

IN THE SENATE OF PENNSYLVANIA

Appeal of St. Hilaire

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Senate RTK Appeal 01-2018

**FINAL DETERMINATION
February 26, 2018**

Statement of Facts

By emails dated November 14, 2017 (two on this date) and November 15, 2017 addressed to the Senate Open Records Officer, Ms. Amanda St. Hilaire (the Requester) sought access to numerous documents from the Senate. These requests were 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).

The Requests

In the first request, Senate RTK Law Request 1711141409, the Requester sought the following:

- All records showing the budget for sexual harassment training for PA Senators and PA Senate employees in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.
- All records showing the amount of money actually spent on sexual harassment training for PA Senators and PA Senate employees in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.
- All records showing the requirements for how often, when, and how sexual harassment training must occur for PA Senators and PA Senate employees in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.

- **All records showing how often, when, and for whom sexual harassment training actually occurred for PA Senators and PA Senate employees in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

Senate RTK Law Request No. 1711141409, Nov. 14, 2017.

In the second request, Senate RTK Law Request 1711141413, the Requester sought the following:

- **All sexual harassment and sexual harassment reporting policies applying to all PA Senators and PA Senate employees [sic] 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**
- **All procedures outlined for PA Senators and PA Senate employees to follow when reporting sexual harassment from 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017 (if these procedures are different from/considered a separate category than the above policies).**
- **All procedures outlined for how investigations into sexual harassment shall be conducted and concluded for PA Senators and PA Senate employees from 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**
- **All records showing how many sexual harassment complaints have been reported to the PA Senate in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**
- **All records showing how many people conduct sexual harassment training for PA Senators and PA Senate employees [sic] 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

Senate RTK Law Request No. 1711141413, Nov. 14, 2017.

In the third request, Senate RTK Law Request 1711151425, the Requester sought the following:

- **All itemized legal bills for the Pennsylvania Senate in 2016 and 2017.**
- **All records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017.**

- **All records showing how much money the Pennsylvania Senate paid defending lawsuits in 2012, 2013, 2014, 2015, 2016 and 2017.**
- **All records showing how much money the Pennsylvania Senate paid specifically defending sexual harassment lawsuits in 2012, 2013, 2014, 2015, 2016, and 2017.**

Senate RTK Law Request No. 1711151425, Nov. 15, 2017.

The Senate Open Records Officer's Response

The Senate Open Records Office consolidated all three requests and responded to the Requester, via email communication dated December 21, 2017.¹

For RTK Law Request No. 1711141409, the Open Records Officer responded as follows:

- **All records showing the budget for sexual harassment training for PA Senators and PA Senate employees in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer denied the request for these documents, providing there are no financial records that are responsive and that the Senate does not budget in the manner suggested in the request.

- **All records showing the amount of money actually spent on sexual harassment training for PA Senators and PA Senate employees in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer denied this request, providing there are no financial records.

- **All records showing the requirements for how often, when, and how sexual harassment training must occur for PA Senators and PA Senate employees in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer granted this request and provided a copy of the Senate's Prevention of Workplace Harassment, COMO Policy 1997:01, to the Requester.

¹ The Senate Open Records Officer extended her response time by 30 days. See 65 P.S. § 67.902.

- **All records showing how often, when, and for whom sexual harassment training actually occurred for PA Senators and PA Senate employees in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

This request was granted in part and denied in part by the Open Records Officer. The Open Records Officer granted in part the request and referred the Requester to the previously referenced COMO Policy 1997:01, as this outlines the policy. The Open Records Officer stated this Policy is the only responsive legislative record to the request. Further, the Open Records Officer denied in part access to any other records maintaining those were not legislative records under the RTK Law. The Open Records Officer cited to and provided copies of several Senate RTK Law Final Determinations² in support of her denial on this basis. The Open Records Officer also maintained the Senate is not required to create a record to respond to a RTK Law request.

Senate Open Records Officer, Response to Requester, Dec. 21, 2017.

For RTK Law Request No. 1711141413, the Open Records Officer responded as follows:

- **All sexual harassment and sexual harassment reporting policies applying to all PA Senators and PA Senate employees [sic] 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**
- **All procedures outlined for PA Senators and PA Senate employees to follow when reporting sexual harassment from 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017 (if these procedures are different from/considered a separate category than the above policies).**
- **All procedures outlined for how investigations into sexual harassment shall be conducted and concluded for PA Senators and PA Senate employees from 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

² The Open Records Officer provided copies of the following Final Determinations to the Requester: Senate RTK Appeals: 01-2009 & 02-2009, Scolforo (correspondence is not a legislative record); 02-2012, Carollo (communications are not legislative records); 01-2013, Miller (emails are not legislative records); 02-2016, Pellington (emails are not legislative records); 01-2017, Coulombis (reports are not legislative records).

For all three of the above requests, the Open Records Officer granted same, referencing the previously provided Prevention of Workplace Harassment, COMO Policy 1997:01.

- **All records showing how many sexual harassment complaints have been reported to the PA Senate in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

This request was denied in part and granted in part by the Open Records Officer. The Open Records Officer denied access providing that “most of the records are not *legislative records*.” (emphasis in original). To support this denial, the Open Records Officer referred the Requester to the previously provided RTK Law Final Determinations. The Open Records Officer also granted in part the request here when she provided to the Requester a “report of financial records relative to a legal engagement letter where legal assistance was provided in regards to investigating sexual harassment complaints filed in 2016 and the only year for which there are financial records responsive to your request.” The Open Records Officer further provided that if the Requester wanted copies of the engagement letter, vouchers and the supporting documentation, to let her know and she would have those items pulled, copied and reviewed for redaction.

- **All records showing how many people conduct sexual harassment training for PA Senators and PA Senate employees [sic] 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer denied this request on the basis that no legislative records are responsive.

Senate Open Records Officer, Response to Requester, Dec. 21, 2017.

For RTK Law Request No. 1711151425, the Open Records Officer responded as follows:

- **All itemized legal bills for the Pennsylvania Senate in 2016 and 2017.**

The Open Records Officer granted this request, providing an expense report to the Requester.

The Open Records Officer again offered to have pulled, copied and reviewed for redaction copies of the engagement letters, vouchers and supporting documentation.

- **All records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer denied this request, providing that lawsuits are not legislative records; rather, they are records of the courts and accessible pursuant to court rules/procedures.

- **All records showing how much money the Pennsylvania Senate paid defending lawsuits in 2012, 2013, 2014, 2015, 2016 and 2017.**

The Open Records Officer denied this request as not sufficiently specific. Further, the Open Records Officer maintained she is not required to create a record that does not exist, and that she is not required to maintain a record in a manner which is not currently done. The Open Records Officer explained that Senate financial records are maintained and paid pursuant to engagement letters, which do not reference a lawsuit or legal claim by name, and which also do not reference whether the representation was for “defending lawsuits.” She asked the Requester to provide a specific case, which would give her office sufficiently specific information to ascertain the requested financial records. In the alternative, the Open Records Officer offered to run a report of all legal bills for the years 2012-15.

- **All records showing how much money the Pennsylvania Senate paid specifically defending sexual harassment lawsuits in 2012, 2013, 2014, 2015, 2016, and 2017.**

The Senate Open Records Officer denied this request on the basis that there are no responsive records. The Open Records Officer explained in her response that she did confer with

caucus legal counsel and there are no financial records responsive to the specifics of the request, as there were no lawsuits filed against the Senate related to sexual harassment claims.

Senate Open Records Officer, Response to Requester, Dec. 21, 2017.

The Appeal

By email dated January 10, 2018, the Requester timely appealed this denial of access. On January 12, 2018, 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 February 1, 2018, this Officer requested, via email, and the Requester approved, a 2-week extension for issuing the Final Determination in this appeal.

The Requester appeals denial and/or partial denial of the following requests:

- **All records showing how many sexual harassment complaints have been reported to the PA Senate in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**
- **All records showing how many people conduct sexual harassment training for PA Senators and PA Senate employees [sic] 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**
- **All records showing how often, when, and for whom sexual harassment training actually occurred for PA Senators and PA Senate employees in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**
- **All records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017.**

The Requester, in her appeal, maintains these requested documents are “public records in the possession of the Senate” and that her request is sufficiently specific. She also maintains the records “do not qualify under the exemptions the Senate claims.”

Further, the Requester avers the records requested “are proof that administrative staff manuals, policies and regulations are being followed. They are also financial records.” She maintains that “[s]exual harassment complaints, records showing who conducts and receives

sexual harassment training, sexual harassment training budgets, and lawsuits all document an agency's use or disposal of services, supplies, materials, equipment, and property." The Requester argues that "[i]nvestigating a complaint, conducting harassment training, and defending lawsuits" are all actions that cost the taxpayers money, and that it is not transparent to turn over such records that "document and confirm how taxpayer-funded systems work." The Requester further argues that even though records such as lawsuits may exist with other agencies, the Senate is still obligated to produce same. Finally, the Requester argues the Senate should release this information under the discretionary provisions of the RTK Law, which she maintains, do not prevent the Senate from releasing the requested records. Requester Appeal to Senate Open Records Officer Response to RTKL Request Nos. 1711141409, 17111414113, and 1711151425, Jan. 10, 2018.

On January 22, 2018, the Senate Open Records Officer filed a Memorandum of Law in support of her denial/partial denial of access.

The Open Records Officer set forth several general arguments that she termed "preliminary" in support of her decision to deny or partially deny access to the requested documents. First, the Open Records Officer maintains the "presumption of access to records of the Senate is only for legislative records" and that legislative records are defined separately from public records in the RTK Law. Senate Open Records Officer, Memorandum of Law, Jan. 22, 2018, p. 5. In support of her argument, the Open Records Officer notes the specificity and exclusivity of the list of items deemed legislative records in the RTK Law, and that there exists extensive Senate precedent for upholding denials of similar RTK Law requests for information not found on that list, because such information does not constitute a legislative record as defined in the RTK Law. *Id.* at 7. The Open Records Officer cites Senate RTK Law Appeals: 02-2012,

Appeal of Carollo (communications are not legislative records); 01-2013, Appeal of Miller (emails are not legislative records); 02-2016, Appeal of Pellington (emails are not legislative records); and, 01-2017, Appeal of Couloubis (reports are not legislative records) to support this proposition. Senate Open Records Officer, Memorandum of Law, Jan. 22, 2018, p. 5.

Further, the Open Records Officer maintains she properly applied the presumption for access that is applicable to the Senate (legislative records), and that the records are not and should not be considered public records for purposes of this request to a legislative agency (the Senate). Id. at 7-8. To do so, she maintains, would contravene the plain language of the statute and the intent of the General Assembly. Id. at 8. Moreover, the Open Records Officer maintains the denials/partial denials were not based on the application of an exemption; rather, these were because the requested items are not legislative records as defined in the RTK Law. Id.

Next, the Open Records Officer avers the Requester's argument that the requested items must be released because these records are "proof that administrative staff manuals, policies, and regulations are being followed" fails, because while such manuals, policies and regulations are accessible under the RTK Law since they are enumerated therein, the requested items are neither included in the list nor are they themselves manuals, policies, or regulations, or part thereof. Id. at 9.

The Open Records Officer next maintains the Requester's argument that all requested records, where the requests are sufficiently specific, should be considered financial records under the Act because these records "document an agency's use or disposal of services, supplies, materials, equipment, and property," also fails. This is so, she maintains, because the Requester's argument "fails to recognize the fundamental part of the definition of financial records that of being 'any account, voucher or contract dealing with...'" Id. at 9. The Open

Records Officer maintains that under the essential component analysis, the records being requested do not bear sufficient connection to accounts, vouchers and contracts. Senate Open Records Officer, Memorandum of Law, Jan. 22, 2018, p. 9. She further avers that in responding to the Requester, she did provide financial records that were responsive, and she attested to this via an affidavit (Exhibit E to Open Records Officer's Memorandum of Law). Id. at 10.

She lastly maintains that she is not required to create a record of the costs associated with an activity, including complying with policies and manuals, where one does not exist. Id.

The Open Records Officer also set forth specific arguments in support of her response to the Requester. These are as follows:

- **All records showing how often, when, and for whom sexual harassment training actually occurred for PA Senators and PA Senate employees in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer granted in part and denied in part this request. She provided a copy of the Senate's Workplace Harassment Policy (COMO Policy, 1997:01) as the only legislative record responsive to the request. She denied access to all other requested records here, citing they are not legislative records as defined in the RTK Law.

The Open Records Officer maintains she properly responded to the Requester here because "any other records connected with the policy, the annual presentation of the policy to each employee and member and the return of a signed copy, are not legislative records." Id. at 11. She attested there are no financial records responsive to this request (see Exhibit E), and that because of this she is not required to create a responsive record indicating when training took place. Id. Therefore, she maintains, her actions were proper and should be sustained.

- **All records showing how many sexual harassment complaints have been reported to the PA Senate in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer denied in part and granted in part this request. She denied in part when she indicated that most of the records responsive to the request are not legislative records. She cited applicable Senate precedent on this point -- that records not legislative are not releasable under the RTK Law. Senate Open Records Officer, Memorandum of Law, Jan. 22, 2018, p. 12. The Open Records Officer granted in part this request when she provided a report of financial records relative to a legal engagement letter where legal assistance was provided in regard to investigating sexual harassment complaints filed in 2016 and that this was the only year for which there are responsive financial records. She offered copies of the engagement letter, vouchers and the supporting documentation. Id. at 12.

The Open Records Officer maintains she properly responded to this request because there are no other financial records. She further maintains complaints are not legislative records, and even if they are public records, they are not accessible pursuant to statutory exemption in that they are grievances. See section 708(b)(7)(vii) of the RTK Law. Id. at 12. By way of further support, the Open Records Officer attested in her affidavit (Exhibit E) that the Office of the Chief Clerk of the Senate receives complaints of sexual harassment under the Senate Policy and that said complaints are filed in an employee's personnel file as a grievance. Id. at 13. Moreover, she maintains she is not required to create a record, including a compilation of complaints, to respond to a request. Id. Therefore, she maintains, her response denying the request was proper and should be sustained.

- **All records showing how many people conduct sexual harassment training for PA Senators and PA Senate employees [sic] 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer denied this request, citing no financial records are responsive to same and referencing Exhibit E. Further, she maintains any other records are not legislative records, are maintained pursuant to the Senate's Workplace Harassment Policy, and would be exempt from disclosure for reasons previously articulated. Senate Open Records Officer, Memorandum of Law, Jan. 22, 2018, p. 13. Therefore, she maintains, her decision was proper.

- **All records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer denied this request, maintaining that lawsuits are not legislative records under the RTK Law. Rather, they are records of the courts and accessible as provided by court rules or procedures. Id.

The Open Records Officer further maintains this request lacks the requisite statutory specificity as required in section 703 of the RTK Law. She maintains that here, if the request were sufficiently specific, then responsive legislative records would be provided, and in this case only financial records would be responsive "with an explanation as to how the records are maintained." She refers then to her responses in Senate RTK Law Request No. 1711151425 as an example. Id. at 13-14.

Also, the Open Records Officer avers she is not required to create a record here – a list of lawsuits -- as the Act contains no such requirement. Id. at 14. Therefore, she maintains her actions denying this request should be sustained.

Lastly, the Open Records Officer argues she is not mandated to use her discretion and release the requested information; therefore, this portion of the Requester's appeal is not

appealable. She argues the RTK Law does not give authority to this Officer or any other Appeals Officer to “review or analyze whether the agency should have exercised this discretion in favor of disclosure.” Senate Open Records Officer, Memorandum of Law, Jan. 22, 2018, pp. 14-15. Therefore, she argues, this argument by the Requester and this part of the appeal should be dismissed without further consideration.

Although the Requester has not availed herself of the opportunity to file any further documentation or a Memorandum of Law to support her appeal, she did provide support in the appeal itself as previously discussed, *supra*.

Discussion

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), *appeal granted*, 15 A.3d 427 (Pa. 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.*

Here, the Requester seeks access to the following records, which access the Senate Open Records Officer either denied or partially denied:

- All records showing how many sexual harassment complaints have been reported to the PA Senate in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.
- All records showing how many people conduct sexual harassment training for PA Senators and PA Senate employees [sic] 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.
- All records showing how often, when, and for whom sexual harassment training actually occurred for PA Senators and PA Senate employees in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.

- **All records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017.**

Each request is addressed separately below in the order in which the Open Records Officer addressed same.

- **All records showing how often, when, and for whom sexual harassment training actually occurred for PA Senators and PA Senate employees in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer granted in part and denied in part this request. She provided a copy of the Senate's Workplace Harassment Policy (COMO Policy, 1997:01) as the only legislative record responsive to the request. She denied access to all other requested records here, citing they are not legislative records as defined in the RTK Law. The Open Records Officer maintains she properly responded to the Requester here because "any other records connected with the policy, the annual presentation of the policy to each employee and member and the return of a signed copy, are not legislative records." She cited Senate precedent on this issue to further support her decision. Additionally, she maintains she is not required to create a record in response to a RTK Law request. She maintains her actions were proper and should, therefore, be sustained. For the reasons that follow, the decision of the Open Records Officer is sustained.

Legislative Records

The RTK Law explicitly requires legislative agencies to provide legislative records in accordance with the Act. 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 Act, however, does not require the Senate to create records that do not currently exist; it likewise does not require the Senate 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 to public records. See 65 P.S. §§ 67.102, 67.301, 67.302, 67.303.

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).

Here, the Requester maintains the requested records (**records showing how often, when, and for whom sexual harassment training actually occurred for PA Senators and PA Senate employees**) are “public records in the possession of the Senate” and that they are financial records because they “document an agency’s use or disposal of services, supplies, materials, equipment, and property.” The Senate Open Records Officer maintains the requested records are not releasable because the Senate is only required to release legislative records under the Act, and the language of the Act is clear that the requested records fall outside the Act’s definition of legislative record.

In analyzing the scope of the term legislative record, Pennsylvania's Statutory Construction Act is our guide. Pennsylvania's Statutory Construction Act, 1 Pa.C.S.A. § 1501 *et seq.*, 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 the requested records (**records showing how often, when, and for whom sexual harassment training actually occurred for PA Senators and PA Senate employees**) 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).

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), *motion denied*, 132 S. Ct. 1073 (U.S. 2012), *cert. denied*, 132 S. Ct. 1634 (U.S. 2012); Commw. of PA v. Ostrosky, 866 A.2d 423, 430 (Pa. Super. Ct. 2005), *appeal granted*, 878 A.2d 863 (Pa. 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).

Further, 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 or her 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," while judicial agencies are required to release "financial records." 65 P.S. §§ 67.301, 67.302, 67.304.

Under the Act, legislative agencies are required to release "legislative records," 65 P.S. § 67.303(a), and the Act explicitly defines the term legislative record in a specific and exhaustive manner. There are nineteen types of legislative documents explicitly listed in the Act as legislative records.³ 65 P.S. § 67.102.

³ "Legislative record." Any of the following relating to a legislative agency or a standing committee, subcommittee or conference committee of a legislative agency:

- (1) A financial record.
- (2) A bill or resolution that has been introduced and amendments offered thereto in committee or in legislative session, including resolutions to adopt or amend the rules of a chamber.
- (3) Fiscal notes.
- (4) A cosponsorship memorandum.
- (5) The journal of a chamber.
- (6) The minutes of, record of attendance of members at a public hearing or a public committee meeting and all recorded votes taken in a public committee meeting.
- (7) The transcript of a public hearing when available.
- (8) Executive nomination calendars.
- (9) The rules of a chamber.
- (10) A record of all recorded votes taken in a legislative session.
- (11) Any administrative staff manuals or written policies.
- (12) An audit report prepared pursuant to the act of June 30, 1970 (P.L.442, No.151) entitled, "An act implementing the provisions of Article VIII, section 10 of the Constitution of Pennsylvania, by designating the Commonwealth officers who shall be charged with the function of auditing the financial transactions after the occurrence thereof of the Legislative and Judicial branches of the government of the Commonwealth, establishing a Legislative Audit Advisory Commission, and imposing certain powers and duties on such commission."
- (13) Final or annual reports required by law to be submitted to the General Assembly.
- (14) Legislative Budget and Finance Committee reports.
- (15) Daily legislative session calendars and marked calendars.
- (16) A record communicating to an agency the official appointment of a legislative appointee.
- (17) A record communicating to the appointing authority the resignation of a legislative appointee.
- (18) Proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency.

The Legislature, if it so intended, could have created a more expansive definition by including other items in the list, such as those requested by the Requester, but it did not. Rather, 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 records 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 the inclusion of these records (**records showing how often, when, and for whom sexual harassment training actually occurred for PA Senators and PA Senate employees**). Because the requested records are 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 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 plain and unambiguous language of the RTK Law defining a legislative record should not be expanded to encompass items the legislature chose not to include (**records showing how often, when, and for whom sexual harassment training actually occurred for PA Senators and PA Senate employees**). Moreover, the Requester's argument that the requested records are "proof that administrative staff manuals, policies and regulations⁴ are being followed" is without merit. To be releasable, the plain language of the Act mandates the requested records be "manuals" or

(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.

⁴ This Officer is not certain to which "regulations" the Requester is referring in her argument. The "regulations" listed as legislative records refer to those regulations submitted to the Senate as part of the regulatory review process. 65 P.S. § 67.102(17).

“policies,” 65 P.S. § 67.102, not “proof” that such records are being followed. The decision of the Open Records Officer on this ground is sustained.

Attestation that no additional financial records exist

Additionally, the Open Records Officer attested there are no financial records responsive to this request (see Exhibit E), and that because of this, she is not required to create a responsive record indicating when training took place. Therefore, she maintains, her actions were proper and should be sustained.

In her sworn statement, the Open Records Officer attested “There are no financial records responsive to sexual harassment training...the financial records already provided in response were the only financial records in possession of the Senate, are responsive to the request and conducted under the Prevention of Workplace Harassment COMO Policy, 1997:01.” Affidavit of Senate Open Records Officer, Attestation that Legislative Agency Provided all Responsive Legislative Records, Jan. 22, 2018 (Exhibit E).

Under the RTK Law, an attestation made under penalty of perjury may serve as sufficient evidentiary support. See Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011), *appeal denied*, 31 A.3d 292 (Pa. 2011); Moore v. OOR, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Averments in the attestation should be taken as true absent any competent evidence of bad faith by the agency. McGowan v. DEP, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014), *rehearing denied*, 2014 Pa. Commw. LEXIS 584 (Pa. Commw. Ct. Dec. 19, 2014) (citing Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

This Officer has no evidence of bad faith on the part of the Senate Open Records Officer, and, therefore, has no reason to doubt the veracity of the Open Records Officer’s sworn statement and takes same as true.

The Requester argues all of the requested records in this appeal are financial records that should be released by the Senate. In support of her argument, the Requester maintains that “Sexual harassment complaints, records showing who conducts and receives sexual harassment training, sexual harassment training budgets, and lawsuits all document an agency’s use or disposal of services, supplies, materials, equipment and property” comport with the Act’s definition of financial record as “Any account, voucher or contract dealing with: (i) the receipt or disbursement of funds by an agency; or (ii) an agency’s acquisition, use or disposal of services, supplies, materials, equipment or property.”

This argument fails because to meet the requirements of the Act, by the very definition of financial record, there must be an account, voucher or contract dealing with (i) the receipt or disbursement of funds by an agency; or (ii) an agency’s acquisition, use or disposal of services, supplies, materials, equipment or property. The Open Records Officer has attested no such records exist, and her attestation is taken as true.⁵

Further, the RTK Law does not impose a duty on an agency to create a record. “When responding to a request for access an agency shall not be required to create a record which does not currently exist or to compile, maintain, format, or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705; see Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

It reasonably follows that the RTK Law does not impose a duty on the Senate Open Records Officer here to create records that do not exist. The Open Records Officer has attested she provided all responsive records. Based on that evidence provided, the Senate has met its

⁵ This Officer takes as true the attestation of the Senate Open Records Officer that there are no other responsive financial records, and therefore, declines to address the merits of the essential component argument raised by the Open Records Officer.

burden of proving the requested records do not exist in the Senate's possession, custody or control. See Smith v. Jersey Shore Borough, OOR Dkt. AP 2016-1468, Sept. 20, 2016.

The decision of the Senate Open Records Officer is sustained on this request because the requested records (**records showing how often, when, and for whom sexual harassment training actually occurred for PA Senators and PA Senate employees**) are not legislative records as defined in the RTK Law. Further, the Open Records Officer's attestation that there are no other responsive records is sufficient to meet her burden under the Act. Finally, the Senate is not required to create a record when one does not exist.

- **All records showing how many sexual harassment complaints have been reported to the PA Senate in 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer denied in part and granted in part this request. She denied in part when she indicated most of the records responsive to the request are not legislative records. She cited applicable Senate precedent on this point, that records not legislative are not releasable under the RTK Law. In her Memorandum, she maintains complaints are not legislative records, and even if complaints are considered public records, they are not accessible under the Act because they are grievances. In her attestation, the Open Records Officer swears that she participates in the sexual harassment complaint process and that she treats same as grievances. She also maintains she is not required to create a record, including creating a record that compiles the number of sexual harassment complaints.

The Open Records Officer granted in part this request when she provided a report of financial records relative to a legal engagement letter where legal assistance was provided in regard to investigating sexual harassment complaints filed in 2016 and that this was the only year for which there are responsive financial records. She offered copies of the engagement letter, vouchers and the supporting documentation to the Requester. She maintains there are no other

financial records responsive to this request. Therefore, she maintains, her response denying the request was proper and should be sustained.

Legislative Records

This Officer's analysis, *supra*, on the scope of the term "legislative record" under the Act applies here and compels the same conclusion – the Senate Open Records Officer properly concluded the requested records are not legislative records under the RTK Law. The Act does not include the requested records (**all records showing how many sexual harassment complaints have been reported to the PA Senate**) in its list of items deemed legislative under the Act. 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). This Officer declines to do so here. It follows that the Open Records Officer's decision is sustained on this point.

Attestation of no additional responsive records

The Open Records Officer maintains she properly responded to this request because there are no other financial records. The Open Records Officer, in her sworn statement, declared she has no additional responsive records to this request. She attested that she conducted "a thorough examination of files in the possession, custody and control" of the Senate. Affidavit of Senate Open Records Officer, Attestation that Legislative Agency Provided all Responsive Legislative Records, Jan. 22, 2018. Her sworn statements are accepted as true; she has met her burden on

this point. Further, as discussed, *supra*, the Open Records Officer properly maintains she is not required to create a record, including making a compilation of sexual harassment complaints, to respond to a request.

Grievances

The Open Records Officer further maintains complaints are not legislative records, and even if they are public records, they are not accessible pursuant to statutory exemption that they are grievances under section 708(b)(7)(vii) of the RTK Law. To support her position, the Open Records Officer has attested in her affidavit (Exhibit E) that the Chief Clerk of the Senate participates in the sexual harassment complaint process under the Senate policy, and that said complaints are maintained in an employee's personnel file as a grievance.

Section 708 of the RTK Law exempts from disclosure records "relating to an employee" including "grievance material, including documents related to discrimination or sexual harassment." 65 P.S. § 67.708(b)(7)(vii). In order for this exemption to apply, an agency must meet its burden to prove the requested materials are grievance materials that relate to an employee, not to labor disputes. Individual interests must be implicated. Johnson v. Pa. Convention Ctr. Authority, 49 A.3d 920, 923-24 (Pa. Commw. Ct. 2012); Oser v. Pocono Mountain Regional Police Dept., OOR Dkt. AP 2017-1463 (Dec. 11, 2017); see Duquette v. Palmyra Area School Dist., OOR Dkt. AP 2017-0372 (Nov. 6, 2017). The Johnson Court opined, "[c]learly, this Section is designed to protect personal information about individual employees which is private." Johnson v. Pa. Convention Ctr. Authority, 49 A.3d at 923. The Court looked to whether the records related to "any conduct of any individual whose privacy interests may be violated if they are released" and to whether disclosure "of any confidential

employee record or material from a personnel file...could be used to harm the employee or cause him embarrassment or humiliation.” Johnson v. Pa. Convention Ctr. Authority, 49 A.3d at 924.

Here, the Open Records Officer attested she participates in the sexual harassment complaint process, maintains the complaints as part of personnel files, and treats them as grievances. This Officer takes her averments as true. Accordingly, to the extent there are responsive records (although the Open Records Officer attested there are no additional responsive records) that would implicate individual interests of Senate employees, these records are shielded from disclosure. These records are exempt as grievance records (documents related to sexual harassment) under the Act. Withholding such records promotes the public policy supporting the exemption of protecting Senate employees from harm, embarrassment or humiliation relating to such private and sensitive information (information relating to sexual harassment complaints) contained in the records.

Accordingly, the decision of the Senate Open Records Officer is sustained on this request because the requested records (**all records showing how many sexual harassment complaints have been reported to the PA Senate**) are not legislative records as defined in the RTK Law. Further, the Open Records Officer’s attestation that there are no other responsive records is sufficient to meet her burden under the Act. Moreover, the Senate is not required to create a record when one does not exist, including creating a record that compiles the number of sexual harassment complaints. Finally, to the extent there are responsive records, these are exempt from disclosure as grievance records (documents related to sexual harassment) that implicate individual employees. The release of such records could violate the privacy interests of these employees, and cause them harm, embarrassment or humiliation due to the sexual harassment nature of the information.

- **All records showing how many people conduct sexual harassment training for PA Senators and PA Senate employees [sic] 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer denied this request, citing no financial records are responsive to same and referencing her sworn statement (Exhibit E). Further, she maintains any other records are not legislative records, are maintained pursuant to the Senate's Workplace Harassment Policy, and would be exempt from disclosure for reasons previously articulated in her Memorandum (any other records – besides the COMO Policy itself – are not legislative records and she is not required to create a record). Therefore, she maintains, her decision was proper.

Again, this Officer accepts as true the averments in the Open Records Officer's attestation that there are no financial records responsive to this request. Further, the requested records (**all records showing how many people conduct sexual harassment training for PA Senators and PA Senate employees [sic] 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017**) are not legislative records under the Act, as discussed, *supra*. 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). This Officer declines to do so here. Finally, as discussed, *supra*, the Open Records Officer is not required to create a record that does not exist. It follows that the Open Records Officer's decision denying this request is sustained.

- **All records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017.**

The Open Records Officer denied this request, maintaining that lawsuits are not legislative records under the RTK Law. Rather, she maintains, they are records of the courts and accessible as provided by applicable court rules or procedures. Finally on this point, the Open Records Officer avers she is not required to create a record here – a list of lawsuits -- as the Act contains no such requirement. Therefore, she maintains her actions denying this request should be sustained.

For the reasons discussed, *supra*, the requested records (**all records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017**) are not legislative records, and therefore, not releasable under the Act. 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). This Officer declines to do so here.

Importantly, only “financial records” of judicial agencies are accessible through the RTKL. 65 P.S. § 67.304. Faulk v. Phila. Clerk of Courts, 116 A.3d 1183, 1187-88 (Pa. Commw. Ct. 2015), *related proceeding, writ granted, petition denied, in part, request granted*, 127 A.3d 1288 (Pa. 2015). “This is in part because the courts are always open under our Constitution, and court records remain accessible to members of the public outside the RTKL.” *Id.* at 1187 (citing PA. CONST., art. I, §11 (“[a]ll courts shall be open”); Commw. v. Fenstermaker, 530 A.2d 414 (Pa. 1987) (discussing common law right of access to criminal courts and to court records)).

Accordingly, the Requester here may seek access to court records outside the constraints the RTK Law's statutory scheme imposes on access to records of a judicial agency. Further and also as discussed, *supra*, the Senate Open Records Officer is not required to create records that do not exist. Therefore, the Open Records Officer's denial on those grounds is sustained.

Specificity of the Request

The Open Records Officer further maintains this request **(for all records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017)** lacks the requisite statutory specificity as required in section 703 of the RTK Law. She maintains that here, if the request were sufficiently specific, then responsive legislative records would be provided, and in this case, only financial records would be responsive "with an explanation as to how the records are maintained." She refers then to her responses in Senate RTK Law Request No. 1711151425 as an example. For the reasons that follow, the Requester's request is insufficiently specific under the Act.

An agency open records officer cannot make a determination of releasability of a record when the RTK Law request is vague; therefore, the Act requires written requests for access to records be specific. The Act mandates that such requests "should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested..." 65 P.S. § 67.703; *see Dept. of Corrections v. St. Hilaire*, 128 A.3d 859, 863 (Pa. Commw. Ct. 2015) (opining that the "central question in evaluating the adequacy of a request is whether the request 'sufficiently informs an agency of the records requested'") (citing *Montgomery County v. Iverson*, 50 A.3d 281, 284, n.4 (Pa. Commw. Ct. 2012)), *appeal denied sub nom, St. Hilaire v. Dept. of Corrections*, 136 A.3d 983 (Pa. 2016). When interpreting a request under the RTK Law, agencies should rely upon the common meaning of words and

phrases, because the RTK Law is remedial legislation that must be interpreted to maximize access. Walters v. Lock Haven Univ., OOR Dkt. AP 2013-0750, June 21, 2013 (citing Gingrich v. PA Game Commission, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at * 16 (Pa. Commw. Ct. Jan. 12, 2012)). The determination of specificity is made on a case-by-case basis. Id.

If the requester fails to identify the requested records with specificity, then the agency has no obligation to comply with the request, because the lack of specificity prevents the agency from determining whether to grant or deny the request. Associated Builders & Contractors, Inc. v. PA Dept. of General Services, 747 A.2d 962, 965-66 (Pa. Commw. Ct. 2000) (finding that request for “any and all documents relating to” the particular subject matter of the requests failed to provide sufficient facts for the Department to determine what type of record was being requested); see Pennsylvania State Police v. Office of Open Records, 995 A.2d 515, 517 (Pa. Commw. Ct. 2010) (holding that portion of request seeking “any and all” records, files, or communications of any kind pertaining to seizures of property was insufficiently specific but portion seeking manuals relating to vehicle stops, searches, and seizures was specific enough to enable agency to ascertain what records were being sought); Arduino v. Borough of Dunmore, 720 A.2d 827, 831 (Pa. Commw. Ct. 1998), *appeal granted*, 753 A.2d 820 (Pa. 1999), *appeal dismissed*, 741 A.2d 195 (Pa. 1999). However, “an agency’s failure to maintain [its] files in a way necessary to meet its obligations under the RTK Law should not be held against the requestor.” Dept. of Corrections v. St. Hilaire, 128 A.3d at 865, *appeal denied sub nom*, St. Hilaire v. Dept. of Corrections, 136 A.3d 983 (Pa. 2016) (citing Dept. of Environmental Protection v. Legere, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012) (opining that just because the Department did “not catalogue or otherwise organize the requested records in a way that permits

them to be easily located does not render the request overbroad”), *reconsideration denied en banc*, 2012 Pa. Commw. LEXIS 258 (Pa. Commw. Ct. Aug. 30, 2012)).

An open-ended request that gives an agency little guidance regarding what to look for may be so burdensome that it will be considered overly broad. Montgomery County v. Iverson, 50 A.3d 281, 284 (Pa. Commw. Ct. 2012) (citing Mollick v. Township of Worcester, 32 A.3d 859, 871 (Pa. Commw. Ct. 2011)). However, a request that is more narrow, may be sufficiently specific even though it requests broad categories of records. Id. (citing Easton Area School District v. Baxter, 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012)); Oser v. Pocono Mountain Regional Police Dept., OOR Dkt. AP 2017-1463, Dec. 11, 2017 (finding that although the scope of the request for “all information” was broad, “the request as a whole provides a narrow search context to sufficiently describe to the Department what records are being sought,” because the subject matter was limited to a specific grievance filed on a specific date). To determine whether a request satisfies this statutory requirement, “the specificity of a request must be construed in the request’s context, rather than envisioning everything the request might conceivably encompass.” Askew v. PA Office of the Governor, 65 A.3d 989, 992 (Pa. Commw. Ct. 2013) (quoting Montgomery County v. Iverson, 50 A.3d 281, 283 (Pa. Commw. Ct. 2012)), *appeal denied*, 72 A.3d 604 (Pa. 2013).

The Commonwealth Court utilizes a three-part balancing test to ascertain specificity under Section 703 of the RTK Law, examining the extent to which the request sets forth: (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. PA Office of Inspector General v. Brown, 152 A.3d 369, 372 (Pa. Commw. Ct. 2016) (citing Dept. of Education v. Pittsburgh Post-Gazette, 119 A.3d 1121, 1124 (Pa. Commw. Ct. 2015)). The Court opined:

Regarding the application of the three prongs, we stated that the subject matter of the request "must identify the 'transaction or activity' of the agency for which the record is sought" and should provide "a context to narrow the search." *Id.* at 1125 (quoting Section 102 of the RTKL, 65 P.S. §67.102).

The scope of the request "must identify a discrete group of documents, either by type . . . or by recipient." *Id.* (internal quotation omitted). Indeed, "[a] request for a broad category of documents, such as all records, may be sufficiently specific if confined to a particular recipient or recipients." *Id.* at 1125-26. "The fact that a request is burdensome does not deem it overbroad, although it may be considered a factor in such a determination." *Dep't of Envtl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Cmwlth. 2012).

Moreover, "[t]he timeframe of the request should identify a finite period of time for which records are sought." 119 A.3d at 1126. However, this prong is the most fluid and whether the request's timeframe is sufficiently narrow is "generally dependent upon the specificity of the request's subject matter and scope." *Id.*

PA Office of Inspector General v. Brown, 152 A.2d at 372-373 (citing Dept. of Education v. Pittsburgh Post-Gazette, 119 A.3d at 1125)) (emphasis added).

In the case sub judice, the request for "all records" is similar to several others where the Commonwealth Court concluded the requests were insufficient, when they, too requested "any" or "all" records without any other specific identifying information such as: a specific subject matter of the request; a specific transaction or activity for which the records were being sought; or, a context for narrowing the search.

First, in Dept. of Education v. Pittsburgh Post-Gazette, the Court concluded the request for "all emails" lacked the specificity required by the Act because it did not identify the agency activity or transaction. There, the requester sought "all emails" of the Secretary of Education "as they pertain to . . . her duties as Acting Secretary since she was appointed on August 25, 2014 to date." Dept. of Education v. Pittsburgh Post-Gazette, 119 A.3d at 1123. The Court opined that although the request identified a finite timeframe and limited the scope to emails to and from the Secretary, it lacked specificity because it failed to specify the subject matter of the request narrower than "all agency activity." *Id.* at 1126. The request for emails pertaining to the

performance of her duties while Acting Secretary "does not provide a context by which the Request can be narrowed; it is, by virtue of the Secretary's position, a request for emails about all of the agency's activity over nearly a one year period. In other words, it is a fishing expedition." Dept. of Education v. Pittsburgh Post-Gazette, 119 A.3d at 1126.

Similarly, in Montgomery County v. Iverson, 50 A.3d 281 (Pa. Commw. Ct. 2012), the Commonwealth Court conclude a request for "all" emails was insufficient under the RTK Law because, *inter alia*, there was no context for narrowing the search, and the search was not limited to specific individuals or email addresses. Rather, the requester sought any applicable emails. Montgomery County v. Iverson, 50 A.3d at 284.

Moreover, in Mollick v. Twp. of Worcester, the Court concluded the request for "all emails" regarding any "business and/or activities for the past one and five years" was not sufficiently specific because the requester did not specify the category or type of Township business or activity he was seeking information. The Court further concluded the request would unreasonably burden the Township to "examine all its emails for an extended time period without knowing, with sufficient specificity, what Township business or activity the request is related." Mollick v. Twp. of Worcester, 32 A.3d 859, 870 (Pa. Commw. Ct. 2011). Cf. Commonwealth v. Engelkemier, 148 A.3d 522 (Pa. Commw. Ct. 2016) (holding that request for all emails was sufficiently specific when requester limited his request by subject matter by providing a keyword list); Easton Area School Dist. v. Baxter, 35 A.3d 1259, 1260 (Pa. Commw. Ct. 2012) (holding that "[a]ll emails sent and received between Oct. 1 and Oct. 31" for email addresses of nine school board members, the general school board address, and the school district superintendent was sufficiently specific).

Further, in Office of Inspector General v. Brown, the Commonwealth Court concluded the request for “all OIG rules, regulations, policies and related authorities” was insufficiently specific, because it did not advise the OIG of what records were being requested and did not identify the OIG transaction or activity for which the records were being sought. The Court concluded, that similar to Pittsburgh Post-Gazette, the request did “not provide a context by which it can be narrowed.” Office of Inspector General v. Brown, 152 A.2d 369, 374 (Pa. Commw. Ct. 2016). Cf. Dept. of Environmental Protection v. Legere, 50 A.3d 260 (Pa. Commw. Ct. 2012) (holding that request for “Act 223, Section 208 determination letters” issued by the Department and the related orders was sufficiently specific because it was for “a clearly-defined universe of documents. There are no judgments to be made as to whether the documents are ‘related’ to the request.”), *reconsideration denied en banc*, 2012 Pa. Commw. LEXIS 258 (Pa. Commw. Ct. Aug. 30, 2012); Pennsylvania State Police v. Office of Open Records, 995 A.2d 515, 516-17 (Pa. Commw. Ct. 2010) (holding that portion of request seeking any and all records, files, or communications of any kind pertaining to seizures of property was insufficiently specific but portion seeking manuals relating to vehicle stops, searches, and seizures was specific enough to enable the agency to ascertain what records were sought). Further, the Brown Court opined the request did not identify a specific subject matter that was the object of the request, and the request would impose an unreasonable burden to require the OIG to examine all of its rules, regulations, policies and related authorities without knowing which OIG business or activity the request contemplated. Brown, 152 A.2d at 375.

Further, in Askew, the Court concluded the request for “any” form of legislation that “provides” jurisdiction lacked the requisite specificity because “it is open-ended in terms of a timeframe, overly broad in the scope of documents sought, and cannot be satisfied without

conducting legal research to form the basis of a legal opinion.” Askew, 65 A.3d at 992. The Askew Court relied upon Pennsylvania Housing Finance Agency v. Ali, where a request for a “[c]opy of all correspondence, including proposal and sales agreements, concerning item 4C Project Workout — Chestnut/56th Street Apartments found on the PHFA February 10, 2011...Agenda and, or distributed to the Board” was determined insufficiently specific because it incorporated too many different kinds of potential documents. Id. at 993 (citing Pennsylvania Housing Finance Agency v. Ali, 43 A.3d 532, 535-536 (Pa. Commw. Ct. 2012)). The Askew Court similarly concluded the request for “any” form of legislation that “provides” jurisdiction was too vague. Askew, 65 A.3d at 993. Further, the Court opined the Office “is asked to search the vast universe of legislation and legal documents without any limiting criteria.” Id. The Court concluded that because the requester failed to sufficiently identify the types of records in which his request would be located, his request was insufficiently specific for the Office to respond because it was overly broad and encompassed a wide-range of legal documents and types of legislation. Id.

The Office of Open Records has opined on a factually similar request to the case at hand for “information related to lawsuits filed by and against the University” and concluded that such a request lacks the requisite specificity under the RTK Law. Such a request, the OOR concluded, did not specify which records the requester sought. Walters v. Lock Haven University, OOR Dkt. AP 2013-0750, June 21, 2013. Even though the request sought “court findings and settlements, including payout amounts and names of those receiving money,” the OOR still concluded the request was not specific because:

it remains unclear as to exactly what documents Requester seeks for over a twelve year period; *e.g.* does the request want correspondence related to lawsuits? Or does the Requester seek settlement agreements, orders, releases, verdicts, court opinions of the lawsuits; correspondence related to post-lawsuit action if any etc.

Walters v. Lock Haven University, OOR Dkt. AP 2013-0750, June 21, 2013. Cf. Dept. of Corrections v. Marshall, 2012 Pa. Commw. Ct. Unpub. LEXIS 947 (Dec. 7, 2012) (holding that request for records “containing details about any claims, settlements, or verdicts” against certain named individuals was sufficiently specific, because it specifically sought settlement agreements and checks related to claims against named individuals). Although not binding on the Senate, the OOR decision in Lock Haven is compelling.⁶

Similarly, the request here (**all records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017**), is insufficiently specific. The request does not identify a specific subject matter that is the object of the request. Nor does it identify a specific transaction or activity for which the information is being sought. Rather, the request is for “all records” concerning “lawsuits.” Moreover, such a broad request imposes an unreasonable burden on the Senate Open Records Officer to examine all of her records for “lawsuits” covering an extended period of time. Even in Walters when the requester sought “court findings and settlements, including payout amounts and names of those receiving money,” the OOR still concluded the request was not sufficiently specific. Unlike that case, here, the Requester has not even asked for those items; rather, she has requested “records showing how many and which lawsuits were filed.” She has neither identified the transaction or activity of the agency, nor has she identified a discreet group of documents. Here, we do not have a request that is broad in scope yet limited to a narrow search context to sufficiently describe what records are being sought. Oser v. Pocono Mountain Regional Police Dept., OOR

⁶ The OOR is only authorized to hear appeals for Commonwealth and local agencies, and an opinion from the OOR is purely advisory. 65 P.S. §§ 67.503, 67.1310(a); Bowling v. Office of Open Records, 75 A.3d 453, 457 (Pa. 2013).

Dkt. AP 2017-1463, Dec. 11, 2017. The request provides little clarity as to what documents are desired by the Requester. Although “[s]eeking records related to a topic or topics does not necessarily make a request insufficiently specific,” the “request must still provide enough specificity in its scope and timeframe to help guide the agency in its search for records.”

Duquette v. Palmyra Area School District, OOR Dkt. AP 2017-0372, Nov. 6, 2017.

This Officer is unable to discern what records are being sought in the Requester’s request. Just as the OOR asked in Walters, “does the request want correspondence related to the lawsuits? Or does the Requester seek settlement agreements, orders, releases, verdicts, court opinions of the lawsuits; correspondence related to post-lawsuit action if any etc.” Without more specificity as to subject matter, agency transaction or activity to narrow the search context, the request for **all records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017** does not properly guide the Senate’s search for responsive records. Thus, it is insufficiently specific under the Act.

Moreover, an argument can be made that the request lacks the requisite specificity because, in order to satisfy the request for **all records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017**, the Open Records Officer would have to conduct legal research to ascertain which, if any, documents would be responsive. This is a requirement the RTK Law does not impose.

The RTK Law does not require an agency to conduct legal research for a requester. If a request necessitates traditional legal research and analysis to ascertain that which is being requested and/or whether a particular document possesses the legal significance necessary to make it responsive to the request, then the request lacks the specificity required by the RTK Law. Askew, 65 A.3d at 993-94; see Monighan v. PA Dept. of Transportation, OOR Dkt. AP 2013-

1967, Nov. 19, 2013; Aliota v. Millcreek Township, OOR Dkt. AP 2012-1351, Sept. 7, 2012. A request that “explicitly or implicitly obliges legal research is not a request for a specific document; rather, it is a request for someone to conduct legal research with the hopes that the legal research will unearth a specific document that fits the description of the request.” Askew, 65 A.3d at 993. When a request would require the agency to “perform a considerable amount of legal research and analysis to locate and identify those laws and/or legal documents that are responsive to Requester’s request,” the request is not specific. Id. at 993-94.

Here, the Open Records Officer could arguably have to conduct extensive legal research looking for responsive legal documents that are “lawsuits” to satisfy the request, but the RTK Law does not require same. Therefore, the request lacks the requisite statutory specificity.

Accordingly, the decision of the Open Records Officer is sustained on this point; the request for **all records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017** lacks the requisite specificity under the Act.

The decision of the Senate Open Records Officer is sustained on this request because the requested records (**all records showing how many and which lawsuits were filed against the Pennsylvania Senate in 2012, 2013, 2014, 2015, 2016, and 2017**) are not legislative records as defined in the RTK Law. Further, because only financial records of the courts are available under the RTK Law, the Requester may obtain the court records she seeks through applicable court rules or procedures. Additionally, the Senate Open Records Officer is not required to create records that do not exist, including making a list of lawsuits. Moreover, without more specificity as to subject matter, agency transaction or activity, the request does not properly guide the Senate’s search for responsive records. Thus, it is insufficiently specific under the Act.

Further, the request lacks the requisite specificity because, in order to satisfy the request, the Open Records Officer would have to conduct legal research to ascertain which, if any, documents would be responsive.

Discretion

Lastly, the Open Records Officer argues she is not mandated to use her discretion and release the requested information; therefore, this portion of the Requester's appeal is not appealable. Further, she argues the RTK Law does not give authority to this Officer or any other Appeals Officer to "review or analyze whether the agency should have exercised this discretion in favor of disclosure." Nereim and the Pittsburgh Post-Gazette v. Pa. Dept. of Public Welfare, OOR Dkt. AP 2011-0187, May 13, 2011. Therefore, she maintains, this argument by the Requester and this part of the appeal should be dismissed without further consideration.

The RTK Law does not mandate the Senate Open Records Officer exercise her discretion and release the requested information. Rather, the plain and unambiguous language of the Act provides the agency "may" exercise its discretion and make otherwise exempt records available if: release is not prohibited by State or Federal law or regulation, or by judicial order or decree; the record is not protected by a privilege; and, if the agency head determines that "the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access." 65 P.S. § 67.506(c). An agency may exercise such discretion, but it is not required to do so. Brown v. PA Dept. of State, 123 A.3d 801, 805 (Pa. Commw. Ct. 2015) (citing PA Dept. of Health v. Office of Open Records, 4 A.3d 803, 815 (Pa. Commw. Ct. 2010)), *decision reached on appeal*, 2015 Pa. Commw. Unpub. LEXIS 731 (Oct. 7, 2015); see Palmer and The Philadelphia Inquirer v. PA Dept. of Public Welfare, OOR Dkt. AP 2014-1647, Nov. 21, 2014 (concluding the agency may exercise its discretion but is not required to despite

the requester's arguments that "the public deserved" to know the requested information and that there was "acute public interest in its release").

When the words of a statute are clear and unambiguous, the letter of the statute "is not to be disregarded under the pretext of pursuing its spirit." Levy, 65 A.3d at 380. Moreover, courts are bound by the limitations found within the RTK Law language itself. See LeGrande v. Dept. of Corrections, 920 A.2d at 950.

The RTK Law is clear: "An agency **may** exercise its discretion..." 65 P.S. § 67.506(c) (emphasis added); therefore, the discretionary release by the agency is just that – discretionary. Such release is not mandated by the Act.

Here, the Requester argues:

Investigating a complaint, conducting harassment training, and defending lawsuits are all actions that cost money. That money comes from taxpayers. Refusing to turn over records that document and confirm how taxpayer-funded systems work snubs the principles of transparency and the hardworking members of the public who pay for all of this...

Despite these compelling public policy arguments, the RTK Law does not require a discretionary release of requested records by the Senate.

It follows that the Senate Open Records Officer is not required to exercise her discretion and release the requested information under the discretionary provisions of Section 506. The plain language of the RTK Law is unambiguous that an agency "may" exercise this discretion; it is not mandated to do so.

Conclusion

The decision of the Senate Open Records Officer is sustained. The Requester is seeking access to records that are not included in the RTK Law's clear and unambiguous definition of a legislative record. To release these records would be to contravene the intent of the General

Assembly by adding requirements to the Act that the Legislature did not see fit to include. This Officer declines to do so here. Further, the Open Records Officer's attestation that no additional responsive records exist is taken as true. This Officer has no evidence to question the veracity of the sworn statement. Moreover, the Open Records Officer is neither required to create records where none exist, nor to exercise her discretion and release the requested records. Further, to the extent there are responsive records pertaining to sexual harassment "complaints," these are shielded from release because they are grievances (documents related to sexual harassment) under the Act. Finally, the request for information concerning "lawsuits" is insufficiently specific under the Act. Without more specificity as to subject matter, agency transaction or activity, the request does not properly guide the Senate's search for responsive records. Therefore, the denial issued by the Senate Open Records Officer must be sustained.

IN THE SENATE OF PENNSYLVANIA

Appeal of St. Hilaire

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Senate RTK Appeal 01-2018

FINAL DETERMINATION
February 26, 2018

ORDER

AND NOW, this 26th day of February 2018, the decision of the Senate Open Records Officer is AFFIRMED. The documents sought by Requester are not legislative records and, thus, not accessible under the Right-to-Know Law. The sworn statement of the Senate Open Records Officer that there are no additional responsive records is taken as true. The Senate Open Records Officer is neither required to create records that do not exist, nor to exercise her discretion and release requested records. Any responsive records relating to sexual harassment "complaints" are exempt from release as grievances (documents related to sexual harassment). Lastly, the request for information concerning "lawsuits" is insufficiently specific under the Act.



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.