

IN THE SENATE OF PENNSYLVANIA

Appeal of Wasserstein

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Senate RTK Appeal 02-2024

FINAL DETERMINATION
August 21, 2024

INTRODUCTION

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.*, seeking “deliverables” under a Senate contract with vendor Envoy Sage, including “briefing slides, dates of all briefings, reports, findings, assessments and all data collected.” The Senate Open Records Officer (“Senate RTKL Officer”) denied the request. 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 this request.

FACTUAL BACKGROUND

On May 30, 2024, Requester submitted a RTKL request to the Senate RTKL Officer seeking: “All deliverables from Envoy Sage as described under item 7 of the Performance Work Statement (Attachment B) in the service purchase contract, including briefing slides, dates of all briefings, reports, findings, assessments and all data collected.”¹ Requester also included a hyperlink to a Service Purchase Contract found on the patreasury.gov website.²

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

² https://patreasury.gov/transparency/e-library/ContractFiles/629719_Senate%20of%20Pennsylvania_3921111601A-Redacted_02.pdf

On July 3, 2024, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Senate RTKL Officer responded to the Requester denying his request on the basis that the records requested are not legislative records under the RTKL.³ The Senate RTKL Officer noted that, “While the financial record delineates deliverables under the contract, they are not part of the financial record and until such time as they are released as part of a legislative record, they are not accessible under the RTKL.” The Senate RTKL Officer further responded that the information “would also be exempt from disclosure under Section 302(b)(2) as they are related to legislative activities protected by the speech and debate privilege.” Finally, the Senate RTKL Officer stated that the records are investigative materials exempt from access under Section 708(b)(17) of the RTKL. 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 July 22, 2024, Requester timely submitted an appeal of the denial via email to the Senate Appeals Officer.⁴ In the appeal, Requester asserts that the records requested are financial records under the RTKL because they “provide important context to the public funds paid to Envoy Sage and illustrate whether the money paid was an appropriate expenditure of public funds...” Requester points to caselaw and contends that the definition of financial record must reach records that bear a sufficient connection to facially financial records in light of the purpose of the RTKL.

Requester further contends that the Senate has not met its burden of proof regarding the legislative privilege basis for denial and asks that the Appeals Officer order the Senate to produce an index of denied records. Specifically, the Requester seeks an “individualized list of responsive records to our request, an acknowledgement of existence for each record, and the corresponding legal basis for denial.” Finally, Requester also requests *in camera* review of responsive documents.

³ The Senate’s response is attached to this Final Determination and labeled “Senate Response.”

⁴ Requester’s appeal is attached to this Final Determination and labeled as “Requester’s Appeal.”

On July 23, 2024, the Senate Appeals Officer issued a submission schedule⁵ to the parties. At the request of counsel for the Senate and with the consent of Requester, the deadline for the Senate submission was extended until August 7, 2024.

On August 7, 2024, counsel for the Senate submitted a letter brief⁶ as well as the affidavits of Pennsylvania State Senator Cris Dush and Crystal H. Clark, Esquire, General Counsel for the Senate Republican Caucus, in support of the Senate's position.⁷ Requester did not make any further submission in support of his appeal in this matter.

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 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). The burden of proving that a legislative record is exempt from public

⁵ Submission schedule is attached to this Final Determination and labeled as “Submission Schedule.”

⁶ Counsel for the Senate's letter brief is attached to this Final Determination and labeled as “Senate's Brief.”

⁷ The Affidavits of Senator Cris Dush and Crystal H. Clark are attached to this Final Determination and labeled “Dush Affidavit” and “Clark Affidavit” respectively.

access is on the legislative agency receiving a request by a preponderance of the evidence. 65 P.S. § 67.708(a)(2).

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.

Additionally, Section 102 of 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.

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.

1. Deliverables from a vendor pursuant to a legislative committee investigation are not legislative records.

The Senate RTKL Officer denied the request on the basis that the records requested are not legislative records and noted that “While the financial record delineates deliverables under the contract, they are not part of the financial record and until such time as they are released as part of a legislative record, they are not accessible under the RTKL.” The Senate RTKL Officer pointed

to prior final determinations in which other categories of materials were determined not to be legislative records.

In his appeal, Requester contends that the Senate RTKL Officer “too narrowly construed the definition of a financial record” under the RTKL. Requester argues that financial records are more than records which on their face constitute financial records, and include materials which “provide context to facially financial records.” Requester cites the Pennsylvania Supreme Court’s opinion in *City of Harrisburg v. Prince*, 656 Pa. 23 (2019), and argues that the records sought through his request “bear a ‘sufficient connection’ to financial records and provide necessary context for the public.”

In its brief, the Senate counters that the materials are not financial records and do not meet the test set forth by the Supreme Court in *Prince*. The Senate submitted two affidavits attesting to the nature of the services provided by the vendor, and the nature of the deliverables delineated by the contract. Specifically, the vendor was engaged to assist a legislative committee with a legislative investigation into elections. *See* Dush Affidavit ¶ 6; Clark Affidavit ¶ 7. The contract contemplated analysis, consultation, advice, and reports to support the investigation. Dush Affidavit ¶ 12; Clark Affidavit ¶ 16. The deliverables were created during the course of, and were part of, the investigation. Dush Affidavit ¶ 15. The deliverables do not state or reference any receipt or disbursement of funds by the Senate or otherwise deal with any Senate receipt or disbursement. Dush Affidavit ¶ 17.

On its face, the materials requested, including “deliverables” and the specific categories of materials set forth in the request, are not among the enumerated categories of legislative records subject to disclosure under the RTKL. Nevertheless, as noted by the Requester in his appeal, Pennsylvania courts have interpreted the term “financial record” under the RTKL to include

documents which on their face are not accounts, vouchers or contracts. The Supreme Court's opinion in *Prince* thoroughly recounts such cases. However, while the Supreme Court in *Prince* interpreted "financial record" under the RTKL broadly, the Court emphasized that its interpretation requires "that a record **both** bear a 'sufficient connection' to a 'financial account, voucher or contract,' **and** 'deal with the receipt or disbursement of funds by an agency.'" *Prince*, 656 Pa. at 47 (emphasis in original). Records will not be considered financial records if they do not satisfy both of the factors set forth in *Prince*.

In the present matter, the materials sought in the request are the "deliverables" under a contract between the Senate and a vendor, which the request further describes as "briefing slides, dates of all briefings, reports, findings, assessments and all data collected." While these deliverables relate to, and are delineated by, the contract, they are not part of the contract. Furthermore, nothing in the record suggests that the deliverables "deal with the receipt or disbursement of funds" by the Senate. The deliverables are part of the vendor's services assisting the legislative committee with its investigation into elections. As the materials sought do not deal with the receipt or disbursement of funds by the Senate, they do not satisfy the second factor under the *Prince* test, and consequently do not meet the definition of financial records.

Therefore, the records sought by the Requester do not fit any of the enumerated categories of legislative records under the RTKL, and the Senate was not required to produce any records in response to the request.

2. Because the materials requested are not legislative records, the Senate's additional bases for denying the request are moot.

In its denial, the Senate cited as alternative bases for denying the request both the speech and debate privilege, and the exemption under Section 708(b)(17) of the RTKL. In his appeal, Requester challenged the Senate's claims on the basis that the Senate had not met its burden of proof regarding the legislative privilege, and that "[a] bald assertion, unsupported by evidence, does not comply with the requirements of the RTKL." Requester asks that the Senate Appeals Officer order the Senate to produce "an index of denied records" including "an individualized list of responsive records to our request, an acknowledgement of existence for each record, and the corresponding legal basis for denial." Requester also "requests an *in camera* review of responsive documents."

Under the RTKL, the Senate as a legislative agency is required to provide legislative records in accordance with the act, and a legislative record in the possession of a legislative agency is presumed to be available in accordance with the act, unless certain exemptions apply. 65 P.S. § 303(a) and § 305(b). As noted above, if the record or document sought does not satisfy the definition of a legislative record, there is no need to discuss whether there are exemptions to disclosure. Having determined above that the materials sought in the request *are not* legislative records, there is no need to go further, and the RTKL does not require the Senate to provide them. Consequently, the Senate's assertion of both speech and debate privilege and the noncriminal investigation exemption under Section 708(b)(17) are moot.

Furthermore, there is no basis for ordering the Senate to provide an index of denied records, or the other items sought by Requester (i.e. "an individualized list of responsive records to our request, an acknowledgment of existence for each record, and the corresponding legal basis for denial."). Nor is there any basis for ordering *in camera* review of responsive documents. The

materials sought are not legislative records, and therefore are not “responsive” to the Requester’s RTKL request. The Senate need not take the further steps sought by Requester.

CONCLUSION

The documents sought by the Requester are not legislative records and therefore are not accessible under the Right-to-Know Law. Requester’s appeal is denied and the Senate is not required to take any further action. 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 02-2024

FINAL DETERMINATION
April 15, 2024

ORDER

AND NOW, this 21st day of August 2024, the appeal is DENIED. The Senate is not required to take any further action regarding the request.



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.