, deserves the 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. Just as it is a "core" legislative function for a legislator and his staff to meet with individuals about legislative matters, in today's age of technology, such meetings have often been replaced by email communications.

To deny the protection of the privilege for such activity renders the privilege meaningless and dilutes the effectiveness of the legislature. Such email correspondence is more than just related to the legislative process; it is an integral part of the legislative process itself. For without such information-gathering via email, 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 discuss issues and gather information via email on legislative matters.

Further, the activity of corresponding "official business" via email 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 communications 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).

It follows that the activity of a Senator or his staff corresponding "official business" via email is within the sphere of legitimate legislative activity and deserving of the protection afforded by legislative privilege. The Senate Open Records Officer properly denied access to these protected emails.

Internal, Predecisional Deliberations

The Senate Open Records Officer lastly argues the requested emails are protected from release because these communications between a Senator and staff are internal, predecisional deliberations. She, however, offered no case law in support of this argument, and the Requester did not address it either, as he did not submit any additional supporting documentation or a Memorandum of Law to support his appeal.

Given the disposition here of the procedural and substantive issues, this Officer need not reach the merits of the internal, predecisional deliberations argument. See PUC v. Gilbert, 40 A.3d 755, 762 n.9 (Pa. Commw. Ct. 2012); Dept. of Health v. OOR, 4 A.3d 803, 816 n.13 (Pa. Commw. Ct. 2010).

Because this appeal is dismissed as insufficient, and alternatively, because the requested email records are not legislative records as defined in the RTK Law, and even if they are legislative records, they are protected from release by legislative privilege, the decision of the Senate Open Records Officer is sustained.

Conclusion

This appeal is dismissed as insufficient; the Requester failed to state why the requested records are legislative records, and the Requester also failed to address the Senate Open Records Officer's grounds for denying access.

In the alternative, assuming *arguendo* the appeal is sufficient, the decision of the Senate Open Records Officer is sustained. The requested emails are not legislative records under the Act, and even if they are, they are not releasable because they are protected by legislative privilege.

Given the disposition of these aforementioned issues, this Officer makes no decision on the merits of the internal, predecisional deliberations argument, which was not adequately addressed by the parties.

IN THE SENATE OF PENNSYLVANIA

Appeal of Pellington	:	**Senate RTK Appeal 02-2016**

FINAL DETERMINATION
January 20, 2017

ORDER

AND NOW, this 20th day of January 2017, the appeal is dismissed as insufficient. Alternatively, the decision of the Senate Open Records Officer is sustained. The documents sought by Requester are not legislative records and, thus, not accessible under the Right-to-Know Law; even if they are legislative records, they are 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.