Right-to-Know Law Administrative Appeals from Legislative Agencies

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Preface

Explanations

This pamphlet contains the appellate decisions for the legislative agencies under the act of February 14, 2008 (P. L. 6, No. 3), known as the Right-to-Know Law, from January 2009 through December 2010. These decisions come from the Pennsylvania Senate, the Pennsylvania House of Representatives, or the Pennsylvania Legislative Reference Bureau. This pamphlet also contains relevant case law from the Commonwealth Court.

Decisions are reprinted in original form except that footnoted content has been set forth after decision text. Reporter's summaries and headnotes have been added.

(357612) No. 442 Sep. 11

Appeal of Scolforo

Senate of Pennsylvania

Nos. 01-2009, 02-2009 **February 24, 2009**

Reporter's summary: Associated Press reporter filed two requests under the new Right-to-Know Law seeking access to all 2008 correspondence between Senators Pileggi and Mellow and any registered lobbyists. The request was denied because communications between Senators and lobbyists do not fall under the definition of a legislative document and are therefore not accessible to the public. The decision was upheld on appeal.

Headnotes:

Statutory construction—

Delineations—By creating the category of "legislative records" and delineating 19 subcategories of information, the General Assembly limited the types of documents the legislative agencies must provide public access to.

Legislative intent—The procedure for determining if a record in the possession of a legislative agency is public is to first determine if the record is a legislative record. If it is a legislative record, it is presumptively a publicly accessible record unless it is exempted by section 708 or another part of Pennsylvania or Federal law.

Legislative intent—Section 708 merely limits what has already been determined to be a publicly accessible legislative record. Section 708 cannot be read to increase access to those records not defined as legislative records.

Section 102—Correspondence between lobbyists and General Assembly members does not fall within the statutory definition of "legislative record" and is therefore not publicly accessible under the Right-to-Know Law.

See, also, Appeal of Scolforo (House, 2009-0001 SCO and 2009-0002 SCO).

Statements of Fact

By letter dated January 1, 2009 addressed to Senator Dominic Pileggi, Mr. Mark Scolforo (Appellant), a reporter with the Associated Press, sought access to any correspondence between the Senator and any registered lobbyists that occurred during calendar year 2008. An identical letter and separate request was sent to Senator Robert J. Mellow on January 1, 2009 seeking the same access to any correspondence between the Senator and any registered lobbyists that occurred during calendar year 2008. These requests were made pursuant to the recently enacted Right-to-Know Law, Act of February 14, 2008, P. L. 6, 65 P. S. § 67.101 *et seq.* (the Act).

Senators Pileggi and Mellow do not serve as open records officers for the Senate of Pennsylvania. Appellant's requests were forwarded to the Senate's Open Records Officer, W. Russell Faber. By e-mail correspondence dated January 9, 2009, the Open Records Officer denied both of Appellant's requests.

By identical letters dated January 26, 2009, Appellant has appealed both denials to this office. Since these two appeals present identical factual situations and identical issues at law, they have been consolidated for disposition.

Discussion

These two appeals are the first to be considered pursuant to the new Act. They present questions of statutory construction.

The Act provides different types of access to different types of records of Commonwealth agencies, local agencies, legislative agencies and judicial agencies. These appeals deal solely with access provided by legislative agencies to legislative records.

No body of jurisprudence interpreting this Act has been developed. However, in construing any statute, it is a basic premise of law that the intention of the General Assembly must be ascertained and given effect. *Craley v. State Farm Fire and Casualty Co.*, 586 Pa. 484, 895 A.2d 530 (2006). The legislative intent is best gleaned from the clear and plain language of the statute. *Bowser v. Blom*, 569 Pa. 609, 807 A.2d 830 (2002). And, '' . . . when the words of a statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent.'' *Walker v. Eleby*, 577 Pa. 104 at 123, 842 A.2d 389 at 400 (2004). These cases can be resolved by applying these legal principles to the existing factual situation.

Section 102 of the Act defines the Senate as a ''legislative agency.'' Section 303(a) of the Act states that, ''A legislative agency shall provide legislative records in accordance with this act.'' The Act is clear and unambiguous. If the correspondence between Senators Pileggi or Mellow and registered lobbyists during calendar year 2008 are legislative records, then Appellant should be granted access to such records.

Section 102 of the Act defines the term ''legislative record'' in a very specific and exhaustive manner. There are nineteen different types of legislative documents listed which would be accessible by the public as legislative records pursuant to the Act.[1]

Nowhere in this list of accessible legislative records is found the mention of correspondence between members of the Senate and registered lobbyists. It would seem clear and unambiguous that it was not the intention of the General Assembly to make such a general class of records into accessible legislative records under these provisions of the Act. If specific correspondence between a member of the Senate and a registered lobbyist would fall within one of the specifically enumerated types of legislative records in an ancillary way, then that correspondence must be made available to the public by the Senate's Open Records

Officer. For example, such correspondence could well be part of the Journal of the Senate. Such is not the case in this instance. Rather, Appellant is seeking access to an entirely new class of record clearly not within the purview of any definition of a legislative record.

Appellant has not availed himself of the opportunity to file any further documentation or a memorandum of law to support his appeal. However, his letter of appeal urges that section 708(b)(29) of the Act should be read to supplement and expand the definition of legislative records to include another class or type of record. I cannot agree.

Section 708, entitled ''Exceptions for public records'', enumerates 30 different types of records which will not be accessible by the public. This section of the law is designed explicitly and exclusively to limit access to certain records. These exceptions are not confined to legislative records. Rather, all of the exceptions apply to any public records, legislative records or judicial records which otherwise would be accessible as public records, legislative records or judicial records. In other words, a record must first be a public record, a legislative record or a judicial record as those terms are defined in the Act before it can be subject to an exception.

Section 708(b)(29) specifically excepts:

> ''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).''

The first sentence clearly denies access to constituent correspondence which would otherwise be considered either a public record, a legislative record or a judicial record. Although constituent correspondence, like correspondence between members of the Senate and registered lobbyists, does not fall within the definition of a legislative record, it is very likely that such correspondence exists in the possession of Commonwealth agencies or local agencies. It would most likely be considered an accessible public record but for this exception in the Act.

The second sentence, limited to the specific paragraph of the section, provides an exception to the broader exception and permits a greater access to certain specific correspondence between members of the General Assembly and registered lobbyists if that correspondence first qualifies as a public record, a legislative record or a judicial record. Such correspondence could qualify as a public record and therefore be accessible to the public. This opinion has already determined that such lobbyist correspondence alone does not constitute an accessible legislative record. There is no indication that the General Assembly intended in any way to add another definition of legislative record in this paragraph.

Further evidence of legislative intent is also found by again looking to Chapter 3 of the Act which provides for access to legislative records. Section 303(b) of the Act states, *inter alia*, ''A legislative record in the possession of a legislative agency . . . shall be presumed to be available in accordance with this Act. The presumption shall not apply if: (1) the record is exempt under section 708 . . . '' This evidences an intent that section 708 be read to limit access to records which are already legislative records rather than granting an increased access to an entirely new class of records not already defined as legislative records.

This opinion has already determined that, in the first instance, correspondence between a member of the Senate and a lobbyist is not in and of itself a legislative record as that term is defined in the Act. Exception provisions of the Act cannot be applied to transform such records into accessible legislative records. Therefore, the denials issued by the Senate's Open Records Officer must be sustained.

Mark Corrigan
Senate Appeals Officer

Notes:

[1] ''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 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.

Appeal of Scolforo

Pennsylvania House of Representatives

No. 2009-0001 SCO **February 24, 2009**

Reporter's summary: Associated Press reporter filed a request under the new Right-to-Know Law seeking access to all 2008 correspondences between Representative Sam Smith and any registered lobbyists. The request was denied because communications between Representatives and lobbyists do not fall under the definition of a legislative document and are therefore not accessible to the public. The decision was upheld on appeal.

Headnotes:

Statutory construction—

Delineations—By creating the category of "legislative records" and delineating 19 subcategories of information, the General Assembly limited the types of documents legislative agencies must provide public access to.

Legislative intent—The procedure for determining if a record in the possession of a legislative agency is public is to first determine if the record is a legislative record. If it is a legislative record, it is presumptively a publicly accessible record unless it is exempted by section 708 or another part of Pennsylvania or Federal law.

Legislative intent—Section 708 merely limits what has already been determined to be a publicly accessible legislative record. Section 708 cannot be read to increase access to those records not defined as legislative records.

Section 102—Correspondence between lobbyists and General Assembly members does not fall within the statutory definition of "legislative record" and is not accessible under the Right-to-Know-Law.

Section 1102—By authorizing the appeals officer to hold a hearing, take evidence and review information, the Right-to-Know Law implies that appeals officers use a de novo standard of review.

Case law—Courts have held that the accessibility of records depends greatly on who holds them. This decision cites two cases involving salary information where when held by a State university the information was not publicly accessible, but when held by a State agency the same salary information was deemed accessible. Roy v. Pennsylvania State University, 130 Pa Commonwealth Ct. 468, 568 A.2d 751 (1990); and Pennsylvania State University v. State Employees' Retirement Board, 594 Pa Commonwealth Ct. 244, 935 A.2d 530 (2007).

See, also, Appeal of Scolforo (Senate, 01-2009, 02-2009) and Appeal of Scolforo (House, 2009-0002 SCO).

Decision

This is an appeal pursuant to Section 1101(a)(1) of the *Right-To-Know Law*, (Act of Feb. 14, 2008, No. 3, P. L. 6) (the ''RTKL''). This appeal was filed on January 26, 2009 by Mark Scolforo, Reporter for the *Associated Press*, Room 526 E Floor, Main Capitol, Harrisburg, PA 17120 (''Requestor''), to a denial by John R. Zimmerman, Open Records Officer, Republican Caucus, PA House of Representatives, Room B-29, Main Capitol, Harrisburg, PA 17120 (''Open Records Officer.'')

By letter dated January 1, 2009, Requestor sought access to 2008 correspondence between Rep. Sam Smith and lobbyists. On January 8, 2009, the Open Records Officer issued a letter denying Requestor's access to requested documents. The January 8, 2009 denial identified the record(s) requested, the specific reasons for the denial including citation to supporting legal authority, identified the open-records officer who issued the denial, listed the date of the response, and identified the procedure to appeal the denial including the person to whom such appeal should be directed. Accordingly, the denial met the requirements of Section 903 of the RTKL. Requestor appealed the denial, timely filing it within the 15 business days mandated by Section 1101 of the RTKL, and addressing the grounds stated for the denial.

Pursuant to Section 1102 of the RTKL, by letter dated January 27, 2009 (amended on January 29, 2009 following the parties' agreed request for an extension), both parties were given an opportunity to submit any additional documents that they wished to have considered by this Appeals Officer prior to the determination. On February 2, 2009, the House Republican Caucus submitted a memorandum supporting the denial; no additional documents were submitted by the Requestor.

Statement of Facts

There are no factual disputes that arise from the parties' submissions. The facts discerned from the submissions are as follows:

1. Requestor submitted a letter, dated January 1, 2009, to the office of Rep. Samuel Smith pursuant to the RTKL, in pertinent part, stating: ''I am requesting access to correspondence between you and registered lobbyists that occurred during calendar year 2008.''

2. In accordance with Section 901 of the RTKL, within the statutory 5 business days response period[1] John Zimmerman, Open Records Officer for the House Republican Caucus, by letter dated January 8, 2009, denied the request ''because the requested record is not a legislative record as defined by § 102.''

3. On January 26, 2009 Requestor hand-delivered a letter to this Appeals Officer appealing Mr. Zimmerman's denial (''Letter Appeal''), which set forth the basis for his position that the denial was in error.

4. Pursuant to Section 1102(a)(1) of the RTKL, by letter dated January 27, 2009, both parties were afforded an opportunity to submit any additional

documents by Noon on January 30, 2009 to this Appeals Officer that they wished to have considered. At the mutual request of the parties, by letter dated January 29, 2009, the period for submission of documents was extended to Noon on February 3, 2009. On February 2, 2009, Brett Feese, Chief Counsel for the Republican Caucus, submitted a 4-page memorandum opposing the appeal. (''Opposition to Appeal''). Requestor did not submit any additional documents.

Discussion

The Open Records Officer denied the request ''because the requested record is not a legislative record as defined by Section 102.'' In the Opposition to Appeal, the Republican Caucus argues that: 1) correspondence between a lobbyist and a member is not a ''legislative record'', and 2) the request should be denied for lack of sufficient specificity. In the Letter Appeal, Requestor argues that sections of the RTKL other than Section 102 grant access to agency records, including legislative records, and that *the legislative record of Section 708(b)(29) of the RTKL . . . echoes a proposal passed by the Speaker's Reform Commission*[2], and that the draft RTKL legislation when it was considered in the House of Representatives should be ''*viewed as the progeny of Section 708(b)(29)* which evidences an intent *to allow access to lawmakers' correspondence with registered lobbyists*.'' (Italics added.)

A. Standard of Review

The RTKL does not expressly provide a standard of review regarding appeals. Supporting *de novo* review, or a broad standard of review, Section 1101(a)(1) mandates that the appeals officer ''set a schedule for the [parties] *to submit documents in support of their positions*.'' *Id.* (emphasis added). The RTKL does not restrict the documents that can be submitted nor does it proscribe the appeals officer's authority to request documents which can be submitted. Instead, the RTKL broadly buttresses that authority by directing the appeals officer to ''review ***all*** information filed relating to the request.'' § 1102(a)(2) (emphasis added)). Additionally, among other things, the appeals officer is authorized by the RTKL to *hold a hearing and admit testimony, documents and other evidence which the appeals officer believes to be reasonably probative and relevant to an issue in dispute*. *Id.* (Emphasis added).

Accordingly, a *de novo* or broad standard of review will be used in reviewing appeals filed under the RTKL.[3]

B. Legislative Records

The Requestor has requested access to any correspondence between Rep. Samuel Smith and ''registered lobbyists that occurred during calendar year 2008.'' The House Republican Caucus argues that the requested records do not meet the definition of a ''legislative record'' and are not subject to disclosure. In contrast, Requestor argues that the record does meet that definition and should be dis-

closed. Based upon these specific arguments of the parties, and for the reasons set forth below, the Appeals Officer affirms the decision of the Open Records Officer.[4]

The RTKL separately defines Commonwealth agency, judicial agency, local agency, and legislative agency and grants access to certain records possessed by each of those agencies. In the case of legislative records, the RTKL defines a ''legislative agency'' as one of 15 identified legislative entities, and specifically identifies the 19 types of records defined as ''legislative records.'' § 102. A legislative record in the possession of a legislative agency is then presumed to be available for public access unless, it is: 1) exempt from disclosure under section 708(b); 2) protected by a privilege; or 3) exempt from disclosure under any other Federal or State law, regulation, judicial order or decree. § 305. A legislative agency claiming that a legislative record is exempt bears the burden of proving exemption by a preponderance of evidence. § 708(a)(2). If a record in the possession of a legislative agency falls within the definition of a ''legislative record'' and is not exempt or privileged from disclosure, it must be disclosed. §§ 303, 305.

In sum, under the framework set forth in the RTKL regarding the General Assembly, determinations are first made whether a record request was made for a ''legislative record'' that is possessed by a ''legislative agency.'' If the determinations are made in the affirmative, then the burden falls on the legislative agency to disclose, or prove by a preponderance of the evidence, that an exemption or privilege preventing disclosure applies.

RTKL Section 102 lists 19 specific categories of records that fall within the definition of ''legislative record.'' Included in that definition are items such as: financial records, introduced bills and resolutions, fiscal notes, rules of a chamber, cosponsorship memorandum, records of votes, and daily legislative calendars. § 102. The list of 19 categories does not include correspondence between a lobbyist and a legislator. In fact, the only references in the list of 19 that involve ''communications'' from or to a legislator, are: 1) a cosponsorship memorandum, 2) final or annual reports required by law to be submitted to the General Assembly, 3) a record communicating to the appointing authority the resignation of a legislative appointee, and 4) the results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency. *Id.*

In this case, the Open Records Officer correctly stated that the requested records are not included within the definition of ''legislative records.'' Furthermore, there is no common or approved usage of any of the words included within the 19 categories of ''legislative records'' that would support an expansion of that definition to grant the access to the records sought by Requestor.[5] Indeed, Requestor does not even argue that the Open Records Officer's interpretation of Section 102 was in error. Instead, Requestor argues that the definition of ''legis-

lative records'' is ''refined'' by Section 708, *Exceptions for public records*. Requester's reliance on those exceptions and prior draft legislation is misplaced.

Requestor contends that 4 clauses[6] of Section 708(b) support an expansive reading of the definition of legislative records.[7] He points out that the enactment of Section 708(b)(29) exempts from disclosure correspondence ''between a person and a member of the General Assembly'' which would identify a person seeking assistance or services, but also states that the exemption 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).'' He argues that this provision both protects legislator/constituent correspondence and permits disclosure of legislator/lobbyist correspondence. As a result, he argues, the legislature intended to expand the definition of legislative records beyond that which is set forth in section 102. Requestor's argument, however, is flawed. First, as a threshold matter, the scope of what constitutes a legislative record is much narrower than what broadly constitutes a public record. The RTKL distinguishes ''public records'' from ''legislative records'' and establishes different parameters for their disclosures. The definition of ''public record'' under the RTKL is more expansive than the definition of ''legislative record.'' A public record is broadly defined as a record of a Commonwealth agency or local agency that: 1) is not exempt under 708; 2) is not exempt from being disclosed under Federal or State law or regulation or judicial order or decree; or 3) is not protected by a privilege. § 102. In contrast, a legislative record under the RTKL is specifically limited to 19 categories of records. There is no equivalent or even similar limitation on the categories of documents that are classified as public records.

By way of background for Section 708 (b)(29), the Opposition to Appeal explains that Members of the General Assembly receive requests for constituent assistance on a daily basis concerning personal and confidential matters, such as vehicle driver licenses suspensions, PACE applications, licensing issues, and health insurance coverage. The requests and supporting documents are often forwarded by the Members to Commonwealth or local agencies. These documents become public records when they fall into the possession of a Commonwealth or local agency. Exemption 29 makes it clear that although the documents are now public records, the constituent's privacy will continue to be protected under the exemption. Opposition to Appeal at 2. This argument is persuasive as our courts have recently held that otherwise nondisclosable records may become available when a request for the same records is made to an agency that has a duty to disclose records in its possession. *Roy v. The Pennsylvania State University*, 130 Pa.Cmwlth. 468, 568 A.2d 751 (1990) (holding that salary information held by state university is not a ''public record'' as state university is not a state agency within the meaning of the RTKA), and *Pennsylvania State University v. State Employees' Retirement Bd.*, 594 Pa 244, 935 A.2d 530, (2007) (holding that state university salary information held by retirement agency is a ''public record'').

Finally, the list of exceptions in Section 708 of the RTKL does not refine, or otherwise modify the definition of a ''legislative record.'' The definitions under Section 102 are explicit and specifically enumerate what is considered a legislative record. The definitions are clear and unambiguous on their face, and they do not require the suggested ''refinement.'' Under well-established principles of statutory interpretation, these definitions should be accorded their customary and approved usages, and specific provisions should prevail over general ones. 1 Pa. C.S. §§ 1903, 1933. Additionally, under the framework set forth in the RTKL, consideration of the exceptions under 708(b) arises only after a determination has been made that a presumptive disclosable legislative record has been requested. Only then is consideration of the exceptions under 708(b) appropriate.

Conclusion

The General Assembly has expressly listed the types of documents which are publicly accessible and available as legislative records under the RTKL. The documents requested herein do not fall within the purview of that statute and need not be disclosed.

Reizdan Moore
House of Representatives Appeals Officer

Notes:

[1] Mr. Zimmerman's January 8, 2009 denial letter indicates that Requestor's letter dated January 1, 2009 was not received until January 5, 2009, which would have resulted in a response deadline of January 12, 2009.

[2] This was a special committee appointed by the Speaker to consider amendments to the 2007-2008 Rules of the Pennsylvania House of Representatives.

[3] A broad standard of review is comparable to the wide latitude of review granted to the final finders of fact in administrative hearings. In Unemployment Compensation matters, appeals are handled by referees and the Board of Unemployment Compensation. Referees review decisions of the Department of Labor personnel. The referee's scope of review is limited by statute to consideration of the issues expressly ruled upon in the decision being appealed. 34 Pa. Code § 101.87. Appeals of the referee's decision are made to the Board of Unemployment Compensation. That Board is the ultimate fact-finder in unemployment cases and is empowered to resolve conflicts in evidence, determine the credibility of witnesses, and determine the weight to be accorded evidence. The Board can affirm, modify, or reverse the referee's decision based on previously submitted evidence, or after taking further evidence. The authority granted to appeals officers under section 1102 of the RTKL more closely approximates that granted to the Board in unemployment compensation cases.

[4] In its Opposition to the Appeal, the House Republican Caucus raises the insufficiency of specificity of the request. Because the Appeals Officer finds that the

requested documents here are not Legislative Records as set forth in the RTKL, no determination on this additional argument is necessary.

[5] Additionally, under Section 1903(a) of the Statutory Construction Act, words and phrases are construed according to their common and approved usage. 1 Pa.C.S. § 1903(a). When the words of a statute are free and clear from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b).

[6] Sections 708(b)(7)(iii), 708(b)(10)(i)(A), 708(b)(10(i)(B), and 708(b)(29).

[7] Although the heading of Section 708 is "*Exceptions for public records*" it is clear that this section also applies to legislative records. Subsection (b) of Section 305, which governs the presumptions regarding legislative records, incorporates by reference the 30 exceptions of Section 708. The exceptions nullify the presumption of disclosure if one of the 30 listed exemptions applies. These sections are part of the same statute, apply to the same subjects, and should be read *in pari material*. 1 Pa.C.S. § 1932. This results in the application of the exceptions of Section 708 to legislative records.

Appeal of Scolforo

Pennsylvania House of Representatives

No. 2009-0002 SCO **February 24, 2009**

Reporter's summary: Associated Press reporter filed a request under the new Right-to-Know Law seeking access to all 2008 correspondences between Representative William DeWeese and any registered lobbyists. The request was denied because communications between Representatives and lobbyists do not fall under the definition of a legislative document and are therefore not accessible to the public. The decision was upheld on appeal.

Headnotes:

Statutory construction—

Delineations—By creating the category of "legislative records" and delineating 19 subcategories of information, the General Assembly limited the types of documents the legislative agencies must provide public access to.

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Legislative intent—Section 708 merely limits what has already been determined to be a publicly accessible legislative record. Section 708 cannot be read to increase access to those records not defined as legislative records.

Section 102—Correspondence between lobbyists and General Assembly members does not fall within the statutory definition of "legislative record" and is therefore not publicly accessible under the Right-to-Know Law.

Section 1102—By authorizing the appeals officer to hold a hearing, take evidence and review all information, the Right-to-Know Law implies that appeals officers are to use a de novo standard of review.

Case law—Courts have held that the accessibility of records depends greatly on who holds them. This decision cites two cases involving salary information where when held by a State university the information was not publicly accessible, but when held by a State agency the same information was deemed a public record. Roy v. Pennsylvania State University, 130 Pa. 468, 568 A.2d 751 (1990); and Pennsylvania State University v. State Employees' Retirement Board., 594 Pa. 244, 935 A.2d 530 (2007).

See, also, Appeal of Scolforo (Senate, 01-2009, 02-2009) and Appeal of Scolforo (House, 2009-0001 SCO)

Discussion

This is an appeal pursuant to Section 1101(a)(1) of the *Right-To-Know Law*, (Act of Feb. 14, 2008, No. 3, P. L. 6) (the ''RTKL''). This appeal was filed on January 26, 2009 by Mark Scolforo, Reporter for the *Associated Press*, Room 526 E Floor, Main Capitol, Harrisburg, PA 17120 (''Requestor''), to a denial by Roger Nick, Open Records Officer, Pennsylvania House of Representatives, Room 129, Main Capitol, Harrisburg, PA 17120 (''Open Records Officer.'')

By letter dated January 1, 2009, Requestor sought access to 2008 correspondence between Rep. H. William DeWeese and lobbyists. On January 8, 2009, the Open Records Officer issued a letter denying Requestor's access to requested documents. The January 8, 2009 denial identified the record(s) requested, the specific reasons for the denial including citation to supporting legal authority, identified the open-records officer who issued the denial, listed the date of the response, and identified the procedure to appeal the denial including the person to whom such appeal should be directed. Accordingly, the denial met the requirements of Section 903 of the RTKL. Requestor appealed the denial, timely filing it within the 15 business days mandated by Section 1101 of the RTKL, and addressing the grounds stated for the denial.

Pursuant to Section 1102 of the RTKL, by letter dated January 27, 2009 (amended on January 29, 2009 following the parties' agreed request for an extension), both parties were given an opportunity to submit any additional documents that they wished to have considered by this Appeals Officer prior to the determination. On February 3, 2009, the Open Records Officer submitted a memorandum supporting the denial; no additional documents were submitted by the Requestor.

Statement of Facts

There are no factual disputes that arise from the parties' submissions. The facts discerned from the submissions are as follows:

1. Requestor submitted a letter, dated January 1, 2009, to the office of H. William DeWeese pursuant to the RTKL, in pertinent part, stating: ''I am requesting access to correspondence between you and registered lobbyists that occurred during calendar year 2008.''

2. In accordance with Section 901 of the RTKL, within the statutory 5 business days response period[1] the Open Records Officer for the Pennsylvania House of Representatives, by letter dated January 8, 2009, denied the request ''because the requested record is not a legislative record as defined by § 102.''

3. On January 26, 2009 Requestor hand-delivered a letter to this Appeals Officer appealing Mr. Nick's denial (''Letter Appeal''), which set forth the basis for his position that the denial was in error.

4. Pursuant to Section 1102(a)(1) of the RTKL, by letter dated January 27, 2009, both parties were afforded an opportunity to submit any additional documents by Noon on January 30, 2009 to this Appeals Officer that they wished to have considered. At the mutual request of the parties, by letter dated January

29, 2009, the period for submission of documents was extended to Noon on February 3, 2009. On February 3, 2009, the Open Records Officer submitted a 7-page memorandum opposing the appeal. (''Opposition to Appeal''). Requestor did not submit any additional documents.

Discussion

The Open Records Officer denied the request ''because the requested record is not a legislative record as defined by Section 102. In the Letter Appeal, Requestor argues that sections of the RTKL other than Section 102 grant access to agency records, including legislative records, and that *the legislative record of Section 708(b)(29) of the RTKL . . . echoes a proposal passed by the Speaker's Reform Commission*[2], and that the draft RTKL legislation when it was considered in the House of Representatives should be ''*viewed as the progeny of Section 708(b)(29) which evidences an intent to allow access to lawmakers' correspondence with registered lobbyists*.'' (Italics added). In the Opposition to Appeal, the Open Records Officer argues that: 1) correspondence between a lobbyist and a member is not a ''legislative record'', and 2) Requestor's reliance on Section 708 of the RTKL is misguided.

A. Standard of Review

The RTKL does not expressly provide a standard of review regarding appeals. Supporting *de novo* review, or a broad standard of review, Section 1101(a)(1) mandates that the appeals officer ''set a schedule for the [parties] *to submit documents in support of their positions*.'' *Id.* (emphasis added). The RTKL does not restrict the documents that can be submitted nor does it proscribe the appeals officer's authority to request documents which can be submitted. Instead, the RTKL broadly buttresses that authority by directing the appeals officer to ''review ***all*** information filed relating to the request.'' § 1102(a)(2) (emphasis added)). Additionally, among other things, the appeals officer is authorized by the RTKL to *hold a hearing and admit testimony, documents and other evidence which the appeals officer believes to be reasonably probative and relevant to an issue in dispute*. *Id.* (Emphasis added).

Accordingly, a *de novo* or broad standard of review will be used in reviewing appeals filed under the RTKL.[3]

B. Legislative Records

The Requestor has requested access to any correspondence between Rep. H. William DeWeese and ''registered lobbyists that occurred during calendar year 2008.'' The Open Records Officer argues that the requested records do not meet the definition of a ''legislative record'' and are not subject to disclosure. In contrast, Requestor argues that the record does meet that definition and should be disclosed. Based upon these specific arguments of the parties, and for the reasons set forth below, the Appeals Officer affirms the decision of the Open Records Officer.

The RTKL separately defines Commonwealth agency, judicial agency, local agency, and legislative agency and grants access to certain records possessed by each of those agencies. In the case of legislative records, the RTKL defines a ''legislative agency'' as one of 15 identified legislative entities, and specifically identifies the 19 types of records defined as ''legislative records.'' § 102. A legislative record in the possession of a legislative agency is then presumed to be available for public access unless, it is: 1) exempt from disclosure under section 708(b); 2) protected by a privilege; or 3) exempt from disclosure under any other Federal or State law, regulation, judicial order or decree. § 305. A legislative agency claiming that a legislative record is exempt bears the burden of proving exemption by a preponderance of evidence. § 708(a)(2). If a record in the possession of a legislative agency falls within the definition of a ''legislative record'' and is not exempt or privileged from disclosure, it must be disclosed. §§ 303, 305.

In sum, under the framework set forth in the RTKL regarding the General Assembly, determinations are first made whether a record request was made for a ''legislative record'' that is possessed by a ''legislative agency.'' If the determinations are made in the affirmative, then the burden falls on the legislative agency to disclose, or prove by a preponderance of the evidence, that an exemption or privilege preventing disclosure applies.

RTKL Section 102 lists 19 specific categories of records that fall within the definition of ''legislative record.'' Included in that definition are items such as: financial records, introduced bills and resolutions, fiscal notes, rules of a chamber, cosponsorship memorandum, records of votes, and daily legislative calendars. § 102. The list of 19 categories does not include correspondence between a lobbyist and a legislator. In fact, the only references in the list of 19 that involve ''communications'' from or to a legislator, are: 1) a cosponsorship memorandum, 2) final or annual reports required by law to be submitted to the General Assembly, 3) a record communicating to the appointing authority the resignation of a legislative appointee, and 4) the results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency. *Id.*

In this case, the Open Records Officer correctly stated that the requested records are not included within the definition of ''legislative records.'' Furthermore, there is no common or approved usage of any of the words included within the 19 categories of ''legislative records'' that would support an expansion of that definition to grant the access to the records sought by Requestor.[4] Indeed, Requestor does not even argue that the Open Records Officer's interpretation of Section 102 was in error. Instead, Requestor argues that the definition of ''legislative records'' is ''refined'' by Section 708, *Exceptions for public records*. Requester's reliance on those exceptions and prior draft legislation is misplaced.

Requestor contends that 4 clauses[5] of Section 708(b) support an expansive reading of the definition of legislative records.[6] He points out that the enactment

of Section 708(b)(29) exempts from disclosure correspondence ''between a person and a member of the General Assembly'' which would identify a person seeking assistance or services, but also states that the exemption 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).'' He argues that this provision both protects legislator/constituent correspondence and permits disclosure of legislator/lobbyist correspondence. As a result, he argues, the legislature intended to expand the definition of legislative records beyond that which is set forth in section 102. Requestor's argument, however, is flawed.

First, as a threshold matter, the scope of what constitutes a legislative record is much narrower than what broadly constitutes a public record. The RTKL distinguishes ''public records'' from ''legislative records'' and establishes different parameters for their disclosures. The definition of ''public record'' under the RTKL is more expansive than the definition of ''legislative record.'' A public record is broadly defined as a record of a Commonwealth agency or local agency that: 1) is not exempt under 708; 2) is not exempt from being disclosed under Federal or State law or regulation or judicial order or decree; or 3) is not protected by a privilege. § 102. In contrast, a legislative record under the RTKL is specifically limited to 19 categories of records. There is no equivalent or even similar limitation on the categories of documents that are classified as public records.

By way of background for Section 708(b)(29), the Opposition to Appeal explains that:

> The purpose of § 708(b)(29) is to prevent public disclosure of otherwise sensitive information which typically comes through the legislative branch for processing by a Commonwealth or local agency. *Id.* at § 708(b)(29). Section 708(b)(29) is intended to shield the availability of constituent correspondence and attendant documents which might be requested under the RTKL from the Commonwealth or local agency once the record is no longer in the possession of the Legislature. *Id.*

Opposition to Appeal at 5. The Opposition further states that: ''the Legislature has the strongest desire to protect constituent correspondence and related documents from public disclosure.'' *Id.*

This argument is persuasive as our courts have recently held that otherwise nondisclosable records may become available when a request for the same records is made to an agency that has a duty to disclose records in its possession. *Roy v. The Pennsylvania State University*, 130 Pa.Cmwlth. 468, 568 A.2d 751 (1990) (holding that salary information held by state university is not a ''public record'' as state university is not a state agency within the meaning of the RTKA), and *Pennsylvania State University v. State Employees' Retirement Bd.*, 594 Pa. 244, 935 A.2d 530, (2007) (holding that state university salary information held by retirement agency is a ''public record'').

Finally, the list of exceptions in Section 708 of the RTKL does not refine, or otherwise modify the definition of a ''legislative record.'' The definitions under Section 102 are explicit and specifically enumerate what is considered a legislative record. The definitions are clear and unambiguous on their face, and they do not require the suggested ''refinement.'' Under well-established principles of statutory interpretation, these definitions should be accorded their customary and approved usages, and specific provisions should prevail over general ones.

1 Pa.C.S. §§ 1903, 1933. Additionally, under the framework set forth in the RTKL, consideration of the exceptions under 708(b) arises only after a determination has been made that a presumptive disclosable legislative record has been requested. Only then is consideration of the exceptions under 708(b) appropriate.

Conclusion

The General Assembly has expressly listed the types of documents which are publicly accessible and available as legislative records under the RTKL. The documents requested herein do not fall within the purview of that statute and need not be disclosed.

Reizdan Moore
House of Representatives Appeals Officer

Notes:

[1] Mr. Nick's January 8, 2009 denial letter indicates that Requestor's letter dated January 1, 2009 was not received until January 5, 2009, which would have resulted in a response deadline of January 12, 2009.

[2] This was a special committee appointed by the Speaker to consider amendments to the 2007-2008 Rules of the Pennsylvania House of Representatives.

[3] A broad standard of review is comparable to the wide latitude of review granted to the final finders of fact in administrative hearings. In Unemployment Compensation matters, appeals are handled by referees and the Board of Unemployment Compensation. Referees review decisions of the Department of Labor personnel. The referee's scope of review is limited by statute to consideration of the issues expressly ruled upon in the decision being appealed. 34 Pa. Code § 101.87. Appeals of the referee's decision are made to the Board of Unemployment Compensation. That Board is the ultimate fact-finder in unemployment cases and is empowered to resolve conflicts in evidence, determine the credibility of witnesses, and determine the weight to be accorded evidence. The Board can affirm, modify, or reverse the referee's decision based on previously submitted evidence, or after taking further evidence. The authority granted to appeals officers under section 1102 of the RTKL more closely approximates that granted to the Board in unemployment compensation cases.

[4] Additionally, under Section 1903 (a) of the Statutory Construction Act, words and phrases are construed according to their common and approved usage.

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1 Pa.C.S. § 1903(a). When the words of a statute are free and clear from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b).

[5] Sections 708(b)(7)(iii), 708(b)(10)(i)(A), 708(b)(10(i)(B), and 708(b)(29).

[6] Although the heading of Section 708 is ''*Exceptions for public records*'' it is clear that this section also applies to legislative records. Subsection (b) of Section 305, which governs the presumptions regarding legislative records, incorporates by reference the 30 exceptions of Section 708. The exceptions nullify the presumption of disclosure if one of the 30 listed exemptions applies. These sections are part of the same statute, apply to the same subjects, and should be read *in pari material*. 1 Pa.C.S. § 1932. This results in the application of the exceptions of Section 708 to legislative records.

Appeal of Wolf

Pennsylvania House of Representatives

No. 2009-0003 WOL **March 2, 2009**

Reporter's summary: Ms. Wolf requested the name and date of, as well as the resume, employment application and all communications regarding, the hiring of the Director of Administration for the House Democrats in 2008. The request was granted as to the name and date of the hiring, but denied as to the remaining information because the information was not an enumerated legislative record and therefore is not a public record. The decision was upheld in this appeal.

Headnotes:

Statutory construction—

Delineations—By creating the category of "legislative records" and delineating 19 subcategories of information, the General Assembly limited the types of documents the legislative agencies must provide access to as public records.

Delineations—If legislation has specific delineations, the court system and appeals officers cannot interpret the specific delineations as including items not mentioned in the list.

Legislative intent—The procedure for determining if a record in the possession of a legislative agency is public is to first determine if the record is a legislative record. If it is a legislative record, it is presumptively a publicly accessible record unless it is exempted by section 708 or another part of Pennsylvania or Federal law.

Legislative intent—Section 708 merely limits what has already been determined to be a publicly accessible legislative record. Section 708 cannot be read to increase access to those records not defined as legislative records.

Section 102—Resumes, employment applications and communications regarding hiring decisions are not considered legislative records under the Right-to-Know Law.

Section 901—Although a request may be deemed denied due to the passage of five business days, in this case it was a harmless error because the requestor did not object to the passage of time and the response was issued merely one day past the deadline. It is noted that there is no recourse other than to declare the record denied.

Section 1102—By authorizing the appeals officer to hold a hearing, take evidence and review all information, the Right-to-Know Law implies that appeals officers are to use a de novo standard of review.

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Decision

This is an appeal pursuant to Section 1101(a)(1) of the *Right-To-Know Law*, (Act of Feb. 14, 2008, No. 3, P. L. 6) (the ''RTKL''), received from Susan T. Wolf (''Requestor'') on February 2, 2009[1]. This is an appeal of a partial denial issued by Roger Nick, Open Records Officer, Pennsylvania House of Representatives, Room 129, Main Capitol, Harrisburg, PA 17120 (''Open Records Officer'').

On January 12, 2009, Requestor sought access to various employment related documents pertaining to the 2008 hiring of the Director of Administration of the Democratic Caucus, Pennsylvania House of Representatives. On January 20, 2009, the Open Records Officer issued a decision partially granted and partially denied the request, and further identified the record(s) requested, the specific reasons for the denial including citations to supporting legal authority, identified the open-records officer who issued the denial, listed the date of the response, and identified the procedure to appeal the denial including the person to whom such appeal should be directed. (''Partial Denial''). The Partial Denial met the requirements of Section 903 of the RTKL. Requestor appealed the Partial Denial, timely filing it within the 15 business days mandated by Section 1101 of the RTKL, and addressing the grounds stated in the Partial Denial.

Statement of Facts

There are no factual disputes that arise from the parties' submissions. The facts discerned from the submissions are as follows:

1. On January 12, 2009, Requestor, on the House of Representatives' Right-To-Know form, submitted a records request to the Open Records Officer:

   For the person hired as Director of Administration - House Democrats in 2008

   1) Name of individual and date of hire
   2) Employment application
   3) Resume
   4) All notes, letters, internal memorandum and correspondence, including emails related to the hiring of the individual.

2. The House of Representatives failed to send a response by January 19, 2009, the fifth business day after receipt of the request. Accordingly, the request was deemed denied pursuant to Section 901 of the RTKL.

3. Thereafter, the Open Records Officer, by letter dated January 20, 2009, denied the request in part, and granted it in part. The Open Records Officer, in his Partial Denial, stated that the requested information does not constitute a legislative record pursuant to the Section 102 of the RTKL. Nonetheless, he provided the name of the individual and the date of hire ''because this information is routinely made public.'' The remainder of the request was denied[2].

4. On February 2, 2009, this Appeals Officer received a letter, dated January 23, 2009, appealing the Partial Denial which set forth the basis for her position that the denial was in error. (''January 23 Letter Appeal'').

5. Pursuant to Section 1102(a)(1) of the RTKL, by letter dated February 2, 2009, both parties were afforded an opportunity to submit any additional documents by Noon on February 6, 2009 to this Appeals Officer that they wished to have considered; Requestor was also directed to provide a copy of the January 20, 2009 Partial Denial from which she appealed. On February 5, 2009, Requestor provided a copy of the Partial Denial with a slightly modified appeal letter, but did not submit any additional documents. (''February 5 Letter Appeal''). On February 6, 2009, the Open Records Officer submitted a 6-page memorandum, with attachments, opposing the appeal. (''Opposition to Appeal'').

Discussion

The Open Records Officer denied the request ''because the requested record is not a legislative record as defined by Section 102.'' In the January 23 Letter Appeal and the February 5 Letter Appeal, Requestor cites Section 708(b)(7) of the RTKL, and argues that the requested records should be available as the requested records do not fall within the list of that section's 9 exceptions from disclosure. In the Opposition to Appeal, the Open Records Officer argues that: 1) the requested records are not accessible as they are not ''legislative records'' as defined in Section 102 of the RTKL, and 2) Requestor's reliance on Section 708 of the RTKL is misguided.

A. Standard of Review

The RTKL does not expressly provide a standard of review regarding appeals. Supporting *de novo* review, or a broad standard of review, Section 1101(a)(1) mandates that the appeals officer ''set a schedule for the [parties] *to submit documents in support of their positions.*'' *Id.* (emphasis added). The RTKL does not restrict the documents that can be submitted nor does it proscribe the appeals officer's authority to request documents which can be submitted. Instead, the RTKL broadly buttresses that authority by directing the appeals officer to ''review ***all*** information filed relating to the request.'' § 1102(a)(2) (emphasis added)). Additionally, among other things, the appeals officer is authorized by the RTKL to *hold a hearing and admit testimony, documents and other evidence which the appeals officer believes to be reasonably probative and relevant to an issue in dispute. Id.* (Emphasis added).

Accordingly, a *de novo* or broad standard of review will be used in reviewing appeals filed under the RTKL.[3]

B. Legislative Records

The Requestor has requested access to certain employment records (the name, date of hire, employment application, resume and all notes, letters, internal memorandum and correspondence including emails related to the hiring) of the person hired in 2008 as the Director of Administration of the House Democratic Caucus. Requestor argues that the requested records are not listed within the 9 exceptions to disclosure set forth in Section 708(b)(7), it is understood that the

records are included within the RTKL, and therefore should be available. For the reasons set forth below, it is determined that the requested records are not encompassed within the definition of legislative records, and the Partial Denial of the Open Records Officer is affirmed.

The RTKL separately defines Commonwealth agency, judicial agency, local agency, and legislative agency and grants access to certain records possessed by each of those agencies. ''Public records'' are distinguished from ''legislative records'' under the RTKL and the scope of what constitutes a legislative record is much narrower than what constitutes a public record. A record in the possession of a Commonwealth agency or a local agency is presumed to be a public record and must be made available unless exempted by Section 708, protected by a privilege, or exempt under a Federal or State law or regulation or judicial order or decree. §§ 301, 305.

In contrast, the definition of a legislative record under the RTKL is specifically limited to 19 categories of records. There is no equivalent or even similar limitation on the categories of documents that are classified as public records.

The RTKL defines a ''legislative agency'' as one of 15 identified legislative entities, and specifically identifies the 19 types of records defined as ''legislative records.'' § 102. A legislative record in the possession of a legislative agency is then presumed to be available for public access unless, it is: 1) exempt from disclosure under section 708(b); 2) protected by a privilege; or 3) exempt from disclosure under any other Federal or State law, regulation, judicial order or decree. § 305. A legislative agency claiming that a legislative record is exempt bears the burden of proving exemption by a preponderance of evidence. § 708(a)(2). If a record in the possession of a legislative agency falls within the definition of a ''legislative record'' and is not exempt or privileged from disclosure, it must be disclosed. §§ 303, 305.

In sum, under the framework set forth in the RTKL regarding the General Assembly, determinations are first made whether a record request was made for a ''legislative record'' that is possessed by a ''legislative agency.'' If the determinations are made in the affirmative, then the burden falls on the legislative agency to disclose, or prove by a preponderance of the evidence, that an exemption or privilege preventing disclosure applies.

Section 102 of the RTKL lists 19 specific categories of records that fall within the definition of ''legislative record.'' Included in that definition are items such as: financial records, introduced bills and resolutions, fiscal notes, rules of a chamber, cosponsorship memorandum, records of votes, daily legislative calendars, and administrative staff manuals or written policies. § 102. The 19 categories explicitly listed in the RTKL do not include employment records of individual legislative employees. Our courts have consistently applied a fundamental maxim of statutory construction: ''*expresio unius est exclusio alterius*,'' which stands for the principle that the mention of one thing in a statute implies the exclusion of others not expressed. *L.S. ex rel. A.S. v. Eschbach*, 583 Pa. 47, 56

874 A. 2d 1150, 1156 (2005); *Com. v. Spotz*, 552 Pa. 499, 519, 716 A.2d 580, 590 (1998) (citing *Windrim v. Nationwide Insurance Co.*, 537 Pa. 129, 139, 641 A.2d 1154, 1159 (1994) (Cappy, J., concurring); *Samilo v. Commonwealth*, 98 Pa.Cmwlth. 232, 510 A.2d 412, 413 (1986)). Under this well-established principle, courts must refrain from expanding statutory provisions through the inclusion of subjects that were omitted. *L.S. ex rel. A.S. v. Eschbach*, 583 Pa. at 56, 874 A.2d at 1156.

In this case, the Open Records Officer correctly determined that the requested records are not included within the definition of ''legislative records.'' Furthermore, there is no common or approved usage of any of the words included within the 19 categories of ''legislative records'' that would support an expansion of that definition to grant access to the records sought by Requestor.[4]

Requestor argues that the Open Records Officer misinterpreted Section 102 which was caused by ''inexperience'' and does not represent an ''avoidance of obligation.'' Requestor further states that she is forwarding a copy of her January 23 Letter Appeal to Barry Fox, Deputy Director, Office of Open Records, Commonwealth of Pennsylvania to ensure assistance is made available to the [House of Representatives] to help it post regulations and policies and become better versed in the full scope of the RTKL. January 23 Letter Appeal at 2. This action highlights Requestor's confusion over the difference between public records and legislative records under the RTKL.

First, as an informational matter, the RTKL framework is clear that Mr. Fox's office handles RTKL appeals from Commonwealth agencies and from local agencies involving documents defined as ''public records.'' His office has no jurisdiction over appeals from decisions by legislative agencies regarding ''legislative records.'' The Pennsylvania House of Representatives and the Senate are legislative agencies which have designated their own Appeals Officers to review denials by their Open Records Officers, and both chambers have published their own policies pursuant to Section 504 of the RTKL.

Additionally, Requestor's acknowledges that the requested records are not included in the 9 exceptions in Section 708(b)(7). She asserts that it is understood from that omission that the requested records should be included in the RTKL. Requestor's assertion is fatally flawed. Under the framework set forth in the RTKL, consideration of the exceptions under 708(b) arises only after a determination has been made that a presumptive, disclosable legislative record—not a public record—has been requested. Only then is consideration of the exceptions under 708(b) appropriate. Furthermore, a construction that permitted the interpretation proffered by Requestor would contravene the well-established principle: ''*expresio unius est exclusio alterius*,'' that the definition of legislative record cannot be expanded to include subjects that are not contained in the explicit definition.

Conclusion

The General Assembly has expressly listed the types of documents which are publicly accessible and available as legislative records under the RTKL. The documents requested herein do not fall within the purview of that statute and need not be disclosed.

Reizdan Moore
House of Representatives Appeals Officer

Notes:

[1] The appeal letter was dated January 23, 2009, but the letter was not deposited in the U.S. Mail until 7 days later on January 30, 2009. It was received by this Appeals Officer on February 2, 2009.

[2] The Open Record Officer's January 20, 2009 letter indicates that the request was made on January 12, 2009 but the denial was not issued until January 20, 2009. The 5 business days response period expired on January 19, 2009, so the request was ''deemed'' denied. However, Requestor did not object to the late response. Any objections that she may have had are considered waived or moot. It is also noted that other than a ''deemed'' denial by a failure to timely respond, the RTKL does not provide any other sanction for a response which exceeds the deadline.

[3] A broad standard of review is comparable to the wide latitude of review granted to the final finders of fact in administrative hearings. In Unemployment Compensation matters, appeals are handled by referees and the Board of Unemployment Compensation. Referees review decisions of the Department of Labor personnel. The referee's scope of review is limited by statute to consideration of the issues expressly ruled upon in the decision being appealed. 34 Pa. Code § 101.87. Appeals of the referee's decision are made to the Board of Unemployment Compensation. That Board is the ultimate fact-finder in unemployment cases and is empowered to resolve conflicts in evidence, determine the credibility of witnesses, and determine the weight to be accorded evidence. The Board can affirm, modify, or reverse the referee's decision based on previously submitted evidence, or after taking further evidence. The authority granted to appeals officers under section 1102 of the RTKL more closely approximates that granted to the Board in unemployment compensation cases.

[4] Additionally, under Section 1903(a) of the Statutory Construction Act, words and phrases are construed according to their common and approved usage. 1 Pa.C.S. § 1903(a). When the words of a statute are free and clear from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b).

Appeal of Noll

Pennsylvania House of Representatives

No. 2009-0004 NOL **March 24, 2009**

Reporter's summary: Requestor wanted documents showing the process and purpose of a meeting allegedly attended by the requestor that led to the approval of a specific wastewater plan. The information requested included: how the meeting was convened, who attended, and all information used to make a decision. The open records officer for the House of Representatives denied the request because those records were not public under the Right-to-Know Law. The requestor admitted that he was not seeking legislative records in a letter construed to be an appeal. Although he did not specifically state that he was appealing the officer's decision, the appeals officer read the letter as though it were an appeal and upheld the decision of the open records officer.

Headnotes:

Statutory construction—

Appeals—Although the requestor failed to state the grounds for appeal on and even seemed unsure if he wanted to appeal, the appeals officer may still consider the matter and issue a ruling.

Appeals—The fact that the requestor admits a document or documents he is seeking are not legislative documents is not fatal to the requestor's appeal.

Delineations—By creating the category of "legislative records" and delineating 19 subcategories of information, the General Assembly limited the types of documents the legislative agencies must provide access to.

Section 102—Documentation of a meeting, not involving a legislative agency, made for the legislator's personal use is not mentioned in the list of 19 specific legislative records and therefore is not publicly accessible through the legislative agencies. However, the requestor is free to contact a Commonwealth or local agency to request that same information.

Decision

This is an appeal pursuant to Section 1101(a)(1) of the *Right-To-Know Law*, (Act of Feb. 14, 2008, No. 3, P. L. 6) (the ''RTKL''), received from Donald Noll (''Requestor'') on March 9, 2009[1]. This is an appeal of a denial issued by Roger Nick, Open Records Officer, Pennsylvania House of Representatives, Room 129, Main Capitol, Harrisburg, PA 17120 (''Open Records Officer'').

In a letter dated February 9, 2009, Requestor directed a letter to Rep. James Wansacz seeking access to documents regarding a private meeting purportedly attended by him. On February 18, 2009, the Open Records Officer issued a letter

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denying Requestor's access to the requested documents (''Denial''). The Denial met the requirements of Section 903 of the RTKL.

Statement of Facts

There are no factual disputes that arise from the parties' submissions. The facts discerned from the submissions are as follows:

1. By letter dated February 9, 2009, Requestor sought from Rep. James Wansacz the following regarding an August 11, 2008 private meeting that the representative allegedly attended:

   a. Information about how the meeting was convened and whether anyone from the Pennsylvania Department of Environmental Protection beyond the level of the Regional Office, was invited and in attendance.

   b. Any and all documentation that you possess explaining the purpose of the meeting and the discussions and decisions that led to the submission and ultimate approval of Scott Township's Revised 537 Wastewater Plan.

2. In his Denial, dated February 18, 2009, the Open Records Officer indicated that he had received the letter and denied the request. The Open Records Officer stated that ''the requested information does not constitute a legislative record pursuant to the Section 102 of the RTKL and is not subject to disclosure.'' He provided the names, addresses, telephone numbers and email addresses of the Scott Township Open Records Officer, and the Open Records Officer for the state Department of Environmental Protection and indicated that those agencies may have information responsive to the request.

3. In a letter to the Open Records Officer dated February 23, 2009 (''February 23rd Letter''), Requestor stated that he was ''writing to clarify a misstatement in [the February 18, 2009 Denial].'' Requestor stated that ''it should be obvious that my letter to Representative James Wansacz of February 9, 2009 which was referred to you, has nothing to do with information pertaining to a legislative record.''

4. On March 9, 2009, this Appeals Officer received a letter, dated March 1, 2009, from Requestor (''March 1 Letter Appeal''). The letter referenced the original request, the Denial, and the February 23rd Letter as attachments, but nothing was attached. Additionally, it was unclear whether Requestor had commenced an appeal, as Requestor had stated: ''I am not sure if I must appeal his decision since I have not requested any information pertaining to a legislative record, but by this letter I wish to do so in order not to be technically remiss in this matter.'' Requestor further stated that: ''the information that I am seeking has nothing to do with a legislative record.'' Requestor also stated that he had ''written a letter of response to Mr. Nick taking issue with his characterization of the request.''

5. On March 10, 2009, a letter was sent to Requestor from this Appeals Officer requesting that he clarify whether he had commenced an appeal, and provide copies of his request, the Denial and the February 23rd Letter. A copy of the RTKL pamphlet law was enclosed for Requestor's review, and he was directed to note the appeal requirements of Section 1101 (a). Finally, Requestor was directed to submit the requested information to this Appeal Officer by Noon on March 16, 2009 if he wished to have his letter treated as an appeal.

6. On March 16, 2009 Requestor's letter, dated March 12, 2009 (''March 12th Letter Appeal''), was received; he provided the 3 attachments that were omitted in his March 1st Letter Appeal.

Responding to this Appeals Officer, Requestor stated:

> ''Mr. Wansacz attended a private meeting at which discussions and decisions of a public nature occurred and [Requestor] was simply seeking any record that Mr. Wansacz may have had of this meeting, [and that Requestor thinks he is] entitled to this information.''
>
> ''When I wrote to you about the lack of certainty about the appeal, it was because I did not believe that the information I was seeking would be considered to be a Legislative record. For this reason I did not want to go through an appeal process unnecessarily. I trust that this information will clarify my position and that I will hear from you again concerning my original request to Rep. Wansacz.''

7. Neither a hearing nor the submission of additional documents was deemed necessary to resolve any issues inherent in this appeal.

Discussion

As a preliminary matter, it is noted that Requestor failed to perfect his appeal. Despite being furnished with a copy of the RTKL and directed to the appeal requirements specified in Section 1101 (a), Requestor's March 1st and March 12th Letter Appeals fail to state the grounds upon which he asserts that the record is a legislative record, or to otherwise address the basis of the Denial. Instead, Requestor repeatedly admits that ''his request has nothing to do with a legislative record.'' Among other things, the March 12th Letter Appeal states ''Mr. Wansacz attended a private meeting at which discussions and decisions of a public nature occurred and [Requestor] was simply seeking any record that Mr. Wansacz may have had of this meeting, [and that Requestor thinks he is] entitled to this information.'' Although unclear, it may be that, Requestor is asserting that the requested record is a ''public record'' to which he should be granted access.

A. Standard of Review

The RTKL does not expressly provide a standard of review regarding appeals. Supporting de novo review, or a broad standard of review, Section 1101(a)(1) mandates that the appeals officer ''set a schedule for the [parties] to submit docu-

ments in support of their positions.'' *Id.* The RTKL does not restrict the documents that can be submitted nor does it proscribe the appeals officer's authority to request documents which can be submitted. Instead, the RTKL broadly buttresses that authority by directing the appeals officer to ''review all information filed relating to the request.'' § 1102(a)(2) (emphasis added). Additionally, among other things, the appeals officer is authorized by the RTKL to hold a hearing and admit testimony, documents and other evidence which the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.*

Accordingly, a *de novo* or broad standard of review will be used in reviewing appeals filed under the RTKL.[2]

B. Legislative Records

The Requestor has requested access to certain records regarding a meeting at which Rep. Wansacz was allegedly a participant. The Open Records Officer denied the request stating that the records are not legislative records that must be disclosed. For the reasons set forth below, it is determined that the requested records are not encompassed within the definition of legislative records, and the denial of the Open Records Officer is affirmed.

The RTKL separately defines Commonwealth agency, judicial agency, local agency, and legislative agency and grants access to certain records possessed by each of those agencies. ''Public records'' are distinguished from ''legislative records'' under the RTKL and the scope of what constitutes a legislative record is much narrower than what constitutes a public record. A record in the possession of a Commonwealth agency or a local agency is presumed to be a public record and must be made available unless exempted by Section 708, protected by a privilege, or exempt under a Federal or State law or regulation or judicial order or decree. §§ 301, 305.

In contrast, the definition of a legislative record under the RTKL is specifically limited to 19 categories of records. There is no equivalent or even similar limitation on the categories of documents that are classified as public records.

The RTKL defines a ''legislative agency'' as one of 15 identified legislative entities, and specifically identifies the 19 types of records defined as ''legislative records.'' § 102. A legislative record in the possession of a legislative agency is then presumed to be available for public access unless, it is: 1) exempt from disclosure under section 708(b); 2) protected by a privilege; or 3) exempt from disclosure under any other Federal or State law, regulation, judicial order or decree. § 305. A legislative agency claiming that a legislative record is exempt bears the burden of proving exemption by a preponderance of evidence. § 708(a)(2). If a record in the possession of a legislative agency falls within the definition of a ''legislative record'' and is not exempt or privileged from disclosure, it must be disclosed. §§ 303, 305.

In sum, under the framework set forth in the RTKL regarding the General Assembly, determinations are first made whether a record request was made for

a ''legislative record'' that is possessed by a ''legislative agency.'' If the determinations are made in the affirmative, then the burden falls on the legislative agency to disclose, or prove by a preponderance of the evidence, that an exemption or privilege preventing disclosure applies.

Section 102 of the RTKL lists 19 specific categories of records that fall within the definition of ''legislative record.'' Included in that definition are items such as: financial records, introduced bills and resolutions, fiscal notes, rules of a chamber, cosponsorship memorandum, records of votes, daily legislative calendars, and administrative staff manuals or written policies. § 102. The 19 categories explicitly listed in the RTKL do not include any notes, records, or other documentation created by a legislative member for his/her own use relative to any meeting of a non-legislative agency. Our courts have consistently applied a fundamental maxim of statutory construction: ''*expresio unius est exclusio alterius*,'' which stands for the principle that the mention of one thing in a statute implies the exclusion of others not expressed. *L.S. ex rel. A.S. v. Eschbach*, 583 Pa. 47, 56 874 A.2d 1150, 1156 (2005); *Com. v. Spotz*, 552 Pa. 499, 519, 716 A.2d 580, 590 (1998) (citing *Windrim v. Nationwide Insurance Co.*, 537 Pa. 129, 139, 641 A.2d 1154, 1159 (1994) (Cappy, J., concurring); *Samilo v. Commonwealth*, 98 Pa. Cmwlth. 232, 510 A.2d 412, 413 (1986)). Under this well-established principle, courts must refrain from expanding statutory provisions through the inclusion of subjects that were omitted. *L.S. ex rel. A.S. v. Eschbach*, 583 Pa. at 56, 874 A.2d at 1156.

There is no common or approved usage of any of the words included within the 19 categories of ''legislative records'' that would support an expansion of that definition to grant access to the records sought by Requestor.[3] In this case, the Open Records Officer correctly determined that the requested records are not included within the definition of ''legislative record.'' and Requestor repeatedly admits he has not requested legislative records. Even if this Appeals Officer were to interpret Requestor's various correspondence to be requests for ''public records'' under the RTKL, such documents are not ''legislative records'' and thus not subject to production by this body.

Conclusion

The General Assembly has expressly listed the types of documents which are publicly accessible and available as legislative records under the RTKL. The documents requested herein do not fall within the purview of that statute and need not be disclosed.

Reizdan Moore
House of Representatives Appeals Officer

Notes:

[1] Requestor's letter was dated March 1, 2009, but the letter was postmarked March 6, 2009. It was received by this Appeals Officer on March 9, 2009. It is unclear whether Requestor's March 1, 2009 letter to this Appeals Officer con-

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stitutes an appeal. Notwithstanding, for purposes of this decision, that letter will be deemed to have commenced an appeal.

[2] A broad standard of review is comparable to the wide latitude of review granted to the final finders of fact in administrative hearings. In Unemployment Compensation matters, appeals are handled by referees and the Board of Unemployment Compensation. Referees review decisions of the Department of Labor personnel. The referee's scope of review is limited by statute to consideration of the issues expressly ruled upon in the decision being appealed. 34 Pa. Code § 101.87. Appeals of the referee's decision are made to the Board of Unemployment Compensation. That Board is the ultimate fact-finder in unemployment cases and is empowered to resolve conflicts in evidence, determine the credibility of witnesses, and determine the weight to be accorded evidence. The Board can affirm, modify, or reverse the referee's decision based on previously submitted evidence, or after taking further evidence. The authority granted to appeals officers under section 1102 of the RTKL more closely approximates that granted to the Board in unemployment compensation cases.

[3] Additionally, under Section 1903(a) of the Statutory Construction Act, words and phrases are construed according to their common and approved usage. 1 Pa.C.S. § 1903(a). When the words of a statute are free and clear from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b).

Appeal of Parsons

Pennsylvania House of Representatives

No. 2009-0005 PAR **June 29, 2009**

Reporter's summary: The requestor filed a request under the Right-to-Know Law seeking access to House policy or guidelines regarding office space for Representatives, any rent studies or validations from the last 10 years, and all leases and amounts of rent paid for 42 specified Representatives and one Senator. The request was referred as it pertained to the Senator. The request was then denied as to the studies or validations and the policies or guidelines because those items did not exist. Finally the request was granted for the leases and amounts of rent provided that the reporter pre-pay the estimated $900 fees for copying to redact signatures and Social Security numbers. The requestor appeals both the fee to be charged and the redaction of the signatures. On appeal, those are held to be invalid grounds of appeal under the Right-to-Know Law.

Headnotes:

Section 1101—Appeals officers have the ability to hear appeals based only on a denial or a deemed denial, not on a granted request.

Case law—Administrative agencies and officers, when created by statute, have only the express and necessary implied powers that the legislature provides. Feingold v. Bell of Pennsylvania, 477 Pa. 1, 383 A.2d 791 (1977). An administrative agency and officer may not expand on those conferred or necessary implied powers. City of Philadelphia v. Schweiker, 579 Pa. 591, 858 A.2d 75 (2004).

See, also, Appeal of Parsons (House, 2009-0007 PAR).

Decision

This is an appeal pursuant to Section 1101(a)(1) of the *Right-to-Know Law*, (Act of Feb. 14, 2008, No. 3, P. L. 6) (the ''RTKL''), received from Jim Parsons (''Requestor'') on May 29, 2009. This is an appeal of a decision issued by Roger Nick, Open Records Officer, Pennsylvania House of Representatives, Room 129, Main Capitol, Harrisburg, PA 17120 (''Open Records Officer'').

Statement of Facts

There are no factual disputed that arise from the parties' submissions. The facts discerned from the submissions are as follows:

1. On May 6, 2009, Brooke Lewis, Open Records Administrator for the House of Representatives (''Open Records Administrator'') received Requestor's letter, dated May 4, 2009, which sought access to House policy or guidelines regarding office space for Representatives, such as square footage per member, number of offices and maximum rent per year, any market rent study

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or rent validations prepared for the Commonwealth within the past ten years to determine allowable rents rates for Representatives and access to all lease for district office space and the amount paid in rent for each district office. This information was requested for forty-two listed western Pennsylvania representatives and one state Senator.

2. On May 7, 2009 the Open Records Officer responded in a letter that granted the request in part, denied it in part and ''referred'' it in part. The request was ''referred'' as it pertained to the Senate Member by advising the Requestor to direct his request to direct his request pertaining to the Senator to the Senate Open Records Officer, whose name and address were provided in the letter. The request was denied as it pertained to the policy and guidelines regarding office space, and any market studies or rent validations prepared within the past ten years because, as Requestor was advised, the House of Representatives does not have such records or documents. The request was granted for the financial information pertaining to rental of the district office spaces for the forty-two House Members, as well as access to the leases of those Members. Requestor was also advised that the leases contain the signatures of Members and lessors (and in many cases, the social security numbers of the Members) and each lease must be copied to redact such information. Requestor was further notified that a copying fee of $.25 per page would apply, and that the estimated fee would be in excess of $900.00. Requestor was directed to contact the Open Records Administrator to make arrangement for prepayment of the total fee and for proceeding.

3. On May 29, 2009 Requestor's appeal letter, dated May 27, 2009 was received by this Appeal Officer. (''May 29th Letter Appeal'').

4. Requestor does not appeal from the part of the request that was ''referred'' or from the part that was denied. Neither does Requestor otherwise contend that the House of Representatives does in fact possess the requested records which it represented it does not have. Rather, Requestor's ''appeal'' challenges the part of the request that was granted. In the May 29th Letter Appeal, Requestor expressly states that he does not dispute that social security numbers should be redacted from the leases. He contends that the RTKL does not provide for the redaction of signatures on any document, and that he is ''*appealing the House's determination that all of the leases must be redacted due to the signatures appearing on said documents and that [he] must pay a copying charge for those lease*.'' *Id.*

5. On June 1, 2009 this Appeals Officer provided a copy of the May 29th Letter Appeal to the Open Records Officer and advised him to submit any additional documents supportive of his position by Noon Monday, June 8, 2009. On June 8, 2009 a memorandum opposing the appeal was received.

6. Also on June 1, 2009 this Appeals Officer acknowledged receipt of the May 29th Letter Appeal, advised Requestor to submit any additional documents supportive of his position, as well as provide copies of the May 6, 2009 RTKL

request and the May 7th Response by Noon on Monday, June 8, 2009. Requestor did not submit any additional supportive documents but did provide the requested copies on June 5, 2009.

Discussion

As a preliminary matter, it must be determined whether this appeal satisfies the requirements of RTKL Section 1101, *Filing of Appeal* and whether the RTKL vests this Appeals Officer with jurisdiction over this matter. Since Requestor is not appealing the ''denial'' of the release of information, nor is he appealing the release of any information that has been ''deemed denied'', this Appeals Officer does not have jurisdiction over Requestor's complaints.

It is a fundamental tenet of the Pennsylvania jurisprudence that a statutorily created administrative agency or officer ''has only those powers which are expressly conferred upon it by the Legislature and those powers which arise by necessary implication'' to effectuate those powers. *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 8, 383 A.2d 791, 794 (1977). As such, the statutory entity cannot exercise powers contrary to, in limitation of, or enlargement of those powers the Legislature has expressly conferred on it. *See, e.g., City of Philadelphia v. Schweiker*, 579 Pa. 591, 858 A.2d 75 (2004).

The Legislature has expressly conferred on this Appeals Officer the right to decide appeals in specific cases. Specifically, section 1101(a), in pertinent part, grants authority to a Requestor to file an appeal under two circumstances: if a written request for access if denied, or ''deemed denied'' pursuant to RTKL Section 901. RTKL §§ 901, 1101(a). In this case, the Open Records Officer granted the request in part, denied the request in part, and referred the request in part. As a threshold matter, the Open Records Officer issued a written response regarding the request within the statutory five business days after receipt of the May 6, 2009 request. Accordingly, the May 7th Response cannot be characterized as a ''deemed denial'' pursuant to RTKL Section 901.

Equally unavailing to Requestor is an effort to characterize his filing as an appeal of a denial. Requestor does not contest or appeal the Open Records Officer's statement that no records or policy or guidelines responsive to the request exist. That was the only aspect of the request that was denied. Instead, Requestor focuses on a portion of his request that was granted, albeit conditionally, and readily admits that ''*he is appealing the House's determination that all of the leases must be redacted due to signatures appearing on said documents and that [he] must pay a copying charge*.[1]'' May 27th Letter Appeal. Regrettable for Requestor, his filing predicated on his disagreement over costs fails to satisfy the statutory criteria for an RTKL appeal, and the filing does not confer the requisite jurisdiction on this Appeals Officer to determine this matter.

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Notes:

[1] It is unclear from the submittals whether Requestor may contend that the $.25 per page copy fee is authorized or unreasonable. Without adjudicating upon this contention, the Appeals Officer notes that Requestor may wish to review RTKL Section 1307(b)(1) and (2) which mandate that legislative and other agencies establish reasonable duplication fees. Requestor may also wish to review the fee schedule contained in the House of Representative's RTKL - Statement of Policy found at 107 Pa. Code Ch. 201, § 201.15 which sets forth a $.25 per page fee, as well as a similar Statement of Policy for the Pennsylvania Senate found at 104 Pa. Code Ch. 7, § 7.15 which sets forth a $.25 per page fee and the fee schedule for the Pennsylvania Office of Open Records available online at http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434/fees/481854.

Additionally, Requestor may wish to review recent court decisions in: *Weiss v. Williamsport Area School District*, 872 A.2d 269 (2005), in which Commonwealth Court held under the pre-2008 *Right to Know Law*, 65 P. S. §§ 66.1—66.9, that a school district fee of $.25 per page for copying records under the pre-2008 RTKL was reasonable; and *Baravordeh v. Borough Council of Prospect Park*, 699 A.2d 789 (1997) in which Commonwealth Court held that a municipal charge of $.25 per page for copies of requested documents was reasonable.

Finally, Requestor may wish to consider the following. The Commonwealth's recognition of the need to protect personal identifying information against authorized use is reflected in the addition of the offense of ''Identity theft'' to the Crimes Code. 18 Pa.C.S. § 4120. That section defines ''identifying information'' to include facts used to establish identification including, but not limited to: a name, social security numbers, and electronic signatures. *Id.* Complementary civil provisions further reflecting this protection are reflected in the following sections of the Judiciary Code, 42 Pa.C.S. § 101, *et seq.*: § 5525 (4 year statute of limitation to bring action for identity theft); § 8315 (Authorizes damages for identity theft); § 8316 (Establishes a cause of action for use of name or likeness); and § 9720.1 (Specific restitution for identity theft authorized).

Appeal of Parsons

House of Representatives

No. 2009-0007 **July 22, 2009**

Reporter's summary: The requestor filed a request under the Right-to-Know Law seeking access to employment documents for caucus lawyers and outside counsel working for the Democratic Caucus. The request was granted for the names and salary amounts of all current caucus lawyers, the current contracts for outside lawyers and the personnel manual for all caucus employees. The request was denied as to job descriptions, attendance records, hiring dates and employment applications for all caucus lawyers. Although there was a potential conflict of interest stemming from the appeals officer's records potentially being involved, this conflict was waived by the requestor and the open-records officer. The appeals officer determined that the records at issue did not fall within the statutory definition of legislative record and upheld the partial denial.

Headnotes:

Conflict of interest—If information pertaining to the appeals officer may be released or withheld based on the decision of the appeals officer, there is a potential conflict of interest. The potential conflict of interest may be waived verbally or in writing by both parties after the appeals officer has fully disclosed the potential impact.

Recusal—An appeals officer is able to decide a case even if there is the potential that records involving the appeals officer may be released. The appeals officer must inform both parties that there is a potential for a conflict of interest and either obtain a written or verbal waiver of this conflict or determine if he or she is able to hear the appeal without bias.

Statutory construction—

Delineations—By creating the category of "legislative records" and delineating 19 subcategories of information, the General Assembly limited the types of documents legislative agencies must provide public access to.

Legislative intent—The procedure for determining if a record in the possession of a legislative agency is public is to first determine if the record is a legislative record. If it is a legislative record, it is presumptively a publicly accessible record unless it is exempted by section 708 or another part of Pennsylvania or Federal law.

Section 1102—By authorizing the appeals officer to hold a hearing, take evidence and review information, the Right-to-Know Law implies that appeals officers use a de novo standard of review.

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Case law— In Commonwealth v. Tedford, it is noted that courts have held that judges may determine their own competency to hear and decide cases. Commonwealth v. Druce, 577 Pa. 581, 588, 848 A.2d 104, 108 (2004). This decision by the judge will only be overturned for abuse of discretion. Commonwealth v. Abu-Jamal, 553 Pa. 485, 509, 720 A.2d 79, 89 (1998) citing, Commonwealth v. Blakeney, 596 Pa. 510, 946 A.2d 645, 659 (2008). The burden to prove a conflict exists is on the party requesting recusal. Commonwealth v. Abu-Jamal, 553 Pa. 485, 509, 720 A.2d 79, 89 (1998) citing, Commonwealth v. Blakeney, 596 Pa. 510, 946 A.2d 645, 659 (2008). Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 55-56 (2008).

If a party provides informed written or verbal consent to waive any potential conflict issue, that waiver is binding no matter what result. See e.g. Commonwealth v. Corbin, 447 Pa. 463, 291 A.2d 307 (1972); Commonwealth v. Stanton,294 Pa. Super, 516, 521, 440 A.2d 585, 588 (1982).

The fundamental rule of statutory construction is expresso unius est exclusio alterius," which means that by including certain items, the legislature intended to exclude others. L.S. ex rel A.S. v. Eschbach, 583 Pa. 47, 56, 874 A.2d 1150, 1156 (2005); Commonwealth v. Spotz, 552 Pa. 499, 519, 716 A.2d 580, 590 (1998) citing Windrim v. Nationwide Insurance Co., 537 Pa. 129, 139, 641 A.2d 1154, 1159 (1994) (Cappy, J., concurring); Samilo v. Insurance Department., 98 Pa.Cmwlth. 232, 235, 510 A.2d 412, 413 (1986).

See, also, Appeal of Parsons (House, 2009-0005 PAR).

Procedural History

This is an appeal pursuant to Section 1101(a)(1) of the *Right-To-Know Law*, (Act of Feb. 14, 2008, No. 3, P. L. 6) (the ''RTKL''), received from Jim Parsons, Reporter WTAE-TV, Pittsburgh, PA (''Requestor'') on June 25, 2009[1], of a partial denial issued by Roger Nick, Open Records Officer, Pennsylvania House of Representatives, Room 129, Main Capitol, Harrisburg, PA 17120 (''Open Records Officer'').

On May 5, 2009, Requestor sought access to various employment related documents pertaining to caucus lawyers and outside counsel working for the Democratic Caucus, Pennsylvania House of Representatives. On June 11, 2009, the Open Records Officer issued a letter, granting in part and denying in part, Requestor's access to the requested documents. The June 11, 2009 partial denial identified the record(s) requested, the specific reasons for the denial including citations to supporting legal authority, identified the open-records officer who issued1 the denial, listed the date of the response, and identified the procedure to appeal the denial including the person to whom such appeal should be directed. (''Partial Denial''). The Partial Denial met the requirements of Section 903 of the RTKL. Requestor appealed certain aspects of the Partial Denial, timely filing it within the 15 business days mandated by Section 1101 of the RTKL, and addressing the grounds stated in the Denial.

Statement of Facts

There are no factual disputes that arise from the parties' submissions. The facts discerned from the submissions are as follows:

1. On May 5, 2009 Requestor submitted a letter to Brooke I. Lewis, the Open Records Administrator, Pennsylvania House of Representatives, requesting:

   a. Names of all current caucus lawyers on the state payroll, hire dates, and salary amounts;

   b. Current contracts the caucus has with outside legal counsel and all bills of outside counsel for 2008 and 2009 to the date the request is fulfilled;

   c. Job descriptions for all individuals employed as lawyers/solicitors for the caucus;

   d. Time and attendance records for all caucus lawyers;

   e. Personnel manual of current caucus employees, including lawyers/solicitors.

   f. Employment applications for all individuals employed as lawyers/solicitors for the caucus.

2. In a letter dated May 12, 2009, the Open Records Officer informed Requestor that his request entailed legal review and would require an extension of the response time.

3. In a letter dated June 11, 2009, the Open Records Officer, denied the request in part, and granted it in part. The Open Records Officer granted access to the records sought in (a), (b) and (e) of paragraph 1 above, excluding the dates of hire of the caucus lawyers. The Open Records Officer issued the Partial Denial, denying access to the remaining records asserting that such information did not constitute legislative records pursuant to Section 102 of the RTKL.

4. On June 25, 2009, this Appeals Officer received a letter, dated June 22, 2009, appealing the Open Records Officer's Partial Denial and setting forth the basis for Requestor's position that the denial was in error. (''June 22nd Letter Appeal'').

5. Pursuant to Section 1102(a)(1) of the RTKL, by letter dated June 30, 2009, both parties were afforded an opportunity to submit any additional documents by Noon on July 6, 2009 to this Appeals Officer that they wished to have considered; upon request of the parties, the deadline was extended until Noon, on July 9, 2009. On July 9, 2009 a Memorandum Opposing the appeal was filed on behalf of the Open Records Officer. (''Memorandum in Opposition''). No further filing was made on behalf of the Requestor.

6. On July 7, 2009, the Appeals Officer identified a possible issue of concern and notified the parties of a conference call that he scheduled for 10:00 am on July 10, 2009 to give them an opportunity to present any requests for recusal that the parties wished to make. In lieu of the conference, the parties were informed they could submit a written waiver prior to the time of the con-

ference. On July 8, 2009 a waiver was submitted by the Open Records Officer. During the July 10, 2009 conference with Clancy Myer, Esquire, on behalf of the Open Records Officer and Requestor, Requestor twice stated that he had no concerns or objection to this Appeals Officer determining the matter. Accordingly, the conference call was ended and this appeal proceeded.

Discussion

A. Request for Recusal

As a threshold matter, this Appeals Officer considered whether disqualification was appropriate in this proceeding based upon the possible inclusion of this Appeals Officer among the attorneys about whom the requested information was sought. Pennsylvania courts have articulated the following standards for judicial officers, which although not directly on point, offer guidance in the case at hand:

It is presumed that a judge has the ability to determine whether he will be able to rule impartially and without prejudice, and his assessment is personal, unreviewable, and final. *Commonwealth v. Druce*, 577 Pa. 581, 848 A.2d 104, 108 (2004). ''Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overturned on appeal but for an abuse of discretion.'' *Commonwealth v. Abu-Jamal*, 553 Pa. 485, 720 A.2d 79, 89 (1998). (Citing, *Commonwealth v. Blakeney*, 596 Pa. 510, 946 A.2d 645, 659 (2008).

Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 55-56 (2008).

Additionally, ''[i]t is the burden of the party requesting recusal to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially.'' *Commonwealth v. White*, 589 Pa. 642, 910 A.2d 648, 657 (2006) (quoting *Commonwealth v. Abu-Jamal*, 553 Pa. 485, 720 A.2d 79, 89 (1998).

Commonwealth v. Tedford, Id.

The parties were advised of the possible inclusion of this Appeals Officer among the attorneys about whom the requested information was sought, and on July 7, 2009 were notified of the scheduling of a conference call for Friday, July 10, 2009 to hear any request that the parties may wish to make that the Appeals Officer recuse himself from consideration of this appeal. By letter dated July 8, 2009, the Open Records Officer waived such request for recusal. Requestor did not transmit a written waiver, but during the conference call with Requestor and Counsel for the Open Records Officer, Clancy Myer, Esquire, Requestor twice stated that he had no objection or concerns, and he agreed that this Appeal Officer could proceed to determine the appeal. Even though this Appeals Officer does not believe he has any bias or prejudice that would interfere with, or prevent him from rendering, a fair and impartial determination in this matter, the parties were afforded the opportunity to present such a request or objection. Subsequently, both parties either verbally or in writing affirmatively waived any objection or request for recusal. *See e.g. Com. v. Corbin*, 291 A.2d 3078 (Pa. Comwlth. Ct.

1972) (noting that where consent to proceed before a judge was deliberate and voluntary, defendant could not later complain that judge should have recused himself); *Com. v. Stanton*, 440 A.2d 585, 588 (Pa.Super., 1982) (''A defendant may for any reason he chooses, waive his right to have a judge, disqualified, and if he does, he cannot be heard to complain following an unfavorable result.'')

B. Standard of Review

The RTKL does not expressly provide a standard of review regarding appeals. Supporting *de novo* review, or a broad standard of review, Section 1101(a)(1) mandates that the appeals officer ''set a schedule for the [parties] *to submit documents in support of their positions.*'' *Id.* (emphasis added). The RTKL does not restrict the documents that can be submitted nor does it proscribe the appeals officer's authority to request documents which can be submitted. Instead, the RTKL broadly buttresses that authority by directing the appeals offices ''review ***all*** information filed relating to the request.'' § 1102(a)(2) (emphasis added)). Additionally, among other things, the appeals officer is authorized by the RTKL to *hold a hearing and admit testimony, documents and other evidence which the appeals officer believe be reasonably probative and relevant to an issue in dispute. Id.* (Emphasis added).

Accordingly, a *de novo* or broad standard of review will be used in reviewing appeals if led under the RTKL[2].

C. Legislative Records

The RTKL separately defines Commonwealth agency, Judicial agency, Local agency, and Legislative agency and grants access to certain records possessed by each of those agencies. In the case of legislative records, the RTKL defines a ''legislative agency'' as one of 15 identified legislative entities, and specifically identifies the 19 types of records defined as ''legislative records.'' RTKL § 102, *Definitions.* A record that falls within that definition is presumed to be available for public access unless, it is: 1) exempt under section 708; 2) protected by a privilege; or 3) exempt from disclosure under any other Federal or State law, regulation, judicial order or decree. RTKL § 305, *Presumptions.* A legislative agency claiming that a record is exempt bears the burden of proving exemption by a preponderance of evidence. RTKL § 708(a)(2). Section 708(b) lists 30 types of public records that are exempt from disclosure. RTKL § 708(b). If a record falls within the definition of a ''legislative record'' and is not exempt or privileged from disclosure, it must be disclosed. RTKL § 303, *Legislative agencies.*

Under the framework set forth in the RTKL regarding the General Assembly, determinations are first made whether a request was made for a ''legislative record'' that is possessed by a ''legislative agency.'' If the determinations are made in the affirmative, then the burden falls on the legislative agency to disclose, or justify an exemption or privilege from disclosure.

In the instant appeal, Requestor sought access from a legislative agency to six categories of employment records pertaining to lawyers on the state payroll, as

well as outside counsel with whom the caucus has contracted. The Open Records Officer granted access to documents in three categories of the requests, namely:

1. The names of all current caucus lawyers on the state payroll, and salary amounts;

2. Current contracts the caucus has with outside legal counsel and all bills of outside counsel for 2008 and 2009 to the date the request is fulfilled, and

3. Personnel manual of caucus employees, including lawyers/solicitors for the caucus.

The Partial Denial later clarifies that access to the records sought in category (1) above was only granted in part, as the Partial Denial states that ''*the portion of the request for hire date information of current lawyers contained in number (1) is denied*.'' (Italics added.) *Id.* Access to the documents requested in the remaining three categories was also denied, including:

4. Job descriptions for all individuals employed as lawyers/solicitors for the caucus;

5. Time and attendance records for all caucus lawyers; and

6. Employment applications for all individuals employed as lawyers/solicitors for the caucus.

The June 22nd Letter Appeal expressly limits the appeal to the partial denial of documents regarding: job descriptions for all individuals employed as lawyers/solicitors for the caucus; time and attendance records for all caucus lawyers; and dates of hire for caucus employees[3]. *Id.*

In his July 9, 2009 Memorandum in Opposition, the Open Records Officer concedes access to the dates of hire for caucus attorneys, stating ''[h]owever, because date of hire information is routinely made public, I will grant the request to access to date of hire information for current Democratic Caucus attorneys.'' Memorandum in Opposition at 7. Therefore, since access in this regard, will be provided, the portion of this appeal pertaining to the dates of hire for these individuals is deemed moot. Furthermore, Requestor has not appealed, or otherwise challenged, the denial regarding his request for employment application documents. Accordingly, the only issues currently unresolved in this appeal are Requestor's request for; (1) the time and attendance records for all caucus lawyers, and (2) job descriptions for all individuals employed as lawyers/solicitors for the caucus, both of which are addressed below.

Requests for Time And Attendance Records For All Caucus Lawyers and Job Descriptions For All Individuals Employed As Lawyers/Solicitors For The Caucus

First, with regard to Requestor's request for time and attendance records, Requestor substantially based his appeal on the Commonwealth Court's holding in *Kanzelmeyer v. Eger*, 16 Pa Cmwlth. 495, 329 A.2d 307 (1974). In that case, a taxpayer sought to examine the payroll vouchers and attendance records of certain school district employees under the Right-to Know-Law, Act of June 21,

1957, P. L. 390[4]. Commonwealth Court determined that the requested records were ''public records'' finding that:

The [attendance] cards are plainly the kind of record intended to be made available to public examination by the ''Right to Know Law'' and that considerations of privacy and confidentiality, as distinguished from regard for reputation and personal security, must yield to the public's right to know about and examine into its servants' performance of duty.

16 Pa. Cmwlth at 502, 329 A.2d at 311. The court affirmed the taxpayer's access to the payroll registers, rather than the payroll vouchers, and ordered the attendance records disclosed. *Id.* Requestor argues that this holding established that time and attendance records are public records to which he should be granted access. June 22nd Letter Appeal. Citing the definition of a ''financial record,'' among other things, as ''any account, voucher or contract dealing with an agency's receipt or disbursement of funds, or acquisition of services,'' Requestor argues that both attendance records and the hire date records are encompassed therein and should be released. *Id.* Requestor's arguments fall short of the mark and must be rejected. They ignore the quintessential distinction of the 2008 RTKL that legislative agencies are required to provide access to ''legislative records'' not to ''public records.''

In *Kanzelmeyer v. Eger, supra*, Commonwealth Court construed the definition of ''public record'' in the Act of June 21, 1957, P. L. 390 (the predecessor to the 2008 Right-to-Know-Law), and considered whether that term encompassed the requested records held by a local agency. The determinations made by Commonwealth Court in that case were inapplicable to the General Assembly. The definition of ''agency'' did not include the legislative branch which has been held to be exempt from that statute. *Uniontown Herald Standard v. Roberts*, 576 Pa. 231, 239, 839 A.2d 185,190 (2003) (citing, *Consumers Education and Protective Assn v. Nolan*, 470 Pa. 372, 368 A.2d 675, 680-81 (1977) Aff'm Pa, 589 Pa. 412, 909 A.2d 804.)

Additionally, in *Kanzelmeyer v. Eger*, Commonwealth Court determined whether the requested attendance and payroll records fell within the purview of the definition of ''public records''. Requestor's reliance on the *Kanzelmeyer* decision is misplaced. The question whether the requested records were accessible as ''legislative records'' never arose in that case under the Act of June 21, 1957, the predecessor Right-to-Know-Law.

To the contrary, the General Assembly is now expressly covered by the Right-to-Know Law, Act 2008-No. 3 and section 102 of that statute lists 19 specific categories of records that fall within the definition of ''legislative record.'' RTKL § 102. *Definitions.* Included in that definition are items such as: financial records, introduced bills and resolutions, fiscal notes, rules of a chamber, cosponsorship memorandum, records of votes, daily legislative calendars, and administrative staff manuals or written policies. *Id.* The 19 categories explicitly listed in the RTKL do not include: time and attendance records, or employee job descrip-

tions. Pennsylvania courts have consistently applied a fundamental maxim of statutory construction: ''*expresio unius est exclusio alterius*,'' which stands for the principle that the mention of one thing in a statute implies the exclusion of others not expressed. *L.S. ex rel. A.S. v. Eschbach*, 583 Pa. 47, 56 874 A. 2d 1150, 1156 (2005); *Com. v. Spotz*, 552 Pa. 499, 519, 716 A.2d 580, 590 (1998) (citing *Windrim v. Nationwide Insurance Co.*, 537 Pa. 129, 139, 641 A.2d 1154, 1159 (1994) (Cappy, J., concurring); *Samilo v. Commonwealth*, 98 Pa.Cmwlth. 232, 510 A.2d 412, 413 (1986)). Under this well-established principle, courts must refrain from expanding statutory provisions through the inclusion of subjects that were omitted. *L.S. ex rel. A.S. v. Eschbach*, 583 Pa. at 56, 874 A.2d at 1156.

With regard to the request for various job descriptions, in his June 22nd Letter Appeal, Requestor argues that ''to the extent that job descriptions are contained in any administrative staff manual, those records would be required to be released.'' *Id.* Requestor does not cite any statutory authority in support of that assertion. The Opens Records Officer argues that the definition of ''legislative records'' in RTKL section 102 does not expressly include job descriptions, and consequently the House is not required to provide access to those documents. Memorandum in Opposition at 5. As noted above, this position correctly interprets the provisions of the statute since such information is similarly not a ''legislative record'' under the statute.

In sum, there is no common or approved usage of any of the words included within the 19 categories of ''legislative records'' that would support an expansion of that definition to grant access to the records sought by Requestor.[5] In this case, the Open Records Officer correctly determined that the requested records are not included within the definition of ''legislative records.''

Conclusion

The General Assembly expressly listed the types of documents which are publicly accessible and available as legislative records under the RTKL. The documents requested herein, and which are specifically at issue in this appeal, do not fall within the purview of that statute and need not be disclosed.

Notes:

[1] The appeal letter was dated June 22, 2009, mailed June 23, 2009 and received by this Appeals Officer on June 25, 2009.

[2] A broad standard of review is comparable to the wide latitude of review granted to the final finders of fact in administrative hearings. In Unemployment Compensation matters, appeals are handled by referees and the Board of Unemployment Compensation. Referees review decisions of the Department of Labor personnel. The referee's scope of review is limited by statute to consideration of the issues expressly ruled upon in the decision being appealed. 34 Pa. Code § 101.87. Appeals of the referee's decision are made to the Board of Unemployment Compensation. That Board is the ultimate fact-finder in unemployment cases and is empowered to resolve conflicts in evidence, determine the credibility of wit-

nesses, and determine the weight to be accorded evidence. The Board can affirm, modify, or reverse the referee's decision based on previously submitted evidence, or after taking further evidence. The authority granted to appeals officers under section 1102 of the RTKL more closely approximates that granted to the Board in unemployment compensation cases.

[3] The context of the original request indicates that this aspect of the appeal is limited to caucus ''lawyers'' rather than to all caucus employees.

[4] Repealed by section 3102(I)(ii) of Act 2008 No. 3.

[5] Additionally, under Section 1903(a) of the Statutory Construction Act, words and phrases are construed according to their common and approved usage. 1 Pa.C.S. § 1903(a). When the words of a statute are free and clear from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b).

Appeal of Lowell

Pennsylvania House of Representatives

Appeal No. 2009-0008 **August 26, 2009**

Reporter's summary: A requestor sought access to all documents involving four traffic flow or road construction issue communications between a given list of 20 individuals and organizations and Representatives Stan Saylor and Ronald Miller. The request was denied and the requestor sent an imperfect appeal to the appeals officer. The appeals officer attempted to contact the requestor to allow the requestor to perfect his appeal, but there was no response. The appeals officer then attempted to use the imperfect appeal as a basis to review the decision by the open-records officer. The appeals officer upheld the denial.

Headnotes:

Statutory construction—

Delineations—By creating the category of "legislative records" and delineating 19 subcategories of information, the General Assembly limited the types of documents legislative agencies must provide public access to.

Legislative intent—The procedure for determining if a record in the possession of a legislative agency is public is to first determine if the record is a legislative record. If it is a legislative record, it is presumptively a publicly accessible record unless it is exempted by section 708 or another part of Pennsylvania or Federal law.

Section 502—There is no merit to a requestor's complaint that the open-records officer, and not the individual legislator that the information was originally requested from, is answering the request. The Right-to-Know law allows for an open-records officer to be designated.

Section 1101(a)—An imperfect request may still be considered by the appeals officer.

Section 1102—By authorizing the appeals officer to hold a hearing, take evidence and review all information, the Right-to-Know Law implies that appeals officers are to use a de novo standard of review.

Case law—The fundamental rule of statutory construction is "expresso unius est exclusio alterius," which means that by including certain items, the legislature intended to exclude others. L.S. ex rel A.S. v. Eschbach, 583 Pa. 47, 56, 874 A.2d 1150, 1156 (2005); Commonwealth v. Spotz, 552 Pa. 499, 519, 716 A.2d 580, 590 (1998) citing Windrim v. Nationwide Insurance Co., 537 Pa. 129, 139, 641 A.2d 1154, 1159 (1994) (Cappy, J., concurring); Samilo v. Ins. Dep't., 98 Pa.Cmwlth. 232, 235, 510 A.2d 412, 413 (1986).

The Speech and Debate Privilege of the Constitution of Pennsylvania mirrors the Federal Speech and Debate Clause and both are intended to protect activities by the legislators that are within the "sphere of legislative activity." See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975); Bogan v. Scott-Harris, 523 U.S. 44, 48-49 (1998); Rusack v. Harsha, 470 F.Supp. 285, 296 (M.D. Pa. 1978); Corporacion Insular de Seguros v. Garcia, 709 F.Supp. 288 (D.P.R. 1988), appeal dismissed, 876 F.2d 254 (1st Cir. 1989).

This is an appeal pursuant to Section 1101(a)(1) of the Right-To-Know Law, (Act of Feb. 14, 2008, No. 3, P. L. 6) (the ''RTKL''), received from Steven Lowell (''Requestor'') on July 29, 2009[1]. This is an appeal of a denial issued by John Zimmerman, Esquire, Open Records Officer for the Republican Caucus, Pennsylvania House of Representatives, Room B-6, Main Capitol, Harrisburg, PA 17120 (''Open Records Officer'').

On July 15, 2009, Requestor mailed RTKL request forms seeking various traffic-related records pertaining to communications between: 1) Rep. Stan Saylor and twenty (20) individuals or organizations, and 2) Rep. Ronald Miller and the same twenty (20) individuals or organizations. On July 24, 2009, the Open Records Officer issued a letter denying Requestor's access to the requested documents pertaining to Rep. Miller. (''Denial''). The Denial met the requirements of Section 903 of the RTKL. Notwithstanding attempts to have Requestor provide additional information crucial to his appeal, to which there has been no response, Requestor's letter to this Appeals Officer will be deemed to have commenced the appeal.

Statement of Facts

There are no factual disputes that arise from the parties' submissions. The facts discerned from the submissions are as follows:

1. On July 15, 2009 Requestor mailed separate ''Standard RTKL Request Forms[2]'' to Rep. Ronald Miller and to Rep. Stan Saylor seeking access to ''*each and every document, including letters, memorandum, faxes, e-mails, phone message logs, reflecting communications sent to [you] by any of the individuals or organizations on List A or communications sent by [you] to any of the individuals or organizations on List A, relating to the following issues:*

a. The reconstruction/ upgrading of PA Routes 24/124.

b. The relocation or elimination of the traffic light at Chambers Road and Mt. Rose Ave.

c. The installation of a traffic light at Plymouth Road and Mt. Rose Ave.

d. Any plans for the taking of any properties to facilitate the PA Route 24/124 construction/ upgrading plan. (Italics added.)"

Twenty individuals or organizations were contained in the referenced ''List A.''

2. The Open Records Officer for the House Republican Caucus, by letter dated July 24, 2009, indicated that the July 17, 2009 RTKL request ''to the House Republican Caucus'' had been received. The Open Records Officer further referenced the request pertaining to Rep. Miller's communications[3] and stated that the request was ''denied by the House Republican Caucus because the requested records are not legislative records as defined by § 102.'' The letter then informed Requestor of the process for filing an appeal. (''Denial'').

4. On July 29, 2009, this Appeals Officer received a letter, dated July 25, 2009, from Requestor seeking ''assistance in obtaining all the information to which [he] is legally entitled.'' Requestor relies on the definition of ''legislative agency'' in RTKL § 102, and the mandate of RTKL § 303 that a legislative agency shall provide legislative records irrespective of the intended use of the record by requestor as support for the appeal. Requestor then questions why the Open Records Officer, Mr. Zimmerman, ''to whom [he] did not forward his requests,'' answered on behalf of Mr. Saylor and Mr. Miller. (''July 25th Letter Appeal'').

5. On July 29, 2009, a Certified letter (with a Request for a Return Receipt) was sent to Requestor from this Appeals Officer acknowledging his July 25th letter, and deeming it to be an appeal from the denial of his request for communications between Rep. Ronald Miller and the 20 individuals or organizations.'' Requestor was advised that certain information that is required to be stated in an appeal was omitted from the July 25th Letter Appeal. A copy of the RTKL was enclosed for Requestor's review, and he was directed to note the requirements for filing an appeal that are contained in RTKL § 1101(a). Requestor was directed to submit the requested information to this Appeal Officer by Noon on August 3, 2009 or his appeal would be discontinued and the file closed. Requestor was also advised that he may submit any additional documents in support of his position that he wished to have considered, and that such documents must be submitted by Noon on August 3, 2009.

6. Additionally, on July 29, 2009 a letter was sent to the Open Records Officer informing him of the July 25th Letter Appeal, and advising him that he may submit any additional documents in support of his position that he wished to have considered. Such documents must be submitted by Noon on August 3, 2009. On August 3, 2009, the Open Records Officer submitted a 2-page Memorandum opposing the appeal. (''Memorandum in Opposition'').

7. A U.S. Postal Service tracking search indicated that an attempt to deliver the certified letter on July 31, 2009 was unsuccessful and a notice left at Requestor's address. The Return Receipt indicated this Appeals Officer's letter was received by Requestor on Saturday, August 8, 2009. As on August 25, 2009, no additional documents have been received from Requestor.

8. Neither a hearing, nor the submission of additional documents, was deemed necessary to resolve any issues inherent in this appeal.

Discussion

Two preliminary matters merit discussion prior to consideration of the issues inherent in this appeal. First, Requester failed to perfect his appeal. In the instant matter, the Denial is a written response which refers to the records requested and states that the request is denied ''since the requested records are not legislative records as defined by § 102.'' (''Denial''). The Denial succinctly summarizes the grounds for denying the request, but nonetheless complies with the requirements for an agency's denial under the RTKL. § 903.

Section 1101(a)(1) of the RTKL authorizes the filing of appeals, and mandates:

The appeal shall state the grounds upon which the requestor asserts that the record is a public record, legislative record, or financial record and shall address any grounds stated by the agency or delaying or denying the request.

§ 1101(a)(1).

Rather than asserting a basis for granting his access to the requested records or addressing the grounds for the denial, Requestor merely referred to the mandated disclosure of legislative records by legislative agencies, and then questioned why his requests to the state legislators were ''answered on [their] behalf by [the Open Records Officer].'' (''July 25th Letter Appeal'').

These statements fall short of the mandated contents of an appeal under the RTKL. To assist him with the proper preparation of his appeal, Requestor was furnished with a copy of the RTKL and directed to submit the requisite information in accordance with the appeal requirements specified in Section 1101(a). Requestor was also advised that a failure to submit the requisite information would result in dismissal of his appeal. (''July 29th Certified Letter'').

Despite these instructions, no further documents or information were submitted by Requestor as of the date of this decision. Notwithstanding this failure, this Decision is being issued, based upon the information in Requestor's July 25th Letter Appeal and his request for assistance ''*in obtaining the information to which he is legally entitled*.'' *Id.* (Italics added).

Secondly, section 502 of the RTKL mandates that an agency designate an open-records officer who ''shall receive requests submitted to the agency under this act, direct requests to appropriate persons, and issue interim and final responses under the act.'' § 502(b)(1). The RTKL expresses authorizes a political party caucus of a legislative agency to appoint an open-records officer under this section to fulfill these functions. § 502(a)(2). The House Republic Caucus designated Mr. Zimmerman as its Open Records Officer to fulfill the duties, and the instant Denial was issued by him in accordance with the RTKL. Requestor's complaint about the author of the response that he received is without merit.

Standard of Review

The RTKL does not expressly provide a standard of review regarding appeals. Supporting *de novo* review, or a broad standard of review, Section 1101(a)(1) mandates that the Appeals Officer ''set a schedule for the [parties] *to submit*

documents in support of their positions.'' *Id.* (emphasis added). The RTKL does not restrict the documents that can be submitted nor does it proscribe the appeals officer's authority to request documents which can be submitted. Instead, the RTKL broadly buttresses that authority by directing the Appeals Officer to ''review *all* information filed relating to the request.'' § 1102 (a)(2) (emphasis added). Additionally, among other things, the appeals officer is authorized by the RTKL to *hold a hearing and admit testimony, documents and other evidence which the appeals officer believes to be reasonably probative and relevant to an issue in dispute*. *Id.* (emphasis added).

Accordingly, a *de novo* or broad standard of review will be used in reviewing appeals filed under the RTKL.[4]

A. Legislative Records

Requestor made a broad, litigation-style discovery request seeking access to ''each and every document, including letters, memoranda, faxes, e-mails, phone message logs, reflecting communications'' sent from, or received by, Rep. Ronald Miller[5] with any of twenty (20) named individuals or organizations. The Open Records Officer denied the request stating that the records are not legislative records that must be disclosed. For the reasons set forth below, it is determined that the requested records do not fall within the definition of legislative records, and the denial by the Open Records Officer is affirmed.

The RTKL separately defines Commonwealth agency, judicial agency, local agency, and legislative agency and grants access to certain records possessed by each of those agencies. ''Public records'' are distinguished from ''legislative records'' under the RTKL and the scope of what constitutes a legislative record is much narrower than what constitutes a public record. A record in the possession of a Commonwealth agency or a local agency is presumed to be a public record and must be made available unless exempted by Section 708, protected by a privilege, or exempt under a Federal or State law or regulation or judicial order or decree. §§ 301, 305. In contrast, the definition of a legislative record under the RTKL is specifically limited to 19 categories of records. There is no equivalent or even similar limitation on the categories of documents that are classified as public records.

The RTKL defines a ''legislative agency'' as one of 15 identified legislative entities, and specifically identifies the 19 types of records defined as ''legislative records.'' § 102. A legislative record in the possession of a legislative agency is then presumed to be available for public access unless, it is: 1) exempt from disclosure under section 708(b)(2) protected by a privilege; or 3) exempt from disclosure under any other Federal or State law, regulation, judicial order or decree. § 305. A legislative agency claiming that a legislative record is exempt bears the burden of proving exemption by a preponderance of evidence. § 708(a)(2). If a record in the possession of a legislative agency falls within the definition of a ''legislative record'' and is not exempt or privileged from disclosure, it must be disclosed. §§ 303, 305.

In sum, under the framework set forth in the RTKL regarding the General Assembly, determinations are first made whether a record request was made for a ''legislative record'' that is possessed by a ''legislative agency.'' If the determinations are made in the affirmative, then the burden falls on the legislative agency to disclose, or prove by a preponderance of the evidence, that an exemption or privilege preventing disclosure applies.

Section 102 of the RTKL lists 19 specific categories of records that fall within the definition of ''legislative record.'' Included in that definition are items such as: financial records, introduced bills and resolutions, fiscal notes, rules of a chamber, cosponsorship memorandum, records of votes, daily legislative calendars, and administrative staff manuals or written policies. § 102. The 19 explicitly listed categories do not include any letters, memoranda, faxes, or phone message logs reflecting communications between state legislators and others. Our courts have consistently applied a fundamental maxim of statutory construction: ''*expresio unius est exclusio alterius*,'' which stands for the principle that the mention of one thing in a statute implies the exclusion of others not expressed. *L.S. ex rel. A.S. v. Eschbach*, 583 Pa. 47, 56 874 A.2d 1150, 1156 (2005); *Com. v. Spotz*, 552 Pa. 499, 519, 716 A.2d 580, 590 (1998) (citing *Windrim v. Nationwide Insurance Co.*, 537 Pa. 129, 139, 641 A.2d 1154, 1159 (1994) (Cappy, J., concurring); *Samilo v. Commonwealth*, 98 Pa. Cmwlth. 232, 510 A.2d 412, 413 (1986). Under this well-established principle, courts must refrain from expanding statutory provisions through the inclusion of subjects that were omitted. *L.S. ex rel. A.S. v. Eschbach*, 583 Pa. at 56, 874 A.2d at 1156.

There is no common or approved usage of any of the words included within the 19 categories of ''legislative records'' that would support an expansion of that definition to grant access to the records sought by Requestor.[6] In this case, the Open Records Officer correctly determined that the requested records are not included within the definition of ''legislative records'' and need not be disclosed.

B. Protected by Privilege

Even assuming *arguendo* that the requested records are ''legislative records,'' Requestor still is not entitled to the access that he seeks. Legislative records that are protected by a privilege are exempt from disclosure under the RTKL. § 305(b). Article II, section 15 of the Pennsylvania Constitution encompasses the Speech or Debate Privilege. The contours of the protection afforded state legislators, legislative staff, and the General Assembly itself by the Pennsylvania Speech or Debate Privilege are identical to those of the federal Speech or Debate Clause. *See, e.g., Consumers Ed. and Protective Ass'n*, 368 A.2d 675, 680-81 (Pa. 1977). That privilege, like its counterpart in the U.S. Constitution relative to federal legislators, protects certain legislative activities of state legislators that fall with the ''sphere of legislative activity'' from public disclosure. *See, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975); *Bogan v. Scott Harris*, 523 U.S. 44, 48-49 (1998); *Rusack V. Harsha*, 470 F.Supp. 285, 296 (M.D. Pa. 1978); *Corporacion Insular de Jeguros v. Gar-*

cia, 709 F.Supp. 288 (D.P.R. 1988), appeal dismissed, 876 F.2d 254 (1S‘ Cir. 1989); *Consumers Ed. and Protective Ass ’n v. Nolan*, supra.

Notes:

[1] The appeal letter was dated July 25, 2009, but the letter was not postmarked until July 28, 2009. It was received by this Appeals Officer on July 29, 2009.

[2] These forms were provided by the Pennsylvania Office of Open Records, rather than the RTKL request forms used by the House of Representatives.

[3] Although requests were mailed to both Rep. Ronald Miller and Rep Stan Saylor, and Requestor mentions both legislators in his Appeal Letter, Requestor did not provide the denial regarding Rep. Saylor’s communications, and provided only the denial regarding Rep. Miller’s communications.

[4] A broad standard of review is comparable to the wide latitude of review granted to the final finders of fact in administrative hearings. In Unemployment Compensation matters, appeals are handled by referees and the Board of Unemployment Compensation. Referees review decisions of the Department of Labor personnel. The referee’s scope of review is limited by statute to consideration of the issues expressly ruled upon in the decision being appealed. 34 Pa. Code § 101.87. Appeals of the referee’s decision are made to the Board of Unemployment Compensation. That Board is the ultimate fact-finder in unemployment cases and is empowered to resolve conflicts in evidence, determine the credibility of witnesses, and determine the weight to be accorded evidence. The Board can affirm, modify, or reverse the referee’s decision based on previously submitted evidence, or after taking further evidence. The authority granted to appeals officers under section 1102 of the RTKL more closely approximates that granted to the Board in unemployment compensation cases.

[5] Requestor made a similar request for the same information reflecting communications with Rep. Stan Saylor, but Requestor did not furnish a copy of a denial letter regarding Rep. Saylor. Accordingly, this decision pertains only to Rep. Miller.

[6] Additionally, under Section 1903(a) of the Statutory Construction Act, words and phrases are construed according to their common and approved usage. 1 Pa.C.S. § 1903(a). When the words of a statute are free and clear from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b).

Appeal of Nicholas

Senate of Pennsylvania

No. 05-2009 **November 9, 2009**

Reporter's summary: Requestor's request for a number of Commonwealth laws was denied as Commonwealth laws are not one of the 19 delineated records available for public access. The denial was upheld on appeal.

Headnotes:

Statutory construction—

Delineations—By creating the category of "legislative records" and delineating 19 subcategories of information, the General Assembly limited the types of documents legislative agencies must provide public access to.

Legislative intent—The best way to determine legislative intent is to look at the unambiguous language of the statute.

Section 102—Under the Right-to-Know law, the Senate is a legislative agency and is required to provide public access to records deemed to be legislative or financial records.

The laws of the Commonwealth are not considered legislative records. However the requestor is free to request the same records from a Commonwealth Agency, where the records may be accessible as public records.

By letter dated October 5, 2009, Mr. Edward J. Nicholas (Appellant) sought access to copies of what appear to be various laws of this Commonwealth[1]. By letter dated October 6, 2009, the Senate's Open Records Officer, W. Russell Faber, denied the request stating that the requested records were not legislative records. The denial was appealed to this office by letter dated October 17, 2009 pursuant to the recently enacted Right-to-Know Law, Act of February 14, 2008, P. L. 6, P. S. § 67.101 *et seq.* (the Act).

Discussion

The Act provides different types of access to different types of records of Commonwealth agencies, local agencies, legislative agencies and judicial agencies. This appeal deals solely with access provided by a legislative agency to legislative records.

No body of jurisprudence interpreting this Act has been developed. However, in construing any statute, it is a basic premise of law that the intention of the General Assembly must be ascertained and given effect. *Craley v. State Farm Fire and Casualty Co.*, 586 Pa. 484, 895 A.2d 530 (2006). The legislative intent is best gleaned from the clear and plain language of the statute. *Browser v. Blom*, 569 Pa. 609, 807 A.2d 830 (2002). And, "... when the words of a statute are clear and free from all ambiguity, they are presumed to be the best indication of

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legislative intent.'' *Walker v. Eleby*, 577 Pa. 104 at 123, 842 A.2d 389 at 400 (2004). This case can be resolved by applying these legal principles to the existing factual situation.

Section 102 of the Act defines the Senate as a ''legislative agency''. Section 303(a) of the Act states that, ''A legislative agency shall provide legislative records in accordance with this act.'' The Act is clear and unambiguous. If the copies of the various law of this Commonwealth are legislative records, then the Appellant should be granted access to such records.

Section 102 of the Act defines the term ''legislative record'' in a very specific and exhaustive manner. There are nineteen different types of legislative documents listed which would be accessible by the public as legislative records pursuant to the Act[2].

Nowhere in this list of accessible legislative records is found the mention of the laws of this Commonwealth. It would seem clear and unambiguous that it was not the intention of the General Assembly to make such a general class of records into accessible legislative records under these provisions of the Act.

Appellant has offered no reason whatsoever why the denial of the Open Records Officer was in error. Rather, the instrument of appeal simply states as a legal conclusion that the ''. . . records are in fact public records, and are a financial record.''

Insofar as public records are concerned, this office has no jurisdiction to decide what is or what is not a public record. Section 102 of the Act defines a public records as, ''A record, including a financial record, of a Commonwealth or local agency . . .'' The Senate is a legislative agency and not a Commonwealth or local agency. As such, the Senate is required by the Act to provide access to legislative records not public records.

Falling within the definition of an accessible legislative records is a financial record defined in section 102 of the act as:

> ''I. Any account, voucher or contract dealing with:
>
> (i) the receipt of disbursement of funds by an agency; or
>
> (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property . . .''

As duly noted by the Open Records Officer, Appellant has not requested access to any information or records about financial transactions of the Senate. Appellant has not cited any authority or reasoning for the stated conclusion that copies of the laws he seeks are financial records of the Senate. I know of no such authority and conclude that the records sought by the Appellant are not accessible financial records.

Finally, it must be noted that in his denial, the Open Records Officer also took the opportunity to advise Appellant that even though the records he sought were not accessible legislative documents, they may well be accessible public records. Appellant was advised to seek his records by making a request with another open records officer. Instead, Appellant elected to pursue this route of appealing the

denial. I repeat the sage counsel already offered Appellant. He may well find that these are accessible public records in another forum.

Notes:

[1] Appellant's note specifically requests:

"(1) 10.57 Sovereign Immunity Act
* Categories of Damages Allowable
# Tort Claims 42 Pa.C.S.A. 8528(c)
(2) 42 Pa.C.S.A. 8553
Local governments defendant(s)
$500,000 per claim
See Malen & Smith, Legal Malpractice
(Westlaw Practice Bk 3)
(3) (A) Title 13 Pa.C.S.A. 3-505
(3) (B) Title 13 Pa.C.S.A. 1-202
(4) Requestor requests for a copy of;
(A) the Privacy Act of 1974,
(B) Act 3 2008 R. T. K. Legislation"

[2] "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 the chamber.

(10) A record of all recorded votes taken in 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.

Appeal of Krawczeniuk

Senate of Pennsylvania

No. 03-2009 **November 23, 2009**

Reporter's summary: A Scranton Times-Tribune reporter filed a request under the Right-to-Know Law seeking access to all correspondences between Senator Robert J. Mellow, or his staff, and "the Senate Clerk's office regarding leases on the senator's Peckville and Mount Pocono offices." The request was in part denied because the requested documents do not fall under the definition of a legislative document and are therefore not accessible to the public. The decision was upheld on appeal.

Headnotes:

Statutory construction—

Legislative intent—As a result of the legislators' decision to use the same definition for "financial records" in the new and former Right-to-Know Law, an appeals officer can utilize the guidance of court cases involving the former Right-to-Know Law for clarification on the definition of "financial records".

Legislative intent—The best way to determine legislative intent is to look at the unambiguous language of the statute.

Plain language—The plain language of the Right-to-Know Law does not support a broad and expansive reading of the records accessible to the public as financial records.

Section 102—To fall under the definition of a legislative record involving the "results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency," the record must have been created for this purpose. It does not matter if that would be the use of the record by the requestor.

Case law—In order for a record to be a financial record, there must be a "sufficient connection to fiscally related accounts, vouchers or contracts." North Hills News Record v. Town of McCandless, 555 Pa. 51, 55, 722 A.2d 1037, 1039 (1999). See, also, Sapp Roofing Company, Incorporated, v. Sheet Metal Workers' International Association, Local Union No. 12, 552 Pa. 105, 713 A.2d 627 (1998) and LaValle v. Office of General Counsel of the Commonwealth, 564 Pa. 482, 769 A.2d 449 (2001).

See, also, Appeal of Krawczeniuk (Senate, 04-2009).

Statements of Fact

By request dated September 22, 1009, Mr. Borys Krawczeniuk (Appellant), a writer with the Scranton Times-Tribune, sought access to "... a copy of any memorandums, communications, notes, letters, instructions, e-mails or other

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communications between Sen. Robert J. Mellow of [sic] members of his staff and the Senate Clerk's office regarding leases on the senator's Peckville and Mount Pocano offices. In particular, I am interested in memorandums, communications, notes, letters, instructions, e-mails or other correspondences centered on the terms of the leases.'' This request was made pursuant to the recently enacted Right-to-Know Law, Act of February 14, 2008, P. L. 6, 65 P. S. § 67.101 *et seq.* (the Act).

By letter dated September 24, 2009, the Senate Open Records Officer, W. Russell Faber, denied Appellant's request concluding that the records were not accessible legislative records under the Act. By letter dated October 15, 2009, Appellant has appealed the denial to this office. At the joint request of the parties, a two week continuance was granted in this case.

Discussion

Section 102 of the Act defines the Senate as a ''legislative agency.'' Section 303(a) of the Act states that, ''A legislative agency shall provide legislative records in accordance with this act.'' At issue in this appeal is whether or not the documents and records requested by Appellant are legislative records.

The definition of legislative records contained in Section 102 includes financial records of the Senate and Appellant first contends the records he seeks are financial records. The definition of a financial record in Section 102 is, *inter alia*I:

''I. Any *account, voucher or contract* dealing with:

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

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

The threshold inquiry in this appeal must be whether or not the records sought by Appellant are actually and specifically accounts, vouchers or contracts. The answer must be no.

The requested records are memorandums, notes, e-mails, letters, and any other correspondence. These types of documents would not be considered account, vouchers or contracts. The scope of the Appellant's request is broad to the extent that he seeks access to any document that might exist as a result of the leasing of two senatorial district offices. The statute defines an accessible financial record much more narrowly.

It is a basic premise of statutory construction that the intention of the General Assembly must be ascertained and given effect. *Cragley v. State Farm Fire and Casualty Co.*, 586 Pa. 484, 895 A.2d 530 (2006). The legislative intent is best gleaned from the clear and plain language of the statute. *Bowser v. Blom*, 569 Pa. 609, 807 A.2d 830 (2002). And ''. . . when the words of the statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent.'' *Walker v. Eleby*, 577 Pa. 104 at 123, 842 A.2d 389 at 400 (2004).

The section of the Act at issue in this appeal is very clear and the language is plain. The General Assembly used the specific words account, voucher or con-

tract. Appellant urges a broad and expansive reading of this definition to include any and all records which might exist as a result of an account, voucher or contract. That cannot be done when the wording of the statute is free from ambiguity and constrains the definition of financial record. If the General Assembly wished a more encompassing definition of financial record, it would most certainly have used different language.

Although the Act is new and recently became effective, the definition of a financial record contained therein is not new and it is not without judicial interpretation. The identical definition was contained in the prior Right-to-Know law which was repealed by the present Act. Act of June 21, 1957, P. L. 390, as amended, 65 P. S. § 66.1 *et seq.* Section 1 of that prior law defined a public record as:

''Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property . . .''

The General Assembly reenacted the identical language in the new Act knowing that the courts had already provided some guidance concerning the words account, voucher and contract.

In *Sapp Roofing Company, Inc. v. Sheet Metal Workers' International Association, Local Union No. 12*, 552 Pa. 105, 713 A.2d 627 (1998), a plurality of our Supreme Court found that this definition of ''account, voucher or contract'' would include a copy of a private contractor's payroll in possession of a school district. The records were accessible because they evidenced a disbursement of funds by the school district.

A year later, in *North Hills News Record v. Town of McCandless*, 555 Pa. 51 at 55, 722 A.2d 1037 at 1039 (1999), the Court adopted the reasoning in *Sapp* stating,

''Implicit in the Court's decision in *Sapp Roofing* is the conclusion that the account/vouchers/contracts category of public records reaches some range of records beyond those which on their face constitute actual account, vouchers or contracts. Nevertheless, it is clear from *Sapp Roofing* that, to constitute a public record, the material at issue must bear a sufficient connection to fiscally related accounts, vouchers or contracts.''

Finally, in *LaValle v. Office of General Counsel of the Commonwealth*, 564 Pa. 482, 769 A.2d 449 (2001), the Court again stated that there must be a close relationship between the records sought and the account, voucher or contract before the record could be an accessible public record. At issue was an audit report prepared for the Commonwealth.

In this line of cases, the Court was dealing, in each instance, with a request for access to one record. The Court examined each of these specific records individually. Although the Court was willing to look beyond the words ''account, voucher and contract'' to a limited extent, the requested record still needed to be substantially intertwined or have a close nexus with an account, voucher or contract.

In the present case, Appellant is not seeking access to a specific record. It would rather appear that he is not even seeking access to a complete class of records. Rather, he is seeking access to any document or record which may exist as a result of leasing two senatorial district offices. The records sought by Appellant would not cause any disbursement of money by the Senate. Any disbursement of funds would be in accordance with and pursuant to the terms of the actual leases or contracts which must speak for themselves. An expansive reading of the Act is not warranted based on either statutory construction or existing jurisprudence.

Appellant cites a prior request for copies of service purchase contracts made by a different individual. Along with copies of the actual contracts, the Senate's Open Records Officer also supplied copies of various memos. Appellant has supplied copies of these memos with his filing and has urged that they Senate be ordered to continue this ''past practice.''

The memos supplied by Appellant were indeed very closely related to the service purchase contract. In fact, they amended the terms of the contract by extending or renewing the contract and causing the further disbursement of Senate funds. These are exactly the type of individual records it seems the Court would be willing to accept as accessible financial records even though not facially an account, voucher or contract. Further, it shows a good faith compliance with the existing law by the Open Records Officer to supply these ancillary documents. However, I cannot find that such a practice should now compel the Open Records Officer to go further and release all records or documents which might exist pertaining to the leasing transaction.

Appeal of Krawczeniuk

Senate of Pennsylvania

No. 04-2009 **November 23, 2009**

Reporter's summary: A Scranton Times-Tribune reporter filed a request under the Right-to-Know Law seeking access to all documents created by a specified list of contractors for the Senate. The request was in part denied because the requested documents, aside from the actual contract between the Senate and the contractors, do not fall under the definition of a legislative document and are therefore not accessible to the public. The decision was upheld on appeal.

Headnotes:

Statutory construction—

Legislative intent—As a result of the legislators' decision to use the same definition for "financial records" in the new and former Right-to-Know Law, an appeals officer can utilize the guidance of court cases involving the former Right-to-Know Law for clarification on the definition of "financial records".

Plain language—The plain language of the Right-to-Know Law does not support a broad and expansive reading of the records accessible to the public as financial records.

Section 102—To fall under the definition of a legislative record involving the "results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency," the record must have been created for this purpose. It does not matter if that would be the use of the record by the requestor.

Case law—In order for a record to be a financial record, there must be a "sufficient connection to fiscally related accounts, vouchers or contracts." North Hills News Record v. Town of McCandless, 555 Pa. 51, 55, 722 A.2d 1037, 1039 (1999). See, also, Sapp Roofing Company, Incorporated, v. Sheet Metal Workers' International Association, Local Union No. 12, 552 Pa. 105, 713 A.2d 627 (1998) and LaValle v. Office of General Counsel of the Commonwealth, 564 Pa. 482, 769 A.2d 449 (2001).

See, also, Appeal of Krawczeniuk (Senate, 03-2009).

Statements of Fact

By request dated September 22, 1009, Mr. Borys Krawczeniuk (Appellant), a writer with the Scranton Times-Tribune, sought access to "...a copy of any memorandums, communications, notes, letters, instructions, e-mails or other correspondence or work product produced for the state Senate by the following contractors: James Moran, Patrick Solano, Hardy Williams, Brian J. Cali, Lt. Col.

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Harold Donahue and Joseph R. Clapps.'' This request was made pursuant to the recently enacted Right-to-Know Law, Act of February 14, 2008, P. L. 6, 65 P. S. § 67.101 *et seq.* (the Act).

Appellant was provided access to copies of these actual contracts. The individual contracts specified the following duties to be performed. Mr. Moran was engaged to, ''perform research on policies, programs or legislation in PA, other states or the federal government for Senator Robert J. Mellow . . . for possible introduction of legislation or for comment on or suggestion of regulations, exexcutive orders or statements of policy.'' Mr. Solano agreed to, *inter alia*, ''. . . provide expertise and consulting services to the Senate Majority Leader and other Leaders and Members of the Republican Caucus regarding economic and environmental issues coming before the Senate . . .'' Mr. Williams was engaged in his capacity as an attorney to provide professional counsel. Mr. Cali was also engaged to provide legal counsel. Colonel Donahue's contractual duties included, ''. . . advice on military and veterans affairs issues, nominations, appointments, legislation and regulations . . .'' Finally, Mr. Clapps contracted to, ''Gather, publish and disseminate information to members of the Pennsylvania Senate Democratic caucus which will assist constituents who are serving as primary care givers to their grandchildren.''

By letter dated September 24, 2009, the Senate Open Records Officer, W. Russell Faber, denied Appellant's request concluding that the records were not accessible legislative records under the Act. By letter dated October 15, 2009, Appellant has appealed the denial to this office. At the joint request of the parties, a two week continuance was granted in this case.

Discussion

Section 102 of the Act defines the Senate as a ''legislative agency.'' Section 303(a) of the Act states that, ''A legislative agency shall provide legislative records in accordance with this act.'' At issue in this appeal is whether or not the documents and records requested by Appellant are legislative records.

The definition of legislative records contained in Section 102 includes financial records of the Senate and Appellant first contends the records he seeks are financial records. The definition of a financial record in Section 102 is, *inter alia*:

''I. Any *account, voucher or contract* dealing with:

(iii) the receipt or disbursement of funds by and agency; or

(iv) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property . . .'' (Emphasis is added.)

The threshold inquiry in this appeal must be whether or not the records sought by Appellant are actually and specifically accounts, vouchers or contracts. The answer must be no.

The requested records are memorandums, communications, notes, e-mails, letters, instructions, work product or any other correspondence. These types of

documents would not be considered account, vouchers or contracts. The scope of the Appellant's request is broad to the extent that he seeks access to any document that might exist as a result of the contractual relationship between the Senate or a senator and a contractor. The statute defines an accessible financial record much more narrowly.

It is a basic premise of statutory construction that the intention of the General Assembly must be ascertained and given effect. *Cragley v. State Farm Fire and Casualty Co.*, 586 Pa. 484, 895 A.2d 530 (2006). The legislative intent is best gleaned from the clear and plain language of the statute. *Bowser v. Blom*, 569 Pa. 609, 807 A.2d 830 (2002). And ''. . . when the words of the statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent.'' *Walker v. Eleby*, 577 Pa. 104 at 123, 842 A.2d 389 at 400 (2004).

The section of the Act at issue in this appeal is very clear and the language is plain. The General Assembly used the specific words account, voucher or contract. Appellant urges a broad and expansive reading of this definition to include any and all records which might exist as a result of an account, voucher or contract. That cannot be done when the wording of the statute is free from ambiguity and constrains the definition of financial record. If the General Assembly wished a more encompassing definition of financial record, it would most certainly have used different language.

Although the Act is new and recently became effective, the definition of a financial record contained therein is not new and it is not without judicial interpretation. The identical definition was contained in the prior Right-to-Know law which was repealed by the present Act. Act of June 21, 1957, P. L. 390, as amended, 65 P. S. § 66.1 *et seq.* Section 1 of that prior law defined a public record as:

''Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property . . .''

The General Assembly reenacted the identical language in the new Act knowing that the courts had already given guidance concerning the words account, voucher and contract.

In *Sapp Roofing Company, Inc. v. Sheet Metal Workers' International Association, Local Union No. 12*, 552 Pa. 105, 713 A.2d 627 (1998), a plurality of our Supreme Court found that this definition of ''account, voucher or contract'' would include a copy of a private contractor's payroll in possession of a school district. The records were accessible because they evidenced a disbursement of funds by the school district.

A year later, in *North Hills News Record v. Town of McCandless*, 555 Pa. 51 at 55, 722 A.2d 1037 at 1039 (1999), the Court adopted the reasoning in *Sapp* stating,

''Implicit in the Court's decision in *Sapp Roofing* is the conclusion that the account/vouchers/contracts category of public records reaches some range of

records beyond those which on their face constitute actual account, vouchers or contracts. Nevertheless, it is clear from *Sapp Roofing* that, to constitute a public record, the material at issue must bear a sufficient connection to fiscally related accounts, vouchers or contracts.''

Finally, in *LaValle v. Office of General Counsel of the Commonwealth*, 564 Pa. 482, 769 A.2d 449 (2001), the Court again stated that there must be a close relationship between the records sought and the account, voucher or contract before the record could be an accessible public record. At issue was an audit report prepared for the Commonwealth.

In this line of cases, the Court was dealing, in each instance, with a request for access to one record. The Court examined each of these specific records individually. Although the Court was willing to look beyond the words ''account, voucher and contract'' to a limited extent, the requested record still needed to be substantially intertwined or have a close nexus with an account, voucher or contract.

In the present case, Appellant is not seeking access to a specific record. It would rather appear that he is not even seeking access to a complete class of records. Rather, he is seeking access to any document or record which may exist as a result of any contractual relationships. The records sought by Appellant would not cause any disbursement of money by the Senate. Any disbursement of funds would be in accordance with and pursuant to the terms of the actual contracts not any extraneous documents. Such an expansive reading of the Act is not warranted based on either statutory construction or existing jurisprudence.

Appellant also contends that the records he requested fall within subsection (19) of the definition of accessible legislative records contained in Section 102 of the Act. That section provides access 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.''

In support of this contention, Appellant offers simply one sentence. ''Given the nature of the contracts, the records certainly focus on such efforts.''

There is a *seriatim* recitation of the duties involved in each of these individual contracts in the Statements of Fact earlier in their opinion. None of these contracts has anything to with polling. Not one of these contractual provisions offers even a scintilla of evidence that they were designed as an effort to measure public opinion. No authority has been offered that these contracts would fall within the cited definition and I do not know of any. Therefore, the records existing as a result of these contractual relationships do not fall within this definition of an accessible legislative record.

Finally, it must be noted that the Open Records Officer argues that the records existing as a result of the contracts with various attorneys are also protected from access by the attorney/client privilege. Having already determined that the request records do not fall within the definition of an accessible legislative record, it is not necessary to address this argument at this time.

Appeal of Murphy

House of Representatives

No. 2010-0009 MUR **March 12, 2010**

Reporter's summary: A Patriot News reporter requested names, current salaries and salary increases for 12 House Democratic legislative staffers with specific anniversary dates. The request was denied because no document existed that contained this information. The requestor appealed the denial, which was upheld by the appeals officer.

Headnotes:

Section 705—If no record exists, an agency has no obligation to create the record.

Section 1102—By authorizing the appeals officer to hold a hearing, take evidence and review all information, the Right-to-Know Law implies that appeals officers are to use a de novo standard of review.

Case law—When determining if a request is sufficiently specific, the appeals officer may rely on case law involving the former right-to-know law that looks to the characteristics of the request. Associated Builders & Contractors, Inc. v. Dept. of General Services, 747 A.2d 962 (2000). See also, Berman v. Pennsylvania Convention Center, 901 A.2d 1085 (Pa. Cmwlth. 2006) and Mooney v. Temple University Board of Trustees, 448 Pa. 424, 292 A.2d 395 (1972).

Decision

This is an appeal, pursuant to Section 1101(a)(1) of the *Right-to-Know Law*, (Act of Feb. 14, 2008, No. 8, P. L. 6) (the ''RTKL'') received from Jan Murphy (''Requestor'') on February 12, 2010, of a decision issued Anthony Frank Barbush, Open Records Officer, Pennsylvania House of Representatives, Room 129, Main Capitol, Harrisburg, PA 17120 (''Open Records Officer'').

Statement of Facts

There are no factual disputes that arise from the parties' submissions. The facts discerned from the submission are as follows:

1. On February 3, 2010, Nedra Dugan, Acting Open Records Administrator for the House of Representatives (''Open Records Administator'') received Requestor's RTK Request form, by facsimile, which stated:

> I would like to receive the names and recently approved annual meritorious salary increases of the 12 House Democratic legislative staffers whose anniversary dates fell in early January 2010, but their annual review had been processed prior to the House Democratic caucus salary controls taking effect on Jan. 1, 2010. I would like to receive what their salary is now and the size of increase they received.''

(The ''February 3rd Request'').

2. On February 10, 2010, within the statutory five (5) business day response period, the Open Records Officer issued a written reply to Requestor, denying the request because: 1) no legislative record exists in response to the request, and 2) citing RTKL § 705 that an agency is not required to create or compile any records for RTKL requests which do not currently exist (the ''Denial''). On February 12, 2010 Requestor's appeal letter, dated February 11, 2010 was received by this Appeal Officer (''February 12th Letter Appeal'').

3. In the appeal, Requestor ''*challenges the assertion that while no document may exist that lists the requested information, certainly a record exists that contains this information or how else would the House know how much to pay these individuals*.'' *Id.* Requestor further states that ''*if it would be more convenient, [she'd] be willing to figure out the increase [herself] if the previous salaries for these employees were provided*. She also asserts that ''*the chief clerk will issues a report on or before the first of February 2011 that will include information on their current salaries that [she] can compare to the payroll information released on Jana 29, 2010 to determine the amount of pay increases for these staffs*.'' *Id.*

4. On February 24, 2010, this Appeals Officer provided a copy of the February 12th Letter Appeal to the Open Records Officer and advised him to submit any additional documents supportive of his position by Noon on Monday, March 1, 2010 a memorandum opposing the appeal was received which contained the February 17th and February 28th RTKL requests referred to below.

5. Also on February 24, 2010 this Appeals Officer acknowledged receipt of the February 12th Letter Appeal, and advised Requestor to submit any additional documents supportive of her position, by Noon on Monday, March 1, 2010. Requestor did not submit any additional supportive documents or other correspondences.

6. On February 17, 2010 the Acting Open Records Administrator received another RTK Request form from Requestor stating:

> I would like to review the payroll for individual House Democratic Caucus employees by pay period for the months of December 2009 and January 2010. But before providing this to me, please advise as to whether the cost will exceed $50.''

(The ''February 17th Request'').

7. On February 26, 2010 the Acting Open Records Administrator received yet another RTK Request form from Requestor stating:

> I am clarifying a request I filed recently that sought payroll for individual House Democratic Caucus employees by pay period for the months of December 2009 and January 2010. I specifically want a record that has the names, titles and annual salaries for all caucus employees, as of December 31, 2009 and January 2010.

(The ''February 26th Request'').

8. On March 4, 2010 this Appeals Officer requested that Requestor clarify whether she wished to continue the appeal or withdraw it in light of discussions with representatives of the Democratic Caucus that had reported occurred. Despite being directed to submit a response by March 8, 2010, Requestor failed to do so, and this appeal continues.

Standard of Review

The RTKL does not expressly provide a standard of review regarding appeals. Supporting *de novo* review, or a broad standard of review, Section 1101 (a)(1) mandates that the appeals officer ''set a schedule for the [parties] *to submit documents in support of their positions." Id.* (emphasis added). The RTKL does not restrict the documents which can be submitted. Instead, the RTKL broadly buttresses that authority by directing the appeals officer to ''review ***all*** information filed relating to the request.'' § 1102(a)(2) (emphasis added). Additionally, among other things, the appeals officer is authorized by the RTKL to hold a hearing and admit testimony, documents and other evidence which the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* (emphasis added).

Accordingly, a *de novo* or broad standard of review will be used in reviewing appeals filed under the RTKL[1].

Discussion

As a preliminary matter, we determine whether the February 3rd Request satisfies the requirements of § 703, *Written requests*. That section expressly states:

> A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested and shall include the name and address to which the agency should address its response.

Id. The issue of the sufficiency of the specificity of the records sought has been addressed in several cases by the courts[2]. In *Associated Builders & Contractors, Inc. v. Dept. of General Services*, 747 A.2d 962 (2000), the court stated:

> Where the request is not sufficiently specific, the agency has no obligation to comply with the request because the lack of specificity prevents the agency from determining whether to grant or deny the request, Id. At 860. Furthermore, a lack of specificity in the request makes it difficult, if not impossible, for this court to conduct meaningful review of the agency's decision. *Id. Accord, Arduino v. Borough of Dunmore*, 720 A.2d 827 (Pa. Cmwlth. 1998); *Hunt, Dept of Corrections*, 698 A.2d 827 (Pa. Cmwlth. 1997).

Id. At 966. The court then reviewed several of the requests characterizing them as ''akin to document requests under the civil discovery rules, i.e. 'any and all documents relating to [subject matter]' ''. *Id.* The court found that that such requests ''*fail to provide sufficient facts to determine what type of record is being*

requested and whether any part of the record constitutes a public record.'' *Id. See also, Berman v, Pennsylvania Convention Center*, 901 A.2d 185 (Pa. Cmwlth. 2006); and *Mooney v. Temple University Board of Trustees*, 448 Pa. 424, 292 A.2d 395 (1972).

In the instant matter, Requestor sought ''the names and salary increases of 12 Democratic Caucus staffers whose anniversary dates fell in January 2010, but who were granted pay increases prior to the caucus's salary controls taking effect on January 1, 2010.'' Requestor does not explain or identify the basis for the assertion that 12 staffers received the subject salary increases, and the Open Records Officer does contest the lack of specificity in the February 3rd Request. Contrary to the Open Records Officer's contention, that request differs from those that the courts have rejected as broad and unlimited general discovery requests. Additionally, Requestor persuasively argues that the requested information constitutes a financial record which falls under the definition of a ''legislative record.'' February 12th Letter Appeal.

The Denial in this case was partially based on the assertion that ''no legislative record exists in response to the request.'' Denial. RTKL § 705 explicitly states that:

> When responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner to which the agency does not currently compile, maintain, format or organize the record.

Id. Clearly, if no legislative record exists, then it was proper to deny the February 3rd Request.

Requestor states that she ''*challenges this assertion*'' that no record exists. February 12th Letter Appeal. However, she appears to concede the assertion when she states ''*while no document may exist that lists the requested information*.'' *Id.* Despite the apparent concession, Requestor then appears to concurrently argue that ''*certainly a record exists that contains this information or how else would the House know how much to pay these individuals*.'' *Id.* Requestor argues that such records should exist, but her February 3rd Request is for ''information'' not ''records.'' Unfortunately for the Requestor, the RTKL requires a legislative agency to provide access to ''records'', not to extract information from various sources, and the n compile a record responding to a request.

Perhaps the reported discussions between the parties and the modified RTKL requests submitted by Requestor subsequent to the filing of this appeal will produce the information she seeks.

For the reasons stated herein, the Denial was proper and Requestor's appeal fails.

Reizdan B. Moore
House of Representatives Appeals Officer

Notes:

[1] A broad standard of review is comparable to the wide latitude of review granted to the final finders of fact in administrative hearings. In Unemployment Compensation matters, appeals are handled by referees and the Board of Unemployment Compensation. Referees review decisions of the Department of Labor personnel. The referee's scope of review is limited by statute to consideration of the issues expressly ruled upon in the decision being appealed. 34 Pa. Code § 101.87. Appeals of the referee's decision are made to the Board of Unemployment Compensation. That Board is the ultimate fact-finder in unemployment cases and is empowered to resolve conflicts in evidence, determine the credibility of witnesses, and determine the weight to be accorded evidence. The Board can affirm, modify, or reverse the referee's decision based on previously submitted evidence, or after taking further evidence. The authority granted to appeal's officers under section 1102 of the RTKL more closely approximates that granted to the Board in unemployment compensation cases.

[2] These cases were decided under the predecessor Right-to-Know Act, Act of June 21, 1957, P. L. 390 as amended (65 P. S. § 66.1, *et seq.*) rather than the new RTKL, Act of February 14, 2008, P. L. 6, No.3 (65 P. S. § 67.101, *et seq.*) Although several definitions, burdens and other provisions were changed, both statutes contain the identical provision requiring that a requestor ''identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.'' RTKL, § 703; Right to Know Act, § 2(c).

Appeal of Joyce

House of Representatives

No. 2010-0010 JOY **May 28, 2010**

Reporter's summary: A reporter for the York Daily Record requested e-mails from a former Representative from four months in 2005. The request was denied because e-mail is not one of the delineated legislative records, the records would be protected by privilege and the request was overly broad. On appeal, requestor argued that e-mails should be examined for content instead of categorically excluded. The appeals officer upheld the denial because there is no delineated legislative record category that would include any information found in e-mails as a general category, the communications fell under privileged communications and the request is overly broad.

Headnotes:

Statutory construction—

Delineations—By creating the category of "legislative records" and delineating 19 subcategories of information, the General Assembly limited the types of documents the legislative agencies must provide public access to.

Section 102—E-mail correspondence with General Assembly members does not fall within the statutory definition of "legislative record" and is therefore not publicly accessible under the Right-to-Know Law.

Section 305(b)—Legislative records may be protected by privilege if the record involves certain legislative activities protected by the Speech or Debate Clauses in the U.S. and Pennsylvania Constitutions.

Section 1102—By authorizing the appeals officer to hold a hearing, take evidence and review all information, the Right-to-Know Law implies that appeals officers are to use a de novo standard of review.

Case law—Communications between legislators or legislators and constituents may be privileged if the communications are within a "legitimate sphere of legislative activity." Uniontown Herald Standard Newspapers v. Roberts, 777 A.2d 1225 (2001).

Case law—When determining if a request is sufficiently specific, the appeals officer may rely on case law involving the former Right-to-Know Law that looks to the characteristics of the request. Associated Builders & Contractors, Inc. v. Dept. of General Services, 747 A.2d 962 (2000). See also, Berman v. Pennsylvania Convention Center, 901 A.2d 1085 (Pa. Cmwlth. 2006) and Mooney v. Temple University Board of Trustees, 448 Pa. 424, 292 A.2d 395 (1972).

This is an appeal pursuant to Section 1101(a)(1) of the Right-to-Know Law, (Act of Feb. 14, 2008, No. 3, P. L. 6) (the ''RTKL''), received from Tom Joyce (''Requestor'') on April 29, 2010[1]. This is an appeal of a denial issued by

Anthony Frank Barbush, Open Records Officer, Pennsylvania House of Representatives, Room 129, Main Capitol, Harrisburg, PA 17120 (''Open Records Officer'').

By letter dated April 12, 2010, Requestor mailed an RTKL request to Brooke I. Lewis, RTK Administrator, Pennsylvania House of representatives, (''RTK Administrator'') seeking access to and copies of emails sent and received by [former state representative] in specified months in 2005. By letter dated April 19, 2010, the Open Records Officer denied the request. The denial met the requirements of Section 903 of the RTKL. By letter dated April 26, 2010, which was received on April 29, 2010, Requestor filed the within RTKL appeal.

Statement of Facts

There are no factual disputes that arise from the parties' submissions. The facts discerned from the submissions are as follows:

1. By letter dated February 2, 2010, received on February 12, 2010, Requestor mailed an RTKL request to the RTK Administrator for ''*access to and copies of e-mails sent and received by former state Rep. Steve Stetler in April, May, October and November 2005*.'' He agreed to pay reasonable duplication fees for processing his request. He further requested ''*all deletions by justified by reference to specific exemptions of the act*'' and he indicated that he expected ''*all segregable portions of otherwise exempt material be released*.''

2. By letter dated February 19, 2010, the Open Records Officer denied the request stating that the information requested was not a ''legislative record'' under the RTKL, as email correspondence does not fall within the definition of ''legislative records.'' Requestor was advised of the process to appeal the denial; however no appeal of the February 19, 2010 denial was filed.

3. By letter dated April 12, 2010, received on April 19, 2010, Requestor sent a second request to the RTK Administrator that was identical to the February 2, 2010 request. (''Letter Request'').

4. On April 19, 2010, the Open Records Officer denied the request, stating that Requestor made an identical request on February 12, 2010 that was denied on the basis that the requested email correspondence does not fall within the definition of a ''legislative record'', and the Open Records Officer again notified Requestor of his appeal rights. (''Denial'').

5. By letter dated April 26, 2010, and received on April 29, 2010, Requestor filed an appeal of the Open Records Officer's decision that the emails requested were not legislative records, and asserted that the Denial ''*does not address the content of the emails*.'' Requestor further states that ''*the RTKL clearly states that content, not the form which the information takes, is what determines whether or not information is accessible*.'' Finally, Requestor states that he ''*would argue that denying access to email simply because it* ***is*** *email violates the law*.'' (''Letter Appeal''.)

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6. On April 29, 2010, a Certified letter (with a Request for a Return Receipt) was sent to Requestor from this Appeals Officer acknowledging his April 26, 2010 letter. Requestor was directed to submit a copy of his RTKL request that was received by the Open Records Officer on April 19, 2010. Pursuant to Section 1102(a)(1) of the RTKL Requestor was also advised that he may submit any additional documents in support of his position that he wished to have considered, and that such documents must be submitted by Noon on May 7, 2010. Neither the RTKL request, nor any additional supportive documents, was submitted by Requestor.

7. Additionally, on April 29, 2010, a letter was hand-delivered to the Open records Officer informing him of receipt of the of the Letter Appeal, and advising him that may submit any additional documents in support of his position that he wished to have considered, and that such documents must be submitted by Noon on May 7, 2010, the RTK Administrator submitted a 7-page Memorandum opposing the appeal with attachments. (''Memorandum in Opposition''.)

8. Neither a hearing, nor the submission of additional documents, was deemed necessary to resolve any issues inherent in this appeal.

Discussion

A. Scope of Review

The RTKL does not expressly provide a standard of review regarding appeals. Supporting *de novo* review, or a broad standard of review, Section 1101(a)(1) mandates that the Appeals Officer ''set a schedule for the [parties] *to submit documents in support of their positions.'' Id.* (emphasis added). The RTKL does not restrict the documents that can be submitted nor does it proscribe the appeals officer's authority to request documents which can be submitted. Instead, the RTKL broadly buttresses that authority by directing the Appeals Officer to ''review *all* information filed relating to the request.'' § 1102(a)(2) (emphasis added)). Additionally, among other things, the appeals officer is authorized by the RTKL to hold a hearing and admit testimony, documents and other evidence which the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* (Emphasis added).

Accordingly, a *de novo* or broad standard of review will be used in reviewing appeals filed under the RTKL.[2]

B. Legislative Records

The Requestor has requested ''access to and copies of emails sent and received by [a former state representative] in April, May, October, and November of 2005.'' Letter Request. The RTK Administrator, among other things, argues that the information requested is not a ''legislative record'' and is therefore not accessible under the RTKL. Memorandum in Opposition. For the reasons set forth below, the Appeals Officer affirms the denial.

As stated in the pervious determinations[3], the RTKL separately defines Commonwealth agency, judicial agency, local agency, and legislative agency and grants access to certain records possessed by each of those agencies. In the case of legislative records, the RTKL defines a ''legislative agency'' as one of 15 identified legislative entities, and specifically identifies the 19 types of records defined as ''legislative records.'' § 102. A legislative records in the possession of a legislative agency is then presumed to be available for public access unless, it is: 1) exempt from disclosure under section 708(b); 2) protected by a privilege; or 3) exempt from disclosure under any other Federal or State law, regulation, judicial order or decree. § 305. A legislative agency claiming that a legislative record is exempt bares the burden of proving exemption by a preponderance of evidence. § 708 (a) (2). If a record in possession of a legislative agency falls within the definition of a ''legislative record'' and is not exempt or privileged from disclosure, it must be disclosed. §§ 303, 305.

Section 102 of the RTKL lists 19 specific categories of records that fall within the definition of ''legislative record.'' Included in that definition are items such as: financial records, introduced bills and resolutions, fiscal notes, rules of a chamber, cosponsorship memorandum, records of votes, and daily legislative calendars. § 102. Unfortunately for Requestor, the list of 19 categories does not include any ''emails.'' In fact, the only references in the list of 19 that involve ''communications'' in any form or to a legislator, are: 1) a cosponsorship memorandum, 2) final or annual reports required by law to be submitted to the General Assembly, 3) a record communicating to the appointing authority the resignation of a legislative appointee, and 4) the results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency. *Id.*

Requestor's argument that he was ''denied access to email simply because it is email'' is inaccurate. Letter Appeal. He was denied access to the requested emails because he has no statutory right to such access under the RTKL. The Open Records Officer correctly stated that the information requested is not encompassed within the definition of ''legislative records.'' Furthermore, there is no common or approved usage of any of the words included within the 19 categories of ''legislative records'' that would support an expansion of that definition to grant access to the emails sought by Requestor.[4]

C. Records Exempted/ Protected By Privilege

Undeterred by this definitional challenge, Requestor boldly asserts that access to requested records should be determined based on the ''contents'' of the records not the ''form.'' Letter Appeal.[5] This argument also fails. Section 305(b) of the RTKL, pertaining to legislative records and financial records, states:

A legislative record in the possession of a legislative agency and a financial record in the possession of a legislative agency and a financial record in the possession of a judicial agency shall be presumed to be available in accordance with the act the presumption shall not apply if:

(1) The record is exempt under section 708;

(2) the record is protected by a privilege; or

(3) the record is exempt from disclosure under any other federal or State law, regulation or judicial order or decree.

(Italics added.)

Id. Both the federal and state courts have consistently held that the Speech or Debate Clauses in Article I § 6 of the U.S. Constitution, and in Article II, § 15 of the Pennsylvania Constitution, respectively, provide an absolute privilege to legislators for certain legislative activities. U.S. CONST. Art, I, § 6; PA CONST. Art. II, § 15. e.gs., *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 763, (1951); *Powell v. McCormack*, 395 U.S. 486, 503, 23 L.Ed.2d 491, 89 S.Ct. 1944 (1969); *Consumers Education and Protective Association v. Nolan*, 470 Pa. 372, 382, 368 A.2d 675, 680 (1977).

Included within the scope of the privilege are communications sent to and received by legislators from other legislators and constituents that fall within the ''legitimate sphere of legislative activity.'' *Uniontown Herald Standard Newspapers v. Roberts*, 777 A.2d 1225 (2001), affm., and remanded on other grounds, 576 Pa. 231, 839 A.2d 185 (2003). In *Uniontown Herald Standards v. Roberts*, Commonwealth Courts upheld the legislative privilege holding that:

> 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. As the *Eastland* Court concluded that there needs to be protection of ''the integrity of the legislative process,'' discussions with other lawmakers and constituents is surely included within the ambit of ''legislative process.'' Therefore, we hold that business telephone calls made by members of the General Assembly fall within the meaning of ''legitimate legislative activity.'' (Underlining added.)

Id. At 1233.

Consistent with the recognition of this constitutional privilege, the RTKL expressly exempts from public access, records regarding ''the drafting of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency.'' § 708(9). The exemption also expressly extends to records that reflect:

(A) The internal, predecisional, deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees, or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, leg-

islative proposal, legislative amendment contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

(B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal, or regulation.

§ 708(10).

Unfortunately for Requestor, the emails that he seeks are not ''legislative records'' as defined by the RTKL. However, even if the emails were legislative records, those that reflect the subjects referred to in Section 708(9) and (10) of the RTKL or by the courts' decisions would be privileged and thus inaccessible by Requestor.

D. Specifically of the Request

Finally, there is the issue of the adequacy of the RTKL request. Section 703 of the RTKL states:

> A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested and shall include the name and address to which the agency should address its response.

§ 703.

The issue of sufficiency of the specificity of the records sought has been addressed in several cases by the courts6. In *Associated Builders & Contractors, Inc. v. Dept. of General Services*, 747 A.2d 962 (2000), the court stated:

> Where the request is not sufficiently specific, the agency has no obligation to comply with the request because the lack of specificity prevents the agency from determining whether to grant or deny the request. Id at 860. Furthermore, a lack of specificity in the request makes it difficult, if not impossible, for this court to conduct meaningful review of the agency's decision. *Id.* Accord, *Arduino v. Borough of Dunmore*, 720 A.2d 827 (Pa. Cmwlth. 1998); *Hunt v. Dept. of Corrections*, 698 A.2d 147 (Pa. Cmwlth. 1997).

Id. at 966. The court then reviewed several of the requests characterizing them as ''*akin to document requests under the civil discovery rules, i.e. 'any and all documents relating to [subject matter]' ''. Id.* The court found that such requests ''*fail to provide sufficient facts to determine what type of record is being requested and whether any part of the record constitutes a public record*.'' *Id. See also, Berman v. Pennsylvania Convention Center*, 901 A.2d 1085 (Pa. Cmwlth. 2006); *Mooney v. Temple University Board of Trustees*, 448 Pa. 424, 292 A.2d 395 (1972).

The Open Records Officer's argument that Requestor has not made his request with the requisite specificity is persuasive. It appeals the Requestor seeks the entirety of the emails to and from the former representative during a four (4) month period. Requestor has not explained how his broad request is ''limited'' to

avoid requesting privileged records, nor has he explained why his request should not be regarded as a ''fishing expedition'' akin to a general discovery request.

Conclusion

The General Assembly has expressly listed the types of documents which are publicly accessible and available as ''legislative records'' under the RTKL. The documents requested in the instant matter do not fall within the purview of that definition. Additionally, the requested records are protected by a constitutional privilege, or are statutorily exempt from access even if they were determined to be legislative records. Finally, even if the request pertained to legislative records that were not exempt or protected, the Request lacks sufficient specificity to trigger the agency's obligation to comply with the request. For the reasons stated herein, the Denial was proper and the appeal fails.

Notes:

[1] The appeal letter was dated April 26, 2010, but the letter was not postmarked until April 27, 2010. It was received by this Appeals Officer on April 29, 2010.

[2] A broad standard of review is comparable to the wide latitude of review granted to the final finders of fact in administrative hearings. In Unemployment Compensation mattes, appeals are handled by referees and the Board of Unemployment Compensation. Referees review decisions of the Department of Labor personnel. The referee's scope of review is limited by statute to consideration of the issues expressly ruled upon in the decision being appealed. 34 Pa. Code § 101.87. Appeals of the referee's decision are made to the Board of Unemployment Compensation. That Board is the ultimate fact-finder in unemployment cases and is empowered to resolve conflicts in evidence, determine the credibility of witnesses, and determine the weight to be accorded evidence. The Board can affirm, modify, or reverse the referee's decision based on previously submitted evidence, or after taking further evidence. The authority granted to appeals officers under section 1102 of the RTKL more closely approximates that granted to the Board in unemployment compensation cases.

[3] The issue was addressed in the following previously issued Decisions: RTKL Appeal No. 2009-0001 SCO; RTKL Appeal No. 2009-0002 SCO; RTKL Appeal No. 2010-0009 MUR

[4] Additionally, under Section 1903(a) of the Statutory Construction Act, words and phrases are construed according to their common and approved usage. 1 Pa.C.S. § 1903(a). When the words of a statute are free and clear from ambiguity.

[5] Requestor failed to provide any legislative or judicial authority for this argument even though he was notified to provide any additional supportive documents that he wished to have considered.

[6] These cases were decided under the predecessor Right-to-Know Act, Act of June 21, 1957, P. L. 390 as amended (65 P. S. § 66.1, *et seq.*) rather than the new RTKL, Act of February 14, 2008, P. L. 6, No. 3 (65 P. S. § 67.101, *et seq.*) Although several definitions, burdens and other provisions were changed, both statutes contain the identical provisions requiring that a requestor ''identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.'' RTKL, § 703; Right to Know Act, § 2(c).

Appeal of Levy

Senate of Pennsylvania

No. 1-2010 **September 16, 2010**

Reporter's summary: Requester requested documents related to payment for legal services for certain Senate Members. The documents are accessible but may be redacted based on the attorney-client privilege for both services rendered and the name of the client so long as the communications were made "without the presence of strangers" and "not for the purpose of committing a crime or tort."

Headnotes:

Case law—"The burden of establishing privilege is on the party seeking to prevent disclosure." Ario v. Deloitte Touche, LLP, 934 A.2d 1290 at 1294 (Pa. Cmwlth. 2007).

Case law—Intra-Senate type communications may retain a privileged status and be shared with employees of the Senate on a "need-to-know basis." Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609 at 633 (M.D. Pa. 1997).

Case law—The work-product doctrine "is designed to shelter the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case." Birth Center v. St. Paul Cos., 727 A.2d 1144 at 1165 (Pa. Super. 1999).

Statement of Fact

By letters dated June 22, 2010, Mr. Marc Levy (Requester), a reporter with the Associated Press, sought access copies of "all bills, contracts and payment records related to the hiring on any outside lawyer or law firm to represent Senator Robert J. Mellow beginning Jan. 2, 2009." An identical request was also made for any current or former employees of the Senate Democratic Caucus beginning January 1, 2009. These requests were submitted pursuant to the Right-to-Know Law, Act of February 14, 2008, P. L. 6, 65 P. S. § 67.101 *et seq.* (RTKL).

The Senate's Open Records Officer provided copies of the documents to the Requester on August 3, 2010. However, redactions were made before the documents were made available to the Requester and certain specific redactions are at issue in this appeal which was filed in this office on August 11, 2010. A one week continuance was granted in this case.

At the request of this Appeals Officer, both the Seante and the Requester have submitted copies of the redacted documents into evidence. These five packets of legislative records include:

1. An April 2007 contract between the Senate and James F. Tierney, IV, Esquire. The name of the client to receive legal representation by Mr. Tierney has been redacted. An April 12, 2007 letter from Attorney Tierney to the Sen-

ate with two paragraphs redacted. Invoices from Attorney Tierney to the Senate dated December 12, 2008, April 15, 2009, July 13, 2009, October 19, 2009, November 13, 2009, December 10, 2009 and January 14, 2010. On each of these invoices, the description of the professional legal services rendered was redacted.

2. A February 18, 2010 letter from the Senate to Brian J. Cali, Esquire engaging his legal services. The name of the client to be represented has been redacted. Invoices from Attorney Cali to the Senate for the months of November and December, 2009 and January, February, March, April and May 2010. The description of the legal services rendered on each of these invoices has been redacted.

3. A May 11, 2010 letter from the Senate to Sal Cognetti, Jr. Esquire engaging his legal services. The name of the client to be represented has been redacted. Invoices from Attorney Cognetti to the Senate for the periods of November through May, 2009 and June through August 2009. The description of the legal services rendered on each of these invoices has been redacted.

4. A June 2007 contract between the Senate and Alan C. Kohler, Esquire. The name of the client to be represented has been redacted. A description of the legal services to be provided by Attorney Kohler has been redacted. A June 11, 2007 letter of engagement from the Senate to Attorney Kohler with a paragraph and a partial sentence redacted. Invoices from Attorney Kohler to the Senate dated October 13, 2008, November 11, 2008, December 3, 3008 and December 31, 2008. The description of the legal services rendered on each of these invoices has been redacted.

5. A letter from Jane Gowen Penny, Esquire to the Senate confirming representation. The purpose of the representation and the identification of the client has been redacted. A February 5, 2010 invoice from Attorney Penny to the Senate. The name of the client has been redacted. The description of the legal services rendered has been redacted. A February 22, 2010 letter to the Senate from the client authorizing the Senate to pay Attorney Penny's invoice. The client's name is redacted.

For each of these five clients, these financial records do indicate which attorney was hired. In addition, the time expended by each attorney, the dates the services were provided, the hourly rate charged for the services or the fee arrangements and the amounts paid by the Senate are revealed.

In the cover letter to the Requester providing copies of these documents, the Senate has asserted that the redacted information is protected by the attorney-client privilege and not accessible pursuant to section 305(b) of the RTKL. 65 P. S. § 67.305(b). The Requester contends that the identify of any client and the purpose or reason for engaging an attorney are not covered by the attorney-client privilege.

Requester also questions whether or not the Senate has provided a full and adequate response to his request for access to legislative records. Requester spe-

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cifically requested access to the records of ''any current or former employee of the Senate Democratic caucus.'' The response from the Open Records Officer specifically states that the records provided were for ''any employee of Senator Mellow . . .''

Discussion

The attorney-client privilege is part of the codified law of Pennsylvania. The relevant statutory language, found at 42 Pa.C.S. § 5928, is as follows:

''In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.''

In criminal actions, the statutory counterpart is found at 42 Pa.C.S. § 5916.

Whether or not the attorney-client privilege will attach and protect client identity and the purpose or reasons why various attorneys were engaged is a question or conclusion of law made based on the facts presented for each of the five clients. *Nationwide Mutual Insurance Company v. Fleming*, 924 A.2d 1259 (Pa. Super. 2007), appeal granted 935 A.2d 1270 (Pa. 2007); *In re Estate of Wood*, 818 A.2d 568 (Pa. Super 2003), appeal denied 882 A.2d 479 (Pa. 2005); *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*, 227 F.R.D. 382 (W. D. Pa. 2005).

The Superior Court has recently stated, ''. . . the party who has asserted the attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked . . .'' *Carbis Walker, LLP v. Hill, Barth & King, LLC*, 930 A.2d 573 at 581 (Pa. Super. 2007). In accord: *T.M. v. Elwyn, Inc.*, 950 A.2d 1050 at 1063 (Pa. Super 2008) Commonwealth Court, as well, has stated that, ''the party asserting the privilege has the initial burden to prove that it is properly invoked . . .'' *Joe v. Prison Health Srevices, Inc.*, 782 A.2d 24 at 31 (Pa Cmwlth. 2001). More recently, the court again stated, ''The burden of establishing privilege is on the party seeking to prevent disclosure.'' , 782 A.2d 24 at 31 (Pa. Cmwlth. 2001). More recently, the court again stated, ''The burden of establishing privilege is on the party seeking to prevent disclosure.'' *Ario v. Deloitte Touche, LLP*, 934 A.2d 1290 at 1294 (Pa. Cmwlth. 2007).

In deciding whether or not to conclude that an attorney-client privilege exists, four criteria must be examined. Those are:

1. The asserted holder of the privilege is, or sought to become, a client/
2. The person to whom the communication was made is a member of the bar of a court or his subordinate.
3. The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter and not for the purpose of committing a crime or tort.

4. The privilege has been claimed and is not waived by the client. *Nationwide, supra.* at 1264; *Commonwealth v. Mrozek*, 657 A.2d 997 at 998 (Pa. Super. 1995); *Montgomery County v. Microvote Corporation*, 175 F.3d 296 at 301 (C.A. 3 (Pa.) 1999).

The evidence on the record in this case from which facts may be determined consists solely of copies of the redacted documents supplied to Requester. Nevertheless, sufficient facts may be gleaned from this documentary evidence to do a partial examination in accordance with the criteria outlined above.

There are five ''sets'' of redacted documents for five clients that were provided to the Requester. In each instance, it is indicated that each individual as a holder of the privilege did indeed seek to become a client of an attorney and that each individual did communicate this to the attorney. This communication from the client would explain the purpose for which the attorney was being engaged. That is, what was the necessity or circumstance causing each of the clients to seek out and engage the attorney. Such a confidential initial communication from a client to counsel goes to the heart of the attorney-client privilege. Furthermore, it is not unreasonable to conclude that these clients also expected their identities to be protected by the privilege especially since they have a heightened awareness of the public nature of their employment. By these redacted submissions, each client has evidenced a legitimate expectation of confidentiality and privacy in dealing with their counsel. Finally, the redactions in these documents and this appeal itself clearly indicate that each of these five individuals is not waiving but is seeking to claim the attorney-client privilege.

It is impossible from the evidence submitted to determine whether or not the communications of identity and the purpose for which the attorney was being engaged were made ''without the presence of strangers'' and ''not for the purpose of committing a crime or tort.'' This lack of evidence does not, however, vitiate the privilege at this point.

It must be noted that Mr. Levy does argue that the documents themselves evidence a waiver of the attorney-client privilege since they were shared with the Chief Clerk of the Senate1 for the purpose of paying the legal fees. Such a conclusion cannot be made. Such intra-Senate type communications may retain a privileged status and be shared with employees of the Senate on a ''need-to-know basis''. *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609 at 633 (M.D. Pa. 1997). Citing *In re Grand Jury 90-1*, 758 F. Supp. 1411 (D. Colo. 1991), the *Andrtriz* court further held at 633, ''Only when the communications are relayed to those who do not need to know the information to carry out their work or make effective decisions on the part of the company is the privilege lost.'' See also: *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467 at 476 (E.D. Pa. 2005); *Southeatern Pennsylvania Transportation Authority v. CaremarkPCS Health, L.P.*, 254 F.R.D. 253 at 258 (E.D. Pa. 2008).

In the present case, it can be discerned that the records at issue were shared with the Chief Clerk of the Senate. The Chief Clerk is an elected officer of the

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Senate. It is well within the scope of his employment to receive copies of these records and make payment of the legal fees incurred by the Senate on behalf of its Members or employees. These documents do not facially reveal a waiver of the attorney-client privilege for this reason. However, it is equally impossible to conclude that these communications were made ''without the presence of strangers'' without further evidence being presented.

''The attorney-client privilege has been a part of Pennsylvania law since the founding of the Pennsylvania colony . . .'' *Commonwealth v. Noll*, 662 A.2d 1123 at 1126 (Pa. Super. 1995) And, ''the attorney-client privilege has deep historical roots and indeed is the oldest of the privileges for confidential communications in common law'' *Nationwide, supra.* at 1263. Our Supreme Court has even termed it ''the most revered of the common law privileges.'' *Commonwealth v. Maguigan*, 511 A.2d 1327 at 1333 (Pa. 1986); *Commonwealth v. Chmiel*, 738 A.2d 406 at 414 (Pa. 1999).

In light of the foregoing, the attorney-client privilege deserves the utmost deference in any proceeding and must be zealously guarded and protected if possible. In this case, the Senate must be given the opportunity to offer and remedy that lack of objective indicia on this record to support the attachment of the attorney-client privilege. The Senate may provide sworn affidavits, statements pursuant to 18 Pa.C.S. § 4904 or any other probative evidence to conclude that the attorney-client privilege compels each redaction of client identity and purpose or reason for hiring an attorney for each of the five clients individually. Specifically, the Senate must address that these communications from the clients to their counsel were made without the presence of strangers and not for the purpose of committing a crime or tort. Such a remedy has been permitted in similar RTKL cases involving the attorney-client privilege. See: *Thompson v. Dickinson Township*, Office of Open Records (OOR) Dkt. AP 2009-302; *Nychis v. North Versailles Township*, OOR Dkt. AP 2009-986; *Latkanich v. Washington Township*, OOR Dkt. 2010-308.

Requester has also questioned the adequacy of the Senate's response to his inquiry. Requester requested records for any Democratic caucus employee and the Open Records Officer provided records for employees of Senator Mellow. The Senate argues in a footnote in its memorandum of law that is has provided the records for all employees and not just Senator Mellow. However, there is no evidence on record to support such a finding. The Senate may provide and affidavit to the Requester that the requested records for all caucus employees have been produced and no other records exist. In the alternative, the Senate must provide records for any other caucus employees. *Moore v. Office of Open Records*, 992 A.2d 907 (Pa. Cmwlth. 2010).

For the first time, the Senate has also argued in its memorandum of law that the redactions in the records may have related to grand jury proceedings which would require secrecy. Although the words ''grand jury investigation'' and the word ''investigation'' do appear in the redacted documents, that is not sufficient

evidence to compel a reasonable person to conclude that grand jury secrecy must attach to those records or the redactions. There is nothing more on the record in this case to suggest which, if any of the clients or records, specifically pertain to grand jury proceedings or how or why such records must be secreted.

The Senate argues in its memorandum that the redactions were made because Section 708(b)(16) of the RTKL excepts from public disclosure ''a record of an agency relating to or resulting in a criminal investigation . . .'' 65 P. S. § 67.708(b)(16). Unfortunately, again, no facts have been offered into evidence at all to support such a finding. The only evidence in this proceeding are copies of the various redacted documents given to Requester. On the face of these redacted documents, it is impossible to conclude that these records have anything at all to do with a criminal investigation.

Finally, the Senate has argued that the redactions were necessary because the information is protected by the attorney-work product doctrine. This doctrine ''is designed to shelter the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case.'' *Birth Center v. St. Paul Cos.*, 727 A.2d 1144 at 1165 (Pa. Super. 1999). It is hard to discern how this doctrine could serve to protect client identity or the purpose or reason a client has engaged an attorney. However, it is not necessary to do so because no factual evidence has been offered in this proceeding to support such a finding.

Note

[1] The Chief Clerk of the Senate also serves at the Open Records Officer for the Senate. 104 Pa. Code § 7.1

Department of Conservation and Natural Resources v. Office of Open Records

Commonwealth Court of Pennsylvania

995 A.2d 906 **May 24, 2010**

Reporter's summary: The Commonwealth Court consolidated three cases involving the accessibility of certified payroll records of third party contractors working on public projects for the Commonwealth. Commonwealth agencies had copies of the certified payroll records at issue. The Commonwealth Court ruled that although the certified payroll records are considered financial records and therefore publically accessible, certain information, such as names or addresses of employees, may be redacted under the personal financial information exception in section 708 of the Right-to-Know Law.

Headnotes:

Statutory construction—

Legislative intent—The new Right-to-Know Law utilizes the same "account, voucher or contract" language as the old law did. This means that prior interpretations of that language were intended to be applicable in the new law. The court uses the Sapp Roofing Company case as precedent for the interpretation of this phrase.

Legislative intent—By limiting the exception in section 708(b)(6)(ii) to public officials and agency employees, this exception would not apply to third party government contractors.

Department of Conservation and Natural Resources, of the Commonwealth of Pennsylvania, Petitioner v. Office of Open Records, Respondent; Office of the Budget, Petitioner v. Office of Open Records, Respondent; Department of General Services, Petitioner v. Office of Open Records, Respondent

COMMONWEALTH COURT OF PENNSYLVANIA

February 10, 2010, Argued

May 24, 2010, Decided

May 24, 2010, Filed

OPINION BY JUDGE BROBSON

I. INTRODUCTION

In these consolidated appeals, n1 three Commonwealth agencies—the Office of the Budget (Budget), the Department of Conservation and Natural Resources (DCNR), and the Department of General Services (DGS) (collectively, Agencies)—seek our review of separate but related decisions by the Office of Open Records (Open Records) pursuant to our statutory jurisdiction under the Right-to-Know Law (RTKL)[1].

The records at issue are certified payroll records of third-party contractors who entered into contracts with the Commonwealth of Pennsylvania for public projects. The certified payroll records of these non-governmental employers contain information relating to each of the contractors' employees who worked on the particular public project, such as each employee's name, social security number, home address, hourly rate of pay, gross amount of wages earned, number of hours worked, amount deducted from gross pay for taxes and/or benefits, and net pay2. In response to RTKL requests for copies of these certified payroll records, the Agencies produced only redacted versions of the certified payrolls. The requesters challenged the Agencies' productions, and Open Records appeals officers directed the Agencies to release un-redacted copies of the certified payroll records.

Having reviewed the record in these consolidated appeals as a whole, and based on the findings of fact and conclusions of law set forth below, we reverse the final determinations of the Open Records appeals officers.

II. FACTS AND PROCEDURAL POSTURE

A. DCNR v. Office of Open Records (Gribbin)

On April 17, 2009, Thomas M. Gribbin, Sr. (Gribbin) requested[3] the release of all certified payroll records submitted by contractor Marion Hill Associates, Inc. and all subcontractors that had been working on a construction project identified in Gribbin's request as ''Marina Dock Rehabilitation.'' DCNR responded by letter dated April 24, 2009, enclosing redacted copies of the requested records. DCNR redacted the Social Security numbers and home addresses of the contractors' employees, taking the position that this information was exempt under the RTKL. The letter further informed Gribbin that he had a right to appeal the response to Open Records because of the redactions.

On April 27, 2009, Gribbin sent a letter to Open Records, identical to his original request for documents. By a second letter to Open Records dated April 28, 2009, Gribbin indicated that he wished to appeal DCNR's April 24th decision to produce only redacted copies of the certified payroll records[4]. Open Records sent a letter to Gribbin and DCNR on May 1, 2009, describing the process Open Records uses to evaluate appeals, including proceedings before appeals officers, who, according to the letter, may or may not conduct a hearing on the appeal.

Open Records assigned an appeals officer to decide Gribbin's appeal. Following various e-mail correspondence, DCNR submitted a brief in support of its denial of the requested information. In its cover letter accompanying the brief, DCNR asked the appeals officer to conduct a hearing to allow DCNR to present evidence of the potential personal harm that would result if Open Records required DCNR to release the information. The appeals officer denied the request by e-mail dated May 28, 2009.

In its brief to Open Records, DCNR argued that home addresses do not constitute records under the RTKL because they are (1) exempt under Section 708(b)(1)(ii) of the RTKL[5] (records the disclosure of which ''would be reason-

ably likely to result in a substantial and demonstrable risk of physical harm to the personal security of an individual'') and Section 708(b)(6)(i)(A)[6] (personal identification information . . . ''[a] record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number'') and (2) they are exempt under the RTKL because the RTKL exempts any information that is exempt under federal or state law, regulation, or judicial decree (under the theory that an individual has a constitutional right to privacy). Around the time DCNR submitted its brief, the contractor that was performing the subject construction sought to intervene.

The Open Records appeals officer issued a Final Determination on June 1, 2009, granting Gribbin's open records appeal and permitting him access to the home addresses of the contractor's employees whose wage information was included on the certified payroll records. The appeals officer referred to earlier decisions of Open Records that had specifically held that addresses were not the subject of any exemption in the RTKL under Section 708(b)(6) because that provision, which defines ''personal identification information,'' specifically exempts only the home addresses of individuals such as law enforcement officers and judges. Also, with regard to Section 708(b)(1) of the RTKL, the appeals officer indicated that DCNR did not meet its burden of proof regarding the substantial/demonstrable risk of harm[7].

DCNR and the intervenor third-party contractor appealed the Open Records appeals officer's Determination, raising the same issues noted above.

B. Budget v. Open Records

(Malley/Leet/Sheet Metal Workers' Union)

On March 2, 2009, Shaun Leet, a representative of Sheet Metal Workers' Local 12 (Leet or Union, as appropriate), sent a RTKL request to the open records officer of Budget, requesting copies of the certified payroll of a roofing contractor—Burns & Scalo Roofing—that had performed services on a construction project for the Fred Rogers Center and Business Conference Center. The request also sought the same information for any roofing subcontractors. Budget's open records officer responded to Leet's request by letter dated March 12, 2009, indicating that Budget would use the RTKL's extension provision, whereby an agency may take longer than the usual statutory period to provide copies when redaction is necessary. By letter dated April 13, 2009, Budget's open records officer produced a compact disc (CD-Rom) with two .pdf files consisting of 180 pages of information responsive to Leet's request. Budget, however, redacted from its production the following information: (1) Social Security numbers, (2) signatures, (3) names, (4) addresses, and (5) W-4 tax exemption information.

By letter dated April 24, 2009, Kevin Malley (Malley) and Leet, on behalf of the Union, filed an appeal with Open Records, challenging the redaction by Budget of the contractors' employees' names. Open Records sent a letter to Budget,

Malley, and Leet on April 27, 2009, describing [*9] the appeal process. Appeals officer Audrey Buglione sent Budget a letter dated April 29, 2009, alerting it to the fact that Open Records had issued earlier determinations in unrelated cases which held that names are not exempt information and directing him, among other things, to inform Open Records of the legal and factual basis for redacting the names.

Budget submitted to the appeals officer a memorandum of law with affidavits. Budget's first argument was that its redaction of names was appropriate. Budget apparently presumed that the Union was interested in knowing whether the contractor was paying prevailing wage[8] to the employees. Budget apparently reasoned that, by supplying the specific wage information about unidentified employees, the Union could determine whether the contractor was in compliance with the PWA. Budget further reasoned that if it included the names, then it would be releasing ''personal financial information,'' which is exempted under the RTKL. The rationale apparently was that the information is not personal financial information unless a name is attached to it.

Budget also argued that the release of names and addresses violated an individual's right to privacy, and that this right, when balanced against the public interest recognized in the RTKL, weighed in favor of the individuals' right to privacy.

In her May 26, 2009 Final Determination, the Open Records appeals officer, relying upon several prior Open Records decisions, rejected Budget's arguments, particularly the argument that there is a right to privacy that outweighs the public's interest under the RTKL. Open Records, however, did not directly address the idea that, under the personal identification information exception, Section 708(b)(6)(i)(A) of the RTKL, which includes ''personal financial information,'' the certified payroll documents are exempt—*i.e.*, are not ''public records.'' The appeals officer granted the appeal and directed Budget to produce the certified payroll records without the names redacted.

C. DGS v. Open Records (Agre)

Louis Agre (Agre), an attorney apparently representing the International Union of Operating Engineers, Local 542, sent a request under the RTKL via e-mail to DGS on April 2, 2009. Agre was seeking certified payroll information regarding a company called Out of Site Infrastructure, which apparently performed demolition, excavation, and other work at a construction site at Cheyney University.

DGS's open records officer responded with copies of certified payroll with names, addresses, Social Security numbers, and telephone numbers redacted. He also noted the right to appeal the adequacy of DGS's response to Open Records. In its letter enclosing the redacted documents, DGS's open records officer reasoned that the redactions were appropriate because the information was protected from disclosure under the RTKL's personal financial information exemption (citing Section 708(b)(6)), under the RTKL's investigation exemption (citing Section

708(b)(17)), and under the right to privacy guaranteed by Article I, Sections 1 and 8 of the Pennsylvania Constitution.

Agre filed an appeal, which Open Records received on May 7, 2009, challenging DGS's redaction of names and addresses. Open Records responded, as it did in the other cases, with a letter acknowledging the appeal and indicating that an appeals officer may conduct a hearing. Open Records assigned Nathaniel J. Byerly, Esquire, as appeals officer for the appeal, and he requested that DGS provide support for its position that the redactions were appropriate. On May 27, 2009, Open Records received DGS's ''Response.'' In this forty-eight page document, DGS commented that it strongly believed that Open Records' current legal analysis regarding the constitutional right to privacy was ''deeply flawed.'' Specifically, DGS asserted that (1) the redaction was appropriate in order to avoid the release of personal financial information; (2) the certified payrolls constitute investigatory documents because they are collected as part of an official inquiry into whether contractors are complying with the Prevailing Wage Act, and, consequently, they are exempt as noncriminal investigative records under Section 708(b)(17) of the RTKL; and (3) release of the names and addresses would violate a constitutional right to privacy. This response also included numerous documents, such as letters and affidavits from persons involved with such matters as law enforcement and technology, indicating problems that could arise through the disclosure of names and addresses[9].

The Open Records appeals officer issued his Final Determination on August 5, 2009, granting Agre's appeal and directing DGS to release the names and addresses that had been redacted from the certified payroll records. In general, the appeals officer indicated that he was relying upon Open Records' earlier decisions, rejecting statutory exemption and constitutional right to privacy arguments. Specifically, the appeals officer first addressed the personal financial information exemption argument. DGS had relied on a Pennsylvania Supreme Court decision, *Sapp Roofing Company, Inc. v. Sheet Metal Workers' International Association*, 552 Pa. 105, 713 A.2d 627 (1998) (plurality). In *Sapp Roofing*, our Supreme Court referred to a decision by the United States Court of Appeals for the Second Circuit, arising under the Federal Freedom of Information Act[10] (FOIA), which recognized the significant interest private employees have in avoiding the disclosure of their names and addresses when associated with financial information. The appeals officer, however, rejected DGS's argument, noting that *Sapp Roofing* was only a plurality opinion that did not expressly adopt the federal court's reasoning. Further, the appeals officer concluded that the term ''personal financial information'' could not be interpreted to include names and addresses.

The appeals officer also rejected DGS's argument that the certified payroll records involved noncriminal investigative information. The appeals officer noted that DGS offered no factual support detailing what is involved under the PWA to support the contention that the contractor submits the payroll documents as part

of an investigation such as would render the documents noncriminal investigative records; however, the appeals officer never provided an opportunity for a hearing.

With regard to the issue of whether a constitutional right to privacy precludes release of names and addresses associated with the payroll records, the appeals officer concluded that no case law supported DGS's argument of such a right. Finally, the appeals officer rejected DGS's argument that Open Records should engage in a balancing test similar to one employed by federal entities under the FOIA, because FOIA has a specific provision requiring such balancing, whereas the RTKL contains no similar provision.

III. ISSUES FOR REVIEW/STANDARD OF REVIEW

The Agencies raise the following issues in their joint brief: (1) whether individuals have a constitutionally protected privacy interest in their names and addresses such that Open Records must balance that interest against the public interest in such information before Open Records may disclose such information; (2) whether the asserted privacy interest outweighs the public interest, where, as the Agencies contend here, the parties seeking the information have not asserted such public interest; and (3) whether the Agencies properly redacted the names and addresses from the disclosed certified payroll records under the personal security exemption and/or the personal financial information exemption in the RTKL, such that the otherwise relevant financial information they provided to the requesting parties satisfied the requirements of the RTKL.

This Court's review of final determinations by Open Records is governed by Section 1301(a) of the RTKL, which provides in pertinent part as follows:

Within 30 days of the mailing date of the final determination . . . a requester or the agency may file a petition for review or other document as might be required by rule of court with the Commonwealth Court. The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole. The decision shall clearly and concisely explain the rationale for the decision.65 P. S. § 67.1301(a). In this Court's recent en banc decision in *Bowling v. Office of Open Records*, 990 A.2d 813, 818 (Pa. Cmwlth. 2010), we held that our standard of review of Open Records orders is as follows. ''[A] reviewing court, in its appellate jurisdiction, independently reviews [Open Records'] orders and may substitute its own findings of fact for that of the agency.'' The Court opined that it could apply the broadest scope of review and look to information beyond the contents of the record to be reviewed as described in the RTKL—*i.e.*, the request, the response, the requester's exceptions to the response, hearing transcript (if any), and the final determination. In other words, the Court can accept additional evidence and make its own factual findings.

IV. DISCUSSION

In this appeal, the Agencies and Open Records have largely focused on the question of whether a constitutional right to privacy protects from release the

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names and/or addresses of individuals identified on the certified payroll records. This Court, however, is guided by the notion that, whenever possible, a court should refrain from deciding constitutional issues when it can resolve a dispute on a statutory basis. *Pottstown Sch. Dist. v. Hill School*, 786 A.2d 312 (Pa. Cmwlth. 2001). Because we believe this appeal can be disposed of on statutory grounds, we will not address the parties' constitutional arguments.

A. The Certified Payroll Records Are "Records"

The parties do not dispute that the certified payroll records meet the definition of a ''record'' under the RTKL. The definition of ''record'' in the RTKL is broad enough to encompass a hard or electronically-stored document in an agency's possession, as well as information stored or maintained by an agency but that is not necessarily part of a specific document[11]. Here, we are dealing with ''records'' that are documents—certified payroll records submitted to the Agencies by third-party contractors. In each case, Budget, DGS, and DCNR produced the records in response to RTKL requests, but redacted certain identifying information about the contractors' employees. At issue in these appeals is the propriety of the Agencies' decision to redact the names and/or addresses of the contractors' employees in the copies of the certified payroll records provided to the requesters.

B. The Certified Payroll Records Include "Personal Financial Information"

The Agencies, collectively, have identified three statutory exemptions to support their decision to redact the certified payroll records in this case: (1) the personal security exemption—Section 708(b)(1)(ii) of the RTKL; (2) the personal financial information exemption—Section 708(b)(6)(i)(A) of the RTKL; and (3) the investigation exemption—Section 708(b)(17) of the RTKL. For the reasons that follow, we find that the certified payroll records include information that falls within the personal financial information exemption[12].

In context, the personal financial information exemption is a component part of a three-part broader exemption for ''personal identification information.'' Section 708 of the RTKL provides, in relevant part:

(b) Exceptions.—Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

. . . .

(6)(i) The following personal identification information:

(A) *A record containing all or part of a person's* Social Security number, driver's license number, *personal financial information*, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number.

(B) A spouse's name, marital status or beneficiary or dependent information.

(C) The home address of a law enforcement officer or judge.

(ii) Nothing in this paragraph shall preclude the release of the *name*, position, *salary, actual compensation or other payments or expenses*,

> employment contract, employment-related contract or agreement and length *of service of a public official* or an *agency employee*. *Id.* § 67.708(b)(6) (emphasis added). As written by the General Assembly, the ''personal identification information'' exemption is actually three separate exemptions set forth in clauses (A), (B), and (C) of Section 708(b)(6)(i) of the RTKL. The ''personal financial information'' exemption is found in clause (A).

The RTKL defines ''personal financial information'' to include: An individual's personal credit, charge or debit card information; bank account information; bank, credit or financial statements; account or PIN numbers *and other information relating to an individual's personal finances*. *Id.* § 67.102 (emphasis added). Though certified payroll records do not fall within one of the specific categories of documents listed in this definition, we must determine whether they constitute ''other information relating to an individual's personal finances.''

With no further guidance from the statutory definitions in the RTKL, we are guided by rules of statutory construction, which instruct us to construe words according to their common usage. *See* 1 Pa.C.S. § 1903(a). The word ''finance'' and its variant ''finances'' have broad meanings. ''Finance'' has been defined as ''money resources, income, etc.'' *Webster's New World Dictionary and Thesaurus* 240 (2nd ed. 2002). ''Finances'' has been defined as ''the pecuniary affairs or resources of a state, company, or *individual*.'' *Webster's Third New Int'l Dictionary (Unabridged)* 851 (1993) (emphasis added). Though we could include additional dictionary support, these two alone clearly support a conclusion that an individual's wages and wage-related information, such as that included in the certified payroll records at issue in these consolidated appeals, represent ''money resources, income'' and go to ''the pecuniary affairs'' of an individual. Because this information relates to an individual's personal finances, the information contained in the certified payroll records falls within the statutory definition of ''personal financial information[13].''

We find further support for this conclusion in subparagraph (ii) of Section 708(b)(6), wherein the General Assembly specifically carved out an exception to exemption in subparagraph (i):

> *Nothing in this paragraph [6] shall preclude the release of the* name, position, *salary, actual compensation or other payments or expenses*, employment contract, employment-related contract or agreement and length of service *of a public official or agency employee. Id.* § 67.708(b)(6)(ii) (emphasis added). Because of the exemption for documents containing personal financial information in clause (A) of subparagraph 6, the General Assembly apparently felt that this exception was necessary to ensure that wage and salary information for public officials and agency employees was available to requesters under the RTKL. The language limiting this carve-out exception to only public officials and agency employees evidences the General Assembly's intent, or at the very least recognition, that the personal

financial information exemption in Section 708(b)(6)(i)(A) of the RTKL exempts wage and wage-related information for individuals who are not public officials or agency employees. To conclude otherwise would essentially render the carve-out exception for public officials and agency employees unnecessary and mere surplusage—a construction we must avoid. *See 1 Pa.C.S. §§ 1922(2) (presumption that "the General Assembly intends the entire statute to be effective and certain"); 1932(b) ("Statutes in pari materia shall be construed together, if possible, as one statute."); Concerned Citizens for Better Schs. v. Brownsville Area Sch. Dist.*, 660 A.2d 668, 671 (Pa. Cmwlth. 1995) (''[W]henever possible, the courts must interpret statutes to give meaning to all of their words and phrases so that none are rendered mere surplusage.'').

C. The Personal Financial Information Exemption Does Not Apply

Section 708(b)(6)(i)(A) of the RTKL, as quoted above, exempts ''personal identification information,'' which includes ''*[a] record containing . . .* personal financial information.'' 65 P. S. § 67.708(b)(6)(i)(A) (emphasis added). Thus, any record that contains ''personal financial information'' is exempt from access by a requester under the RTKL[14]. *See id.*; *see also id.* §§ 67.102 (defining ''public records'' to exclude records that are exempt under Section 708), .301 (requiring agencies to provide access to ''public records'').

If this were the end of the analysis, we would be compelled to conclude that the certified payroll records at issue in this case are exempt from disclosure in their entirety[15]. But in applying any of the exemptions set forth in Section 708(b), we must consider subsection (c), which provides:

Financial records.—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). An agency shall not disclose the identity of an individual performing an undercover or covert law enforcement activity. *Id.* § 67.708(c). Pursuant to this provision of the RTKL, if a public record is a ''financial record,'' many of the exemptions in subsection (b) do not apply. The RTKL 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.

(3) A financial audit report. The term does not include work papers underlying an audit. *Id.* § 67.102.

Due to precedent from the Pennsylvania Supreme Court, we are constrained to conclude that the certified payroll records in this case are ''financial records''

under the RTKL. In Sapp Roofing, a private contractor sought to enjoin a labor union from the right to access a contractor's payroll records in the possession of a school district. The trial court denied the injunction, and, in an unreported decision, a three-judge panel of this Court affirmed. On appeal, a divided Supreme Court took up the question of whether the contractor's payroll records were open for inspection under the old Right-to-Know Law (''Old Law'')[16]. The payroll records at issue in *Sapp Roofing* included information similar to the certified payroll records at issue here—*i.e.*, employee names and addresses, social security numbers, job positions, rates of pay, etc.

Justice (now Chief Justice) Castille, writing the lead opinion, found that the payroll records fell within the definition of ''public records'' under the Old Law. He relied on the following language in the definition: '' 'Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property. . . .' '' *Sapp Roofing*, 552 Pa. at 108, 713 A.2d at 628 (quoting Section 1 of the Old Law). Justice Castille reasoned: ''[T]he payroll records are public records because they are records evidencing a disbursement by the school district.'' *Id.*, 552 Pa. at 109, 713 A.2d at 629 (emphasis added).

Sapp Roofing gained precedential force months later when our Supreme Court further examined the account/vouchers/contracts category of the definition of ''public records'' under the Old Law and cited Sapp Roofing with favor:

> The first of these categories deals generally with fiscal aspects of governance, providing for public review of accounts, vouchers or contracts ''dealing with'' receipts of and disbursements by an agency. This Court's decision in *Sapp Roofing*] concerned the accounts/vouchers/contracts category of public records. . . .
>
> . . . Implicit in the Court's decision in *Sapp Roofing* is the conclusion that the accounts/vouchers/contracts category of public records reaches some range of records beyond those which on their face constitute actual accounts, vouchers or contracts. Nevertheless, it is clear from *Sapp Roofing* that, to constitute a public record, the material at issue must bear a sufficient connection to fiscally related accounts, vouchers or contracts. *North Hills News Record v. McCandless*, 555 Pa. 51, 55, 722 A.2d 1037, 1038-39 (1999); *see also LaValle v. Office of Gen. Counsel*, 737 A.2d 330, 332 n.5 (Pa. Cmwlth. 1999) (''Although the decision in *Sapp Roofing* was a plurality decision, we note that the full Supreme Court in *North Hills* cited favorably to the reasoning employed in Sapp.''), *aff'd*, 564 Pa. 482, 769 A.2d 449 (2001). In *LaValle*, the Supreme Court summarized the impact of *Sapp Roofing* and *McCandless*:
>
> > These decisions establish that the Act reaches some class of materials that are not facially accounts, vouchers, contracts, minutes, orders or decisions. The general constraint upon this expanded class that became relevant in *McCandless* was that the party seeking to inspect government records must establish some

> close connection between one of the statutory categories and the materials sought. *LaValle v. Office of Gen. Counsel*, 564 Pa. 482, 493, 769 A.2d 449, 456 (2001).

These decisions from our Supreme Court and this Court examining the account/voucher/contract portion of the definition of ''public record'' under the Old Law are relevant because in crafting the new RTKL, the General Assembly essentially lifted this component of the old definition of ''public record'' and used it to define a new term—''financial record''—in the RTKL. The language in the two definitions is virtually identical[17]. Faced with a prior judicial interpretation in *Sapp Roofing*[18] by a majority of the Justices on the Pennsylvania Supreme Court of the account/voucher/contract language in the RTKL, even though issued in the context of the Old Law, we are not at liberty here to ascribe a different meaning to the same language. *See Nunez v. Redevelopment Auth. of Phila.*, 147 Pa. Commw. 577, 609 A.2d 207, 209 (Pa. Cmwlth. 1992) (''[A]s an intermediate appellate court, we are bound by the opinions of the Supreme Court.'')

Applying the Supreme Court's expansive reading of the account/voucher/contract language, the certified payroll records, in an indirect sense, are records that deal with or evidence the Commonwealth's dealings with these third-party contractors on public projects and the Commonwealth's disbursement of funds related to those public contracts. Unless and until the Supreme Court interprets the statutory language otherwise[19], we are constrained to conclude that the certified payroll records fall within the account/voucher/contract class of documents that under the Old Law were ''public records'' and under the new law are now ''financial records.'' The exemptions in Section 708(b) of the RTKL from disclosure thus do not apply to the certified payroll records in this case. 65 P. S. § 67.708(c)[20].

D. The Agencies' Acted Within Their Discretion In Redacting the Certified Payroll Record

Though the exemptions in subsection (b) of Section 708 of the RTKL do not apply to financial records, such as the certified payroll records here, subsection (c) nonetheless provides that an agency ''may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17).'' *Id.* Here, the Agencies produced redacted copies of the certified payroll records. Open Records held that the Agencies erred in redacting the names and/or home addresses of the third-party contractors' employees in those records. We find no error in the Agencies' decisions to exercise discretion afforded to them under the RTKL and to release the certified payroll records as redacted.

In its brief to the Open Records appeals officer, DCNR explained its reasons for redacting the home addresses as follows:

> The certified payrolls that are the subject of the instant RTKL request contain the name of the employer and the name, address, job classification, hourly rate of pay, number of hours worked during the reporting period, wages and fringe benefits paid, and deductions

> made for each listed employee. These employees are not agency employees and there can be no question that this constitutes personal financial information. *However, in order to provide information that may be useful to monitor compliance with the [PWA], portions of the information have been supplied, but not the home address. When coupled with the other information in the payroll records concerning their wages and employment, the home addresses of employees constitute "other information relating to an individual's personal finances" and should therefore be exempt from disclosure under* section 708(b)(6)(i)(A).(R.R. at 9a (emphasis added).) This reasoning is persuasive and can be applied with equal force to Budget's and DGS's decisions to redact the names and addresses of the third-party contractors' employees—*nongovernmental employees*—from the certified payroll records. The financial information contained in the certified payroll records is only personal to the individual employees so long as the identity of the employees is attached to the information. Redaction of the names and/or addresses renders what was personal financial information, impersonal. The Agencies thus acted reasonably and within the bounds of their discretion by producing the certified payroll records in redacted form to protect the personal nature of the financial information contained in those records[21].

V. CONCLUSION

Based on undisputed facts of record and for the reasons set forth above[22], we reach the following conclusions of law:

1. The certified payroll records at issue in these consolidated appeals are public records under the RTKL.

2. Because the certified payroll records are also financial records under the RTKL, none of the exemptions from access in Section 708(b) of the RTKL apply to the certified payroll records.

3. The Agencies did not abuse their discretion under Section 708(c) of the RTKL in redacting from the certified payroll records the names and/or addresses of the contractor's employees to shield the personal nature of the financial information in the certified payroll records, which is protected under Section 708(b)(6)(i)(A).

We thus reverse the final determinations and orders of Open Records.

P. KEVIN BROBSON, Judge

Judge Cohn Jubelirer concurs in the result only.

Notes:

[1] Act of February 14, 2008, P. L. 6, 65 P. S. §§ 67.101—67.3104. Open Records operates under the RTKL. One of Open Record's duties under the RTKL is to assign appeals officers to review, when challenged, decisions by Commonwealth agencies in response to RTKL requests and issue orders and opinions on those

challenges. *See* Section 1310 of the RTKL, 65 P. S. § 67.1310. Section 1301(a) of the RTKL authorizes an agency of the Commonwealth to file a petition for review with this Court from a final determination by an Open Records appeals officer. *Id.* § 67.1301(a).

[2] The third-party contractors apparently submitted the certified payrolls to the Agencies to prove their compliance with the Pennsylvania Prevailing Wage Act, Act of August 15, 1961, P. L. 987, as amended, 43 P. S. §§ 165-1 to -17 (PWA). We find nothing, however, in the PWA that requires private contractors to submit to the Agencies the level of detail contained in the certified payroll records in this case. *See Sapp Roofing Co. v. Sheet Metal Workers' Int'l Ass'n*, 552 Pa. 105, 713 A.2d 627 (1998) (Zappalla, J., concurring).

[3] Gribbin made his request in writing addressed to Scott Schaffer, Project Engineer of Western Engineering. It is apparent from the record, however, that this written request made its way to DCNR.

[4] It appears from the record that Gribbin did not challenge DCNR's decision to redact the employees' Social Security numbers from the certified payroll records; rather, his challenge was to the decision to redact home addresses.

[5] 65 P. S. § 67.708(b)(1)(ii).

[6] 65 P. S. § 67.708(b)(6)(i)(A).

[7] We find this decision by the Open Records appeals officer peculiar in light of her decision to deny DCNR's request for an evidentiary hearing to present evidence of harm.

[8] As set forth in Budget's memorandum of law submitted to Open Records, under the PWA, which relates to wages required to be paid to workers on construction projects for the Commonwealth and its political subdivisions, employers must pay the wage determined by the Secretary of Labor to be appropriate for a given class of worker.

[9] Neither DCNR nor Budget appears to have submitted similar documents in their filing with Open Records.

[10] 5 U.S.C. § 552.

[11] ''Record'' is defined as follows:

Information, regardless of physical form or characteristics, that documents a transaction or activity of any agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document. Section 102 of the RTKL, 65 P. S. § 67.102.

[12] Accordingly, we will not address whether the records fall within the other exemptions claimed by the Agencies.

[13] Notwithstanding dictionary support, we are confident that our decision to construe ''personal financial information'' to include wage and wage-related information for individuals, such as that included in the certified payroll records, is con-

sistent with the common usage and understanding of the phrase. Indeed, we are hard-pressed to fathom a piece of financial information that is more personal to the citizens of this Commonwealth—particularly those in the private sector—than how much they earn on a gross basis, how much is deducted from their paychecks for taxes and other withholdings, and their take-home pay.

[14] Contrast the exemption in clause (A) of Section 708(b)(6)(i) of the RTKL with the exemptions in clauses (B) and (C). In the latter two, the phrase ''a record containing'' does not precede the exempt information. Thus, unlike the exemption in clause (A), which exempts the entire record if it contains the exempt information, the exemptions in clauses (B) and (C) exempt only the information in what may otherwise be a ''public record'' that must be disclosed, albeit in redacted form. *See* 65 P. S. § 67.706 (Redaction).

[15] Had we concluded that the certified payroll records were records that were exempt from access, the agencies, nevertheless, would have had the discretion to release the records with redaction. Section 506(c) of the RTKL, 65 P. S. § 67.506(c), provides agencies with the discretionary power ''to make any otherwise exempt record accessible for inspection and copying.'' The RTKL prohibits such discretionary disclosure only if disclosure is prohibited by state or federal law or regulation, judicial order or decree, or the record is protected by a privilege. When no such prohibition exists, the ''agency head'' may provide for disclosure (and presumably partial disclosure) if he or she ''determines that the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access.'' An agency, therefore, in its discretion may release certain records or parts of records where none of the above-noted prohibitions bar release and where the head of the agency concludes that the public interest outweighs a public interest in access restriction.

[16] Act of June 21, 1957, P. L. 390, as amended, formerly 65 P. S. §§ 66.1-66.9 (repealed 2008).

[17] In preserving the account/voucher/contract language in the new law, the General Assembly is presumed to concur in the judicial interpretations placed on that language. *See Buehl v. Horn*, 728 A.2d 973, 980 (Pa. Cmwlth. 1999).

[18] Chief Justice Flaherty joined Justice Castille in the lead opinion, with Justice Zappalla filing a separate concurring opinion only to point out that nothing in the PWA required the contractor to submit to the school district the payroll records in question. Accordingly, three out of the five justices who considered the case expressly concluded that the payroll records in *Sapp Roofing* were public records. Justice Nigro concurred only in the result and did not write a separate opinion. But seeing as he concurred in the result—*i.e.*, that the unions should have access to the payroll records (in redacted form) under the Old Law, we must presume that he also concluded that the documents were public records. Thus, although *Sapp Roofing* is often described as a plurality decision, a strong majority of the justices in that case concluded that the payroll records were ''public records'' under the Old Law and thus affirmed the unpublished, unanimous panel opinion

from this Court. Only Justice Cappy dissented, noting that he believed that the records were not ''public records'' under the Old Law. No other justices participated in the decision in *Sapp Roofing*.

[19] Unlike *Sapp Roofing*, in this case the contractors affected by the agencies' disclosure of the certified payroll records are not before the Court to argue their interests or that of their employees in ensuring that the personal financial information of these nongovernmental employees be exempt from RTKL requests. Moreover, none of the parties before the Court in these consolidated appeals have pressed us to conclude, contrary to Sapp Roofing, that the certified payroll records are not ''financial records'' under the RTKL. Accordingly, while the opportunity may come for the Supreme Court to revisit its broad interpretation of the account/voucher/contract language, these consolidated appeals do not appear to present that opportunity

[20] Though we do not address in this opinion specifically the Agencies' claim that the exemptions in Sections 708(b)(1) and (b)(17) of the RTKL also support their decision to redact the certified payrolls, we would find that those exemptions also do not apply by virtue of Section 708(c) of the RTKL for the reason set forth above.

[21] Our holding in this case is limited to the public records at issue in these consolidated appeals—*i.e.*, certified payroll records of private employers doing business with Commonwealth agencies—and the propriety of the Agencies' redactions to protect the personal financial information of private citizens. Our holding should not be construed as a recognition (or rejection) of an exemption under the RTKL for names and/or addresses generally when such information is in the possession of a Commonwealth or local agency.

[22] Although we agree with Open Records' comment that an agency seeking to deny access to a record has the burden to prove by a preponderance of the evidence that the record is exempt, Section 708(a)(1) of the RTKL (65 P. S. § 67.708(a)(1)), the question presented and resolved above is one of law. The Agencies, by providing copies of the redacted certified payroll records or by describing the contents and the redactions, provided the only evidence that was necessary for the Court to address the overarching legal issues in this case—namely, whether the documents were accessible under the RTKL and, if so, whether the Agencies erred in producing only redacted copies.

Bowling v. Office of Open Records

Commonwealth Court of Pennsylvania

990 A.2d 813 **February 5, 2010**

Reporter's summary: The Commonwealth Court considered an appeal based on redaction and formatting of a document provided by PEMA. The court declined to rule on the formatting requirements for documents provided under the Right-to-Know Law, but did rule on the redaction. The court found that PEMA's redaction based on claimed homeland security issues was too broad and the court remanded the appeal.

Headnotes:

Appeals process —Under the Right-to-Know Law, courts utilize a broad and independent review of the decisions.

Brian Bowling, Petitioner v. Office of Open Records, Respondent
COMMONWEALTH COURT OF PENNSYLVANIA
990 A.2d 813; 2010 Pa. Commw.
December 9, 2009, Argued
February 5, 2010, Decided
February 5, 2010, Filed
OPINION BY JUDGE SIMPSON

This appeal from a Commonwealth administrative agency concerns the recently re-enacted Right-to-Know Law (Law). n1 Brian Bowling (Requester), an employee of the Pittsburgh Tribune-Review, petitions for review from a final determination of the Office of Open Records (OOR)[1] granting in part his request for records of goods and services the Pennsylvania Emergency Management Agency (PEMA) purchased with Department of Homeland Security (Homeland Security) grant funds. PEMA granted the right-to-know request but redacted the identities of the recipients of the goods and services purchased. It also redacted records pertaining to the Buffer Zone Protection Program[2]. The OOR denied Requester's appeal concluding PEMA properly withheld the recipients' names under Section § 708(b)(2) of the Law, 65 P. S. § 67.708(b)(2) (exemption from disclosure of public records pertaining to military, homeland security, national defense, law enforcement, or public safety).

In this appeal, we address the manner of judicial review of an OOR determination as well as issues raised in Requester's petition for review. Requester questions: whether documents disclosing the identities of recipients of emergency response equipment purchased by PEMA are public records under the Law; whether those documents are exempt from access on the basis their release would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity; and, whether Requester is entitled to the information

sought in a medium in which it exists. Concluding PEMA redacted the records requested in a manner inconsistent with the Law, we reverse and remand to the OOR with instructions for further remand to PEMA for refinement of the redactions.

I. The Right-to-Know Law

In 2008, the General Assembly passed the new Right-to-Know Law, which made sweeping changes to access of government records. In addition to the issues raised on appeal, we are particularly concerned with the Law's procedures for review of right-to-know determinations. The following is a brief overview of the new procedures set forth in the Law.

Pursuant to Section 502 of the Law, each agency must designate an official or employee to act as an open-records officer. 65 P. S. § 67.502. Among other duties, the designated individual issues the agency's final response to a request for public records. *Id*[3]. In denying a request in whole or in part, the open-records officer must provide a written description of the record requested with specific reasons for the denial. Section 903 of the Law, 65 P. S. § 67.903.

If the agency denies the request, or it is deemed denied, a requester may file an appeal with the OOR. OOR assigns an appeals officer to review the decision of the agency's open-record's officer, and to issue an order and opinion disposing of the appeal. Section 1310 of the Law, 65 P. S. § 67.1310. Notably, the appeals officer may, in his or her discretion, conduct a hearing prior to issuing a final decision. Section 1101(b)(3) of the Law, 65 P. S. § 67.1101(b)(3). The appeals officer must provide a written explanation for the decision. *Id*[4].

Chapter 13 of the Law governs judicial review. If the appeals officer's final determination relates to a decision of a Commonwealth, legislative or judicial agency, the requester or the agency may file a petition for review with the Commonwealth Court. Section 1301(a) of the Law, 65 P. S. § 67.1301(a). If the appeals officer's final determination relates to a decision of a local agency, the requester or the local agency may file a petition for review with the court of common pleas for the county in which the agency is located. Section 1302(a) of the Law, 65 P. S. § 67.1302(a). The court's decision on appeal ''shall contain findings of fact and conclusions of law based upon the evidence as a whole'' and ''clearly and concisely explain the rationale for the decision.'' 65 P. S. §§ 67.1301(a) and 1302(a). The record on appeal consists of the request, the agency's response, the appeal filed with the OOR, the hearing transcript, if any, and the final written determination of the appeals officer. Section 1303(b) of the Law, 65 P. S. § 67.1303(b).

The current right-to-know request proceeded through the newly enacted procedure.

II. Facts

On January 2, 2009, Requester filed a written request with PEMA seeking all invoices and contracts for first responder equipment and services which PEMA

purchased with Homeland Security funds for fiscal years 2005-08. Reproduced Record (R.R.) at 6a-7a. Over the next several days, Requester and PEMA's Open-Records Officer clarified the request to mean ''electronic spreadsheets maintained by PEMA containing information regarding equipment procured for the nine (9) regional counterterrorism task forces with 2005-08 Homeland Security grant funds.'' *Id.* at 8a.

PEMA granted the request and created a ''.pdf'' document of the invoices[5]. However, PEMA redacted some information purportedly exempt from disclosure pursuant to Sections 708(b)(2) (relating to military, homeland security, national defense, law enforcement, or public safety) and 708(b)(3)(ii) of the Law (relating to safety or security of buildings, public utilities, resources, infrastructure, facilities, or information storage systems). 65 P. S. §§ 67.708(b)(2), (b)(3)(ii).

PEMA first redacted the names of *all* recipients of the equipment procured as critical information that reveals gaps, vulnerabilities and emergency response capabilities in the Commonwealth. R.R. at 8a. PEMA explained disclosure of the recipients' names would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activities. *Id.* PEMA also redacted information pertaining to the Buffer Zone Protection Program on the ground that the information discloses sites in the Commonwealth designated as critical infrastructure. *Id.* PEMA explained that disclosure would be reasonably likely to endanger the safety and/or physical security of a Program building, public utility, resource, infrastructure, facility or information storage system. R.R. at 8a-9a[6]. As such, the redactions constituted a partial denial of Requester's request.

Requester appealed to the OOR. First, Requester disputed PEMA's conclusion that disclosure of the names of the recipients of goods purchased would show gaps, vulnerabilities and emergency response capabilities in the Commonwealth. According to Requester, such documentation would show fortification of the Commonwealth's emergency response capabilities. Second, although not disputing non-disclosure of Buffer Zone Protection Program records, Requester asserted the redactions relating to the Program must be more clearly identified to enable meaningful review of PEMA's redaction of the names of the recipients of the goods and services purchased. Finally, Requester challenged the format by which PEMA satisfied his request. PEMA provided Requester with a ''.pdf'' version of the records even though it maintains the records in a Microsoft Excel spreadsheet.

The OOR Appeals Officer permitted PEMA and Requester to file memoranda in support of their respective positions; however, the OOR Appeals Officer did not conduct a hearing. The OOR Appeals Officer first determined PEMA did not violate the Law by providing Requester a ''.pdf'' file of the records. OOR Dec., 4/17/09, at 9. The OOR Appeals Officer concluded that the Law authorizes inspection and duplication of public records but does not require the records be provided in a manner subjecting them to alteration or manipulation. *Id.*; *see* Sec-

tion 701(b) of the Law, 65 P. S. § 67.701(b) (''[n]othing in this act shall be construed to require access to any computer either of an agency or individual employee of an agency.'').

The OOR Appeals Officer further determined PEMA properly redacted information identifying the recipients of goods and services procured through Homeland Security grants. PEMA persuaded the OOR Appeals Officer there is a strong connection between knowing what entities receive emergency equipment and a threat to public safety. According to the OOR Appeals Officer, PEMA provided examples of how disclosure of the recipients' identities would expose vulnerabilities and gaps in emergency preparedness and could point terrorists in the direction of high profile or weak targets[7]. OOR Dec., 4/17/09, at 10.

Requester now appeals the OOR Appeals Officer's determination. PEMA appears as Intervenor[8].

III. Preliminary Considerations

Before we reach the merits of Requester's appeal, we first resolve questions regarding the standard and scope of judicial review of an OOR decision. Requester submits our standard of review is *de novo* where the Law directs this Court to issue findings and conclusions based on the evidence as a whole. 65 P. S. § 67.1301(a). This is more in line with our original jurisdiction rather than with deferential appellate review. Conversely, PEMA urges application of the traditional, three-pronged appellate standard of review for administrative agency determinations: whether the record supports the findings of fact, whether errors of law were committed, or whether constitutional rights were violated.

In a detailed discussion, our Supreme Court clarified in *Morrison v. Department of Public Welfare, Office of Mental Health (Woodville State Hosp.)*, 538 Pa. 122, 131, 646 A.2d 565, 570 (1994), that ''scope of review'' and ''standard of review'' refer to two distinct concepts and should not be confused. Considering a motion for new trial, the Court explained:

> ''Scope of review'' refers to ''the confines within which an appellate court must conduct its examination.'' *Coker v. S.M. Flickinger Company, Inc.*, 533 Pa. 441, 450, 625 A.2d 1181, 1186 (1993). In other words, it refers to the *matters* (or ''what'') the appellate court is permitted to examine. In contrast, ''standard of review'' refers to the manner in which (or ''how'') that examination is conducted. *In Coker* we also referred to the standard of review as the ''degree of scrutiny'' that is to be applied. *Id.*, 625 A.2d at 1186.

A. Standard of Review

For the following reasons, we conclude that a reviewing court, in its appellate jurisdiction, independently reviews the OOR's orders and may substitute its own findings of fact for that of the agency.

1. Initially, we examine the statutory language providing for judicial review. Section 1301(a) of the Law provides that decisions of the reviewing

court shall contain findings and conclusions based on the evidence as a whole. 65 P. S. § 67.1301(a). This express duty of fact-finding is consistent with a standard similar to *de novo* review.

Also, Section 1309 of the Law specifies that the provisions of 2 Pa.C.S. (relating to administrative law and procedure) shall not apply unless specifically adopted by regulation or policy. 65 P. S. § 67.1309. As a result, among the provisions which do not apply to the Law is Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704 (disposition of appeal), which provides, with emphasis added:

> The court shall hear the appeal without a jury on the record certified by the Commonwealth agency. After hearing, *the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence*. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa.C.S. § 706 (relating to disposition of appeals).Thus, the Law commands tha the usual deferential standard of review on appeal from Commonwealth agencies, such as the OOR, does not apply.

2. Next, we seek guidance from the Freedom of Information Act (FOIA), the federal counterpart to our Law. *See* 5 U.S.C. § 552. The FOIA provides a two-step process for obtaining public records of federal government agencies. Like local and Commonwealth agencies, each federal agency is required to designate a Chief FOIA Officer who is responsible for compliance with the FOIA. 5 U.S.C. § 552(j-l). In the event an agency withholds the records requested, the appropriate district court may order production of records improperly withheld. 5 U.S.C. § 552(a)(4)(B). Upon review, the district court ''shall determine the matter *de novo*, and may examine the contents of such agency records in camera to determine whether such records or any part therefore shall be withheld under any of the [applicable exemptions]. . . .'' *Id. See also Vaughn v. Rosen*, 484 F.2d 820, 823, 157 U.S. App. D.C. 340 (D.C. Cir. 1973) (''when the [g]overnment declines to disclose a document the burden is upon the agency to prove *de novo* in trial court that the information sought fits under one of the exemptions to the FOIA'').

3. We also look for guidance to similar, if not identical, appeal procedures which involve independent review and fact-finding. This Court, in its appellate jurisdiction, conducts fact-finding when reviewing decisions of the Board of Finance and Review (F&R Board). *See Pa. R.A.P. 1571*. There is similarity between the Appellate Rule governing review of F & R Board determinations and the Law's appeal procedures.

Appellate *Rule 1571* sets forth the procedures for appellate review. Particularly helpful here are *subsections (f) and (h)*. The F & R Board does not certify a record to the Court. *Pa. R.A.P. 1571(f)*; *Tool Sales & Serv. Co., Inc. v. Commonwealth*, 536 Pa. 10, 637 A.2d 607 (Pa. Cmwlth. 1993). The record is made before the Court by stipulation or evidentiary hearing. *See* Pa. R.A.P. 1542 (''Evidentiary Hearing); Pa. R.A.P. 1571(f); 20A *West's Pa. Appellate Practice*, § 1571:9 (2008). The stipulations of fact are binding and conclusive on the court; however, we may draw our own legal conclusion from those facts. *Norris v. Commonwealth*, 155 Pa. Commw. 423, 625 A.2d 179 (Pa. Cmwlth. 1993). Thus, this Court functions as a trial court although the matter appears in our appellate jurisdiction. *See* 42 Pa.C.S. § 763 (Direct appeals from government agencies).

Notably, when reviewing F & R Board determinations, we are entitled to the broadest scope of review. Allfirst Bank v. Commonwealth, 895 A.2d 669 (Pa. Cmwlth. 2006), *aff'd*, 593 Pa. 631, 933 A.2d 75 (2007); Ignatz v. Commonwealth, 849 A.2d 308 (Pa. Cmwlth. 2004); *Norris*; PICPA Found. For Educ. & Research v. Commonwealth, 143 Pa. Commw. 291, 598 A.2d 1078 (Pa. Cmwlth. 1991), *aff'd*, 535 Pa. 67, 634 A.2d 187 (1992)[9].

4. In light of the foregoing discussion, we conclude that while reviewing this appeal in our appellate jurisdiction, we function as a trial court, and we subject this matter to independent review. We are not limited to the rationale offered in the OOR's written decision. Accordingly, we will enter narrative findings and conclusions based on the evidence as a whole, and we will explain our rationale.

B. Scope of Review

For the following reasons, we conclude that a court reviewing an appeal from an OOR hearing officer is entitled to the broadest scope of review.

1. The Law designates the record on appeal before a court as the request for public records, the agency's response, the appeal, the hearing transcript, if any, and the final written determination of the appeals officer. 65 P. S. § 67.1303(b). The Law does not expressly restrain a court from reviewing other material, such as a stipulation of the parties, or an *in camera* review of the documents at issue. Also, the Law does not prohibit a court's supplementation of the record through hearing or remand.

It is unclear whether the General Assembly intended the Law to limit a reviewing court's scope of review or merely to describe the items which must be certified to a court for review. Accordingly, we engage in statutory construction.

2. The language of the Law describing the record on appeal before a court predates the current Law. In 2002, the previous version of the Right-to-Know Law was amended to include the provision that the record on appeal to a court shall be ''the request, the agency's response, the requester's exceptions, if applicable, the hearing transcript, if any, and the agency's final determination,

if applicable.'' *See* Former Section 4 of the Law, added by the Act of June 29, 2002, P. L. 663, *formerly*, 65 P. S. § 66.4, repealed by the Act of February 14, 2008, P. L. 6.

In deciding the effect of the current language on our scope of review, we may consider appellate decisions made while functionally identical language was in effect. 1 Pa.C.S. § 1921(c)(5) (the intention of the General Assembly may be ascertained by considering, among other matters, the former law, including other statutes on the same subject). In Nernberg v. City of Dubois, 950 A.2d 1066 (Pa. Cmwlth. 2008), *appeal denied*, 600 Pa. 772, 968 A.2d 234 (2009), the trial court reviewed an appeal from a deemed denial under the former Right-to-Know Law. The court admitted evidence during a hearing. The evidence was admitted over objection. Ultimately, this Court affirmed, although for reasons unrelated to the enlargement of the record.

Similarly, in *York Newspapers, Inc. v. City of York*, 826 A.2d 41 (Pa. Cmwlth. 2003), the trial court issued an order establishing the procedure whereby the requested records would be searched, conducted a view of the location where the records were stored, permitted the requester to review boxes previously searched, and conducted *in camera* review of documents to which the parties could not agree. This Court affirmed for reasons unrelated to the enlargement of the record. *See also Muir v. Alexander*, 858 A.2d 653 (Pa. Cmwlth. 2004) (trial court conducted *in camera* review of settlement agreement between school district and former employee).

Moreover, several recent appellate decisions suggest that a court's *in camera* review of public records sought under the former Right-to-Know Law is permissible. *Tribune-Review Publ'g Co. v. Bodack*, 599 Pa. 256, 961 A.2d 110 (2008) (Saylor, J. concurring) (recognizing availability of *in camera* review in appropriate cases); *Commonwealth ex rel. v. Dist. Attorney of Blair County*, 2003 PA Super 114, 823 A.2d 147 (Pa. Super. 2003), *aff'd*, 583 Pa. 620, 880 A.2d 568 (2004) (common pleas court reviewed autopsy report in camera to determine whether Commonwealth established release of report would hinder homicide investigation); *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177 (Pa. Cmwlth. 2006) (Commonwealth Court retained jurisdiction over request to PHEAA for expense vouchers to conduct in camera review, if necessary, over redacted information); *Weiss v. Williamsport Area Sch. Dist.*, 872 A.2d 269 (Pa. Cmwlth. 2005) (common pleas court reviewed school documents *in camera* to determine whether they were public records). *See also LaValle v. Office of Gen. Counsel*, 564 Pa. 482, 769 A.2d 449 (2001) (sound policy would support availability of *in camera* review by Commonwealth Court where appropriate; case decided before statutory language describing record on appeal). As previously noted, this procedure is consistent with the federal district court's authority to conduct *in camera* review under the FOIA. *See* 5 U.S.C. § 552(b).

In sum, appellate courts deciding cases under the former Right-to-Know Law did not restrict reviewing courts from considering information beyond the record described in the statutory language.

3. We also find guidance in our Supreme Court's decision in *Appeal of Borough of Churchill*, 525 Pa. 80, 575 A.2d 550 (1990), which addressed a court's inherent authority to control matters before it in a statutory appeal. In *Borough of Churchill*, a landowner appealed a board of assessment's determination of the fair market value of property to the court of common pleas. A question arose as to post-trial practice. In particular, confusion arose as to whether the appealable order was the order entered after hearing or the order disposing of post-trial motions.

On landowners' appeal from the order disposing of post-trial motions, this Court quashed the appeal. We reasoned that post-trial practice does not apply to statutory appeals; therefore, the appealable order was the order entered after hearing, not the order disposing of post-trial motions.

On further appeal, the Supreme Court reversed. Of particular note, the Supreme Court agreed with our conclusion the Rules of Civil Procedure do not apply in statutory appeals. But, the Court further stated:

> Since the Rules of Civil Procedure are inapplicable to statutory appeals, rules of practice and procedure [do] not have to be enacted in strict compliance with the provisions of Rule 239 [relating to local rules]. Rather, our trial courts have had the right to enact rules and publish these to cover practice in this area of the law. Where they have not created and published such local rules, then each trial court has been vested with the full authority of the court to make rules of practice for the proper disposition of cases before them and that we have enforced those rules unless they violated the Constitution or laws of the Commonwealth or United States, or our state-wide rules. The general, inherent power of all courts to regulate their own practice, without control, on the ground of expediency, has been recognized by this court for almost one hundred and eighty years . . . and we see no reason at this time to disturb that well-settled principle. *Id.* at 89, 575 A.2d at 554. As the common pleas court in *Borough of Churchill* expressly invited the parties to file exceptions to its decision, and its decision to do so did not violate case law or state-wide rules, the Supreme Court concluded post-trial practice was not prohibited. Thus, the appealable order was the order disposing of post-trial motions.

Our Supreme Court in Borough of Churchill held that a court reviewing a decision in a statutory appeal possesses the inherent right to employ rules for procedure and practice before it so long as the rules do not conflict or violate the laws of the Commonwealth or the United States. As discussed above, the current Law does not expressly restrain a court from reviewing other material or prohibit

a court's supplementation of the record through hearing or remand. The rationale in *Borough of Churchill* supports a conclusion that, in the absence of a specific restriction, a court deciding a statutory appeal has the inherent authority to take reasonable measures to ensure that a record sufficient for judicial review exists.

4. In light of the discussion above, we conclude that Section 1303 of the Law was not intended to restrict a reviewing court's scope of review. Rather, similar to this Court's review of F & R Board decisions, a court is entitled to the broadest scope of review. *Allfirst Bank; Ignatz*. The language in Section 1303 of the Law was intended to describe the record to be certified by the OOR to a reviewing court.

However, the overall statutory scheme of the Law clearly indicates the General Assembly's intent that issues regarding access to public records be resolved expeditiously and efficiently. This is most evident in Chapters 9 and 11 of the Law, which deal with agency responses to requests and initial appeals of agency determinations. 65 P. S. §§ 67.901-67.1102.

For example, Section 901 of the Law requires that an agency respond to a request within five business days of receipt of the request by the agency's open records officer. 65 P. S. § 67.901. Failure to do so may result in a deemed denial. *Id.* Under certain circumstances, the time to respond may be extended up to 30 additional days. Section 902 of the Law, 65 P. S. § 67.902.

Also, Section 1101 of the Law imposes tight time limits on the time to file an initial appeal to OOR (15 days) and on the time within which an OOR appeals officer shall resolve an initial appeal (30 days). 65 P. S. § 67.1101. An appeal is deemed denied where no determination is rendered by the appeals officer within 30 days. *Id.* In the absence of regulation, policy or procedure governing initial appeals, the appeals officer shall rule on procedural matters ''on the basis of justice, fairness *and the expeditious resolution of the dispute*.'' Section 1102 of the Law, 65 P. S. § 67.1102 (emphasis added).

Given this overall scheme, a court reviewing an appeal from the OOR under the Law should consider the manner of proceeding most consistent with justice, fairness and expeditious resolution. For example, should a hearing be necessary for proper review, a court may consider that a hearing before an OOR appeals officer is not attended with the same formality as in court. *See* Section 1102(a)(2) of the Law, 65 P. S. § 67.1102(a)(2) (appeals officer may admit into evidence information believed to be reasonably probative and relevant; appeals officer may limit cumulative evidence)[10]. Also, a court should consider that at times requesters will be unrepresented and therefore at a disadvantage in certain court proceedings.

IV. Merits

A. Issues

On appeal, Requester assigns error in the OOR's conclusion that PEMA proved it properly withheld the names of recipients of goods and services purchased with

Homeland Security grant funds. He also claims the OOR erred by denying access to the records in the medium requested.

B. Public Records

The new Law is significantly different in that the prior version of the Law narrowly defined the term ''public record[11].'' Under the current Law, however, any record, including financial records of a Commonwealth or local agency, is a public record to the extent the record: is not exempt from disclosure under the Law; is not exempt under Federal or State law, regulation, or judicial order or decree; or, is not protected by privilege. Section 102 of the Law, 65 P. S. § 67.102. In turn, the term ''record'' is defined as [i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document. *Id.*

Here, there is no dispute, and we so find, the records at issue are records as defined by the Law. The issue, therefore, is whether the records are ''public records'' and whether there is a statutory exemption prohibiting their disclosure.

We also find the records requested are public records. Indeed, PEMA does not disagree to the extent it provided information contained within the records Requester sought: the purchase order number; the quantity and types of goods and services purchased; the unit price; the total purchase price; the total of all items on a single purchase order; the date upon which PEMA sent the purchase order to the vendor; and, the vendor. *See* R.R. at 10a-286a.

C. Statutory Exemption

We therefore consider whether Section 708(b)(2) and (3) requires PEMA to withhold the names of the recipients of the goods and services purchased. As the Law is remedial legislation 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, the exemptions from disclosure must be narrowly construed. *See generally Borough of Youngwood v. Pa. Prevailing Wage Appeals Bd.*, 596 Pa. 603, 947 A.2d 724 (2008) (exemptions to remedial legislation must be construed narrowly); *Lukes v. Dep't of Pub. Welfare*, 976 A.2d 609 (Pa. Cmwlth. 2009) (purposes of Law); *see also Judicial Watch, Inc. v. U.S. Dep't of State*, 650 F. Supp. 2d 28 (D.D.C. 2009) (exemptions from disclosure must be construed in such a way as to provide maximum access consonant with overall purpose of FOIA).

PEMA cited subsections 708(b)(2) and (3)(ii) of the Law, 65 P. S. § 67.708(b)(2) and (3)(ii), to justify redaction of the recipients' names. In their entirety, these subsections provide the following records shall not be accessed by a requester:

> (2) A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety

activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated by an appropriate Federal or State military authority.

(3) A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include:

(i) documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act;

(ii) lists of infrastructure, resources and significant special events, including those defined by the Federal Government in the National Infrastructure Protections, which are deemed critical due to their nature and which result from risk analysis; threat assessments; consequence assessments; antiterrorism protective measures and plans; counterterrorism measures and plans; and security and response needs assessments; and

(iii) building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

Reviewing the statutory exemption and the public records subject to this appeal, we conclude PEMA erred in part by redacting the names of *all* recipients.

More particularly, a cursory review of the reproduced record indicates some goods and services purchased are not of such significance that knowing their location endangers the public safety or preparedness, or the physical security of a building, public utility, resource, infrastructure, facility or information storage system. 65 P. S. § 67.708(b)(2) and (3); *see* R.R. at 10a-284a. By way of example, we fail to see how knowledge of the location of ''bungee cords'' endangers public safety or security of facilities. *See* R.R. at 11a. The reproduced record is replete with examples of innocuous items the location of which is not vital to local, state, or national public safety, preparedness, or public protection activity.

On the other hand, we agree with PEMA that knowledge of the location of some goods and services may pose a threat to public safety, preparedness and protection activity. For example, PEMA purchased a number of computer servers. R.R. at 3a. Knowledge of the location of servers has the potential to endanger an information storage system. 65 P. S. § 67.708(b)(3). Similarly, knowledge of the location of biochemical testing equipment could indicate a taskforce's ability to effectively respond to a chemical threat. *See* R.R. at 115a.

In other words, PEMA's sweeping redaction of the recipients' names is overbroad. Whether knowledge of the location of a particular item (with its supporting goods and services) is reasonably likely to pose a threat to or endanger pub-

(357720) No. 442 Sep. 11

lic safety cannot be made using a blanket approach. PEMA's method of withholding the recipients' names runs counter to the purposes of the Law. Therefore, PEMA must make a reasonable effort to differentiate between goods and services which are reasonably likely to endanger public safety and those that do not. In the latter instance, PEMA must provide Requester with the names of the recipients of the goods and services purchased with Homeland Security funds.

We are mindful, however, Section 705 of the Law, 65 P. S. § 67.705, specifically provides that an agency is not required to ''compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.'' Thus, we must leave to the discretion of the agency the manner it chooses to release the names of the recipients of goods and services purchased with Homeland Security funds for fiscal years 2005-2008 which do not pose a threat to public safety or facilities[12].

We appreciate the enormity of the task before PEMA on remand. Nevertheless, the General Assembly's enactment of the new Law evidences its commitment to providing greater access to the Commonwealth's public records. PEMA's redaction of all recipients' names is far too reaching, and the broad redaction fails to consider that the location of all goods and services is not vital to public safety.

Accordingly, we reverse and remand this matter to the OOR with further instructions for remand to PEMA allowing it to refine its redactions consistent with our discussion[13].

ROBERT SIMPSON, Judge

Notes:

[1] The General Assembly established the Office of Open Records (OOR) as part of its overhaul of Pennsylvania's former Right-to-Know Law. The OOR is within the Department of Community and Economic Development. *See* Section 1310 of the Law, 65 P. S. § 67.1310.

[2] According to PEMA, the Buffer Zone Protection Program identifies sites within the Commonwealth that the Department of Homeland Security designates as ''critical infrastructure.'' Reproduced Record (R.R.) at 8a.

[3] *See also* Sections 705 (creation of record), 706 (redaction), 707 (production of records) and 901 (agency response) of the Law, 65 P. S. §§ 67.705-67.707, and § 67.901.

[4] Pursuant to Section 1309 of the Law, 65 P. S. § 67.1309, the provisions of 2 Pa.C.S. (relating to administrative law and procedure) do not apply to the Law unless specifically adopted by regulation or policy.

[5] ''PDF'' stands for ''portable document format.'' A ''.pdf'' is a file format which captures formatting information from desktop publishing applications making it possible to send documents and have them appear on the recipient's monitor as they were intended to be viewed. Available at www.webopedia.com/DidYouKnow/Computer Science/2005/pdf.asp.

[6] PEMA also reasoned Buffer Zone Protection Program information is exempt from disclosure under the Homeland Security's Protected Critical Infrastructure

Information Program. *See* Critical Infrastructures Protection Act of 2001, 42 U.S.C. § 5195c. Records designated as critical infrastructure information are exempt from disclosure under the Freedom of Information Act (FOIA) as well as state and local disclosure laws. *See* FOIA, 5 U.S.C. § 552(b)(3) (protection from disclosure of records by statute); 6 U.S.C. § 133(a)(1)(A) (protection of voluntary shared critical infrastructure information). ''Critical infrastructure'' is defined as ''systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.'' 42 U.S.C. § 5195c(e).

[7] In its supporting memorandum, PEMA maintained knowledge of the location of the goods and services: draws a map to equipment that terrorists may wish to destroy or steal; allows terrorists to formulate plans to circumvent the protective equipment; and, makes target selection easier. In addition, PEMA attached to its memorandum three documents: a 2009 Taskforce Allocation Formula; a formula for assessing ''risk''; and, an affidavit James F. Powers, Director of the Department of Homeland Security for PEMA. The director's affidavit reinforces PEMA's position that knowledge of even insignificant goods can be critical pieces of information to the Commonwealth's safety and security. *See* OOR Record, at Tab 8.

Requester submitted an October 2007 Legislative Budget and Finance Committee report, ''A Review of Pennsylvania's Homeland Security Program.'' The purpose of the report was to address the need to strengthen and clarify Pennsylvania's homeland security program and expenditure of funds. OOR Record, at Tab 21.

[8] The Pennsylvania Newspaper Association appears as *amicus curiae*.

[9] Our conclusion is also consistent with other avenues of statutory appeals where a reviewing tribunal on appeal is permitted to take additional evidence and render findings of fact. *See generally* 75 Pa.C.S. § 1550 (pertaining to judicial review of Department of Transportation decisions affecting operating privileges); *Commonwealth v. Etzel*, 370 Pa. 253, 86 A.2d 64 (1952) (it was incumbent on trial court to make findings of fact from the evidence adduced at hearing and enter order consistent with such findings on appeal from license suspension); Section 1005-A of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P. L. 805, *as amended*, *added* by the Act of December 21, 1988, P. L. 1329, 53 P. S. § 11005-A (court of common pleas may receive additional evidence on appeal from zoning determination); *DeCray v. Zoning Hearing Bd. of Upper Saucon Twp.*, 143 Pa. Commw. 469, 599 A.2d 286 (Pa. Cmwlth. 1991) (trial court required to decide zoning appeal de novo where it took additional evidence); *Hastings Indus. v. Workmen's Comp. Appeal Bd. (Hyatt)*, 531 Pa. 186, 611 A.2d 1187 (1992) (Workers' Compensation Appeal Board has broad scope of review in disfigurement cases); *W. Pa. Hosp. v. Workers' Comp. Appeal Bd. (Cassidy)*, 725 A.2d 1282 (Pa. Cmwlth. 1999) (amendments to Workers' Com-

pensation Act, Act of June 2, 1915, P. L. 736, *as amended*, 77 P. S. §§ 1-1041.4, 2501-2708, did not affect Workers' Compensation Appeal Board's scope of review in disfigurement cases); Section 518.2 of The General County Assessment Law, Act of May 22, 1933, P. L. 853, *as amended*, *added* by the Act of December 13, 1982, P. L. 1160, 72 P. S. § 5020-518.2 (court of common pleas shall determine market value of property subject to tax assessment appeal); *Matter of Harrisburg Park Apartments*, 88 Pa. Commw. 410, 489 A.2d 996 (Pa. Cmwlth. 1985) (trial court is fact-finder in tax assessment appeals and is required to independently determine fair market value of property); *Two Sophia's, Inc. v. Pa. Liquor Control Bd.*, 799 A.2d 917 (Pa. Cmwlth. 2002) (trial court is required to receive record below, and together with any other evidence properly submitted, make findings and conclusions).

[10] Section 1101(a)(2) of the Law also provides that an appeals officer's decision to hold or not to hold a hearing is not appealable. We construe this provision to be a limitation on a requester's ability to appeal a denial of hearing, not a limitation on the inherent authority of a court to supplement a record so that it is sufficient for review.

[11] *See* Former Section 1 of the Law, formerly, 66 P. S. § 66.1.

[12] For guidance, we refer PEMA to two approaches which the federal courts use when addressing an agency's claim of disclosure exemption under the FOIA. First, the District of Columbia Circuit Court of Appeals established in *Vaughn v. Rosen*, 484 F.2d 820, 157 U.S. App. D.C. 340 (D.C.Cir., 1973), an item-by-item indexing system which correlates to a specific FOIA exemption.

The second approach recognized that a ''*Vaughn* index'' may not be a practical approach in view of the records requested. In some instances, a satisfactory index could undermine the exemption and, in those cases, agencies may proffer generic determinations for nondisclosure. *Curran v. Dep't of Justice*, 813 F.2d 473 (1st Cir. 1987); *see also Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 252 U.S. App. D.C. 232 (D.C.Cir. 1986). This does not, however, absolve agencies from making a minimally sufficient showing of exemption. *Curran*. Agencies may justify their exemptions on a category-of-document by category-of-document basis. *Id.* The chief characteristic of a category-of-document methodology must be functionality, that is, the classification should be clear enough to permit a court to ascertain ''how each . . . category of documents, if disclosed, would interfere with [the agency's duty not to disclose exempt public records].'' *Id.* at 475.

[13] Because remand may alter the format in which PEMA provides the public records, we will not consider at this time Requester's argument PEMA violated the Law by failing to produce the public records in the format requested. *See Lake v. City of Phoenix*, 222 Ariz. 547, 218 P.3d 1004 (Ariz. 2009).

Signature Information Solutions, LLC. v. Aston Township

Commonwealth Court of Pennsylvania

995 A.2d 510 **May 26, 2010**

Reporter's summary: A request was made for certain tax documents from the Township. TheTtownship denied this request because the information was available online. On appeal, the township then explained that the printouts did not exist. Although the appeals officer disregarded this information, on appeal to the Court of Common Pleas, the court found that . On appeal with the Commonwealth Court, the Court found that the trial erred in allowing for the consideration of the explanation provided by the township. The township must only submit documents supporting the original denial.

Headnotes:

Appeals process: It is not proper for an appeals officer or court to consider information that goes beyond merely supporting the original denial of a record.

Signature Information Solutions, LLC, Appellant v. Aston Township

COMMONWEALTH COURT OF PENNSYLVANIA

995 A.2d 510; 2010 Pa. Commw.

February 9, 2010, Argued

May 26, 2010, Decided

May 26, 2010, Filed

OPINION BY SENIOR JUDGE FRIEDMAN n1

Signature Information Solutions, LLC, (Requester) appeals from the May 27, 2009, order of the Court of Common Pleas of Delaware County (trial court), which reversed the Final Determination of the Pennsylvania Office of Open Records (OOR) directing Aston Township (Township) to supply Requester with information it requested pursuant to the Right-to-Know Law (Law)[1]. We reverse.

On January 28, 2009, Requester submitted a standard right-to-know request form to the Township, seeking ''printouts of the current tax year information (including INTERIM tax bills), as well as any other charges for lienable items against the real estate that your tax entity collects, with regard to . . . [two specified properties. Requester also sought] Homestead Rebate information where applicable.'' (R.R. at 5a; Findings of Fact, Nos. 1-2.)

The Township denied the request because the information ''is available through publicly accessible electronic means by accessing www.co.Delaware.pa.us, see Section 704 of the Act[2].'' (1/29/09 Letter, R.R. at 6a; Findings of Fact, No. 4.) The Township advised, ''Should [Requester] require a certification of the tax status for the property identified, a written request can be submitted to the Tax Collector for Aston Township, along with the requisite fee. . . .'' (1/29/09 Letter, R.R. at 6a.)

(357724) No. 442 Sep. 11

On February 11, 2009, Requester filed an appeal with the OOR, stating, in part, as follows:

We are aware of the county site and do research information from the county on a regular basis with no issue. Our request was focused [on] the information maintained by the tax collector. [Township employees] have been upholding the argument that they . . . would need to obtain a certification from the tax collector. We were simply . . . requesting the information from the [open records officer].(R.R. at 7a.) By letter dated February 11, 2009, the OOR notified the parties that it would assign an Appeals Officer to review the case and that the parties could submit additional information regarding the appeal within seven calendar days. (R.R. at 9a.)

The Township submitted nothing to the OOR within seven calendar days. On February 27, 2009, however, the Township submitted an ''Explanation of Grounds for Denial of Request'' (Explanation). The Township asserted that it denied the request pursuant to section 705 of the Law, which states that ''an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.'' 65 P. S. § 67.705. Although the Township previously denied the request under section 704 of the Law because the printouts were available through the county web site, the Township now asserted that printouts with the requested information do not exist. (R.R. at 13 a.)

[S]uch information would need to be assembled and then created in the form of a database to be provided to [Requester]. This request seeks the type of information typically provided in the form of a Tax Certification/Lien Search. . . . The Certification requires intensive research on the part of the Township officials and employees. In order to prepare a Certification, a Township official or employee must search various records in numerous databases (including but not limited to paper files, bank deposits, court orders and county assessment appeals). From this information the Township official would then assemble the data and figures and create a certified record. In some instances, a search of this nature [*5] may take many hours. This Certification is not a public record and is not subject to the [Law] as it requires the creation of a record, which is specifically exempted . . . under Section 705. *[Requester] attempts to circumvent the Township policy on Certifications through the Right to Know request*.

The Township requires a Certification fee of $ 15.00 per researched and certified year. . . .(R.R. at 13a-14a) (emphasis added).

In a March 4, 2009, letter, the Appeals Officer advised the Township as follows:

> Please be advised that your Explanation does not support nor appear to pertain to the Township's January 29, 2009 denial letter that advises certain information is available to the public electronically and so need not be provided as per Section 704. . . .

The Explanation asserts *new and previously not cited grounds for denial that are not properly raised here*. As to the reasons stated in the Denial, please specify what of the information requested . . . is available publicly at the website the Township provided, and provide an Attestation . . . . as to whether the remaining information exists to be printed out as requested.(R.R. at 20a) (emphasis added).

In response, the Township filed a ''Supplemental Explanation of Grounds for Denial of Request,'' asserting that it denied the request because ''some or all'' of the information is available on the Delaware County website[3]. (R.R. at 21a.) The Township also attached the affidavit of its Tax Collector, which stated that ''the information requested . . . is not available in one single document or 'printout' but must be assembled by me from a review of multiple documents and/or sources[4].'' (R.R. at 24a.)

In a Final Determination, the Appeals Officer concluded that: (1) the Township improperly denied Requester's request based on electronic availability because, under section 704(b)(2) of the Law, the Township is required to provide printouts of public records when a requester is not willing to access a public record electronically; (2) although the Township is not obligated to create a record under section 705 of the Law, the Township did not deny Requester access to the requested information on that basis; (3) the Township cannot convert a proper right-to-know request into a tax certification request, and any similarity between a tax certification request and the request here is irrelevant; and (4) ''[m]ere assembly of a separate record from a series of existing records is not 'creation' of a document under Section 705 [of the Law]. Regardless of whether there is a single screen, or multiple screens containing the requested information, if it exists, the Township must provide it.'' (R.R. at 36a.)

The Township filed an appeal with the trial court, which reversed the OOR's Final Determination. The trial court stated that: (1) because the Appeals Officer could expand the record under section 1102(a) of the Law[5], the Township was not limited to its initial reason for denial of the right-to-know request; and, (2) under section 705 of the Law, the Township was not required to assemble the information requested from a review of multiple documents or sources. Requester now appeals to this court.

Requester argues that the trial court erred in concluding that section 1102(a) of the Law allowed the Township to assert a different reason for its denial of the right-to-know request. We agree.

We begin by pointing out that section 903(2) of the Law requires that a denial of a right-to-know request include the ''specific reasons for the denial, including a citation of supporting legal authority[6].'' 65 P. S. § 67.903(2). Section 1101(a)(1) of the Law states that an appeal to the OOR ''shall address any grounds stated by the agency for . . . denying the request.'' 65 P. S. § 67.1101(a)(1). Here, the Township's specific reason for its denial was the

(357726) No. 442 Sep. 11

availability of the information on the county web site, citing section 704 of the Law as supporting legal authority for the denial. Requester's appeal addressed that issue.

Section 1102(a) of the Law provides, in pertinent part, as follows:

(a) Duties.—An appeals officer . . . shall do all of the following:

(1) Set a schedule for the requester and the open-records officer to submit documents in support of their positions.

(2) Review all information filed relating to the request. The appeals officer may hold a hearing. A decision to hold or not to hold a hearing is not appealable. The appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. 65 P. S. § 67.1102(a) (emphasis added). Contrary to the trial court's reading of the provision, section 1102(a) of the Law does **not** permit an agency that has given a specific reason for a denial to assert a different reason on appeal. Section 1102(a) of the Law permitted the Township only to submit documents in support of its stated position.

If an agency could alter its position after the agency stated it and the requester addressed it in an appeal, then the requirements in sections 903(2) and 1101(a)(1) of the Law would become a meaningless exercise. An agency could assert any improper reason for the denial of a right-to-know request and would not have to provide an arguably valid reason unless and until the requester filed an appeal. Such a reading of section 1102(a) of the Law would make a mockery of the process set forth in the Law.

Indeed, under section 902(a)(4) of the Law, if an agency is uncertain regarding its duty to disclose requested information under the Law, the agency may assert the need for an extension of time to perform a legal review to determine whether the requested information is subject to access. 65 P. S. § 67.902(a)(4). Thus, no agency can claim that it lacked sufficient time to consider the reason it decided to give for denying a right-to-know request.

Furthermore, section 1102(b)(3) of the Law states that, ''[i]n the absence of a regulation, policy or procedure governing appeals under this chapter [Chapter 11], the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute.'' It is not fair or just to a requester to allow an agency to alter the reason given [*11] for a denial after the requester has taken an appeal based on the stated reason. Moreover, permitting an agency to set forth additional reasons for a denial at the appeal level does not allow for an expeditious resolution of the dispute.

Based on the foregoing, we conclude that the trial court erred in allowing the Township to alter its reason for denying Requester's right-to-know request and in considering whether the Township could have properly denied Requester's right-to-know request under section 705 of the Law.

Accordingly, we reverse[7].

ROCHELLE S. FRIEDMAN, Senior Judge

ORDER

AND NOW, this 26th day of May, 2010, the order of the Court of Common Pleas of Delaware County, dated May 27, 2009, is hereby reversed.

ROCHELLE S. FRIEDMAN, Senior Judge

Notes:

[1] Act of February 14, 2008, P. L. 6, 65 P. S. §§ 67.101-67.3104.

[2] Section 704(b) of the Law provides, in pertinent part, as follows:

> (1) . . . [A]n agency may respond to a request by notifying the requester that the record is available through publicly accessible electronic means. . . .
>
> (2) If the requester is unwilling . . . to access the record electronically, the requester may, within 30 days following receipt of the agency notification, submit a written request to the agency to have the record converted to paper. The agency shall provide access to the record in printed form within five days of the receipt of the written request for conversion to paper. 65 P. S. § 67.704(b).

[3] We note that the Township actually denied the request because all of the information was available on the website.

[4] We note that the Township did not provide what the Appeals Officer directed, *i.e.*, a statement specifying the information that is available publicly at the web site and an attestation as to whether the remaining information exists to be printed out as requested.

[5] 65 P. S. § 67.1102(a). Under section 1102(a) of the Law, the parties may submit documents in support of their positions, and the appeals officer may hold a hearing for the submission of evidence. *Id.*

[6] As indicated, the Township set forth a specific reason for the denial and cited section 704 of the Law as supporting legal authority; however, if the reason given and the authority cited did not reflect the actual reason for the denial, then the Township failed to comply with section 903(2) of the Law. Indeed, we read section 903(2) of the Law to require an agency to provide the **actual** reason for the denial.

[7] Because of our disposition of these issues, we need not address other issues raised in the briefs.

Pennsylvania State Police v. Office of Open Records

Commonwealth Court of Pennsylvania

995 A.2d 515 **May 26, 2010**

Reporter's summary: The Commonwealth Court determined that the Office of Open Records erred when the appeals officer unilaterally narrowed the scope of the request on appeal and granted the request.

Headnotes:

Review process—On appeal, the court and appeals officers are limited to: the original request and documents supporting the request and the original denial and documents supporting the denial.

Pennsylvania State Police, Petitioner v. Office of Open Records, Respondent
COMMONWEALTH COURT OF PENNSYLVANIA
995 A.2d 515; 2010 Pa. Commw.
April 23, 2010, Submitted
May 26, 2010, Decided
May 26, 2010, Filed
OPINION BY JUDGE PELLEGRINI

The Pennsylvania State Police (PSP) appeals from the final determination of the Office of Open Records (OOR) granting the appeal of John P. George (Requestor) who had requested certain information from the PSP regarding vehicle stops and searches and the seizure of property taken from such vehicles.

Requestor submitted a Right-to-Know Law (RTKL)[1] request to the PSP seeking:

> Any and all records, files, or *manual(s)*, communication(s) of any kind, that explain, instruct, and or require officer(s) and Trooper(s) to follow when stopping a Motor Vehicle, pertaining to subsequent search(es) of that Vehicle, and the seizures of any property, reason(s) therefore (sic) taking property. (Emphasis added.)(Reproduced Record, p. 23.)

The PSP denied the request stating that it was insufficiently specific[2], and Requestor appealed to the OOR. The OOR agreed that the request was insufficiently specific, stating that the final phrase of the request, ''and the seizures of any property, reason(s) therefore (sic) taking property,'' could be read to mean the seizure of any property from any location or any person for any reason. (OOR Final Determination, p. 7.) However, the OOR stated that in his appeal, Requestor narrowed his request to make it clear he was only seeking a ''manual'' relating to the actual procedures for handling the vehicle stop and subsequent search of the person, vehicle and property within the vehicle. In turn, the OOR itself narrowed

the request to include only that specific manual and ordered the PSP to turn over that information to Requestor.

PSP appealed[3] arguing that the OOR does not have the authority to unilaterally narrow the scope of a request to make it conform to the parameters of the RTKL. The OOR in its brief concedes that the PSP is correct and that it erred by narrowing the request and asks us to reverse its decision. We agree that the request and the reason(s) that the agency denies access are fixed, and the OOR is limited to the reasons set forth in those pleadings unless the agency cannot know that the record is not subject to access or make other determinations before a preliminary matter is resolved. Otherwise, the procedures would not be in accord with the legislative scheme set forth in Sections 901, 903 and 1101 of the RTKL regarding access to public records[4]. Section 901 deals with the process the agency must go through to determine how to respond to a request for a record. It provides that an agency must make a good faith effort to determine the type of record requested and then to respond as promptly as possible to the request. Section 903 provides that if an agency denies access to a record, it must give ''[t]he specific reasons for the denial.'' Section 1101 provides, ''The appeal [to the OOR] shall state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record and shall address any grounds stated by the agency for delaying or denying the request.''

Under these provisions, the requestor tells the agency what records he wants, and the agency responds by either giving the records or denying the request by providing specific reasons why the request has been denied. The requestor can then take an appeal to the OOR where it is given to a hearing officer for a determination. Nowhere in this process has the General Assembly provided that the OOR can refashion the request.

Having said all that, we do not agree with the OOR that all of the information requested in this case was insufficiently specific. The OOR determined that the request was insufficiently specific by reasoning that ''conceivably'' the request could be read to ask for any and all materials regarding any and all types of seizure. In context, it is clear that the phrase ''and the seizure of any property'' refers only to property seized from a vehicle following a stop and search of that vehicle and is, thus, not overbroad. What is overbroad, though, is the first clause of the request, which begins, ''Any and all records, files, or manual(s), communication(s) of any kind. . . .'' (Reproduced Record, p. 23.) The portion of the request seeking any and all records, files or communications is insufficiently specific for the PSP to respond to the request. However, the request for ''manual(s)'' relating to vehicle stops, searches and seizures is specific and does provide a basis for the PSP to respond.

Because the valid part of the request was included in a laundry list of requested materials and because of the newness of the law, the PSP may still raise any claim that access to the manuals, if they exist, should be denied under another provision of the RTKL. However, agencies as a normal practice should raise all objec-

tions to access when the request is made if the reason for denying access can be reasonably discerned when the request is made. Otherwise, review will be piecemeal, and the purpose of the RTKL in allowing access to public records in a timely manner will be frustrated.

For the foregoing reasons, the OOR's final determination is affirmed regarding the request for ''any and all records, files, or communications of any kind'' but it is vacated as to the request for ''manuals.'' The matter is remanded to the Pennsylvania State Police to either provide access to the manual(s) or give specific reasons why access is denied.

DAN PELLEGRINI, Judge

Notes:

[1] Act of February 14, 2008, P. L. 6, 65 P. S. §§ 67.101—67.3104.

[2] Section 703 of the RTKL, 65 P. S. § 67.703, provides, in pertinent part, ''A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.''

[3] Our standard of review in an appeal from the OOR is independent review of the evidence, and our scope of review is plenary. Bowling v. Office of Open Records, 990 A.2d 813 (Pa. Cmwlth. 2010).

[4] 65 P. S. §§ 67.901, 67.903 and 67.1101.

Marc Levy v. Senate of Pennsylvania

Commonwealth Court of Pennsylvania

34 A.3d243 **October 6, 2011**

Reporter's summary: Although the attorney-client privilege protects confidential communications between a client and an attorney in certain situations, the privilege will generally not protect the names of the clients and a general description of legal work provided.

Headnotes:

Case law—The attorney-client privilege covers "not only confidential client-to-attorney communications but also confidential attorney-to-client communications made for the purpose of obtaining or providing professional legal advice." Gillard v. AIG Insurance Company*, 15 A.3d 44 (2011).*

Marc Levy, Petitioner v. Senate of Pennsylvania, Respondent
COMMONWEALTH COURT OF PENNSYLVANIA
34 A.3d 243; 2011 Pa. Commw.
May 11, 2011, Argued
July 25, 2011, Decided
October 6, 2011, Filed
OPINION BY JUDGE SIMPSON[1]

In this Right-to-Know Law (Law)[2] appeal from a partial denial (redaction) of legislative records[3] of the Senate of Pennsylvania, we are asked whether the attorney-client privilege shields the names of clients and descriptions of legal services in bills presented to the Senate for reimbursement. In particular, Marc Levy appeals the decision of the Senate Appeals Officer which directed the Senate either to provide affidavits supporting the assertion of the attorney-client privilege or to provide the requested records ''revealing the identity of the clients and any purpose for which the various attorneys are engaged.'' Pet'r's Br., App. A at 14 (Senate Appeals Officer, Final Determination Order, 9/16/10).

I. Background

At issue are two requests. The first sought ''all bills, contracts and payment records relating to the hiring of any outside lawyer or law firm to represent Sen. Robert J. Mellow beginning Jan. 1, 2009.'' Reproduced Record (R.R.) at 2a. The second request sought the same records regarding ''any current or former employee of the Senate Democratic caucus.'' R.R. at 1a.

The Senate Open Records Officer responded to the requests and provided about 100 pages with redactions. Specifically, the Senate produced five sets of financial records relating to five clients employed by the Senate who, pursuant to the Senate Committee on Management Operations (COMO) Policy for the Payment of Legal Services, were provided with outside counsel.

(361708) No. 454 Sep. 12

The reason for the redactions was stated to be ''the attorney-client privilege.'' R.R. at 3a. Primarily, the names of the five clients and the description of legal services provided to them were redacted. Other information in the financial records was available.

Levy appealed the partial denial to the Senate Appeals Officer, taking the position that the redacted information was not privileged. The parties submitted memoranda. In its memorandum, the Senate addressed the attorney-client privilege, and it also discussed the work product privilege, grand jury secrecy, and an exemption relating to a criminal investigation. See Section 708(b)(16) of the Law, 65 P. S. § 67.708(b)(16).

In an opinion accompanying his final determination, the Senate Appeals Officer discussed the attorney-client privilege at length.4 He reviewed copies of the redacted records to determine whether the criteria necessary for the attorney-client privilege were present. He concluded that most of the criteria were present, but it was impossible to determine whether or not the communications of identity and the purpose for which the attorney was being engaged were made ''without the presence of strangers'' and ''not for the purpose of committing a crime or tort.'' Final Determination, September 16, 2010 at 8. Because the attorney-client privilege deserves the utmost deference, he ordered that the Senate could remedy the lack of objective indicia by providing supplemental affidavits.

The Senate Appeals Officer also addressed Levy's argument that any privilege was waived because the bills for legal services were submitted to the Chief Clerk of the Senate for the purpose of paying the legal fees. He concluded that such intra-Senate type communications may retain a privileged status and be shared with employees on a ''need-to-know'' basis. The Chief Clerk is an elected officer of the Senate, and it is well within his duties to receive copies of the records and make payment of the legal fees incurred by the Senate on behalf of its members and employees. In the absence of some indication of waiver on the face of the records, they retain their privileged status.

Unfortunately, the Senate Appeals Officer did not specify a time within which to produce supplemental affidavits or unredacted records. On Friday, October 15, 2010, which was the twenty-ninth day after the final determination was mailed, Levy appealed to this Court. At that point, neither supplemental affidavits nor unredacted records had been produced by the Senate. Pursuant to Section 1301(b) of the Law, 65 P. S. § 67.1301(b), the appeal stayed release of documents.

II. Appeal

A. Generally

While the appeal was pending in this Court, the Pennsylvania Supreme Court rendered an important decision on the attorney-client privilege, *Gillard v. AIG Insurance Company*, ____ Pa. ____ , 15 A.3d 44 (2011). The holding in that case essentially broadened the attorney-client privilege to cover not only confidential client-to-attorney communications but also confidential attorney-to-client com-

munications made for the purpose of obtaining or providing professional legal advice. *Id.* at ____ , 15 A.3d at 59. Although the case did not deal with bills for legal services or the identities of clients, the Supreme Court's analysis is useful here and will be discussed below.

After appellate argument, and in an effort to untie the procedural knot arising from the timing of the appeal and the application of an automatic stay, we entered a case management order which allowed the Senate to file a supplemental affidavit as ordered by the Senate Appeals Officer within 10 days. *See Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Cmwlth. 2010) (*en banc*), *appeal granted*, ____ Pa. ____ , 15 A.3d 427 (2011) (reviewing court may supplement record to ensure adequate review; court should consider manner of proceeding most consistent with justice, fairness and expeditious resolution). The affidavit was timely filed, and it is appended to this decision as Attachment A.

In addition, we ordered production of unredacted records for *in camera* judicial review. See *Pa. State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Cmwlth. 2010) (court conducted *in camera* review of incident reports to determine whether exception under the Law applied); *Bowling* (Law does not expressly prohibit in camera review); *see also Gillard* (trial court conducted *in camera* review of documents subject to asserted privilege on the record and in presence of counsel; *in camera* judicial review provides essential check against possibility for abuse of privilege). *In camera* judicial review was undertaken by Senior Judge James R. Kelley, acting as special master for the *en banc* panel. His report was filed under seal on July 25, 2011. Although the unredacted records shall remain under seal, the report is UNSEALED, and it is appended to this decision as Attachment B. His recommendations are accepted and entered as supplemental findings and conclusions by the *en banc* panel. His recommendations are discussed below.

In an appeal to this Court under Section 1301 of the Law, 65 P. S. § 67.1301 (pertaining to Commonwealth, legislative and judicial agencies), we act in our appellate jurisdiction, but we independently review the appeals officer's orders, and we may substitute our own findings of fact. *Bowling*. Further, we exercise the broadest scope of review. *Id.* The issue of whether the attorney-client privilege protects a particular communication from disclosure is a question of law. *Nationwide Mut. Ins. Co. v. Fleming*, 2007 PA Super 145, 924 A.2d 1259 (Pa. Super. 2007), *aff'd on other grounds by an equally divided court*, 605 Pa. 468, 992 A.2d 65 (2010). For any question of law, this Court's standard of review is de novo and our scope is plenary. *Id.*

B. Contentions

Generally, Levy contends the Law establishes a presumption of public access to government records, especially, as here, to records relating to the expenditure of public funds. The Senate bears the burden of rebutting that presumption and establishing a lawful basis for redaction, but it failed to carry its burden.

More specifically, Levy argues that the attorney-client privilege does not shield from disclosure the identities of public employees who receive publicly funded legal representation or the nature of the services provided at public expense. Citing pre-*Gillard* cases, Levy argues the Senate's blanket redaction conflicts with established Pennsylvania privilege law, which protects attorney-to-client communications only when those communications reflect the confidential client-to-attorney communications. Levy also seeks to distinguish two Commonwealth Court cases addressing redactions of the description of legal services in bills, *Board of Supervisors of Milford Township v. McGogney*, 13 A.3d 569 (Pa. Cmwlth. 2011), *appeal denied*, ____ Pa. ____ , 24 A.3d 364 (No. 124 MAL 2011, filed July 8, 2011), and *Schenck v. Township of Center, Butler County*, 893 A.2d 849 (Pa. Cmwlth. 2006).

Further, Levy contends that the Senate misstates the narrow circumstances where client identities may be privileged. The Senate did not establish those narrow circumstances here.

In addition, Levy argues that the unidentified clients waived any privilege by seeking reimbursement from the third-party Senate.

In addition to his primary arguments, Levy makes other points. He generally contends that the Senate's alternate arguments (work product, grand jury secrecy and investigative exemption) are unpersuasive. Also, he decries the tenor of the Senate's written argument.[5]

In its spirited written arguments on the merits, the Senate contends that this Court should conclude as a matter of law that the attorney-client privilege applies to protect client identities and the purpose or reasons why various attorneys were engaged. Relying on *McGogney*, *Schenck* and two advisory opinions from the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, the Senate argues that Pennsylvania law protects the information redacted here.

Also, the Senate acknowledges the general rule that attorney billing records are generally not protected by the attorney-client privilege. However, the Senate urges application of either of two overlapping exceptions to the general rule which protect a client's identity in certain circumstances. The first is the legal advice exception, which arises where there is a strong possibility that disclosure of the fact of retention or of the details of a fee arrangement is tantamount to disclosing why the person sought legal advice in the first place. *See United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984); *In re Grand Jury Investigation*, 631 F.2d 17 (3d Cir. 1980). The second overlapping exception is the confidential communications exception, which protects client identity and services performed by an attorney if, by revealing the information, the attorney would necessarily disclose confidential communications. The Senate cites federal cases beyond the Third District. According to the Senate, two of the records state on their face that they are related to an ongoing criminal grand jury investigation. Supplemental Reproduced Record (S.R.R.) at 140a, 145a. Moreover, ''revelation of the services per-

formed for the five clients would undoubtedly reveal the motive of the clients in seeking representation (i.e., to navigate the grand jury process), as well as the attorney's specific advice in navigating that . . . process.'' Respondent Br. at 23.

The Senate further contends that indemnification of legal fees does not waive the attorney-client privilege. The Chief Clerk of the Senate, who is also the open records officer, is an agent of the Senate for purposes of privilege analysis. Pursuant to the Senate COMO Policy for the Payment of Legal Services,[6] he must preserve the privilege. The privilege can only be waived by the clients.

Finally, the Senate urges the merits of it alternate bases for redaction.

After the Supreme Court issued its decision in *Gillard*, both parties supplemented their arguments. Offering a broad interpretation, the Senate argued that the Court in *Gillard* expressly rejected Levy's contention that the attorney-client privilege is limited to confidential communications from a client. Thereafter, Levy rejoined that *Gillard* does not bring client identity within the privilege. Also, *Gillard* does not justify blanket redactions, nor does that decision impact the waiver issue.

C. Discussion

1. Alternate Bases for Redaction

While the parties argue about other privileges and exemptions, those alternate bases for redaction are waived. This is because the only reason given by the Senate's Open Records Officer for the redaction was ''the attorney-client privilege.'' R.R. at 3a; *see Signature Information Solutions, LLC v. Aston Twp.*, 995 A.2d 510 (Pa. Cmwlth. 2010) (local agency not permitted to alter its reason for denying request on appeal to the Office of Open Records).

2. Attorney-Client Privilege

a. Generally

The attorney-client privilege has deep historical roots and indeed is the oldest of the privileges for confidential communications in common law. *Fleming; McGogney*. It is designed to encourage trust and candid communication between lawyers and their clients. *Gillard*, ____ Pa. at ____ , 15 A.3d at 57 (*citing*, among other authority, Restatement (Third) of The Law Governing Lawyers § 68 cmt. c (2000) (privilege ''enhances the value of client-lawyer communications and hence the efficacy of legal services'')).[7] The privilege affords derivative protection to attorney-to-client communications. *Id.* A broader range of derivative protection is appropriate to facilitate open communication. *Id.* Our Supreme Court recognizes the difficulty in unraveling attorney advice from client input and stresses the need for greater certainty to encourage the desired frankness. *Id.*

The attorney-client privilege often competes with other interests-of-justice factors. *See id.* The privilege here is in tension with the purpose of the Law, which is remedial legislation 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. *Bowling*.

The general rule is that, unless otherwise provided by law, a legislative record is accessible for inspection and duplication. Section 710(a) of the Law, 65 P. S. § 67.701(a); *McGogney*. However, a legislative record is not presumed to be available in accordance with the Law if it is protected by a privilege. Section 305(b) of the Law, 65 P. S. § 67.305(b). Similarly, privileged documents are excluded from the definition of ''public record'' by Section 102 of the Law. 65 P. S. § 67.102; *McGogney*. Section 102 of the Law also defines ''privilege'' as including the attorney-client privilege. *Id.* Further, Section 506 of the Law states that an agency lacks discretion to release privileged information. 65 P. S. § 67.506(c)(2); *McGogney*.

The party asserting the attorney-client privilege must initially set forth facts showing that the privilege is properly invoked. *Fleming; see also Dep't of Transp. v. Office of Open Records*, 7 A.3d 329 (Pa. Cmwlth. 2010) (agency failed to carry its burden of showing documents covered by privilege). This burden is similar to the burden imposed by the Law on an agency to justify a total or partial denial (redaction). Section 903 of the Law, 65 P. S. § 67.903.

b. General Rules

i. Client Identity

As to the issue of whether a client's identity falls within the scope of the attorney-client privilege, an American Law Reports 3rd (A.L.R.3d) article on that issue provides:

> It has been said that the reason underlying the attorney-client privilege is to encourage a client to disclose fully the facts and circumstances of his case to his attorney without fear that he or his attorney will be compelled to testify as to the communications had between them. Since the privilege results in the exclusion of evidence it runs counter to the widely held view that the fullest disclosure of the facts will best lead to the truth and ultimately to the triumph of justice. In reconciling these conflicting principles the courts have pointed out that since the policy of full disclosure is the more fundamental one, the privilege is not to be viewed as absolute and is to be strictly limited to the purpose for which it exists.
>
> *There is general agreement among the courts that where an inquiry is directed to an attorney as to the name or identity of his client the attorney-client privilege is inapplicable* even though the information was communicated confidentially to the attorney in his professional capacity, in some cases in spite of the fact that the attorney may have been sworn to secrecy. This principle has been supported, with some exceptions, in criminal and tax proceedings . . . as well as in civil actions, the courts often basing its application on the premise that since the privilege presupposes the attorney-client relationship, it does not attach to its creation. *It is therefore concluded that a client's*

> *identity, which is necessary proof of the existence of the relationship is, similarly, not privileged information. . . .*
> *While the disclosure of the name or identity of a client is generally held not, in and of itself, a matter within the attorney-client privilege, it has become so in situations in which so much has been divulged with regard to the legal services rendered or the advice sought, that to reveal the client's name would be to disclose the whole relationship and confidential communications.* Thus, in a number of civil actions courts have declared a client's name privileged where the subject matter of the attorney-client relationshiphas already been revealed; and in criminal proceedings, particularly where the attorney is not the accused, courts have recognized that a client's name may be privileged if information already obtained by the tribunal, combined with the client's identity, might expose him to criminal prosecution for acts subsequent to, and because of, which he had sought the advice of his attorney. Similarly, in tax proceedings, some courts have declared a taxpayer-client's name privileged when so much has been revealed concerning the legal services rendered that the disclosure of the client's identity exposes him to possible investigation and sanction by government agencies. . . .
> *In a number of cases the courts have held or recognized that, as a general principle, the name or identity of an undisclosed client is not proper subject matter for a confidential communication and will not ordinarily be treated as privileged information.*

R.M. Weddle, Annotation, *Disclosure of Name, Identity, Address, Occupation, or Business of Client as Violation of Attorney-Client Privilege*, 16 A.L.R.3d 1047 (2008) (emphasis added) (footnotes omitted).

Further, as explained by Professor Paul R. Rice, in his treatise entitled Attorney-Client Privilege in the United States:

> Establishing the existence of an attorney-client relationship usually requires the identification of the client. *The client's identity, moreover, is not important to the substance of the legal advice or assistance sought. Therefore, that information is usually is not protected by the attorney client-privilege*. This is also true of the names of prospective clients. Similarly, it does not protect the identity of those who are agents of the client, and through whom the client has communicated with the attorney. *The client cannot reasonably assume that his identity will be confidential*.
>
> As explained in *Behrens v, Hironimus*[,] [170 F.2d 627, 628 (4th Cir. 1948)]: *The existence of the relationship of attorney and client is not a privileged communication*. The privilege pertains to the subject matter, and not to the fact of employment as attorney, and since it presupposes the relationship of attorney and client, it does not attach to the

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> creation of that relationship. *So, ordinarily, the identity of the attorney's client*, or the name of the real party in interest, or the terms of the employment *will not be considered as privileged matter. The client or the attorney may be permitted or compelled to testify as to the fact of his employment as attorney, or as to the fact of his having advised his client as to a certain matter, or performed certain services for the client.*

Paul R. Rice, Attorney-Client Privilege in the United States, § 6:14 (2d. ed. 1999) (footnotes omitted).

The parties do not cite any Pennsylvania state cases that directly answer the question of whether a client's identity is covered by the attorney-client privilege. Nevertheless, there are two early Pennsylvania Supreme Court cases that specifically recognize the rule that a client's identity is not shielded by the attorney-client privilege.

More specifically, in *In re Seip's Estate*, 163 Pa. 423, 30 A. 226, 35 Week. Notes Cas. 401 (1894), our Supreme Court explained that the mere fact of employment of an attorney is not privileged. *Accord Sargent v. Johns*, 206 Pa. 386, 55 A. 1051 (1903) (mere fact of employment of an attorney is not a confidential or privileged communication). As a result, the Court held that an attorney was competent to testify regarding his client's identity and an objection on the grounds of privilege could not prevail.

This rule was more clearly expressed by the Pennsylvania Supreme Court in *Beeson v. Beeson*, 9 Pa. 279, 1848 WL 5605 (Pa. 1848), where the Court explained:

> With respect to the testimony of Mr. Veech[,] [an attorney], it is not objected that he was permitted to disclose the fact of his having been retained by Jesse Beeson. . . . *It is conceded such an objection could not have prevailed, for an attorney is compellable to disclose, not only the name of the person by whom he was retained, but also the character in which his client employed him; whether as executor, trustee, or on his private account.* . . .

Id., 1848 WL 5605, at *13 (emphasis added) (citation omitted).

Federal cases within the Third Circuit adhere to the rule that a client's identity is not privileged. *See In re Grand Jury Investigation*, 631 F.2d 17 (3d Cir. 1980) (''in the absence of unusual circumstances, the privilege does not shield . . . the identity of clients. . . .''); *In re Semel*, 411 F.2d 195, 197 (3d Cir. 1969) (''In the absence of unusual circumstances, . . . *the identity of the client*, the conditions of employment and the amount of the fee *do not come within the privilege of the attorney-client relationship*.'') (emphasis added); *Mauch v. Comm'r of Internal Revenue*, 113 F.2d 555, 556 (3d Cir. 1940) (the ''authorities are almost unanimous in excluding bare identity from the scope of the privilege.''); *United States v. Cedeno*, 496 F.Supp.2d 562, 567 (E.D. Pa. 2007) (noting ''the attorney-client privilege exists to protect confidential communications between a lawyer and a

client; in most cases, the disclosure of a fee arrangement or a client's identity does not disclose the substance of any confidences.'') (Citation omitted); *see also United States v. Grand Jury Investigation*, 401 F.Supp. 361 (W.D. Pa. 1975) (same).

The Senate relies on two informal advisory opinions from the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility which seek to protect client identity.[8] We greatly respect the thoughtful views of the Association; nevertheless, in light of the extensive and binding authority to the contrary, and mindful of the self-acknowledged limitations of the advisory opinions,[9] we decline the invitation to follow them in this context.

ii. Description of Legal Services

Similarly, attorney fee agreements and billing records are generally subject to disclosure in Pennsylvania. Thus, our Supreme Court in *Commonwealth v. Chmiel*, 585 Pa. 547, 599, 889 A.2d 501, 531 (2005), a capital murder case, agreed with the trial court that ''disclosure of a fee agreement between an attorney and client does not reveal a confidential communication.'' The Court held that ''[b]ecause the [prior attorney's] testimony regarding the fee agreement . . . does not disclose strategy or otherwise divulge confidential information, it is not subject to the attorney-client privilege.'' *Id.* at 599, 889 A.2d at 532.

Also, in *Slusaw v. Hoffman*, 2004 PA Super 354, 861 A.2d 269 (Pa. Super. 2004), the Superior Court addressed production of invoices billed by attorneys to their client. The client objected to production of the bills on the basis of the attorney-client privilege. Recognizing the derivative protection for confidential attorney-to-client communication, the Court nevertheless ordered production of the bills to the extent the bills did not disclose confidential communications from the client. The Court stated, ''If the invoices contain any references to such confidential communications, those references can be redacted from the invoices.'' *Id.* at 373.

We reject as inapplicable much of the authority on which the Senate relies to shield from disclosure descriptions of legal services. In Schenk, a case under the former Right-to-Know Law, the attorney-client privilege was not at issue; rather, the case was decided on the basis of the work product rule applied during on-going litigation. Thus, that case is distinguished on both law and facts. In *McGogney*, a case under the current Law, the requestor did not contest application of a privilege; therefore, this Court did not decide the issue. *McGogney*, 13 A.3d at 571,[6]. Accordingly, that case is not helpful in resolving the current controversy.

c. Exception

The limited exception to the general rule is, according to Professor Rice, variously described as the ''legal advice'' or ''confidential communications'' exception. The Senate also relies on this exception. Regarding the client's identity, Professor Rice describes the exception in this way:

> When the confidentiality of the client's identity has been substantively linked to the advice that was sought, however, courts have afforded it protection because disclosure would implicate the client in the very matter upon 'which legal advice was being sought.' Under such circumstances the client could have a reasonable expectation that his identity would be confidential. This exception has variously been described as the 'legal advice' or 'confidential communications' exception.

Paul R. Rice, Attorney-Client Privilege in the United States, § 6:14 (2d. ed. 1999) (footnotes omitted).

We are unaware of any Pennsylvania state case that applied the exception to shield the name of a client.[10] However, the Third Circuit recognized the exception to the general rule when ''so much of the actual communication had already been established, that to disclose the client's name would disclose the essence of a confidential communication. . . .'' *United States v. Liebman*, 742 F.2d 807, 809 (3d Cir. 1984) (citations omitted). Thus, the identity of a client may become privileged if the person asserting the privilege can show ''a strong probability that disclosure of the fact of retention or of the details of a fee arrangement would implicate the client in the very criminal activity for which the advice was sought.'' *In re Grand Jury Investigation*, 631 F.2d at 19.

Further, in addressing disclosure of a fee agreement, our Supreme Court in Chmiel cited the Third Circuit decision *In re Grand Jury* Investigation for the proposition that the ''attorney-client privilege does not protect fee agreements absent [the] strong probability that disclosure would implicate [the] client in [the] criminal activity for which client sought legal advice.'' *Chmiel*, 585 Pa. at 599, 889 A.2d at 531-32. Given the existence of the Third Circuit cases and our Supreme Court's recent citation to one of them, it is possible that the Court would apply the exception in the rare instance when it is appropriate.

Moreover, in *Gillard* the parties and the Supreme Court gave much attention to Restatement (Third) of the Law Governing Lawyers. Ultimately, the Court adopted a position on broad derivative privilege which is consistent with that set forth in the Restatement. *See* Restatement (Third) of The Law Governing Lawyers § 69 cmt.i (2000) (rejecting limitation on protection of lawyer communication unless it contains or expressly refers to a client communication in favor of broader rule). Under these circumstances, it is useful to examine the Restatement's approach to protection of a client's name and billing information. Comment g to Section 69 of the Restatement (Third) of The Law Governing Lawyers (entitled ''Attorney-Client Privilege—'Communication' ''), states:

> *g. Client identity, the fact of consultation, fee payment, and similar matters*. Courts have sometimes asserted that the attorney-client privilege categorically does not apply to such matters as the following: *the identity of a client; the fact that the client consulted the lawyer and the general subject matter of the consultation*; the identity of a non-

> client who retained or paid the lawyer to represent the client; the *details of any retainer agreement; the amount of the agreed-upon fee*; and the client's whereabouts. *Testimony about such matters normally does not reveal the content of communications from the client. However, admissibility of such testimony should be based on the extent to which it reveals the content of a privileged communication. The privilege applies if the testimony directly or by reasonable inference would reveal the content of a confidential communication. But the privilege does not protect clients or lawyers against revealing a lawyer's knowledge about a client solely on the ground that doing so would incriminate the client or otherwise prejudice the client's interests. . . .*
>
> Restatement (Third) of The Law Governing Lawyers § 69 cmt.g (2000).[11]

d. *In Camera* Judicial Review

After careful *in camera* judicial review, the Court identified specific descriptions of legal services which implicate confidential communications between the clients and the attorneys. Those will be redacted in accordance with the recommendations of our special master, Senior Judge Kelley. The general descriptions of legal services, however, do not implicate confidential communications covered by the privilege. This information will be released.

Regarding the identities of the clients, it is clear that the name of one, Robert J. Mellow, is already in the public domain. Indeed, he was specifically referenced in one request. Therefore, in accordance with the general rule that the attorney-client privilege does not protect client names, no redaction of his name is appropriate.

As to the other four clients, we are mindful of the approach taken by our Supreme Court in *Chmiel* and by our Superior Court in *Slusaw*: if the invoices contain any references to confidential communications, those references will be redacted. Having approved those redactions and thereby removed all references to confidential communications from the invoices, we conclude that the Senate did not show ''a strong probability that [further] disclosure would implicate [the] client in [the] criminal activity for which client sought legal advice.'' *Chmiel*, 585 Pa. at 599, 889 A.2d at 531-32. Accordingly, we conclude the general rule applies; thus, the names of the other four clients are not protected by the attorney-client privilege, and redaction of the names is not appropriate.

3. Waiver

For reasons described above, it is useful to examine the position of the Restatement (Third) of The Law Governing Lawyers as to those persons covered by the attorney-client privilege. The purpose of this inquiry is to determine whether the involvement of the Chief Clerk of the Senate in receipt and payment of legal invoices for members and employees under the COMO Policy works a waiver of the attorney-client privilege.

The topic is generally addressed by Section 70 of the Restatement, titled ''Attorney-Client Privilege-'Privileged Persons.' '' Privileged persons include

agents of either the client or the lawyer who facilitate communications between them and agents of the lawyer who facilitate the representation. Restatement (Third) of The Law Governing Lawyers § 70 (2000). Comment e provides in part that ''If the third person is an agent for the purpose of the privilege, communications through or in the presence of that person are privileged; if the third person is not an agent, then communications are not in confidence . . . and are not privileged.'' Restatement (Third) of The Law Governing Lawyers § 70 cmt.e (2000).

Comment f addresses a client's agent for communications. One such agent is described as follows (with emphasis added):

> *The privilege applies to communications to and from the client disclosed to persons who hire the lawyer as an incident of the lawyer's engagement. Thus, the privilege covers* communications by a client-insured to an insurance-company investigator who is to convey the facts to the client's lawyer designated by the insurer, as well as *communications from the lawyer for the insured to the insurer in providing a progress report or discussing litigation strategy or settlement*. Such situations must be distinguished from communications by an insured to an insurance investigator who will report to the company, to which the privilege does not apply.

Restatement (Third) of The Law Governing Lawyers § 70 cmt.f (2000).

Here, pursuant to the COMO Policy, the Senate hires the lawyer for the member or employee. Indeed, contracts for legal services are formalized with an engagement letter signed by both the Senate and the attorney or law firm providing services. R.R. at 62a; *see, e.g.*, R.R. at 105a-06a. The attorney or law firm is required to submit periodic invoices to be paid. R.R. at 63a-64a. Thus, the invoices involve communications in the nature of a progress report from the lawyer incident to the lawyer's engagement made to persons who hired the lawyer. Under these circumstances, we have no difficulty finding that the Senate officers and staff who administer the COMO Policy function as the client's agents for communications. We therefore conclude that confidential communications through those persons are privileged. As a result, we reject Levy's waiver argument.

D. Conclusion

For the foregoing reasons, we affirm in part and reverse in part the final decision of the Senate Appeals Officer. We reverse as to the names of the clients and, in accordance with the recommendations of our special master, as to general descriptions of legal services. Consequently, those redactions cannot stand. However, in accordance with the recommendation of our special master, we affirm as to the specific descriptions of legal services that implicate confidential communications.

ROBERT SIMPSON, Judge

Notes:

[1] Judge Leavitt recused herself after argument. Judge Butler is substituting for Judge Leavitt and is considering the case on briefs.

[2] Act of February 14, 2008, P. L. 6, 65 P. S. §§ 67.101—67.3104. The Law repealed the former Right-to-Know Law, Act of June 21, 1957, P. L. 390, *as amended*, *formerly* 65 P. S. §§ 66.1—66.4.3

[3] Section 102 of the Law, 65 P. S. § 67.102, defines "**Legislative record**" to include a financial record relating to a legislative agency. Similarly, "**Legislative agency**" is defined to include "The Senate." Section 1301 of the Law, 65 P. S. § 67.1301, provides that appeals from a final determination of an appeals officer relating to a decision of a legislative agency shall be taken to the Commonwealth Court.

[4] The Senate Appeals Officer also briefly addressed the arguments raised by the Senate for the first time in its legal memorandum. The Appeals Officer decided there was insufficient record information to determine that grand jury secrecy should attach, that the records were exempt as relating to a criminal investigation, or that the attorney-work product doctrine protected client identity or the purpose or reason a client engaged an attorney.

[5] Both parties offer extensive and animated procedural arguments stemming from the timing of the appeal, the Senate's failure to file supplemental affidavits or produce unredacted records, and the Senate's failure to appeal or cross-appeal. We deem these procedural arguments moot in view of our case management order, and they will not be discussed further.

[6] The policy was produced by the Senate as part of its Supplemental Reproduced Record. In the absence of objection, we take judicial notice of the policy. Pa.R.E. 201(c), (f); *Bowling* (reviewing court may supplement record to ensure adequate review).

[7] In Pennsylvania, the attorney-client privilege is codified by statute:

§ 5928. **Confidential communications to attorney**

In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client. 42 Pa.C.S. § 5928. Pennsylvania codified the privilege in 1887. *See* Act of May 23, 1887, P. L. 158, § 5d (*formerly* 28 P. S. § 321). The statutory provision regarding privilege was reenacted in 1976 without substantive changes, as quoted above.

Similarly, in the context of a criminal case:

§ 5916. Confidential communications to attorney

In a criminal proceeding counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client. 42 Pa.C.S. § 5916.

[8] *See Informal Op.* No. 94-119, 1994 WL 928075 (Sept. 6, 1994); *Informal Op. No. 90-174*, 1990 WL 709683 (Dec. 17, 1990). *Informal Opinion No. 94-119* relied on *Informal Opinion No. 90-174* for the proposition that revealing information without the client's permission, even the fact of representation, is prohibited by Rule 1.6 of the Rules of Professional Conduct. *Informal Opinion No. 90-174* relied on language in *former* Disciplinary Rule DR 4-101 that expressly prohibited a lawyer from revealing ''a confidence or secret of his client, *including his identity* . . . (emphasis provided).'' However, the language relied upon was not made part of the current Rule 1.6 of Professional Conduct or the Comment to the Rule 9.

[9] Both of the informal advisory opinions contain the following caveat:

Th[is] . . . opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any court. It carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the Committee and is not an opinion of the full Committee.

[10] *But see Brennan v. Brennan*, 281 Pa. Super. 362, 422 A.2d 510 (Pa. Super. 1980) (*en banc*) (petition for contempt arising in child custody litigation; attorney-client privilege protects home address where client asks attorney to keep information confidential).

[11] The Restatement provides the following example regarding this exception:

Client consults Lawyer about Client's taxes. In the consultation, Client communicates to Lawyer Client's name and information indicating that Client owes substantial amounts in back taxes. The fact that Client owes back taxes is not known to the taxing authorities. Lawyer sends a letter to the taxing authorities and encloses a bank draft to cover the back taxes of Client. Lawyer does so to gain an advantage for Client under the tax laws by providing a basis for arguing against the accrual of penalties for continued nonpayment of taxes. Neither Lawyer's letter nor the bank draft reveals the identity of Client. . . . In a grand-jury proceeding investigating Client's past failure to pay taxes, Lawyer cannot be required to testify concerning the identity of Client because, on the facts of the Illustration, that testimony would by reasonable inference reveal a confidential communication from Client, Client's communication concerning Client's nonpayment of taxes. Restatement (Third) of The Law Governing Lawyers § 69 cmt.g, illus. 6 (2000).

Table of Decisions

Editor's Note: The Legislative Reference Bureau has codified the previous decisions in the Pennsylvania Code Reporter (September 2012).