

IN THE SENATE OF PENNSYLVANIA

Appeal of Bumsted, *et al.*

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Senate RTK Appeal 02-2020

FINAL DETERMINATION

April 2, 2020

Statement of Facts

*The Request – In Original Form and as Modified*

On January 9, 2020, Requesters, Brad Bumsted and Angela Coulombis, submitted a Request for numerous documents, via email, to the Senate Open Records Officer. The Request was made pursuant to the Right-to-Know Law, Act of February 14, 2008, P.L. 6, 65 P.S. § 67.101 *et seq.* (the Act or RTK Law). The Requesters sought: “...expenses of the Office of Senate President Pro Tempore, excluding salaries and benefits, for calendar years,[sic] 2017, 2018, and 2019. Please provide this information electronically.” Senate RTK Law Request No. 2001101341, Jan. 9, 2020.

On January 10, 2020, the Requesters verbally modified this original Request through a phone call with Counsel to the Open Records Officer, which was memorialized in an email from the Open Records Officer to the Requesters that same date. The Requesters modified their request as follows: “...employee expenses of the Office of Senate President Pro Tempore, excluding salaries and benefits, for calendar years,[sic] 2017, 2018, and 2019.” (emphasis in email from Senate Open Records Officer). Senate Open Records Officer Email to Requesters, RTK Request No. 2001101341, Jan. 10, 2020.

In her email, the Open Records Officer also advised the Requesters that in accordance with section 902 of the RTK Law, an extension was necessary to respond to their Request. She further advised that her response would be made on or before February 15, 2020, within the 30-

day extension window based upon the submission date from the original request. Senate Open Records Officer Email to Requesters, RTK Request No. 2001101341, Jan. 10, 2020; Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 3.

The Requesters again modified their Request on January 14, 2020 via another email to the Open Records Officer, requesting the following:

...expenses of the Office of Senate President Pro Tempore including Senator Scarnati's expenses and those of his employees – but excluding salaries and benefits – for calendar years, [sic] 2017, 2018 and 2019. Please provide this information electronically. Please advise of any cost exceeding \$100. For any breakfast meetings, lunches, dinners, charged by the senator or his staff, please include the legislative purpose and the third party or parties with whom they dined. This request covers, [sic] 2017, 2018 and 2019.

Senate RTK Law Request No. 2001101341, modified Jan. 14, 2020.

#### **The Senate Open Records Officer's Response**

The Senate Open Records Officer timely responded to the Requesters via email communication on February 12, 2020, granting the Request as modified in part, and denying in part via redactions.<sup>1</sup> In her response, the Senate Open Records Officer provided records for the period January 1, 2017 through January 10, 2020, which she concluded were responsive to the Request. In those records, she made limited redactions, citing legislative privilege. Senate Open Records Officer Response to RTK Request No. 2001101341, Feb. 12, 2020.

The Open Records Officer cited various provisions of the RTK Law in her response, including: an explanation to the Requesters of her process for review, 65 P.S. § 67.303; the definitions of a legislative record, a financial record and privilege as applied in the RTK Law context, 65 P.S. § 67.102; and, the permissibility of using redactions for information that is not

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<sup>1</sup> As discussed, *supra*, the Senate Open Records Officer extended her response time by 30 days. See 65 P.S. § 67.902.

accessible under the RTK Law, 65 P.S. § 67.706. Senate Open Records Officer Response to RTK Request No. 2001101341, Feb. 12, 2020.

In response to the Request, the Open Records Officer provided a 27-page report to the Requesters documenting the following information for salaried officers and employees: voucher number; payee name; date incurred; processed date; amount expense; and, appropriation. This report covered the period January 1, 2017 through January 10, 2020, with the first entry dated February 9, 2017.

In this report, the Open Records Officer redacted information on pages 2, 6, 7, 8, 14, 15, 16, 18, 22, 23<sup>2</sup>, pursuant to 65 P.S. § 67.305(b)(2). The Open Records Officer maintains the redacted information is protected by the speech and debate privilege, citing the Speech and Debate Clause of the Pennsylvania Constitution, Article II, Section 15. She explained:

Very limited information was redacted within the report, as the information is protected by the speech and debate privilege and specifically as to whom and was met with and/or the topic, as this information relates to legislative activities, which are essential prerequisites to the drafting of bills and debating proposed legislation. This privilege is in both the federal and state constitutions and has been affirmed by the courts.

Senate Open Records Officer, Response to RTK Request No. 2001101341, Feb. 12, 2020. The Open Records Officer then cited to, and attached to her response, a prior decision of this Officer, Appeal of Swift, Senate RTK Appeal No. 03-2015, upholding the redaction of similar information protected by the speech and debate privilege. Id. The Open Records Officer also cited to League of Women Voters of PA v. Commw. of PA, 177 A.3d 1000, 1005 (Pa. Commw. Ct. 2017), for support that the privilege was re-affirmed with regard to state legislators and their staff acting within the sphere of legitimate legislative activity. Id. Finally, the Open Records Officer provided to the Requesters the information needed to appeal her decision to the Senate

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<sup>2</sup> These pages were not redacted in their entirety; rather, limited information on each of these pages was redacted.

RTK Law Appeals Officer. Senate Open Records Officer, Response to RTK Request No. 2001101341, Feb. 12, 2020.

*The Appeal*

On February 26, 2020, the Requesters timely filed an appeal of the Senate Open Records Officer's decision. That same day, this Officer notified the Senate Open Records Officer of the Appeal, Senate RTK Appeal 02-2020, via email letter, which copied the Requesters. On February 27, 2020, via email, this Officer communicated the briefing schedule to the parties as follows. The Senate Open Records Officer was afforded the opportunity to file a Memorandum of Law and any other evidentiary documentation until close-of-business March 6, 2020. The Requesters were afforded the opportunity to file a Memorandum of Law and any other evidentiary documentation until close-of-business March 13, 2020. Senate RTK Appeals Officer Briefing Schedule Correspondence, Feb. 27, 2020.<sup>3</sup>

The Requesters appeal the partial denial of their request "...for expenses of the Office of Senate President Pro Tempore including Senator Scarnati's expenses and those of his employees – but excluding salaries and benefits – for calendar years, [sic] 2017, 2018 and 2019..."

Requesters included a legal analysis in their appeal arguing that the Senate Open Records Officer's interpretation of the Speech and Debate Clause is over-broad. Maintaining, instead,

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<sup>3</sup> On February 27, 2020, this Officer requested, via email, an approximate 30-day extension of time (from March 27 to April 30) to file the Final Determination and Order in this matter, citing 65 P.S. § 67.1101(b)(1). By way of support, this Officer noted the conflict of not only her parliamentary and Senate session responsibilities with her ability to complete this work, but also the conflict of her work as Senate Secretary as well. Senate RTKL Appeals Officer Email to Requesters, Feb. 27, 2020. Further, it was explained to the Requesters in this email communication that this Officer would endeavor to complete her work in this appeal before April 30. *Id.* The next day, the Requesters agreed, via email, to a one-week extension, making April 3, 2020 the deadline for filing this Final Determination and Order. Requesters Email Response to Senate RTKL Appeals Officer Email, Feb. 28, 2020; Senate RTKL Appeals Officer Email Response to Requesters, Feb. 28, 2020. The Senate RTKL Appeals Officer copied the Senate Open Records Officer on all of this correspondence.

that their Request is for “records reflecting the financial expenditures of the Office of the Senate Pro Tempore and the purpose of those expenditures, which under the state’s Right-to-know law are expressly public records.” Requesters Appeal to Senate Open Records Officer Response to RTKL Request No. 2001101341, Feb. 26, 2020, p. 2.

In support of their appeal, the Requesters maintain the Pennsylvania Constitution’s Speech and Debate Clause, Article II, Section 15, has not been interpreted broadly by either Pennsylvania or federal courts, but rather, the courts have limited it to activities “within the ‘legitimate legislative sphere.’” Requesters Appeal to Senate Open Records Officer Response to RTKL Request No. 2001101341, Feb. 26, 2020, p. 2. Further, the Requesters argue that when interpreting the Clause it is appropriate to look to decisions interpreting the federal Speech and Debate Clause found in Article I, Section 6 of the United States Constitution. Consumers Educ. & Protective Ass’n v. Nolan, 368 A.2d 675 (Pa. 1977). Requesters Appeal to Senate Open Records Officer Response to RTKL Request No. 2001101341, Feb. 26, 2020, p. 2. The Requesters argue the United States Supreme Court has defined the legitimate legislative sphere as follows: “Activities that are ‘an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.’” Youngblood v. DeWeese, 352 F.3d 836, 840 (3d Cir. 2003) (quoting Gravel v. U.S., 408 U.S. 606, 625 (1972)). Requesters Appeal to Senate Open Records Officer Response to RTKL Request No. 2001101341, Feb. 26, 2020, p. 2. Further, the Requesters argue the federal courts “have defined the legitimate legislative sphere to include acts like voting for a resolution, subpoenaing and seizing property and records for a committee hearing, preparing investigative reports, addressing

a congressional committee and speaking before the legislative body in session.” Youngblood v. DeWeese, 352 F.3d at 840 (quoting Gravel, 408 U.S. at 625). Requesters Appeal to Senate Open Records Officer Response to RTKL Request No. 2001101341, Feb. 26, 2020, p. 2.

The Requesters argue the records they seek are unlike the records the federal courts have found fall within the legitimate legislative sphere, because they are records “reflecting the financial expenditures of the Office of the Senate Pro Tempore and the purposes of those expenditures, which under the state’s Right-to-know law are expressly public records.” Requesters Appeal to Senate Open Records Officer Response to RTKL Request No. 2001101341, Feb. 26, 2020, p. 2.

Further, the Requesters argue the federal courts do not include acts within the legitimate legislative sphere if they “are ‘casually or incidentally related to legislative affairs but not a part of the legislative process itself.’” U.S. v. Eilberg, 507 F. Supp. 267, 286 (E.D. Pa. 1980) (quoting U.S. v. Brewster, 408 U.S. 501, 512 (1972)). Requesters Appeal to Senate Open Records Officer Response to RTKL Request No. 2001101341, Feb. 26, 2020, p. 2.

The Requesters also maintain the Commonwealth Court has declined to extend the privilege to financial records related to a House newsletter, Hamilton v. Hennessey, 783 A.2d 852 (Pa. Commw. Ct. 2001), *aff’d*, 800 A.2d 927 (Pa. 2003). Similarly, they argue, the privilege should not attach to records “showing the purpose and/or attendees of a lunch meeting with legislators.” They maintain this is not the type of information protected by the privilege. Requesters Appeal to Senate Open Records Officer Response to RTKL Request No. 2001101341, Feb. 26, 2020, p. 2.

Additionally, the Requesters argue that Pennsylvania trial courts have also limited the privilege and not extended it to administrative records such as calendar entries and account

records related to reimbursement for expenses related to a legislative office. McNaughton v. McNaughton, 72 Pa. D. & C.4<sup>th</sup> 363 (2003). The redacted records here, Requesters maintain, are similarly “administrative in nature and do not constitute an integral part of a deliberative or communicative process within the legitimate legislative sphere.” Requesters Appeal to Senate Open Records Officer Response to RTKL Request No. 2001101341, Feb. 26, 2020, pp. 2-3.

Finally, the Requesters argue the Senate has interpreted legislative privilege too broadly, which is not consistent with the case law. This, they maintain, makes the privilege:

...a shield to prevent the public from assessing or understanding its own government’s expenditures. Under that scenario, members of the public would never be able to question the financial decisions of the very people they elected to manage public dollars...It also defeats the plain language and intent of the [sic] Pennsylvania’s Right-to-Know Law.

Requesters Appeal to Senate Open Records Officer Response to RTKL Request No. 2001101341, Feb. 26, 2020, p. 3.

**Briefs of the Parties**

On March 6, 2020, the Senate Open Records Officer timely filed a Memorandum of Law in support of her redactions. In her memo, the Open Records Officer maintains the information she redacted was “narrow and limited” and “relates to legitimate legislative activities of the members and activities on behalf of members, in the course of fulfilling their duties as a member of the Senate of Pennsylvania...” Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 2. Further, she maintains that despite these redactions, she still provided access to the requested financial records, which specifically included access to the following information: the financial transaction, including voucher number; payee name; date incurred; processed date; amount of the expense; the appropriations account; to whom the expense applies; and a general description “as explicitly permitted by the plain language of the RTKL and as the precedent has been upheld.” Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 2.

That same date, the Senate Open Records Officer also filed a Declaration of her Counsel, Michael A. Sarfert, attesting that the records were reviewed, and that limited redactions were made in good faith based upon the Speech and Debate privilege. Senate Open Records Officer Declaration of Michael A. Sarfert, Senate RTK Appeal No. 02-2020.

On March 13, 2020, the Requesters timely filed their Memorandum of Law in support of their appeal. In their memo, they maintain the Senate Open Records Officer's reliance upon both League of Women Voters of PA v. Commw. of PA, 177 A.3d 1000 (Pa. Commw. Ct. 2017), and Appeal of Swift, Senate RTK Appeal 03-2015, is misplaced. They argue that League is factually distinguishable and that Swift is of no precedential value in this case. Requesters Memorandum of Law, March 13, 2020, pp. 1-2.

#### **Discussion**

This appeal presents the following question for review: whether the Senate Open Records Officer, when responding to a request under the RTK Law, properly redacted limited information (names of attendees at meetings with legislative staff and the legislative topics discussed) contained in legislative records of the Senate on the basis of legislative privilege.

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

#### **Legislative Records**

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

The RTK Law requires legislative agencies to provide legislative records in accordance with the Act. 65 P.S. § 67.303(a). It is presumed that a legislative record in the possession of a legislative agency will be available in accordance with the Act. 65 P.S. § 67.305(b). This

presumption does not apply if the record is exempt under Section 708 of the Act, if the record is protected by a privilege, or if the record is exempt from disclosure under any other State or Federal law, regulation, or judicial order or decree. 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 a legislative record is exempt from public access. 65 P.S. § 708(a)(2). It follows that the burden is on the Senate to prove a legislative record is exempt from release.

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

As with all questions of statutory construction and interpretation, the starting point is the plain language of the statute, because "[t]he clearest indication of legislative intent is generally the plain language of a statute." Commw. of PA, Office of the Governor v. Donahue, 59 A.3d 1165, 1168 (Pa. Commw. Ct. 2013), *aff'd*, 98 A.3d 1223, 1237-38 (Pa. 2014). When the words of a statute are "clear and free from all ambiguity, the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit." Honaman v. Twp. of Lower Merion, 13 A.3d 1014, 1020 (Pa. Commw. Ct. 2011), *appeal denied*, 31 A.3d 292 (Pa. 2011); 1 Pa.C.S.A. § 1921(b). Further, when the statutory language is unambiguous there is "no need to resort to

other indicia of legislative intent...[thus] any further deliberation as to its meaning is unwarranted.” Donahue, 59 A.3d at 1168-69; see 1 Pa.C.S.A. § 1921(b)-(c).

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

Although the RTK Law must be liberally construed to effectuate its purpose, Barnett v. PA DPW, 71 A.3d 399, 403 (Pa. Commw. Ct. 2013) (citing Levy v. Senate of PA, 65 A.3d 361, 381 (Pa. 2013), *substituted opinion after remand*, 94 A.3d 436 (Pa. Commw. Ct. 2014), *appeal denied*, 106 A.3d 727 (Pa. 2014)) (citations omitted), matters not included in a statutory provision are deemed to be excluded. See 1 Pa.C.S.A. § 1903; Commw. of PA v. Zortman, 23 A.3d 519, 524 (Pa. 2011), *cert. denied*, 132 S. Ct. 1634 (U.S. 2012); Commw. of PA v. Ostrosky, 866 A.2d 423, 430 (Pa. Super. Ct. 2005), *aff’d*, 909 A.2d 1224 (Pa. 2006); see also, Donahue, 59 A.3d at 1168, *aff’d*, 98 A.3d at 1237-38 (concluding the plain language of the RTK Law was unambiguous; therefore, the court did not expand the law to include agency personnel not specifically set forth in the statute) (citation omitted). Courts cannot “add, by interpretation, to a statute, a requirement which the legislature did not see fit to include.” The Summit School, Inc. v. PA Dept. of Educ., 108 A.3d 192, 199 (Pa. Commw. Ct. 2015) (citing Shafer Electric & Constr. v. Mantia, 96 A.3d 989, 994 (Pa. 2014) (quoting Commw. v. Rieck Investment Corp., 213 A.2d 277, 282 (Pa. 1965))). Similarly, courts cannot insert words that the Legislature failed

to supply into a statute. PA Dept. of Health v. Office of Open Records, 4 A.3d 803, 812 (Pa. Commw. Ct. 2010).

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

The Act defines the Senate as a legislative agency, 65 P.S. § 67.102; therefore, the Senate is required to release legislative records. 65 P.S. § 67.303(a). The Senate, however, is not required to create records that do not currently exist. It likewise is not required to compile or format records in a way it is not already currently compiling or formatting them. 65 P.S. § 67.705. Importantly, by their very definitions, legislative records are not the same as public records; therefore, the Senate is required only to provide access to legislative records, not public records. See 65 P.S. §§ 67.102, 67.301, 67.302, 67.303.

Section 102 of the Act explicitly defines the term legislative record in a specific and exhaustive manner. There are nineteen different types of legislative documents listed that would be accessible by the public as legislative records pursuant to the Act.<sup>4</sup> 65 P.S. § 67.102.

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<sup>4</sup> “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.

The Legislature, if it so intended, could have created a more expansive definition by including other items in the list, but it did not. Instead, it crafted a specific and exhaustive list of documents that would constitute legislative records under the Act, to further its goal of expanded government transparency through public access to documents. See also, Levy v. Senate of PA, 65 A.3d at 381.

Further, the RTK Law defines a 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...

65 P.S. § 67.102

Here, it is undisputed that the records requested – “expenses of the Office of Senate President Pro Tempore including Senator Scarnati’s expenses and those of his employees – but

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- (10) A record of all recorded votes taken in a legislative session.
  - (11) Any administrative staff manuals or written policies.
  - (12) An audit report prepared pursuant to the act of June 30, 1970 (P.L.442, No.151) entitled, "An act implementing the provisions of Article VIII, section 10 of the Constitution of Pennsylvania, by designating the Commonwealth officers who shall be charged with the function of auditing the financial transactions after the occurrence thereof of the Legislative and Judicial branches of the government of the Commonwealth, establishing a Legislative Audit Advisory Commission, and imposing certain powers and duties on such commission."
  - (13) Final or annual reports required by law to be submitted to the General Assembly.
  - (14) Legislative Budget and Finance Committee reports.
  - (15) Daily legislative session calendars and marked calendars.
  - (16) A record communicating to an agency the official appointment of a legislative appointee.
  - (17) A record communicating to the appointing authority the resignation of a legislative appointee.
  - (18) Proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency.
  - (19) The results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency.

65 P.S. § 67.102 (emphasis added)

excluding salaries and benefits – for calendar years, [sic] 2017, 2018 and 2019...” – are financial records as defined in the Act.

The Senate Open Records Officer acknowledged this in her response and provided same to the Requesters with limited redactions on the basis of legislative privilege. The question remains whether these redactions are allowable under the RTK Law. The answer to that question must be yes.

### Redactions

The Senate Open Records Officer produced financial records of the Senate reflecting the expenses of the Office of the Senate President Pro Tempore (PPT), including PPT Senator Scarnati and his employees for calendar years 2017-2019; however, asserting legislative privilege, she redacted information revealing the individuals with whom PPT legislative staff met and the specific legislative issue or issues they discussed. The Open Records Officer maintained she withheld this information because it “relates to legislative activities, specifically fact-finding, gathering information and investigating activities, which are essential prerequisites to the drafting of bills and debating proposed legislation.” Senate Open Records Officer Response to RTK Request No. 2001101341, Feb. 12, 2020.

The Senate Open Records Officer also filed a Declaration of her Counsel, Michael A. Sarfert, attesting the records were reviewed, and that limited redactions were made in good faith based upon the Speech and Debate privilege. Senate Open Records Officer Declaration of Michael A. Sarfert, Senate RTK Appeal No. 02-2020.

Requesters maintain the Senate Open Records Officer’s redactions were overly broad in violation of the Act. They argue the information redacted is not protected by legislative privilege.

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

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

The Senate Open Records Officer has met this burden.

In her Memorandum of Law, the Senate Open Records Officer, citing sections 102 and 303 of the RTK Law, maintains the Senate, as a legislative agency, is required to provide legislative records in accordance with the RTK Law. Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 4. However, she further maintains that while the

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<sup>5</sup> Although the OOR is only authorized to hear appeals for Commonwealth and local agencies, an opinion from the OOR is still advisory. 65 P.S. §§ 67.503, 67.1310(a); Bowling v. Office of Open Records, 75 A.3d 453, 457 (Pa. 2013).

legislative intent of the RTK Law is for the Senate to release these records, it was also the intent of the Act to permit the Senate to deny access to records that are protected by a privilege. Id. at 4-5. She acknowledges the Senate bears the burden to show by a preponderance of the evidence that the legislative records are protected – in full or in part – by a privilege in accordance with section 305 of the Act. Id. at 5.

The Senate Open Records Officer released the requested records and made limited redactions to same based on legislative privilege. She maintains that requiring access to the redacted information in the legislative records would contravene the legislative privilege and the RTK Law itself. Senate Open Records Officer Memorandum of Law, March 6, 2020, pp. 9-10.

The Senate Open Records Officer argues that legislative privilege enables members of the General Assembly to conduct their legislative activities and fulfill their legislative duties without interference from the courts. Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 5.

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

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

PA Const. Art. II, Sec. 15. Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 5. The Clause, the Senate Open Records Officer argues, prohibits inquiry into things done and said in the Senate and House in the performance of official duties. PA Sch. Boards Ass’n. v. Commw. Ass’n. of Sch. Adm’rs, 805 A.2d 476, 486 (Pa. 2002) (citing Powell v. McCormack, 395 U.S. 486, 502-03 (1969)). Senate Open Records Officer Memorandum of Law, March 6,

2020, p. 6. The essence of the privilege, she argues, is to protect the “integrity of the legislative process by insuring the independence of individual legislators.” PA AFLCIO by George v. Commw., 691 A.2d 1023, 1034 (Pa. Commw. Ct. 1997), *aff’d*, 757 A.2d 917 (Pa. 2000) (quoting U.S. v. Brewster, 408 U.S. 501, 507 (1972)). Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 6. Further, this immunity, she maintains, “insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation.” PA Sch. Boards Ass’n, 805 A.2d at 485 (quoting Powell, 395 U.S. at 503). Senate Open Records Officer Memorandum of Law, March 6, 2020, 2015, p. 6.

The Senate Open Records Officer, citing Consumers Educ. and Protective Ass’n v. Nolan, 368 A.2d 675, 681 (Pa. 1977), explains that this privilege protects legislators from interference with their “legitimate legislative activities” and that any civil or criminal suit brought against a legislator for an action falling within the “legitimate legislative sphere” must be dismissed. Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 5. She maintains this immunity is “absolute” as to the actions of the legislators that fall within this legislative sphere. Consumer Party of PA v. Commw., 507 A.2d 323, 331 (Pa. 1986). Senate Open Records Officer Memorandum of Law, March 6, 2020, pp. 5-6. She further maintains the protections afforded by the privilege for activities within the legitimate legislative sphere were most recently affirmed in League of Women Voters of PA v. Commw., 177 A.3d 1000, 1005 (Pa. Commw. Ct. 2017). Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 6.

The Senate Open Records Officer maintains the redacted information – names of individuals with whom legislative staff met and the legislative topics they discussed – fall within

the legislative sphere and, are therefore, protected by the privilege. The sphere of activity, she argues, is not limited to floor debates on proposed legislation or to conduct that actually takes place in the Capitol. Harristown Dev. Corp. v. DGS, 580 A.2d 1174 (Pa. Commw. Ct. 1990), *reversed on other grounds*, 614 A.2d 1128 (Pa. 1992) (holding a state senator was legislatively immune from a suit in connection with his requests for information from a nonprofit corporation); Melvin v. Doe, 48 D. & C. 4<sup>th</sup> 566 (C.P. Allegh. 2000) (quashing the subpoena of a state senator to attend and testify at a deposition about his activities in filling a judicial vacancy). Senate Open Records Officer Memorandum of Law, March 6, 2020, pp. 6-7. She cites to this Officer's decision in Appeal of Swift, Senate RTK Appeal 03-2015, for the proposition that legislative privilege applies to "a representative's actions seeking input from his constituents because talking to constituents is a 'core legislative function.'" Swift (citing Firetree Ltd. v. Fairchild, 920 A.2d 913, 919 (Pa. Commw. Ct. 2007), *appeal denied*, 946 A.2d 689 (Pa. 2008)) (citation omitted). Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 7.

The Senate Open Records Officer asks for a broad interpretation of the privilege to protect legislators from judicial interference with their activities that fall within the legislative sphere. Smolsky v. PA General Assembly, 34 A.3d 316 (Pa. Commw. Ct. 2011), *aff'd*, 50 A.3d 1255 (Pa. 2012). Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 7.

She further maintains that to determine what constitutes activity within the legislative sphere it is proper to look to how the federal courts have interpreted the Speech and Debate Clause. Consumers Educ. & Protective Ass'n, 368 A.2d at 680 (holding there is no basis for distinguishing the scope of the Speech and Debate Clause in the Pennsylvania Constitution from that in the U.S. Constitution). Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 7.

Moreover, the Senate Open Records Officer argues the RTK Law itself specifically envisions and allows for redaction of privileged information:

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

65 P.S. § 67.706. This language, read together with the Act's definition of legislative record as well as with section 305 of the Act, the Senate Open Records Officer maintains, supports her position that the redactions here were proper. Senate Open Records Officer Memorandum of Law, March 6, 2020, pp. 7-8.

Further, the Senate Open Records Officer maintains the definition of legislative record contemplates both protecting privilege and only releasing information made in connection with action taken by the General Assembly. Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 8. Although the definition includes a financial record, she maintains that privileges can and do apply in some instances and in those cases redactions are permissible. Id.

The Senate Open Records Officer also argues that Levy is analogous to the extent that it allows for limited redactions when a privilege attaches. Levy v. Senate of PA, 34 A.3d 243 (Pa. Commw. Ct. 2011), Levy v. Senate of PA, 65 A.3d 361 (Pa. 2013); Levy v. Senate of PA, 94 A.3d 436 (Pa. Commw. Ct. 2014). Specifically, she maintains Levy is applicable because the Court there approved redactions of descriptions of legal services in financial records where the descriptions "specify the issues or laws researched by the attorneys, specify the services provided and the names of individuals with whom the attorney communicated" because these descriptions have the "potential to reveal the confidential communications shared by attorney and client, the

motive of the client in seeking representation and litigation strategy.” Levy v. Senate of PA, 34 A.3d 243, 257 (Pa. Commw. Ct. 2011); Levy v. Senate of PA, 65 A.3d 361 (Pa. 2013) and Levy v. Senate of Pa, 94 A.3d 436 (Pa. Commw. Ct. 2014). Senate Open Records Officer Memorandum of Law, March 6, 2020, p. 8.

Moreover, the Senate Open Records Officer maintains the ruling in Appeal of Swift, Senate RTK Appeal 03-2015, applies here, because the privilege is similarly being applied narrowly to redact financial records of the Senate, which if released in full would “reveal the topic of a matter which the member may be considering in the sphere of legislative activity.” Senate Open Records Officer Memorandum of Law, March 6, 2020, pp. 8-9.

Finally, the Senate Open Records Officer has submitted an Attestation by her Counsel, Michael A. Sarfert, swearing and affirming the records were reviewed keeping in mind possible redactions based upon the Speech and Debate Clause, and that limited redactions were made. He specifically attested the following:

5. Redactions were made when information in the record was of the nature as to the identity of whom was met with and/or the topic, in what would be considered as a private, non-public setting.
6. The information redacted includes specifics as to whom was met with or a group of individuals that could be reasonably identified based upon the description of the group.
7. Redactions were also made to protect specific topics of the meeting.
8. Redactions were not made when the information in the record provided details of individuals, etc. or topics that would or were in a public setting or of a general description, such as “Rural Regional College Board of Trustees Meeting”, “attend Supreme Court Hearing”, “Pittsburgh Chamber Breakfast Series Meeting”, “attend PA, [sic] Convention Center Board Meeting”, “UPMC Post Election Briefing”, “budget issues”, and “Northern PA Regional College Meeting w/ NPRC President[.]”
9. All redactions were made in good faith and based upon information available.

Senate Open Records Officer Declaration of Michael A. Sarfert, Senate RTK Appeal No. 02-2020.

However, the Requesters argue these redactions were improper because the Senate Open Records Officer's interpretation of the privilege is over-broad. In support of this, they maintain the Senate's reliance on League of Women Voters is misplaced because "[t]he application of the speech and debate clause in the League of Women Voters case was a small and extremely narrow facet of a far broader case." Requesters Memorandum of Law, March 13, 2020, p. 1. They argue the decision in League of Women Voters applied to a discovery request, unlike the present case, which involves "financial records from the legislature – records that are expressly public under the RTKL." Requesters Memorandum of Law, March 13, 2020, p. 1. Further, they maintain our Pennsylvania Supreme Court, when it ultimately decided League of Women Voters, "cautioned against reliance on the ruling by the Commonwealth Court." *Id.* They argue:

Specifically, in its majority opinion, the high court states: "However, we caution against reliance on the Commonwealth Court's ruling. This Court has never interpreted our Speech and Debate Clause as providing anything more than immunity from suit, in certain circumstances, for individual members of the General Assembly." (see footnote 38 on page 35 of the high court's majority opinion).

The court added: "Although not bound by decisions interpreting the federal Speech and Debate Clause in Article I, Section 6 of the United States Constitution, see *id.* At 703 n. 14, we note that the high Court has recognized an evidentiary privilege only in cases where an individual legislator is facing criminal charges."

Even in evidentiary proceedings, the court further noted: "To date, the United States Supreme Court has never held that an evidentiary privilege exists under the Speech and Debate Clause in lawsuits challenging the constitutionality of a statute. Further, we are not aware of any precedent to support the application of any such privilege to information in the possession of third parties, not legislators."

Requesters Memorandum of Law, March 13, 2020, p.2. Requesters further argue "[t]he Senate's Open Records officer, in redacting information regarding routine financial information that is explicitly public under the RTKL, has erroneously and dangerously expanded the application of the state's speech and debate clause." Requesters Memorandum of Law, March 13, 2020, p.2.

Finally, the Requesters argue that because this Officer's decision in Swift was never challenged in court, it should not be relied upon in this case. Id.

It follows that in order for the redactions at issue to be allowable under the Act, they must be protected by legislative privilege.

### Legislative Privilege

Elected members of the Pennsylvania General Assembly are entitled to legislative privilege -- the privileges and immunities set forth in the Speech and Debate Clause of the Pennsylvania Constitution. League of Women Voters of PA v. Commw., 177 A.3d 1000, 1003 (Pa. Commw. Ct. 2017); Firetree, Ltd. v. Fairchild, 920 A.2d 913, 919 (Pa. Commw. Ct. 2007), *appeal denied*, 946 A.2d 689 (Pa. 2008). The Clause provides:

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

PA Const. Art. II, Sec. 15.

Legislative privilege has long been recognized in this Commonwealth. Geyer's Lessee v. Irwin, 4 U.S. 107 (Pa. 1790) (holding that "a member of the general assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him...And,...that upon principle, his suits cannot be forced to a trial and decision, while the session of the legislature continues"); Consumers Educ. & Protective Ass'n v. Nolan, 368 A.2d 675, 680-81 (Pa. 1977) (holding the privilege applied to the actions of the President of the Senate and to the Senate's Chair of its Rules and Executive Nominations Committee when they were acting during session and in committee on an executive nomination); Firetree, 920 A.2d at 920-21 (holding legislative privilege applied to a representative's actions

seeking input from his constituents because talking to constituents is a “core legislative function”) (citing DeSimone, Inc. v. Phila. Authority for Industrial Dev., 2003 Phila. Ct. Com. PI. LEXIS 27, 2003 WL 21390632 (C.P. Phila. 2003)).

The privilege is still recognized today. In League of Women Voters, the Commonwealth Court held that legislators and their staff enjoyed absolute protection of the privilege for their legislative activities that were within the legitimate legislative sphere – in that case, the activities that led to the passage of legislation. 177 A.3d at 1005. The lower court, it concluded, could not compel testimony or documents “relative to the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage” of legislation. Id.

Importantly, the privilege is predicated upon protecting the public good and ensuring there is no interference “with the rights of the people to representation in a democratic process.” Spallone v. U.S., 493 U.S. 265, 279 (1990). The privilege protects the integrity and independence of the legislature, which “reinforces the separation of powers that is fundamental to the structure of both the federal and state governments.” Larsen v. Senate of PA, 152 F.3d 240, 249 (3d Cir. 1998), *cert. denied*, Larsen v. Afflerbach, 525 U.S. 1145 (1999) (citations omitted); Sweeney v. Tucker, 375 A.2d 698, 703 (Pa. 1977) (citations omitted); Vieth v. Commw. of PA, 67 Fed. Appx. 95, 99 (3d Cir. 2003), *cert. denied*, Republican Caucus of the PA House of Representatives v. Vieth, 540 U.S. 1016 (2003) (citing U.S. v. Brewster, 408 U.S. 501, 507 (1972)).

Legislative privilege protects legislators from judicial interference with their legitimate legislative activities. The privilege ensures that legislators are free to represent the interests of their constituents without fear they will later be called into court for that representation. Consumers Educ. & Protective Ass’n, 368 A.2d at 680-81; Sweeney, 375 A.2d at 703 (citations

omitted); Firetree, 920 A.2d at 919; Vieth, 67 Fed. Appx. at 99; Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998) (“the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability.”) (citation omitted); see Larsen, 152 F.3d at 250 (“An additional purpose of legislative immunity is to shield the legislature from the delay and disruption that a lawsuit can bring.”). Significantly, the privilege is not to make legislators “super-citizens”; therefore, “the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.” Brewster, 408 U.S. at 516-17.

This legislative privilege extends to legislative staff. League of Women Voters, 177 A.3d at 1003 (“It is also now well-settled that the protections of the Speech and Debate Clause extend to legislative staff.”) (citing Gravel, 408 U.S. at 616-622). Given the complexities of the legislative process, legislative staff carry out critical functions for their members. They are the “alter ego” of their members, and as such, are deserving of the protection of the privilege for their legitimate legislative acts. Gravel, 408 U.S. at 617. This furthers the goal of protecting the public good and ensures there is no interference with the rights of the people to representation in our democratic government. Spallone, 493 U.S. at 279.

The privilege affords absolute immunity from liability for legislative acts and is broadly construed to effectuate its purposes. Gallas v. Supreme Court of PA, 211 F.3d 760, 773 (3d Cir. 2000) (emphasis added) (citations omitted); Consumers Educ. & Protective Ass’n, 368 A.2d at 680-81; Sweeney, 375 A.2d at 703-04 (citations omitted). When applicable, the privilege protects against civil and criminal actions, and against actions brought by private individuals, as well as by the Executive Branch. Eastland v. U.S. Servicemen’s Fund, 421 U.S. 491, 502-03 (1975) (citations omitted). The privilege protects against “inquiry into those things generally said or done in the House or Senate in the performance of official duties and into the motivation

for those acts.” Sweeney v. Tucker, 375 A.2d 698, 704 (Pa. 1977) (citations omitted); Consumer Party of PA v. Commw., 507 A.2d 323, 330 (Pa. 1986).

Legitimate legislative activity is more than floor debate on proposed legislation, and is not confined to conduct that occurs only in the State Capitol Building. League of Women Voters, 177 A.3d at 1003; Firetree, 920 A.2d at 920; Larsen, 152 F.3d at 251 (citations omitted); Brewster, 408 U.S. at 515 (citation omitted). To determine if an act is “legislative” and deserving of absolute protection, courts examine the nature of the act, not the motive or intent of the official performing the act. League of Women Voters, 177 A.3d at 1003 (“It is undisputed that legislative immunity [under the Speech and Debate Clause] precludes inquiry into the motives or purposes of a legislative act.”) (quoting Govt. of the Virgin Islands v. Lee, 775 F.2d 514, 522 (3d Cir. 1985)); Firetree, 920 A.2d at 920 (citation omitted); Gallas, 211 F.3d at 773 (citations omitted); see Brewster, 408 U.S. at 508 (citation omitted).

Although the activity need not literally be speech or debate, it must be more than just related to the legislative process to be protected, Brewster, 408 U.S. at 516; the conduct must fall within the “legitimate legislative sphere.” League of Women Voters, 177 A.3d at 1003; Consumers Educ. & Protective Ass’n, 368 A.2d at 681; Sweeney, 375 A.2d at 703-04; Firetree, 920 A.2d at 920. The Pennsylvania Supreme Court has defined the breadth of this immunity as follows:

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

Firetree, 920 A.2d at 919-20 (emphasis in original) (quoting Consumer Party of PA v. Commw., 507 A.2d 323, 331 (Pa. 1986) (citation omitted)). The privilege provides not only immunity from suit or oral testimony but also protects documents from discovery when those documents

contain information that is the result or product of activity within the legitimate legislative sphere. McNaughton v. McNaughton, 72 Pa. D. & C. 4<sup>th</sup> 363, 369 (C.P. Dauph. 2005) (citations omitted).

Examples of activity falling within the legislative sphere include: (1) activities, intentions and motivations of state legislators and their staff relating to the passage of legislation and the documents reflecting same, League of Women Voters, 177 A.3d at 1005; (2) the passage of legislation, Smolsky v. PA General Assembly, 34 A.3d 316, 321 (Pa. Commw. Ct. 2011), *aff'd*, 50 A.3d 1255 (Pa. 2012); (3) participation in committee and floor proceedings with respect to the passage or rejection of legislation or with respect to any other matters the constitution places in the jurisdiction of the legislature, Pilchesky v. Rendell, 932 A.2d 287, 289 (Pa. Commw. Ct. 2007), *aff'd*, 946 A.2d 92 (Pa. 2008) (citation omitted); (4) communications between a senator and any other person regarding filling judicial vacancies, Melvin v. Doe, 48 Pa. D. & C. 4<sup>th</sup> 566, 576 (C.P. Allegh. 2000); (5) voting on the seating of senators, Jubelirer v. Singel, 638 A.2d 352, 356-57 (Pa. Commw. Ct. 1994); (6) meeting with constituents and others to discuss legislative matters, Firetree, 920 A.2d at 921, DeSimone, 2003 Phila. Ct. Com. Pl. LEXIS 27 at \*19-21; and, (7) business telephone calls made by members of the General Assembly, Uniontown Newspapers, Inc. v. Roberts, 777 A.2d 1225, 1233 (Pa. Commw. Ct. 2001), *aff'd in part and rev'd in part*, 839 A.2d 18 (Pa. 2003), *on remand*, 893 A.2d 846 (Pa. Commw. Ct. 2006), *aff'd*, 909 A.2d 804 (Pa. 2006).

The scope of this clause has not been distinguished from that of the federal clause; to the contrary, Pennsylvania courts have sought guidance from federal courts interpreting the federal clause. Consumers Educ. & Protective Ass'n, 368 A.2d at 680-81; Sweeney, 375 A.2d at 703-04; Firetree, 920 A.2d at 920. The privilege “does not prohibit inquiries into activities that are

casually or incidentally related to legislative affairs but not a part of the legislative process itself.” Brewster, 408 U.S. at 528. It follows that the privilege does not protect all conduct “relating to the legislative process.”

Federal courts have found the following activities to fall within the sphere: (1) voting for a resolution, Kilbourn v. Thompson, 103 U.S. 168, 204 (1881), Powell v. McCormack, 395 U.S. 486, 502 (1969), see Brewster 408 U.S. at 516, FN 10; (2) activities relating to conducting committee hearings and investigations, Tenney v. Brandhove, 341 U.S. 367, 377-78 (1951), *rehearing denied*, 342 U.S. 843 (1951); (3) speaking before the legislative body during session, U.S. v. Johnson, 383 U.S. 169 (1966); (4) preparing investigative reports and issuing subpoenas, Eastland v. U.S. Servicemen’s Fund, 421 U.S. 491, 503-04 (1975) (“the power to investigate is inherent in the power to make laws because ‘[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.’”); (5) telephonic communications between Congressmen, In re Grand Jury Investigation into Possible Violations of Title 18, 587 F.2d 589, 594 (3d Cir. 1978); (6) legislative “fact-finding”/conversations and meetings between a legislator and others, Govt. of the Virgin Islands v. Lee, 775 F.2d 514, 521 (3d Cir. 1985) (“[F]act-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation.”), see U.S. v. James, 888 F. 3d 42, 47 (3d Cir 2018) (affirming that “as a general matter, legislative fact-finding is entitled to the protection of legislative immunity”); (7) Pennsylvania state senators engaged in impeachment proceedings, Larsen, 152 F.3d at 251; and, (8) emails created in connection with bona fide legislative activity, Puente Arizona v. Arpaio, 314 F.R.D. 664, 670 (D. Ariz. 2016).

Examples of activity outside the legitimate legislative sphere include: (1) service by a legislator on the Board of PHEAA because such service is not an integral part of the deliberative process of enacting legislation (instead, it is administration of a public corporation), Parsons v. PHEAA, 910 A.2d 177, 187-88 (Pa. Commw. Ct. 2006), *appeal denied*, 917 A.2d 316 (Pa. 2007); (2) participation by legislative employees in unconstitutional activities (they are responsible for their actions, even if an action against the legislator is barred), Sweeney, 375 A.2d at 704; (3) performance of legitimate “errands” for constituents, making appointments with government agencies, assistance securing government contracts, preparation of newsletters/news releases, and delivering speeches outside of Congress, McNaughton v. McNaughton, 72 Pa. D. & C. 4<sup>th</sup> at 370, 373 (citing Brewster, 408 U.S. at 512); (4) sending out documents and questionnaires to constituents and others, McNaughton v. McNaughton, 72 Pa. D. & C. 4<sup>th</sup> at 374 (citations omitted); (5) calendars and date books of a legislator insofar as they reflect appointments that are political rather than legislative in nature, McNaughton v. McNaughton, 72 Pa. D. & C. 4<sup>th</sup> at 374-75; (6) in divorce proceedings, calendars and date books of a legislator that only reflect the existence of legislative meetings and tasks, McNaughton v. McNaughton, 72 Pa. D. & C. 4<sup>th</sup> at 374-75; (7) bank statements, cancelled checks, check registers and expense account documentation, because these are only “casually or incidentally” related to the legislative process, McNaughton v. McNaughton, 72 Pa. D. & C. 4<sup>th</sup> at 375; (8) legislator’s actions of selectively or conditionally distributing his phone records, Uniontown Newspapers, Inc. v. Roberts, 839 A.2d 185, 194-95 (Pa. 2003), *on remand*, 893 A.2d 846 (Pa. Commw. Ct. 2006), *aff’d*, 909 A.2d 804 (Pa. 2006); and, (9) taking a bribe for the purpose of having the legislator’s official conduct influenced, U.S. v. Brewster, 408 U.S. at 526, U.S. v. Menendez, 132 F.Supp. 3d 610, 621 (D. NJ 2015).

Significantly, activities within the legitimate legislative sphere include “fact-finding, information gathering, and investigative activities,” because these “are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation.” League of Women Voters, 177 A.3d at 1003 (quoting Govt. of the Virgin Islands, 775 F.2d at 521); see U.S. v. James, 888 F.3d 42, 47 (3d Cir. 2018) (affirming that “legislative fact-finding is entitled to the protection of legislative immunity”). The Pennsylvania Supreme Court has opined: “**nothing is more within the legitimate legislative sphere than the process leading up to and the passage of legislation.**” Consumer Party of PA, 507 A.2d at 331 (emphasis added) (citation omitted); Kennedy v. Commw., 546 A.2d 733, 735-36 (Pa. Commw. Ct. 1988).

To that end, talking to constituents and others about their concerns with respect to legislative matters falls within the legislative sphere; these conversations are a “core” legislative function. Firetree, 920 A.2d at 921; see Govt. of the Virgin Islands, 775 F.2d at 521 (“Legislators must feel uninhibited in their pursuit of information, for ‘a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change...’”). Undeniably, a state senator or representative:

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

Firetree, 920 A.2d at 921 (emphasis added) (citations omitted). Further, a City Councilman’s similar conversations are protected by the privilege:

[I]t is clear that the ‘sphere of legislative activity’ extends much farther than merely the debating and drafting of laws. Clearly, there could be no more of an ‘integral step in the legislative process’ than a public official’s right to speak on behalf of his constituency. Government officials are frequently called upon to be ombudsmen for their constituents. In this capacity, they intercede, lobby, and generate publicity to advance their constituents’ goals...’This kind of petitioning may be nearly as vital to the functioning of a modern representative democracy as petitioning that originates with private citizens.’

**To hold [the Councilman] liable because his actions were not within the ‘four corners of legislative activity,’ ... belies the purpose of legislative immunity, namely to ‘ensure that legislators are free to represent the interests of their constituents without fear that they will be later called to task in courts for that representation.’**

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

Moreover, for these same reasons, telephone calls made by a legislator are also within the legitimate legislative sphere:

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

Uniontown Newspapers, 777 A.2d at 1233 (emphasis added).

Further, Puente Arizona v. Arpaio, 314 F.R.D. 664, 670 (D. Ariz. 2016), is also instructive. There, the court opined that obtaining information that is pertinent to potential legislation is a “legitimate legislative activity” and, therefore, federal legislative privilege applies to “communications in which constituents urge their congressperson to initiate or support some legislative action and provide data to document their views.” (citation omitted). The court further opined that the privilege “applies more broadly to a congressperson’s communications with third parties about legislation or legislative strategy.” Puente Arizona, 314 F.R.D. at 670 (citing Jewish War Veterans of the U.S. Am. v. Gates, 506 F.Supp. 2d 30, 57 (D.D.C. 2007) (“communications with executive branch, constituents, interested organizations, and members of the public are protected by federal privilege if these communications ‘constitute information gathering in connection with or in aid of...legislative acts.’”))

It is within this legal framework that this appeal is analyzed. Here, the Senate Open Records Officer responded to the Requesters and provided an attestation from her counsel that the only information redacted in her Response was the names of participants in the meetings and the topics discussed. Further, she explained in her Response that this redacted information was legislative in nature and “essential prerequisites to the drafting of bills and debating proposed legislation.” It follows that for legislative privilege to apply in this instance, the activity of legislative staff meeting with individuals on behalf of a state senator to discuss those legislative matters (as reflected in those redactions) must be within the legitimate legislative sphere.

After considering the nature of the activity in question, the conclusion that must be reached is the activity of legislative staff meeting with individuals to discuss legislative matters falls squarely within the sphere of legitimate legislative activity, and therefore, deserves the absolute protection afforded by the privilege. To conclude otherwise would contravene the purpose of the privilege to protect the integrity of the legislative process.

Our state and the federal courts have recognized the process “leading up to” the passage of legislation is sacrosanct. The activity in question is precisely the kind that deserves the protection of the privilege, as it is a “core” legislative function for a legislator and his staff to meet with individuals about legislative matters. To deny the protection of the privilege for such significant legislative activity renders the privilege meaningless and arguably dilutes the effectiveness of the legislature.

Such meetings are more than just related to the legislative process; they are an integral part of the process itself. For without such meetings and information-gathering, a legislator would not be able to effectively represent his or her constituents. This denies constituents the representation they deserve and expect by hindering the ability of their elected representatives to

meet and gather information on these legislative matters. Moreover, legislators would be inhibited from making informed votes and participating in meaningful debate on proposed legislation.

Finally, for purposes of the legislative privilege, “a Member and his aide are to be ‘treated as one...’” Gravel, 408 U.S. at 616 (citation omitted). This is so because

...it is literally impossible, in view of the complexities of the modern legislative process...and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members’ performance that they must be treated as the latter’s alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause – to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.

Gravel, 408 U.S. at 617 (citing U.S. v. Johnson, 383 U.S. 169, 181 (1966)). The same can be said for the legislative staff of a state senator.

Therefore, the protections of the privilege apply to President Pro Tempore (PPT) legislative staff for their legislative acts of meeting with individuals to discuss legislative matters, as such acts fall within the legitimate legislative sphere.

Moreover, the Senate Open Records Officer provided an attestation from her counsel that the only information redacted was the names of participants in the meetings and the topics discussed. Further, she explained in her response to the Requesters that this redacted information was legislative in nature and “essential prerequisites to the drafting of bills and debating proposed legislation.”

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, 1103-04 (Pa. Commw. Ct. 2013)).

This Officer has no reason to doubt the veracity of the declaration of the Open Records Officer's Counsel, and takes same as true. Further, despite the limited redactions made by the Senate Open Records Officer, the Requests were answered, such that Requesters are able to see "the workings of state government." Requesters can see that the PPT's legislative staff met with individuals to discuss legislative matters.

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

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

The Requesters argue these redactions are broader than the law allows because the activity in question does not fall within the legitimate legislative sphere, as the records reflect “the financial expenditures of the Office of the Senate Pro Tempore and the purposes of those expenditures.”

Requesters’ argument is without merit. These limited redactions were proper and limited in scope as they consisted only of information protected by the legislative privilege. The Senate Open Records Officer provided numerous pages of responsive records to the Requesters. She provided information documenting the following information for salaried officers and employees of the Senate from 2017 through 2019: voucher number; payee name; date incurred; processed date; amount expense; and, appropriation. Further, the Open Records Officer provided detailed information of individuals and topics that were “in a public setting or of a general description.” She only redacted information that is protected by legislative privilege – specific information that would have revealed the individuals with whom the senator’s staff met and the legislative matters they discussed. These redactions in the records the Senate Open Records Officer provided were limited in scope – limited to the legitimate legislative activity of meeting with individuals to discuss legislative matters, conversations that could ultimately result in the drafting and passage of legislation. This activity lies at the heart of the legislative process.

These facts are analogous to League of Women Voters in that documents revealing the specifics of the legislative activity are shielded by the privilege. In League, all of the documents revealing legislative activity relating to legislation were protected by legislative privilege, and here, parts of the responsive records are similarly shielded, as they too would reveal the specifics of the legitimate legislative activity – the individuals with whom legislative staff met and the specific legislative issues they discussed. The Senate Open Records Officer explained in her

Response to the Requesters that this redacted information was legislative in nature and “essential prerequisites to the drafting of bills and debating proposed legislation.” This Officer concurs.

Further, Requesters seem to purport that any redaction of a financial record would be improper, because they are entitled to such information; however, the RTK Law provides otherwise. Its redaction provisions contemplate a situation just like the present case – where information within a responsive document may not be released because it is protected by a privilege -- here, the legislative privilege. This protection is absolute. Moreover, it is important to note that consistent with the recognition of this constitutional privilege, the RTK Law expressly exempts from disclosure draft bills and resolutions, as well as records that reflect the internal, predecisional deliberations relating to legislation and the strategy to be used to develop and adopt legislation, and correspondence between a person and a member of the General Assembly which would identify that person who requests assistance or constituent services – all of which are integral to the legislative process. 65 P.S. § 67. 708(b)(9), (10), (29). The same can be said for the conversations and information-gathering that senators and their legislative staff perform.

Requesters argue this Officer’s prior decision on the issue of legislative privilege is not to be relied upon here because that decision was never challenged in court. While appeals officers under the Right-to-Know Law are not bound by the rule of *stare decisis*, appeals officers do have an obligation to render consistent decisions. Department of Corrections v. Maulsby, 121 A.3d 585, 589 (Pa. Commw. Ct. 2015). This means either overruling, distinguishing, or following prior decisions. Id. This Final Determination does just that.

A final word regarding the declaration and the arguments advanced by the parties. The declaration is not a model of clarity. It consists of two pages and a mere nine paragraphs. While

the Senate could have provided more details, rather than conclusory statements, with respect to the framework within which it made its redaction decisions, Office of the Governor v. Scolforo, 65 A.3d 1095, 1103-04 (Pa. Commw. Ct. 2013), it is not incumbent upon this Appeals Office to request additional evidence when developing the record. The burden is on the parties to submit sufficient evidence to establish the material facts. Mission Pennsylvania, LLC v. McKelvey, 212 A.3d 119, 129 (Pa. Commw. Ct. 2019); Highmark Inc. v. Voltz, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (en banc); see Rinaldi v. Jessup Borough, OOR Dkt. AP 2020-0465, April 1, 2020. In the same vein, the Requesters' memorandum of law, which was also limited to two pages, focuses exclusively on their argument that the speech and debate clause cannot be applied in the context of the Right-to-Know Law. See Requesters' Memorandum of Law, at 2 (arguing that the Senate "has erroneously and dangerously expanded the application of the state's speech and debate clause" to the Right-to-Know Law).

The Senate must prove that the exception applies "by a preponderance of the evidence," 65 P.S. § 67.708(a)(2), which, in the Right-to-Know Law context, is defined as "a more likely than not inquiry." Mission Pennsylvania, LLC v. McKelvey, 212 A.3d 119, 132 (Pa. Commw. Ct. 2019). In some contexts, such as this one, the records themselves may support the applicability of certain exceptions. Id. at 134 (discussing the competent evidence upon which adjudicators may rely). Here, the Senate provided a 27-page expense report to the Requesters in response to their RTK Law request. Based upon the formatting of the report, which includes several pages of unredacted information, and based, in part, on the Senate's declaration, it appears clear (certainly more likely than not) that the limited redactions are related only to the identities of the individuals with whom the PPT's legislative staff met, and the specific topics of the matters discussed – information that is clearly shielded by legislative privilege.

Moreover, the Requesters argue that the Senate's redaction of this information is an "erroneous" application of this privilege in the Right-to-Know Law context, but as noted, the plain language of the statute refutes this position. 65 P.S. § 67.102 (public records do not include financial records protected by a privilege; defining privilege to include the speech and debate privilege). The Right-to-Know Law explicitly includes the speech and debate privilege as an exception to disclosure of certain information, and under the Statutory Construction Act, it must be presumed that the "General Assembly intends the entire statute to be effective and certain," and that the General Assembly "does not intend to violate the Constitution of the United States or of this Commonwealth." 1 Pa.C.S. § 1922. 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).

In the absence of any further specific arguments as to why the Requesters believe that the speech and debate privilege ought not to apply to these limited redactions, this Officer hereby affirms the decision of the Senate Open Records Officer and issues the following Order.

#### **Conclusion**

For the foregoing reasons, the decision of the Senate Open Records Officer is affirmed.

**IN THE SENATE OF PENNSYLVANIA**

**Appeal of Bumsted, *et al.***

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**Senate RTK Appeal 02-2020**

**FINAL DETERMINATION**  
**April 2, 2020**

**ORDER**

AND NOW, this 2<sup>nd</sup> day of April 2020, the decision of the Senate Open Records Officer is  
AFFIRMED, as the redacted information is protected by legislative privilege.

**/s/ Megan Martin**  
**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.