

IN THE SENATE OF PENNSYLVANIA

Appeal of Turner

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Senate RTK Appeal 02-2018

FINAL DETERMINATION
April 11, 2018

Statement of Facts

By email dated January 12, 2018 addressed to the Senate Open Records Officer, Mr. Ford Turner of the *Reading Eagle* (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 Request

In his request, Senate RTK Law Request No. 1801121547, the Requester sought the following:

Documents, records, lists, spreadsheets or other materials that show the full dollar value (as reported to the IRS) of the health care benefits provided during 2016 and, if available, during 2017, to all Pennsylvania Senate members past and present, including the value of the benefits provided to spouses and dependents; and to all Senate employees, past and present, including the value of the benefits provided to spouses and dependents.

The request covers materials sufficient to provide the following detail for 2016 and, if available, for 2017:

1 ...

- A) A per-member, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate members on the Highmark plan who are covered as individuals, without spouses or dependents; and the number of members covered in that fashion.
- B) A per-member, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate members on the Highmark plan who are covered as "individual and spouse" or under a similar description; and the number of members covered in that fashion.

- C) A per-member, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate members on the Highmark plan who are covered as “individual, spouse and dependents” or under a similar description; and the number of members covered in that fashion.

2 ...

- A) The same information requested in 1A, for retired (or former) Senate members.
- B) The same information requested in 1B, for retired (or former) Senate members.
- C) The same information requested in 1C, for retired (or former) Senate members.

3 ...

A, B, and C) The same information requested in 1A, 1B and 1C, for the UPMC plan.

4 ...

A, B, and C) The same information requested in 2A, 2B and 2C, for the UPMC plan.

5 ...

A, B, and C) The same information requested in Items 1 and 2, presented in the same fashion, for any members or former members provided with health care benefits under plans other than the Highmark or UPMC plans.

6 ...

- A) A per-employee, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate (non-member) employees on the Highmark plan who are covered as individuals, without spouses or dependents; and the number of employees covered in that fashion.
- B) A per-employee, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate (non-member) employees on the Highmark plan who are covered as “individual and spouse” or under a similar description; and the number of employees covered in that fashion.
- C) A per-employee, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate (non-member) employees on the Highmark plan who are covered as “individual, spouse and dependents” or under a similar description; and the number of employees covered in that fashion.

7 ...

- A) The same information requested in 6A, for retired (or former) Senate non-member employees.
- B) The same information requested in 6B, for retired (or former) Senate non-member employees.
- C) The same information requested in 6C, for retired (or former) Senate non-member employees.

8 ...

A, B, and C) The same information requested in 6A, 6B and 6C, for the UPMC plan.

9 ...

A, B, and C) The same information requested in 7A, 7B and 7C, for the UPMC plan.

10 ...

A, B, and C) The same information requested in Items 6 and 7, presented in the same fashion, for any non-member employees or retired (or former) non-member employees provided with health care benefits under plans other than the Highmark or UPMC plans.

THE REQUEST IS NOT INTENDED TO SEEK ANY PERSONALLY IDENTIFIABLE INFORMATION.

Senate RTK Law Request No. 1801121547, Jan. 12, 2018.

The Senate Open Records Officer's Response

The Senate Open Records Office responded to the Requester, via email communication dated February 20, 2018.¹

For RTK Law Request No. 1801121547, the Open Records Officer responded as follows:

- **Documents, records, lists, spreadsheets or other materials that show the full dollar value (as reported to the IRS) of the health care benefits provided during 2016 and,**

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

if available, during 2017, to all Pennsylvania Senate members past and present, including the value of the benefits provided to spouses and dependents; and to all Senate employees, past and present, including the value of the benefits provided to spouses and dependents.

The Senate Open Records Officer denied this request and responded:

The specific records requested, those reported to the IRS, are not financial records of the Senate as they are maintained by the Senate, do not fall under the definition of “legislative record” and therefore not accessible under the RTKL. But for the requirement to report this information pursuant to federal law these records would not be created, as the figures reported are the combination of medical, prescription and SEAP (State Employees Assistance Program) benefit figures paid for each individual employee, including members, who received the benefits during the year, including only part of a year.

Senate Open Records Officer, Response to Requester, Feb. 20, 2018. The Open Records Officer provided that the Senate, as a legislative agency, is only required to provide access to legislative records, which these, she maintains, are not. Id.

The Open Records Officer further concluded:

as the individual records are information created and provided only to the individuals, including members, who were employed (for part of or the whole year) by the Senate of Pennsylvania, who received the benefits, and the information was contained on their W-2 forms the information is considered “return information” and under Section 305(b)(3) is exempt from disclosure under Section 6103(a) of the Internal Revenue Code which prohibits disclosure of “returns” and “return information.” 26 U.S.C. § 6103(a).

The Open Records Officer referenced the Commonwealth Court’s opinion in Office of the Budget v. Campbell, 25 A.3d 1318 (Pa. Commw. Ct. 2011), providing that the Court held W-2 forms are confidential under the Internal Revenue Code as return information. Id.

In addition to this denial, the Open Records Officer also responded as follows for requests numbered 1 through 10:

• **Requests 1, 3, 6, & 8 --**

1 ...

- A) A per-member, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate members on the Highmark plan who are covered as individuals, without spouses or dependents; and the number of members covered in that fashion.**
- B) A per-member, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate members on the Highmark plan who are covered as "individual and spouse" or under a similar description; and the number of members covered in that fashion.**

3 ...

A, B, and C) The same information requested in 1A, 1B and 1C, for the UPMC plan.

6 ...

- A) A per-employee, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate (non-member) employees on the Highmark plan who are covered as individuals, without spouses or dependents; and the number of employees covered in that fashion.**
- B) A per-employee, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate (non-member) employees on the Highmark plan who are covered as "individual and spouse" or under a similar description; and the number of employees covered in that fashion.**
- C) A per-employee, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate (non-member) employees on the Highmark plan who are covered as "individual, spouse and dependents" or under a similar description; and the number of employees covered in that fashion.**

8 ...

A, B, and C) The same information requested in 6A, 6B and 6C, for the UPMC plan.

For these requests, the Open Records Officer denied same and responded that the specific records are not maintained separately by employee and member. Rather, these records are based upon the coverage the individual receives regardless of whether they are an employee or member. The Open Records Officer stated that, pursuant to Section 705 of the RTK Law, a record is not required to be compiled in a manner in which the legislative agency does not currently do so. Therefore, she denied these requests. Senate Open Records Officer, Response to Requester, Feb. 20, 2018.

- **Requests 2, 4, 7, & 9 --**

2 ...

- A) **The same information requested in 1A, for retired (or former) Senate members.**
- B) **The same information requested in 1B, for retired (or former) Senate members.**
- C) **The same information requested in 1C, for retired (or former) Senate members.**

4 ...

A, B, and C) The same information requested in 2A, 2B and 2C, for the UPMC plan.

7 ...

- A) **The same information requested in 6A, for retired (or former) Senate non-member employees.**
- B) **The same information requested in 6B, for retired (or former) Senate non-member employees.**

The same information requested in 6C, for retired (or former) Senate non-member employees.

9 ...

A, B, and C) The same information requested in 7A, 7B and 7C, for the UPMC plan.

The Open Records Officer denied these requests, concluding the specific records requested do not exist because retirees who were retired for an entire year (2016 & 2017) did not receive the record requested as the information was not required to be provided to them and they do not receive a W-2. She further maintained that, pursuant to Section 705 of the RTK Law, the Senate is not required to create a record. Senate Open Records Officer, Response to Requester, Feb. 20, 2018.

- **Requests 5 & 10 --**

5 ...

A, B, and C) The same information requested in Items 1 and 2, presented in the same fashion, for any members or former members provided with health care benefits under plans other than the Highmark or UPMC plans.

10 ...

A, B, and C) The same information requested in Items 6 and 7, presented in the same fashion, for any non-member employees or retired (or former) non-member employees provided with health care benefits under plans other than the Highmark or UPMC plans.

The Open Records Officer denied these requests, stating there are no records because there was no additional coverage provided other than Highmark and UPMC. Senate Open Records Officer, Response to Requester, Feb. 20, 2018.

In her response, the Open Records Officer provided the Requester with information on the RTK Law appeal process.

She also provided the following information to the Requester, pursuant to the discretionary release provisions of the Act, 65 P.S. § 506(c), in response to his requests:

In accordance with Section 506, I would like to provide you information in a manner which I believe does not conflict with Section 6103 and provides information I believe is responsive your request and are from the financial records of the Senate.

My office is open to discussing which records are available and responsive to your request.

For employees, including members, who received benefits for the entire calendar year, the following figures represent the costs for medical, prescription and SEAP coverage and come from the financial records of the Senate.

Behind each dollar figure is the number of employees who received the benefits for the full year or a part of the year, whether it was for one month or eleven months, and based upon the plan they were covered by at the end of the year or when they left employment with Senate. The number of employees who receive coverage changes frequency as employees are hired or leave employment with Senate. Additionally, the coverage an employee receives during the course of a year may change due to changes in their family and here are a few examples: getting married or divorced, the birth or adoption of a child, and children aging out of coverage. Lastly, employees of the Senate who elect coverage must pay one percent of their annual salary towards the costs of the benefits.

(Notes: Senate Health/Prescription plans and SEAP are by fiscal years. Prescription plan for 2016 was through BeneCard PBF and for 2017 half the year was through BeneCard PBF (1/1 to 6/30) and half through Highmark Prescription (7/1 to 12/31).

<u>Highmark/Prescription/SEAP</u>	<u>2016</u>	<u>2017</u>
Employee Only	\$ 9,945.01 (220)	\$ 9,887.34 (208)
Employee/Child	\$16,890.25 (36)	\$16,792.38 (41)
Employee/Children	\$24,671.53 (36)	\$24,485.10 (26)
Employee/Spouse	\$21,663.61 (187)	\$21,517.50 (195)
Employee/Family	\$27,705.13 (332)	\$27,511.86 (317)

<u>UPMC /Prescription/SEAP</u>	<u>2016</u>	<u>2017</u>
Employee Only	\$ 9,954.97 (11)	\$10,850.58 (10)
Employee/Child	\$16,907.41 (2)	\$18,429.90 (4)
Employee/Children	\$24,697.93 (4)	\$27,018.54 (3)
Employee/Spouse	\$21,668.29 (11)	\$23,684.94 (12)
Employee/Family	\$27,734.41 (14)	\$30,305.46 (15)

Senate Open Records Officer, Response to Requester, Feb. 20, 2018.

The Appeal

By email dated March 13, 2018, the Requester timely appealed this denial of access. On March 14, 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).

The Requester stated the following in his appeal:

I am seeking access to records that show full dollar value of health care benefits provided during 2016 and 2017, for:

1. All Pennsylvania Senate members (past and present), including the value of the benefits provided to spouses and dependents; and
2. All Senate employees (past and present), including the value of the benefits provided to spouses and dependents.

My request sought these records for each of the health care plans offered by the Senate, including Highmark, UMPC and any other plan that may have been provided to members during 2016-2017.

Why the records are public under RTKL

The RTKL provides presumptive access to legislative records, as that term is defined by law. The records in this case are legislative records because the [sic] constitute financial records of the Senate.

The records at issue in this case illustrate the value of tax-payer funded health care coverage provided to Senate members and staff, and this information fits within the definition of “financial record” under the RTKL.

Section 102 of the RTKL defines “financial record” as:

- (1) 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.
- (2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.
- (3) A financial audit report. The term does not include work papers underlying an audit.

Records that show how much Senate health plans cost and are valued at illustrates not only the disbursement of funds by the Senate, but also other payments or expenses paid on behalf of public employees.

As a financial record and a legislative record, the information requested in this case is presumptively public, and the Senate’s bases for denial do not overcome the presumption.

Senate’s bases for denial

1. Not a financial record

As explained above, the information requested in this case deals squarely with the costs associated with health care coverage financed with taxpayer funds and paid for by the Senate for its members and employees. The value assigned to these benefits illustrates the type of benefits taxpayers are financing, and it provides a critical tool for the public to understand what is being provided as remuneration to Senate members and employees. The information provided by the Senate under Section 506 of the law is certainly relevant and appreciated, it does not provide a full understanding of the health care benefits received at taxpayer expense by Senate members and staff.

2. IRS code, w-2 information

The request in this case does not seek copies of any specific w-2. On the contrary, the references to the IRS and w-2 forms were for made for illustrative purposes only. I am not seeking w-2 forms.

The Senate’s reliance on section 6103 of the IRS Code and decisions from the Commonwealth Court are misplaced. While it is true that w-2 have been denied under the RTKL, I have not requested access to w-2s and not all information that appears on a

w-2 is confidential. For example, Senators' and employees' names are included on the form as are wages, both of which are expressly public under the RTKL. Nothing in the IRS Code makes this information non-public in the context of the RTKL. Similarly, the cost of the health care plan provided to Senators and Senate employees is generated by the Senate as part of its benefit and financial administration duties. The fact that the cost may also be reported to the IRS does not render it confidential, in the same way that wages and names that appear on a w-2 are not rendered confidential.

3. Section 705, creation of a record

The Senate's position that it is not required to create a record is misplaced. The Senate does not deny certain information exists, and in fact admits that the records "are based upon the coverage the individual receives regardless of whether they are an employee or member." The fact is that these records exist in some form, and the fact that they do not exist in a pre-existing list is not outcome determinative. The categories of the request were included as a means of specifying which records were sought, not as a means of limiting the request to pre-existing lists. To the extent a responsive list does not exist, the law still requires access to the information in the form in which it exists. Moreover, if the information exists as part of a database, pulling relevant fields of data in response to a request is not "creation" of a record under section 705.

4. Non-existence

To the extent the remaining records do not exist, I have no bases upon which to challenge that assertion, presuming the denial is based on good faith.

Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1801121547, March 13, 2018.

On March 22, 2018, the Senate Open Records Officer filed a Memorandum of Law in support of her denial of access. She argued as follows.

A Requester cannot modify his request on appeal.

First, the Open Records Officer maintains a RTK Law request on appeal cannot be modified to change the specifics of the original request. The original requests, she maintains, provided specific information as to what records were being requested; she maintains that she appropriately responded to these specific requests and the records the Requester explicitly identified in his requests. The Open Records Officer argues that once the Requester's requests were denied, he modified the specifics of the requests through his appeal, which is improper. See

Smith Butz v. DEP, 142A.3d 941, 945 (Pa. Commw. Ct. 2016); Dept. of Corrections v. Disability Rights Network of PA, 35 A.3d 830 (Pa. Commw. Ct. 2010). Senate Open Records Officer, Memorandum of Law, March 22, 2018, pp. 4-5.

Specifically, the Open Records Officer maintains the original requests as written satisfied the RTK Law requirement for specificity, referencing Carey v. Dept. of Corrections, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013), that she was able to discern what records he was requesting (the Requester explicitly included “as reported to the IRS” in each request), and that she responded accordingly. The Open Records Officer maintains that based on the specific language of the requests, she was able to identify the documents being requested, and that she reviewed same for their accessibility under the RTK Law. She also maintains that she acted in good faith discharging her obligations under the Act. Senate Open Records Officer, Memorandum of Law, March 22, 2018, p. 5.

For these reasons, the Open Records Officer argues this part of the appeal should be dismissed and the original language of the request should be the basis for the remainder of the appeal and the grounds for denying the requests. Id.

Only Legislative Records are accessible under the RTK Law.

Next, the Open Records Officer argues the requested records are not legislative and therefore, not releasable under the Act. Specifically, the Open Records Officer maintains the specific records requested, “those ‘reported to the IRS,’” “are not financial records of the Senate as they are maintained by the Senate, do not fall under the definition of “legislative record” and therefore [are] not accessible under the RTKL.” She further maintains, these records would not be created but for the requirement to report this information pursuant to federal law, “as the figures reported are the combination of medical, prescription and SEAP (State Employees

Assistance Program) benefits figures paid for each individual employee, including members, who received benefits during the year, including only part of a year.” Senate Open Records Officer, Memorandum of Law, March 22, 2018, p. 6.

The Open Records Officer argues that to determine whether a record is part of a financial record that is accessible under the Act, there must be a “sufficient connection” to the financial record as established in the essential component analysis. See Sapp Roofing Co. v. Sheet Metal Workers International Assoc. Local Union No. 12, 713 A.2d 627 (Pa. 1998). Here, she maintains the records specifically requested by the Requester (the records “as reported to the IRS”) do not bear a sufficient connection to an account, voucher or contract. Rather, the records “are a combination of financial records, so the record reported to the IRS is not directly tied to an account, voucher or contract.” Id. Accordingly, she argues, the requested records are not financial records and therefore are not legislative records, and are not releasable under the Act. The Open Records Officer cites to several prior Senate Final Determinations supporting her argument. Id. at 6-7. She also maintains that her argument is supported by the plain language of the Act and that a contrary interpretation would contravene the intent of the General Assembly in the Act. Id. at 7.

The requested records are exempt from disclosure as “return information.”

Third, the Open Records Officer maintains the requested records, as explicitly set forth in the Requester’s original request, are information that is only provided as part of a W-2 and is only maintained for that purpose; therefore, it is exempt from disclosure pursuant to federal law (Section 6103(a) of the Internal Revenue Code). In support of this argument, she maintains the “W-2 form and the information found therein is exempt. The names of members and wages are available under the RTKL and are made available via other means.” Therefore, the denial of

access to these records of “return information” should be sustained. Senate Open Records Officer, Memorandum of Law, March 22, 2018, p. 7.

The requested records in Requests 1, 3, 6, and 8 are not maintained by the Senate in the format requested and the Senate is not required to provide them in a way they are not compiled or maintained.

Fourth, the Open Records Officer maintains that, even if the requested records would be available under the Act, the records requested in Requests 1, 3, 6 and 8 are not maintained separately by employee and member. Further, she maintains that Section 705 of the RTK Law provides that records are not required to be compiled in a manner in which they are not maintained, and that the Senate is not required to create a record in a manner in which it does not exist. See Moore v. OOR, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Therefore, the Open Records Officer maintains the denial on this ground should be sustained. Senate Open Records Officer, Memorandum of Law, March 22, 2018, p. 8.

The requested records in Requests 2, 4, 5, 7, 9 and 10 do not exist.

Lastly, the Open Records Officer maintains the records requested in Requests 2, 4, 5, 7, 9 and 10 do not exist; therefore, denial of access was proper. She explains that the specific records requested do not exist “because retirees who were retired for an entire year (2016 & 2017) did not receive the records requested as the information was not required to be provided to them and they do not receive a W-2, so there are no records “as reported to the IRS.”” Id. Further, she maintains Requests 5 and 10 were denied because there were no records, as there were no health care benefits plans provided other than those by Highmark and UPMC. “[H]ence all records were covered under the specifics of the other requests submitted by the appellant.” Senate Open Records Officer, Memorandum of Law, March 22, 2018, p. 9. The Open Records Officer provided an attestation that there are no records responsive to these requests (2, 4, 5, 7, 9 and

10). See Exhibit E to the Open Records Officer's Memorandum of Law. Moreover, again she maintains, the Senate is not required to create a record that does not exist. Senate Open Records Officer, Memorandum of Law, March 22, 2018, p. 8. Accordingly, she maintains her denial on these grounds was proper.

The Requester, in accordance the briefing schedule established by this Officer, submitted a letter in support of his appeal on March 29, 2018. In his letter, the Requester maintains the requested records "are clearly public in nature." Requester, Letter of Support, March 29, 2018. He argued that he requested "information on how much public money was being spent on health care for the state's current and former elected senators, their families and staffers." Id.

The Requester further argues the Senate Open Records Officer used a dated test regarding financial records "that was created under a prior, more restrictive version of the Right-to-Know Law." This test, he argues, is not applicable to the "financial record analysis under the current law." Id. Further, the Requester argues the remedial nature of the Act, and that in line with both the letter and the spirit of the law, the definition of legislative record is broader than that relied upon by the Senate. Specifically, he argues the definition encompasses records that are "facially "accounts, vouchers and contracts"" and also includes "[T]he salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer and employee." Id.

Finally, the Requester argues the "information requested...shows the financial remuneration paid by the Senate, with taxpayer funds, on behalf of its members and employees. The records...directly illustrate how much the Senate is spending on health care benefits and the amount of remuneration provided to public servants." This, the Requester argues, "is the exact

type of information the RTKL is intended to reach; it illustrates how public money is spent.”

Requester, Letter of Support, March 29, 2018.

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 denied:

Documents, records, lists, spreadsheets or other materials that show the full dollar value (as reported to the IRS) of the health care benefits provided during 2016 and, if available, during 2017, to all Pennsylvania Senate members past and present, including the value of the benefits provided to spouses and dependents; and to all Senate employees, past and present, including the value of the benefits provided to spouses and dependents.

The request covers materials sufficient to provide the following detail for 2016 and, if available, for 2017:

1 ...

- D) A per-member, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate members on the Highmark plan who are covered as individuals, without spouses or dependents; and the number of members covered in that fashion.**
- E) A per-member, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate members on the Highmark plan who are covered as “individual and spouse” or under a similar description; and the number of members covered in that fashion.**

- F) A per-member, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate members on the Highmark plan who are covered as “individual, spouse and dependents” or under a similar description; and the number of members covered in that fashion.**

2 ...

- D) The same information requested in 1A, for retired (or former) Senate members.**
E) The same information requested in 1B, for retired (or former) Senate members.
F) The same information requested in 1C, for retired (or former) Senate members.

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A, B, and C) The same information requested in 1A, 1B and 1C, for the UPMC plan.

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A, B, and C) The same information requested in 2A, 2B and 2C, for the UPMC plan.

5 ...

A, B, and C) The same information requested in Items 1 and 2, presented in the same fashion, for any members or former members provided with health care benefits under plans other than the Highmark or UPMC plans.

6 ...

- D) A per-employee, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate (non-member) employees on the Highmark plan who are covered as individuals, without spouses or dependents; and the number of employees covered in that fashion.**
E) A per-employee, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate (non-member) employees on the Highmark plan who are covered as “individual and spouse” or under a similar description; and the number of employees covered in that fashion.
F) A per-employee, full dollar value figure (as reported to the IRS) for the health care benefits provided to current Pennsylvania Senate (non-member) employees on the Highmark plan who are covered as “individual, spouse and

dependents” or under a similar description; and the number of employees covered in that fashion.

7 ...

- C) The same information requested in 6A, for retired (or former) Senate non-member employees.
- D) The same information requested in 6B, for retired (or former) Senate non-member employees.
- E) The same information requested in 6C, for retired (or former) Senate non-member employees.

8 ...

A, B, and C) The same information requested in 6A, 6B and 6C, for the UPMC plan.

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A, B, and C) The same information requested in 7A, 7B and 7C, for the UPMC plan.

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A, B, and C) The same information requested in Items 6 and 7, presented in the same fashion, for any non-member employees or retired (or former) non-member employees provided with health care benefits under plans other than the Highmark or UPMC plans.

THE REQUEST IS NOT INTENDED TO SEEK ANY PERSONALLY IDENTIFIABLE INFORMATION.

Senate RTK Law Request No. 1801121547, Jan. 12, 2018.

For the reasons that follow, the decision of the Open Records Officer is sustained.

A Requester may not modify, explain or expand a request on appeal

Here, the Requester requested various records in his original request, as set forth immediately above. In his appeal, however, the Requester maintains he is seeking:

I am seeking access to records that show full dollar value of health care benefits provided during 2016 and 2017, for:

1. All Pennsylvania Senate members (past and present), including the value of the benefits provided to spouses and dependents; and

2. All Senate employees (past and present), including the value of the benefits provided to spouses and dependents.

My request sought these records for each of the health care plans offered by the Senate, including Highmark, UMPC and any other plan that may have been provided to members during 2016-2017.

Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1801121547, March 13, 2018.

The Senate Open Records Officer maintains the Requester is attempting to modify his original requests through this appeal. Specifically, she maintains that in the original request, he sought various records “as reported to the IRS” and that now, through his appeal, he has removed the specific requirement of seeking records “as reported to the IRS.” This, she maintains, is a modification to his original request that is not permissible. Further, the Open Records Officer maintains she acted in good faith discharging her statutory duties by searching for and reviewing the records as specifically set forth in the Requester’s original request, and that she based her decisions upon the specific requests set forth in the original request.

Based upon a review of the record here, the Requester rephrased the original request on appeal, *inter alia*, removing the requirement that the records be those “as reported to the IRS” and greatly reducing the number and specificity of the records he seeks (he removed all 10 subparts to his original request), which modifies the request. This is not permissible.

Once a Requester submits a request under the RTK Law, a Requester may not modify, explain or expand the original request on appeal. Smith Butz, LLC v. DEP, 142 A.3d 941, 945-46 (Pa. Commw. Ct. 2016) (“Once a RTKL request is submitted, a requester is not permitted to expand or modify the request on appeal”) (citing Dept. of Corrections v. Disability Rights

Network of PA, 35 A.3d 830, 833 (Pa. Commw. Ct. 2012); Winder v. Wolf Township, OOR Dkt. AP 2017-1140, June 28, 2017 (request for “minutes” of a meeting could not be modified on appeal to seek “transcript” of a meeting) (citing PA State Police v. OOR, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010) (opining the request and the reason(s) the agency denies access are fixed; Requester could not narrow his search on appeal; OOR could not narrow the request on appeal); Staley v. Pittsburgh Water and Sewer Authy., OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256 (“A requester may not modify the original request as the denial, if any, is premised upon the original request as written”); Alexander v. Sexual Offender Assessment Bd., OOR Dkt. AP 2009-0591, Aug. 10, 2009 (request cannot be modified, as the denial is based upon the original request as written).²

Further, the Senate is only required to “search for and provide **the records which are requested.**” (emphasis in original). Butz, 142 A.3d at 945-46 (citing Hodges v. Dept. of Health, 29 A.3d 1190, 1193 (Pa. Commw. Ct. 2011)). 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).

² Although the OOR is only authorized to hear appeals for Commonwealth and local agencies, an opinion from the OOR is still advisory to the Senate. 65 P.S. §§ 67.503, 67.1310(a); Bowling v. Office of Open Records, 75 A.3d 453, 457 (Pa. 2013).

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); see Pennsylvania State Police v. Office of Open Records, 995 A.2d 515, 517 (Pa. Commw. Ct. 2010); 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), *reconsideration denied en banc*, 2012 Pa. Commw. LEXIS 258 (Pa. Commw. Ct. Aug. 30, 2012)). A request that lacks the requisite specificity also makes it difficult, if not impossible, for this Officer and the Courts to meaningfully review the Senate’s decision if appealed. See Associated Builders v. DGS, 747 A.2d 962, 965 (Pa. Commw. Ct. 2000).

Once the Agency reviews and responds to the specific request as written, a requester cannot modify that request. The Act, 65 P.S. § 67.901, requires good faith efforts by an agency to

respond to a request and there is a presumption the Senate will act in good faith in discharging its duties under the Act. Butz, 142 A.3d at 945-46 (citing Commw. v. Donohue, 98 A.3d 1223, 1239 (Pa. 2014) (citations omitted)). There is no reason, based upon the record, to believe the Senate Open Records Officer did not comply with this statutory mandate.

Here, the Requester made a specific request to the Senate. The Senate Open Records Officer, in good faith, conducted her search and evaluation of records based upon the express language in the Requester's original request. She interpreted the request as it was plainly written. The Requester rephrased the original request on appeal, *inter alia*, removing the requirement that the records be those "as reported to the IRS" and greatly reducing the number and specificity of the records he seeks (he removed all 10 subparts to his original request). The Requester cannot, through the appeals process, modify said request. See Butz, 142 A.3d at 945.

The Requester improperly modified his original request in his appeal. Accordingly, the requests, as stated in the original request, shall form the basis of the review of Requester's appeal. His appeal based on his modified request is denied.

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).

- **Documents, records, lists, spreadsheets or other materials that show the full dollar value (as reported to the IRS) of the health care benefits provided during 2016 and, if available, during 2017, to all Pennsylvania Senate members past and present, including the value of the benefits provided to spouses and dependents; and to all Senate employees, past and present, including the value of the benefits provided to spouses and dependents.**

Here, the Requester maintains the requested records (stated above) are “legislative records because the[y] constitute financial records of the Senate.” These records, the Requester maintains, “illustrate the value of tax-payer funded health care coverage provided to Senate members and staff, and this information fits within the definition of “financial record” under the RTKL.” The Requester argues that records showing “how much Senate health plans cost and are valued at illustrates not only the disbursement of funds by the Senate, but also other payments or expenses paid on behalf of public employees” which complies with the statutory definition of

financial record in the Act. He finally argues the information requested is “presumptively public” because it is a financial record and a legislative record, and the Open Records Officer’s bases for denial do not overcome this presumption. Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1801121547, March 13, 2018.

By way of further support, the Requester argues:

the information requested in this case deals squarely with the costs associated with health care coverage financed with taxpayer funds and paid for by the Senate for its members and employees. The value assigned to these benefits illustrates the type of benefits taxpayers are financing, and it provides a critical tool for the public to understand what is being provided as remuneration to Senate members and employees. The information provided by the Senate under Section 506 of the law is certainly relevant and appreciated, it does not provide a full understanding of the health care benefits received at taxpayer expense by Senate members and staff.

Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1801121547, March 13, 2018.

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 specific records requested (“those reported to the IRS”) “are not financial records of the Senate as they are maintained by the Senate, do not fall under the definition of “legislative record” and therefore [sic] not accessible under the RTKL.” Further, she maintains, “[b]ut for the requirement to report this information pursuant to federal law these records would not be created...” Senate Open Records Officer, Memorandum of Law, March 22, 2018, p. 6.

Further, the Open Records Officer maintains that to establish whether a record is part of a financial record under the Act, there must be a sufficient connection to the financial record as established by the essential component analysis. Sapp Roofing Co. v. Sheet Metal Workers’ International Assoc. Local Union No. 12, 713 A.2d 627 (Pa. 1988). She maintains the second part of this test applies here, “as it requires the record being requested must bear a sufficient

connection to accounts, vouchers and contracts.” Sapp, 713 A.2d at _____. Here, the Open Records Officer maintains the requested records “as reported to the IRS” do not bear sufficient connection to an account, voucher or contract. Instead, these records are “a combination of financial records, so the record reported to the IRS is not directly tied to an account, voucher or contract.” Therefore, because these records are not financial records of the Senate, they are not legislative records, and are not required to be released here. Senate Open Records Officer, Memorandum of Law, March 22, 2018, p. 6.

Finally, the Open Records Officer maintains her argument is supported by the plain language of the Act and that a contrary interpretation would contravene the intent of the General Assembly in the Act. Id. at 7.

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 within the Act’s definition of “legislative record.”

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), *appeal denied*, 116 A.3d 606 (Pa. 2015). 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.

The Legislature, if it so intended, could have created a more expansive definition by including other items in the list, 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 must fall within the RTK Law's clear and unambiguous and comprehensive list of accessible legislative records to be releasable.

In this instance, the records would have to be financial records as defined in the Act. The Act defines financial record as "Any of the following":

- (1) 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.
- (2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.
- (3) A financial audit report. The term does not include work papers underlying an audit.

(11) Any administrative staff manuals or written policies.

(12) An audit report prepared pursuant to the act of June 30, 1970 (P.L.442, No.151) entitled, "An act implementing the provisions of Article VIII, section 10 of the Constitution of Pennsylvania, by designating the Commonwealth officers who shall be charged with the function of auditing the financial transactions after the occurrence thereof of the Legislative and Judicial branches of the government of the Commonwealth, establishing a Legislative Audit Advisory Commission, and imposing certain powers and duties on such commission."

(13) Final or annual reports required by law to be submitted to the General Assembly.

(14) Legislative Budget and Finance Committee reports.

(15) Daily legislative session calendars and marked calendars.

(16) A record communicating to an agency the official appointment of a legislative appointee.

(17) A record communicating to the appointing authority the resignation of a legislative appointee.

(18) Proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency.

(19) The results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency.

65 P.S. § 102.

The Open Records Officer argues the requested records “as reported to the IRS” do not meet this statutory definition. She relies upon the essential component analysis as the basis for her conclusion that the records being requested do not bear a sufficient connection to accounts, vouchers and contracts. This is so, she states, because the requested information is a compilation of information that cannot be directly tied an account, voucher or contract. Senate Open Records Officer, Memorandum of Law, March 22, 2018, p. 6.

In response, the Requester argues the Senate Open Records Officer used a dated test regarding financial records (the essential component test) “that was created under a prior, more restrictive version of the Right-to-Know Law.” This test, he argues, is not applicable to the “financial record analysis under the current law.” Further, the Requester argues the remedial nature of the Act, and that in line with both the letter and the spirit of the law, the definition of legislative record is broader than that relied upon by the Senate. Specifically, he argues the definition encompasses records that are “facially “accounts, vouchers and contracts”” and also includes “[T]he salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer and employee.” Requester, Letter of Support, March 29, 2018.

Salary and benefit information is releasable under the RTK Law.⁴ See Stein v. OOR, 2010 Pa. Commw. Unpub. LEXIS 313 * 8, May 19, 2010 (request for “names, salaries, ranks and information regarding employee benefits” for employees at State Correctional Institution); Sorensen v. Northwestern Lehigh Sch. Dist., OOR Dkt. No. AP 2013-2028, Dec. 13, 2013 (“An

⁴ The Senate Open Records Officer concedes this point: “The names of members and wages are available under the RTKL and are made available via other means.” Senate Open Records Officer, Memorandum of Law, March 22, 2018, p. 7.

insurance policy for public employees is “an employment-related contract” for health or dental coverage for employees, and payments to those policies by a public agency are “financial records” of the agency-party to the contract”; District was required to disclose the amounts of District payments made on behalf of District employees) (citing Associated Builders v. DGS, 747 A.2d 962, 966 (Pa. Commw. Ct. 2000) (interpreting “account, voucher, contract” definition to apply to insurance policies because such policies disburse agency funds)); Mychak v. Mt. Carmel Township, OOR Dkt. No. AP 2009-0556, Aug. 14, 2009 (insurance policies are public records).

It follows that such information – relating to salary and benefits – is a financial record under the Act. Such information is “the salary or other payments or expenses”⁵ as set forth in the definition of financial record in the RTK Law. 65 P.S. § 102.

Here, however, the Requester has not asked for benefits information generally. Rather, he has requested such information “as reported to the IRS.”

The question, then, is whether this “reported” information is releasable under the Act; the answer to that question must be no.

As discussed, *supra*, a Requester cannot modify his request on appeal. In his original request, the Requester expressly asked for “health care benefits” “as reported to the IRS.” The Senate Open Records Officer in good faith reviewed and responded to this request based on that express language. She argues that the responsive benefits information is only provided as part of a W-2 and only maintained as part of a W-2, and therefore, not releasable under the Act. This Officer agrees.

⁵ This Officer uses paragraph (2) of the definition of legislative record and declines to address the merits of the essential component argument raised by the Open Records Officer.

W-2s are not releasable under the RTKL Law

In the Requester's original request, he asks for records "as reported to the IRS" in his opening paragraph request, as well as in the specific 10 requests that follow. The Senate Open Records Officer, in good faith, reviewed the request, searched for responsive documents and responded to the Requester based on this express language of his request.

The Requester, however, maintains in his appeal that he is not seeking W-2 forms and that "the references to the IRS and w-2 forms were made for illustrative purposes only."

Further, the Requester argues in his appeal:

The Senate's reliance on section 6103 of the IRS Code and decisions from the Commonwealth Court are misplaced. While it is true that w-2 have been denied under the RTKL, I have not requested access to w-2s and not all information that appears on a w-2 is confidential. For example, Senators' and employees' names are included on the form as are wages, both of which are expressly public under the RTKL. Nothing in the IRS Code makes this information non-public in the context of the RTKL. Similarly, the cost of the health care plan provided to Senators and Senate employees is generated by the Senate as part of its benefit and financial administration duties. The fact that the cost may also be reported to the IRS does not render it confidential, in the same way that wages and names that appear on a w-2 are not rendered confidential.

Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1801121547, March 13, 2018.

The Open Records Officer maintains that the records, as originally requested by the Requester, is information "that is **only provided as part of a W-2 and is only maintained for that purpose.**" (emphasis added). Further, she maintains:

as the individual records are information created and provided only to the individuals, including members, who were employed (for part of or the whole year) by the Senate of Pennsylvania, who received the benefits, and the information was contained on their W-2 forms the information is considered "return information" and under Section 305(b)(3) is exempt from disclosure under Section 6103(a) of the Internal Revenue Code which prohibits disclosure of "returns" and "return information." 26 U.S.C. § 6103(a). See the Commonwealth Court's opinion in *Office of the Budget v. Campbell*, 25 A.3d 1318 (Pa. Cmlth. 2011), wherein the Court held that W-2 forms are confidential under the Internal Revenue Code as return information.

Senate Open Records Officer, Memorandum of Law, March 22, 2018, p. 7.

First, the Requester's argument that "the references to the IRS and w-2 forms were made for illustrative purposes only" is without merit. This Officer has already concluded that the Requester's original request, in his own words, stands. He cannot, at this point in the proceedings, modify or explain his request.⁶

Second, the Open Records Officer is correct that W-2s are exempt from disclosure by federal statute; therefore, they are not public records releasable under the RTKL. Fort Cherry School Dist. v. Coppola, 37 A.3d 1259, 1261 (Pa. Commw. Ct. 2012); Office of the Budget v. Campbell, 25 A.3d 1318, 1319-20 (Pa. Commw. Ct. 2011). Section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103, protects W-2 forms from disclosure. Section 6103(a) prohibits disclosure of "returns" or "return information." 26 U.S.C. § 6103(a). The Commonwealth Court has determined that W-2s qualify as "return information" and are, therefore, exempt from disclosure. Campbell, 25 A.3d at 1319-20; see Coppola, 37 A.3d at 1261. Moreover, release of redacted W-2 forms is not permissible. Campbell, 25 A.3d at 1320 (citing Church of Scientology v. IRS, 484 U.S. 9, 14-16 (U.S. 1987)).

Here, the Open Records Officer maintains the requested information was created only for the purpose of being reported to the federal government. Such information was included on Senate members' and staff W-2 forms; therefore, she argues, this information is "return information" that is protected from disclosure by federal law. See 65 P.S. § 67.305(b).

Although the Requester did not use the words "W-2 form" in his request, this is arguably implicit in the words he did use – "as reported to the IRS." The Open Records Officer maintains

⁶ The Requester can, of course, submit a new request to the Open Records Officer.

this requested information is only provided and maintained as part of W-2 forms; therefore, it is not releasable, and that her denial upon this ground should be sustained. This Officer agrees.

W-2 forms are exempt by federal law from disclosure and cannot be released pursuant to a RTK Law request. 65 P.S. § 67.305(b); 26 U.S.C. § 6103. Moreover, the Requester's argument that not all information on a W-2 is confidential is misplaced. The United States Supreme Court has determined that release of redacted W-2 forms is not permissible. Campbell, 25 A.3d at 1320 (citing Church of Scientology v. IRS, 484 U.S. 9, 14-15 (U.S. 1987)). It follows that the Open Records Officer's denial on this ground is sustained.

The Senate is not required to create a record

Assuming *arguendo*, the requested records in Requests 1, 3, 6 and 8 would be accessible under the Act, the Open Records Officer argues such records are not maintained separately by employee and member; therefore, she is not required to compile a record in a manner in which it is not maintained or to create a record in a manner in which it does not exist.

In response, the Requester argues:

The Senate's position that it is not required to create a record is misplaced. The Senate does not deny certain information exists, and in fact admits that the records "are based upon the coverage the individual receives regardless of whether they are an employee or member." The fact is that these records exist in some form, and the fact that they do not exist in a pre-existing list is not outcome determinative. The categories of the request were included as a means of specifying which records were sought, not as a means of limiting the request to pre-existing lists. To the extent a responsive list does not exist, the law still requires access to the information in the form in which it exists. Moreover, if the information exists as part of a database, pulling relevant fields of data in response to a request is not "creation" of a record under section 705.

Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1801121547, March 13, 2018.

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).

Here, the Open Records Officer explained that the records requested are not maintained separately by member and employee. Rather, they are based upon the coverage the individual received regardless of whether they are a member or an employee.

Moreover, the Senate Open Records Officer did provide information she believed was responsive to the request. She provided the figures from the financial records of the Senate representing the costs for medical, prescription, and SEAP coverage for employees and members who received coverage for the entire calendar year for years 2016 and 2017. She included “the number of employees who received the benefits for the full year or a part of the year, whether it was for one month or eleven months, and based upon the plan they were covered by at the end of the year or when they left employment with the Senate.” She also offered to discuss with the Requester “which records are available and responsive to your request.”

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. Her denial on this basis is sustained.

Attestation that no additional financial records exist

Additionally, the Open Records Officer attested there are no financial records responsive to Requests 2, 4, 5, 7, 9 and 10 (see Exhibit E), and that because of this, she is not required to create a responsive record. Therefore, she maintains, her actions were proper and should be sustained.

In her sworn statement, the Open Records Officer attested:

I have inquired with relevant Senate personnel as to whether the requested records (requests 2, 4, 7 & 9) exist in the Legislative Agency’s possession, specifically records

related to any account, voucher, or contract dealing with the topic specifically outlined in the above listed requests. There are no records responsive to the requests as the records requested were not prepared for retirees as they do not receive w-2 forms and the information was not required to be reported to the IRS.

Exhibit E.

She further attests:

I have inquired with relevant Senate personnel as to whether the requested records (requests 5 & 10) exist in the Legislative Agency's possession, specifically records related to any account, voucher, or contract dealing with the topic specifically outlined in the above listed requests. There are no records responsive to the requests as there are no other health care benefits plans other than Highmark and UPMC.

Exhibit E.

The Open Records Officer maintains in her Memorandum of Law that the specific records requested do not exist because "retirees who were retired for an entire year (2016 & 2017) did not receive the records requested as the information was not required to be provided to them and they do not receive a W-2, so there are no records "as reported to the IRS.'" Senate Open Records Officer, Memorandum of Law, March 22, 2018, p. 8. For Requests 5 and 10, the Open Records Officer maintains there are no records "because there was no health care benefits plans provided other than Highmark and UPMC, hence all records were covered under the specifics of the other requests." Id. at 8-9. She further maintains that she is not required to create a responsive record to these requests. Id.

The Requester, in his Appeal, stated he has "no bases upon which to challenge that assertion [that the remaining records do not exist], presuming the denial is based on good faith." Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1801121547, March 13, 2018.

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. Based on that evidence provided, the Senate has met its 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. Her denial on this basis is sustained.

Discretion of the Open Records Officer

Finally, the Requester makes several compelling policy arguments in his Letter of Support for his appeal. Specifically, he maintains he requested "information on how much public money was being spent on health care for the state's current and former elected senators, their families and staffers." Requester, Letter of Support, March 29, 2018. The Requester also argues the "information requested...shows the financial remuneration paid by the Senate, with taxpayer funds, on behalf of its members and employees. The records...directly illustrate how much the Senate is spending on health care benefits and the amount of remuneration provided to public servants." This, the Requester argues, "is the exact type of information the RTKL is intended to reach; it illustrates how public money is spent. Id.

The RTK Law, however, 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. Despite 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.

Although not required to make a discretionary release under the RTK Law, the Senate Open Records Officer did just that. She provided the Requester with information she believed was responsive to his request. She provided the following information, pursuant to the discretionary release provisions of the Act, 65 P.S. § 506(c), to the Requester:

In accordance with Section 506, I would like to provide you information in a manner which I believe does not conflict with Section 6103 and provides information I believe is responsive your request and are from the financial records of the Senate.

My office is open to discussing which records are available and responsive to your request.

For employees, including members, who received benefits for the entire calendar year, the following figures represent the costs for medical, prescription and SEAP coverage and come from the financial records of the Senate.

Behind each dollar figure is the number of employees who received the benefits for the full year or a part of the year, whether it was for one month or eleven months, and based upon the plan they were covered by at the end of the year or when they left employment with Senate. The number of employees who receive coverage changes frequency as employees are hired or leave employment with Senate. Additionally, the coverage an employee receives during the course of a year may change due to changes in their family and here are a few examples: getting married or divorced, the birth or adoption of a child, and children aging out of coverage. Lastly, employees of the Senate who elect coverage must pay one percent of their annual salary towards the costs of the benefits.

(Notes: Senate Health/Prescription plans and SEAP are by fiscal years. Prescription plan for 2016 was through BeneCard PBF and for 2017 half the year was through BeneCard PBF (1/1 to 6/30) and half through Highmark Prescription (7/1 to 12/31).

<u>Highmark/Prescription/SEAP</u>	<u>2016</u>	<u>2017</u>
Employee Only	\$ 9,945.01 (220)	\$ 9,887.34 (208)
Employee/Child	\$16,890.25 (36)	\$16,792.38 (41)
Employee/Children	\$24,671.53 (36)	\$24,485.10 (26)
Employee/Spouse	\$21,663.61 (187)	\$21,517.50 (195)
Employee/Family	\$27,705.13 (332)	\$27,511.86 (317)

<u>UPMC /Prescription/SEAP</u>	<u>2016</u>	<u>2017</u>
Employee Only	\$ 9,954.97 (11)	\$10,850.58 (10)
Employee/Child	\$16,907.41 (2)	\$18,429.90 (4)
Employee/Children	\$24,697.93 (4)	\$27,018.54 (3)
Employee/Spouse	\$21,668.29 (11)	\$23,684.94 (12)
Employee/Family	\$27,734.41 (14)	\$30,305.46 (15)

Senate Open Records Officer, Response to Requester, Feb. 20, 2018.

The Requester stated this information “is certainly relevant and appreciated” but “it does not provide a full understanding of the health care benefits received at taxpayer expense by Senate members and staff.” Requester Appeal to Senate Open Records Officer Response to RTKL Request No. 1801121547, March 13, 2018. The Senate Open Records Officer, in her response to the Requester, offered to discuss with him “which records are available and responsive to your request.” Senate Open Records Officer, Response to Requester, Feb. 20, 2018. There is no support in the record for whether such a discussion took place.

Conclusion

The decision of the Senate Open Records Officer is sustained. The Requester is seeking access to records that are not releasable pursuant to federal law. W-2 information is exempt from disclosure under the Act. 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. Therefore, the denial issued by the Senate Open Records Officer must be sustained.

IN THE SENATE OF PENNSYLVANIA

Appeal of Turner

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Senate RTK Appeal 02-2018

**FINAL DETERMINATION
April 11, 2018**

ORDER

AND NOW, this 11th day of April 2018, the decision of the Senate Open Records Officer is AFFIRMED. The documents sought by Requester are 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.



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.