



**LEGISLATIVE REFERENCE BUREAU**

ROOM 641 MAIN CAPITOL BUILDING  
HARRISBURG, PENNSYLVANIA 17120-0033

**IN THE MATTER OF  
APPEAL OF  
CARUSO,  
Requester**

**v.**

**LRB Appeal No. 2023-02  
(Senate RTK Appeal 02-2023)**

**SENATE OF  
PENNSYLVANIA,  
Legislative Agency**

**FINAL DETERMINATION**

**INTRODUCTION**

Stephen Caruso of Spotlight PA (Requester) submitted a request to the Senate of Pennsylvania (Senate) pursuant to the Act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* (RTKL), seeking “all emails between any Senate employee or Senator and lobbyists Carson Baker (Reg. No. L4479), Jenna Earley (Reg. No. L44718), Matthew Plummer (Reg. No. L43320) and Dave Thomas (Reg. No. L43319) on behalf of their client Kooth USA LLC (Reg. No. P69245)” for the time period May 24, 2022, through July 18, 2023. The Senate Open Records Officer (Senate RTKL Officer) denied the request and Requester appealed. For the reasons stated in this Final Determination, the appeal is denied and the Senate is not required to take any further action on the request.

## FACTUAL BACKGROUND

On July 19, 2023, Senate RTKL Officer received a RTKL request from Requester via electronic transmission.<sup>1</sup> The request read as follows:

*Pursuant to Pennsylvania's Right to Know law, I request all emails between any Senate employee or Senator and lobbyists Carson Baker (Reg No. L4479) Jenna Earley (Reg. No. L44718) Matthew Plummer (Reg. No. L43320) and Dave Thomas (Reg. No. L43319) on behalf of their client Kooth USA LLC (Reg. No. P69245) between 5/24/22 and 7/18/23.*

*Requester notes that although Sec. 708(b)(29) of the Right to Know Law exempts from disclosure correspondence that would identify a person seeking assistance or constituent services, Section 29 does not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbying disclosure).*

On July 26, 2023, Senate RTKL Officer denied the request.<sup>2</sup> The request was denied based on a determination that the requested records are not within the definition of a "legislative record" as provided for in the RTKL. 65 P.S. § 67.102.

Requester was notified of the right to appeal. 65 P.S. § 67.903. Senate RTKL Officer appointed Michael Gerdes to serve as Senate Appeals Officer. Requester filed an appeal on July 28, 2023, via electronic transmission.<sup>3</sup> In the appeal, Requester states:

*First, the definition of "legislative record" within Section 102 of the Right to Know Law does not contain the word "email." However, there are nineteen categories of records that are considered "legislative records" and within those, there are certainly some emails that may be subject to disclosure. For instance, a financial record (I) may be contained within an email. Financial records are the most broadly available category of records across all branches of government, including the legislature. If there are emails in the requested subject area concerning the expenditure of taxpayer money, they should be released. Similarly, if emails in the requested subject area make offers of non-taxpayer money, they should also be released (the definition of "agency" includes a legislative agency and the definition of "financial record" includes an agency's receipt or disbursement of money, equipment, etc). In addition, a co-sponsorship memo (4)*

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<sup>1</sup> Requester's request is attached to this Final Determination and labeled "Requester's Request."

<sup>2</sup> Senate's response denying Requester's request is attached to this Final Determination and labeled "Senate's Denial."

<sup>3</sup> Requester's appeal is attached to this Final Determination and labeled "Requester's Appeal."

*could be contained within an email. For instance, a lobbyist could send an email with feedback about a co-sponsorship memo. "Legislative appointee" (16 and 17) could be contained within an email and exchanged between parties in the requested records. "Proposed regulations, etc" (18) may have been submitted by a lobbyist to a legislative agency regarding the requested subject area. Public opinion" (19) about a certain subject could be contained within an email regarding the requested subject area.*

*Second, in the Senate's denial letter of July 26, 2023, by simply stating that "emails" do not fall into the definition of a "legislative record," without any supporting attestation demonstrating a good faith search by the Senate using the requested search terms, the Senate has failed to uphold its duties under Sect. 901. The Senate Appeals Officer should require the Senate to perform a good faith search and submit a detailed attestation and exemption log about what records may exist, and to explain with particularity which exemptions apply to specific records.*

*Finally, in terms of a plain language reading of the Right to Know Law, the legislative intent behind Sec. 708(b)(29) is quite clear. The legislature intended for communications between a constituent and a member of the General Assembly to be exempt. However, the exception to the exemption clearly states that "This paragraph shall not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbying disclosure)." (emphasis added). "Correspondence" is not defined in Sec. 102 of the Right to Know Law, but a basic and widely understood meaning of the noun "correspondence" is "communication by letters or email." Merriam Webster Dictionary (2023).*

On July 28, 2023, the recusal of the Senate Appeals Officer prompted the transfer of this appeal and its corresponding record to the Pennsylvania Legislative Reference Bureau (LRB), which agreed to assign an Appeals Officer.<sup>4</sup>

On July 28, 2023, the parties were notified that Kristin M. Kayser of the LRB would serve as the Appeals Officer (LRB Appeals Officer).<sup>5</sup> In accordance with regulations of the LRB, 101 Pa. Code § 31.21 *et seq.*, on July 31, 2023, LRB Appeals Officer established a schedule for documents to be submitted in the appeal with

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<sup>4</sup> Letter recusing Senate Appeals Officer is attached to this Final Determination and labeled "Senate Appeals Officer Recusal Letter."

<sup>5</sup> Letter assigning LRB Appeals Officer is attached to this Final Determination and labeled "LRB Appeals Officer Assignment Letter."

instructions to serve the other party.<sup>6</sup> On August 4, 2023, upon request of counsel for the Senate, the schedule was modified.<sup>7</sup>

According to the regulations of the LRB, the provisions of 2 Pa.C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) and Ch. 7 Subch. A (relating to judicial review of Commonwealth agency action) apply to RTKL appeals. 101 Pa. Code § 31.21(b)(1). The Administrative Agency Law, 2 Pa.C.S. § 101 *et seq.*, permits all relevant evidence of reasonably probative value to be received in adjudication. 2 Pa.C.S. § 505. In addition, all parties are afforded opportunity to submit briefs prior to adjudication by a Commonwealth agency. 2 Pa.C.S. § 506.<sup>8</sup>

On August 9, 2023, counsel for the Senate filed a letter brief in support of the Senate's position.<sup>9</sup> On August 18, 2023, Requester filed a response in support of the Requester's position.<sup>10</sup> On August 23, 2023, counsel for the Senate filed a notice of supplemental authority.<sup>11</sup>

## LEGAL ANALYSIS

"[T]he objective of the Right-to-Know Law... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government

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<sup>6</sup> Submission schedule is attached to this Final Determination and labeled "Submission Schedule."

<sup>7</sup> Modification of submission schedule is attached to this Final Determination and labeled "Modification of Submission Schedule."

<sup>8</sup> Under 65 P.S. § 67.1102(a)(2), a hearing is held only at the discretion of the appeals officer. LRB Appeals Officer has determined that no hearing is necessary to resolve the appeal. No party has requested a hearing in this appeal.

<sup>9</sup> Counsel for the Senate's letter brief is attached to this Final Determination and labeled "Senate's Brief."

<sup>10</sup> Requester's response is attached to this Final Determination and labeled "Requester's Response."

<sup>11</sup> Counsel for the Senate's notice of supplemental authority is attached to this Final Determination and labeled "Senate's Notice of Supplemental Authority."

information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions." *Pennsylvania State Police v. McGill*, 83 A.3d 476, 479 (Pa. Commonwealth 2014) (citing *Office of Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commonwealth 2013)).

In construing any statute, the intention of the General Assembly must be ascertained and given effect. The clearest indication of legislative intent is the plain language of a statute. *See Office of Governor v. Donahue*, 98 A.3d 1223, 1237-38 (Pa. 2014). When the words of a statute are clear and free from ambiguity, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. *See Levy v. Senate of Pennsylvania*, 65 A.3d 361, 380 (Pa. 2013). This case can be resolved by applying these legal principles to the factual situation.

The RTKL provides different types of access to different types of records of Commonwealth agencies, local agencies, legislative agencies and judicial agencies. Commonwealth agencies and local agencies are required to provide public records in accordance with the RTKL. 65 P.S. §§ 67.301 and 67.302. Judicial agencies are required to provide financial records in accordance with the RTKL. 65 P.S. § 67.304. Legislative agencies are required to provide legislative records in accordance with the RTKL. 65 P.S. § 67.303.

The Senate is a legislative agency subject to the RTKL and, as such, is required to disclose its legislative records. 65 P.S. § 67.303(a). A legislative record in the possession of a legislative agency is presumed to be available in accordance with the RTKL unless an exemption applies. 65 P.S. § 67.305(b). Upon receipt of a request under the RTKL, a legislative agency is required to assess whether a record is within its

possession, custody or control and respond within five business days. 65 P.S. § 67.901.

Under the RTKL, legislative agencies are only required to provide statutorily defined legislative records. *See* 65 P.S. § 67.303(a). Legislative records are limited in scope and comprise only those records specifically designated as such in the RTKL. If the record or document sought does not satisfy the definition of a legislative record, there is no need to discuss whether the document is in the possession, custody or control of the legislative agency or whether there are exemptions to disclosure; in such a case, the record or document is not subject to disclosure under the RTKL.

Section 102 of the RTKL provides the following pertinent definition:

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

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

*(15) Daily legislative session calendars and marked calendars.*

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

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

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

*(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. There are various forms of records of legislative agencies that fall within the definition of "legislative record." However, unless a record satisfies one of the enumerated forms, it is not required to be produced by a legislative agency under the RTKL.

In this case, under the original request, Requester seeks emails between Senate employees or Senators and certain lobbyists on behalf of their client Kooth USA LLC from May 24, 2022, through July 18, 2023. On appeal, Requester asserts that email may contain legislative records such as financial records, cosponsorship memorandums, records communicating to an agency the official appointment of a legislative appointee, records communicating to the appointing authority the resignation of a legislative appointee, proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency and the results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency.

In its brief, the Senate argues that in the original request, Requester did not request any of the specific legislative records listed in the appeal. The Senate argues that under case law, Requester is not permitted to change the request on appeal.

The Senate's argument is well taken, and Requester's explanation in the appeal has limited relevance. An appeal is constrained to analyzing the request as written, not as explained on appeal. *See Lemmon v. Borough of Paxtang*, OOR Docket No. AP 2022-2772, slip op. at 4-5 (Final Determination, March 3, 2023) (citing *Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commonwealth 2010)). Further, once a requester submits a request under the RTKL, a requester may not modify, explain or expand the original request on appeal. *See Smith Butz, LLC v. Department of Environmental Protection*, 142 A.3d 941, 945-46 (Pa. Commonwealth 2016) (citing *Department of Corrections v. Disability Rights Network of Pennsylvania*, 35 A.3d 830, 833 (Pa. Commonwealth 2012)). In *Butz*, the court reasoned that an agency makes its decision of accessibility of a record under the RTKL as the request is plainly written. *Id.* at 945. Under *Lemmon* and *Butz*, the explanation Requester gave on appeal is not permitted to alter the original request. Therefore, the primary issue is whether Requester's original request sought legislative records from the Senate.

As discussed above, unless a request satisfies one of the enumerated records under the definitions of "legislative record" under the RTKL, it is not required to be produced by a legislative agency under the RTKL. Here, Requester is not seeking access to a specific record. Rather, Requester is seeking access to an entirely new class of record, namely emails between Senate employees or Senators and lobbyists. This class of record is not explicitly listed under the definition of "legislative record" under the RTKL. It is clear and unambiguous under the rules of statutory construction that it was not the intention of the General Assembly to make such a general class of records accessible "legislative records" under the RTKL.



Requester argues that under section 708(b)(29) of the RTKL, the General Assembly explicitly intended for correspondence between a member of the General Assembly and a principal or lobbyist to be subject to disclosure under the law, even if the correspondence is not a “legislative record” under the RTKL. However, the RTKL does not support this argument.

Section 708 of the RTKL creates exemptions for records that would otherwise be accessible records under the RTKL. Section 708(a) of the RTKL specifies that the burden is on a Commonwealth agency, local agency, judicial agency or legislative agency to prove that an otherwise accessible record under the act is exempt from public access. Section 708(b) of the RTKL lists 30 different types of records which are not accessible by the public. The exceptions to disclosure apply to public records, financial records of judicial agencies and legislative records which would otherwise be accessible. Importantly, as inferred by section 708(a) of the RTKL, a record must be determined to be a record of a Commonwealth agency or local agency, financial record of a judicial agency or legislative record before it can be subject to an exemption under section 708 of the RTKL.<sup>12</sup>

Section 708(b)(29) of the RTKL makes an exception to disclosure for the following:

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<sup>12</sup> 65 P.S. § 67.708(a) states as follows:

(a) Burden of proof.--

(1) The burden of proving that **a record of a Commonwealth agency or local agency is exempt** from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.

(2) The burden of proving that **a legislative record is exempt** from public access shall be on the legislative agency receiving a request by a preponderance of the evidence.

(3) The burden of proving that **a financial record of a judicial agency is exempt** from public access shall be on the judicial agency receiving a request by a preponderance of the evidence.

(Emphasis added).

*(29) Correspondence between a person and a member of the General Assembly and records accompanying the correspondence which would identify a person that requests assistance or constituent services. This paragraph shall not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbying disclosure).*

65 P.S. § 67.708(b)(29). The first sentence denies access to constituent correspondence that is otherwise determined to be a public record, financial record of a judicial agency or legislative record. The second sentence, which provides an exception to the broader exception laid out in the first sentence, permits access to correspondence between a member of the General Assembly and a principal or lobbyist if the correspondence is a public record, financial record of a judicial agency or legislative record.

As determined above, emails between Senate employees or Senators and certain lobbyists are not a legislative record under the RTKL. Therefore, there is no need to analyze whether an exemption under section 708(b) (29) of the RTKL applies. Further, there is no indication that the General Assembly intended to transform otherwise inaccessible correspondence into legislative records through this exception provision.

Requester raises a second issue on appeal, arguing that in failing to conduct a search, the Senate has failed to uphold its duties under section 901 of the RTKL. Section 901 of the RTKL states:

*Section 901. General rule.*

*Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request. All applicable fees shall be paid in order to receive access to the record requested. The time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency. If the agency fails to send the*

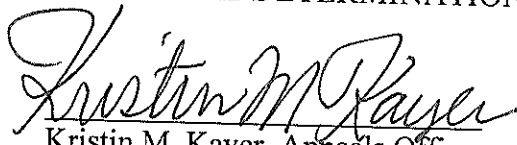
*response within five business days of receipt of the written request for access, the written request for access shall be deemed denied.*

65 P.S. § 67.901. Under the section, an agency has a duty to determine, as promptly as possible under the circumstances, if the record requested is a public record, legislative record or financial record and whether the agency has possession, control or custody of the record. It has no other duty under section 901. In this case, the Senate determined that the record requested was not a legislative record under the RTKL. The Senate responded on July 26, 2023, which was within five business days of the receipt of the request on July 19, 2023. The Senate has complied with section 901 of the RTKL. There is no duty under section 901 of the RTKL to submit an attestation of a good faith search of records.

#### CONCLUSION

For the foregoing reasons, Requester's appeal is denied and the Senate is not required by the RTKL to take any further action. This Final Determination is binding on all parties. Within 30 days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court of Pennsylvania. 65 P.S. § 67.1301(a). If a party appeals, it must serve notice of the appeal to all other parties and the LRB. Pursuant to section 1303(a) of the RTKL, LRB has the right to respond. 65 P.S. § 67.1303(a).

FINAL DETERMINATION ISSUED AND MAILED: August 25, 2023.

  
Kristin M. Kayer, Appeals Officer