

IN THE SENATE OF PENNSYLVANIA

Appeal of Wasserstein

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Senate RTK Appeal 01-2024

FINAL DETERMINATION
April 15, 2024

FACTUAL BACKGROUND

On January 26, 2024, Ben Wasserstein of WITF (“Requester”) submitted a request to the Senate of Pennsylvania (“Senate”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 et seq., seeking¹:

- 1). “[t]he results of the election inquiry into the 2020 general and 2021 primary elections started by Sen. Doug Mastriano in July 2021”
- 2). “Financial records from the contract with Envoy Sage who conducted the audit.”

On February 8, 2024, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Senate RTKL Open Records Officer (“Senate RTKL Officer”) responded to the Requester both granting in part and denying his Request.² With regard to Item 1 of the Request, the Senate RTKL Officer denied arguing that legislative records are specifically defined under the RTKL, and while there is not a specific legislative record that would be responsive or titled ‘*results of the election inquiry of the 2020 general and 2021 primary elections*’ pursuant to Section 704 of the RTKL, Requestor was directed to the following website – PA Election Investigation.³ 65 P.S. § 67.704.

¹ Requester’s request is attached to this Final Determination and labeled “Requester’s Request.”

² The Senate’s response to Requester’s request is attached to this Final Determination and labeled “Senate Response.”

³ The Senate Response contained a hyperlink to the website: www.paelectioninvestigation.com.

In response to Item 2 of the Request, the Senate RTKL Officer granted the request to the Envoy Sage, LLC (“Vendor”) contract (“Contract”) by providing a link to records of payment and the associated vouchers and supporting documentation relevant to the Request. Additionally, pursuant to Section 704 of the RTKL, the Senate RTKL Officer provided a hyperlink to the service purchase contract and addenda (SPC# 3921111601A, B, C, D & E), between the Senate and Vendor as found on the Pennsylvania Treasury website.⁴ 65 P.S. § 67.704.

The Senate RTKL Officer noted that, “In the financial records, the following redaction code was used to redact limited information which is exempt from access and for which the contractor asserted is confidential information. 65 P.S. § 708(b)(11).” The redacted information was deemed a denial and the Senate RTKL Officer provided the Requester with information concerning how Requester could appeal the denial under the RTKL. 65 P.S. § 67.903.

On February 14, 2024, Requester submitted an appeal of the denial via email to the Senate Appeals Officer.⁵ In the appeal, Requester asserted that the records sought under Item 1 of his Request fall under category 19 of the definition of legislative record under Section 102 of the RTKL:

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.

Requester further contends that, “even if portions of the audit may be protected by some exception or fall outside of the 19 categories of ‘legislative record,’ the Senate did not satisfy the

⁴ <http://www.patreasury.gov/transparency/e-library/Home/ContractView?id=679021>

⁵ Requester’s appeal is attached to this Final Determination and labeled as “Requester’s Appeal.” Included in Requester’s Appeal are hyperlinks to two documents received by the Requester with the Senate Response. Those two documents are attached and labeled as referenced in Requester’s Appeal as “RTK-2024-9 Expense Report Envoy Sage.pdf” and “3921111601 Envoy Sage LLC – All Vouchers.pdf.”

requirement under the RTKL to make a good faith effort to determine if the record requested is a public record, legislative record or financial record.”

The Requester challenges the redactions made by the Senate RTKL Officer in the records provided in response to Item 2 of his Request. Requester contends that the Senate is responsible under the RTKL to determine whether the trade secret or confidential, proprietary information exemption applies, and that it was improper for the Senate to pass off that duty by stating “as asserted by the Vendor.” Requester insists that the information redacted is “purely financial information and entirely appropriate for the taxpayer to understand what is being paid for.”

On February 16, 2024, the Senate Appeals Officer issued a submission schedule⁶ to the parties, and on February 20, 2024, the schedule was revised at the request of counsel for the Senate and the Senate RTKL Officer and with the consent of the parties.⁷

On March 15, 2023, counsel for the Senate submitted a letter brief⁸ and the affidavit of Crystal H. Clark, General Counsel for the Senate Republican Caucus, in support of the Senate’s position.⁹ On March 22, 2024, the Requester submitted an email response in support of Requester’s position.¹⁰

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, the law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public

⁶ Submission schedule is attached to this Final Determination and labeled as “Submission Schedule.”

⁷ Modified submission schedule is attached to this Final Determination and labeled as “Revised Submission Schedule.”

⁸ Counsel for the Senate’s letter brief is attached to this Final Determination and labeled as “Senate’s Brief.”

⁹ Affidavit of Crystal H. Clark is attached to this Final Determination and labeled “Clark Affidavit.”

¹⁰ Requester’s email is attached to this Final Determination and labeled as “Requester’s Response.”

officials, and make public officials accountable for their actions.” *Pennsylvania State Police v. McGill*, 83 A.3d 476, 479 (Pa.Cmwlt. 2014) (citing *Office of Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa.Cmwlt. 2013)).

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 a public record in accordance with the RTKL unless an exemption applies. 65 P.S. § 67.305(b).

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 instances, the record or document is not subject to disclosure under the RTKL.

Section 102 of the RTKL defines legislative record as:

"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.

Unless a record satisfies one of the categories of legislative records enumerated under Section 102 of the RTKL, it is not required to be produced by a legislative agency under the RTKL. 65 P.S. § 67.102. Also, Section 706 of the RTKL provides for the redaction of certain information contained within a legislative record as follows:

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, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9.

65 P.S. § 67.706.

1. Results of the Election Inquiry are not legislative records

The Senate RTKL Officer responded to Item 1 of the Request by providing that there is not a specific legislative record that would be responsive or titled as set forth in the Request. The

Senate RTKL Officer directed Requester to a publicly accessible Internet website with information identified as relevant to the Request.

On appeal, Requester characterizes the Senate's response to Item 1 of his Request as a complete denial. He contends that the definition of legislative record under the RTKL includes "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(19). Requester notes that the website linked in the Senate's response indicates that the effort was designed to answer concerns which arose based upon a June 2021 Franklin & Marshall poll.

Furthermore, the website lists the first step in the process as "1. Gathering evidence. Invite Pennsylvanians to share fraud testimony. Gather information at public hearings." Requester contends that activity of the type described on the website is exactly what was anticipated by Section 102 of the RTKL as defined in paragraph 19 ("similar efforts designed to measure public opinion funded by a legislative agency."). Requester asserts that even if portions of the audit may be protected by some other exception or fall outside of the enumerated categories under the definition of "legislative record," the Senate failed to make a "good faith effort to determine if the record requested is a public record, legislative record or financial record."

In its brief, the Senate maintains that, as a legislative agency, it is presumptively required to provide requested legislative records, but not if those records are exempt under the RTKL, are protected by a privilege, or are shielded by other law, regulation, or judicial order. 65 P.S. § 67.305(b). Further, the Senate points out that under the plain language of the RTKL, the Senate must produce nineteen types of items, but it is not required to produce anything beyond those nineteen types. According to the Senate, Item 1 of the Request sought the results of an election inquiry which is not among the enumerated list of legislative records under the RTKL. Therefore,

the Senate was not required under the RTKL to produce any records in response to the first portion of Requester's request.

The Senate's arguments regarding Item 1 of the Request are persuasive. The Request sought "results of the election inquiry." Under the plain language of the RTKL such records do not fall within any of the nineteen categories of items under the definition of legislative record. The Senate satisfied its duty to conduct a good faith effort by determining that the records sought are not listed among the enumerated categories, and, therefore, not legislative records under the plain meaning of the RTKL. As such, the Senate was not obligated under the RTKL to produce any records responsive to that portion of the request.

2. The Vendor did not perform an audit.

Additionally, in his appeal, Requester describes his Request as a request for "the results of the audit of the 2020 and 2021 elections that began under Sen. Mastriano as chair of the Senate Intergovernmental Operations Committee and continued under Sen. Cris Dush as well as the financial records from Envoy Sage who conducted the audit." The terms "inquiry" and "audit" are used interchangeably by the Requestor in his Request.

The Senate rejected Requester's attempt to fit the records sought into both categories as defined in Section 102 of the RTKL 65 P.S. § 67.102.¹¹ Furthermore, the Senate pointed out that the Vendor was not engaged to conduct an "audit" but to "provide consultation, advisory services,

¹¹(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."

(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 (12)(19).

and analysis regarding the conduct of an investigation.”¹² Also, the Senate noted that Requester points to the website provided in the Senate Response to show that the Senate’s efforts were undertaken to “answer concerns” arising from a *private* poll – not a poll paid for by the Senate. According to the Senate, Requester’s assertion that the definition in category 19 applies to “gathering evidence” and “information” at “public hearings” is incorrect as those activities do not constitute the results of public polling which is the focus of that provision of the RTKL. Rather the activities undertaken by the Senate are part of a legislative investigation which was expected to result in “recommendations for legislative improvements” and “legislative recommendations to [the] General Assembly.”

Further, the Senate argues that such activities epitomize the legislative process, and if Requester’s interpretation of category 19 were correct, it would swallow the concept of “legislative records” under the RTKL by making most Senate documents potentially subject to disclosure. The Senate argues that this would invite impermissible administrative or judicial rewriting of the statute and violate the Pennsylvania Constitution by intruding into the Senate’s Speech or Debate privilege. Under the RTKL, Speech or Debate protected material is expressly exempt from disclosure. 65 P.S. § 67.305(b) and § 67.102. The Senate RTKL Officer reviewed the Request as written and determined that the documents sought did not fit within the definition of legislative record under the RTKL and therefore were not subject to disclosure.

Moreover, Requester’s attempt to fit the documents sought under both categories of definitions for both audits and polls is not persuasive. Specifically, in regard to polls, that provision of the RTKL refers to “the results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency.”

¹² See service purchase contract, SPC#3921111601A, Master Services Agreement, Attachment B, § 1.1.

The plain language of that provision very clearly encompasses the results of publicly funded efforts to measure public opinion.

Requester points to a public opinion poll conducted and funded by a private entity, not by a legislative agency. Furthermore, the efforts undertaken by the Senate Intergovernmental Operations Committee constitute a legislative investigation rather than an effort to measure public opinion. Accepting Requester's interpretation of category 19 to include the investigative activities of a legislative committee would expand the language of the RTKL beyond its plain language. This would not only encroach upon legitimate legislative activities but would also require disclosure of materials which would be protected by the Speech or Debate Privilege and made explicitly exempt from disclosure under the RTKL.

Therefore, by the plain language of the RTKL, the records sought by the Requester under Item 1 of his request are not legislative records, and the Senate was not required to produce any records in response to that portion of the request. Nevertheless, the Senate did acknowledge that certain publicly available records might be relevant to that request and directed the Requester to the website where information about the Committee's investigation could be found. The Senate was not required under the RTKL to do anything further with regard to Item 1 of the request.

3. The RTKL's exemption for trade secrets or confidential proprietary information does not apply to financial records.

In Item 2 the Requestor requests financial records from the Vendor's Contracts. The Senate provided the requested Contracts but redacted certain information from them arguing that it constitutes or reveals a trade secret or confidential proprietary information. However, as a threshold matter, the Senate Appeals Officer must consider whether the Contract constitutes a financial record, because the RTKL's exemption for trade secrets or confidential proprietary

information does not apply to financial records. 65 P.S. § 67.708(c) (“The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17)”); 65 P.S. § 67.708(b)(11). The RTKL defines “financial record” as:

"Financial record." Any of the following:

(1) Any account, voucher or contract dealing with:

(i) the receipt or disbursement of funds by an agency; or

(ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.

(2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.

(3) A financial audit report. The term does not include work papers underlying an audit.

65 P.S. § 67.102.

In the *City of Harrisburg v. Prince*, the Pennsylvania Supreme Court embraced a broad reading of the term, “financial records,” acknowledging that the term encompasses a broad class of records that “both bear a ‘sufficient connection’ to a financial ‘account, voucher or contract’ and ‘deal with the receipt or disbursement of funds by an agency.’” 219 A.3d 602, 617 (Pa. 2019). The Court noted that government contracts are financial records that have historically been subject to public access. *Id.* at 615; see also *Pa. Dep’t of Pub. Welfare v. Eiseman*, 125 A.3d 19, 30 (Pa. 2015). Here, the Vendor’s Contract is clearly a financial record, and it is not subject to redaction on the basis of Section 708(b)(11) of the RTKL. *See* 65 P.S. § 67.706; 65 P.S. § 67.708(c); 65 P.S. § 67.708(b)(11).

4. The Senate’s affidavit is conclusory as it relates to the confidential nature of the redactions in Vendor’s Contract.

On March 22, 2024, the Requester submitted a brief e-mail challenging the Senate’s position as dependent on conclusory evidence. Requester contends that the RTKL does not allow

agencies to rely on conclusory statements and affidavits as evidence to overcome the presumption of access. According to Requester, the Senate pointed to the RTKL and did not provide additional evidence to support its denial. Requester asserts that this makes the Senate's denial conclusory which cannot be used to deny access to the requested financial documents.

Under the RTKL, the Senate as a legislative agency bears the burden of showing by a preponderance of the evidence that a requested record is exempt from production. 65 P.S. § 67.708(a)(2). A preponderance of the evidence is such evidence as would lead a factfinder to find that the existence of a contested fact is more probable than the nonexistence of the contested fact. *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa.Cmwlth. 2011). An agency may present sufficient evidence for a claimed exemption by the submission of affidavits. *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 381 (Pa.Cmwlth. 2011). Affidavits are the means through which a governmental agency justifies nondisclosure of the requested documents under each exemption upon which it relied upon. The affidavits must be detailed, nonconclusory, and submitted in good faith. A generic determination or conclusory statements are not sufficient to justify the exemption of public records. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa.Cmwlth.2013).

The Requester challenges the assertions of the Senate as conclusory. The partial denial of the request through the redactions were based, according to the Senate RTKL Officer, on the assertions of the Vendor. The Clark Affidavit refers to a signed written statement by the Vendor asserting that the information was exempt from disclosure under exemption 11.¹³ However, no explanation as to why the information was exempt from disclosure was provided by the Senate. There is no explanation of the nature of the information redacted, or why it constitutes confidential

¹³ The signed written statement was not included in the Senate's Response or with the Clark Affidavit.

proprietary information or trade secrets, as defined under the RTKL. All that is included is a reference to the specific exemption and a statement that the Vendor has asserted that the exemption applies.

The affidavit submitted by the Senate to support the exemptions upon which it relied describes the manner in which the Senate responded to the request and the basis on which the Senate redacted certain information contained in the records. The affidavit points to the terms of the contract between the Senate and the Vendor, and the fact that the redacted information was identified by the Vendor as containing confidential proprietary information. The affidavit demonstrates good faith on the part of the Senate to identify responsive documents, and to redact that information which the Vendor had identified as confidential and proprietary. Nevertheless, the affidavit does not explain in any detail why the information redacted is exempt from disclosure, other than pointing out that the Vendor has asserted it to be.

Without further information, it is impossible to determine whether the information redacted is in fact exempt from disclosure under the RTKL. There is no way to determine whether the information redacted constitutes trade secrets or confidential proprietary information. The affidavit standing alone is insufficient to prove that the redacted portions of the records are exempt from disclosure. The record includes no other justification or explanation concerning the redacted information. Therefore, the Senate has not met its burden of proving the redacted portions of the records are exempt from disclosure under the RTKL.

CONCLUSION

For the foregoing reasons, Requester's appeal is denied in part and granted in part. With regard to the first item of the Request, the appeal is denied and the Senate is not required to take any further action. With regard to the second item of the Request, the appeal is granted, and the

Senate shall provide unredacted copies of the financial records produced related to the contract with Envoy Sage to the Requestor. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal.

IN THE SENATE OF PENNSYLVANIA

Appeal of Wasserstein

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Senate RTK Appeal 01-2024

**FINAL DETERMINATION
April 15, 2024**

ORDER

AND NOW, this 15th day of April 2024, this appeal is denied with regard to the request for “The results of the election inquiry into the 2020 general and 2021 primary elections started by Sen. Doug Mastriano in July 2021.” The appeal is granted with regard to the request for “financial records from the contract with Envoy Sage who conducted the audit.” The Senate is required to provide unredacted copies of those records to the Requester within thirty (30) days of the date of this Order.



**MICHAEL GERDES
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 717-255-1650.