

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 1071 C.D. 2023

ANGELA COULOUMBIS,

Petitioner-Appellant,

v.

SENATE OF PENNSYLVANIA,

Respondent-Appellee.

**BRIEF OF *AMICI CURIAE*, DEMOCRATIC & REPUBLICAN CAUCUSES
OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES**

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The Democratic and Republican Caucuses of the Pennsylvania House of Representatives (collectively, “*Amici*”), by and through their undersigned counsel, file this brief of *amici curiae* (“Brief”) in support of Respondent-Appellee, the Senate of Pennsylvania, (“Respondent”) and in opposition to the relief sought by Petitioner-Appellant, Angela Couloumbis (“Petitioner”).

I. STATEMENT OF INTEREST OF AMICI CURIAE

Amici have an interest in this case because it involves certain duties and responsibilities to which the *Amici* are subject under Pennsylvania’s Right to Know Law, 65 P.S. §§ 67.101-67.3104, (“RTKL”) and because it impacts what records of *Amici* may be made available under the RTKL. Thus, *Amici* believe this Court would benefit from hearing their perspectives germane to the underlying issues in this case.

Currently, Members of the House Democratic and Republican Caucuses occupy 202 seats in the Pennsylvania House of Representatives (“House” or “House of Representatives”).¹ *Amici* are integral components of the House, and therefore, the Pennsylvania General Assembly. *Precision Mktg., Inc. v. Com., Republican Caucus of the Sen. of Pa./AKA Sen of Pa. Republican Caucus*, 78 A.3d 667, 672 (Pa. Commw. Ct. 2013). As such, *Amici* include themselves under

¹ There are a total of 203 seats in the Pennsylvania House of Representatives. There is currently a vacancy in the seat representing the 139th legislative district.

the definition of “legislative agencies” for purposes of fielding, processing, and responding to requests submitted to the House under the RTKL. *See* 65 P.S. § 67.102.

Amici routinely work cooperatively with each other and the Chief Clerk of the House to provide records in response to RTKL requests submitted to the House. Because this appeal significantly affects the manner in which a “legislative agency” responds to a written request for records under the RTKL, *Amici* have a significant interest in the outcome of this appeal.

Amici Curiae file this brief pursuant to Pa.R.A.P. 531(b)(1)(i). *Amici Curiae* disclose that no other person or entity other than the *Amici Curiae* or their counsel paid for the preparation of or authored, in whole or in part, this *Amici Curiae* brief. *See* Pa.R.A.P. 531(b)(2).

II. ARGUMENT

This Court should grant relief to Respondent and affirm the Legislative Research Bureau’s (“LRB”) Final Determination that the denial of Petitioner’s appeal is appropriate and that Respondent is not required to take any further action on the request. The request at issue is not for records available from Respondent under the RTKL because the request is not for “legislative records.” Further, Petitioner’s attempt to obtain the requested communications using the exemption at Section 708(b)(29) is improper as it creates another category of legislative records

not found in the RTKL and does not apply to the legislative records available from Respondent under the RTKL. Finally, Petitioner's appeal fails to demonstrate that Respondent did not make a good faith effort to determine whether the requested information was a legislative record.

1. Petitioner's request for communications is not a request for legislative records under Pennsylvania's RTKL.

The RTKL is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. OOR*, 990 A.2d 813, 814 (Pa. Commw. Ct. 2010), *appeal granted* 15 A.3d 437 (Pa. 2011). *See SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). In cases involving statutory interpretation such as this one, "[t]he statute's plain language generally provides the best indication of legislative intent." *A.S. v. Pa. State Police*, 143 A.3d 896, 903 (Pa. 2016) (quoting *McGrory v. Dep't of Transp.*, 915 A.2d 1155, 1158 (Pa. 2007)). *See Commonwealth v. Gilmour Mfg. Co.*, 822 A.2d 676, 679 (Pa. 2003).

Much of Petitioner's brief is spent discussing statutory interpretation tools, analyzing floor debate, and reciting legislative history in an attempt to construe the language of the RTKL to fit a certain interpretation of the statute. *See Pet'r's Br.* 11-35. However, "[i]t is only when statutory text is determined to be ambiguous

that [the Court] may go beyond the text and look to other considerations to discern legislative intent.” *A.S.*, 143 A.3d at 903.

The statutory text of the RTKL is clear and unambiguous. “Legislative records” are presumed to be available from a “legislative agency,” defined to include Respondent and *Amici*, in accordance with the RTKL unless protected by privilege or exempt under the statute itself, any other federal or state regulation law, regulation, or judicial order or decree. 65 P.S. §§ 67.102, 67.303, 67.305(b).

The RTKL defines “legislative records” as:

- (1) A financial record.
- (2) A bill or resolution
- (3) Fiscal notes.
- (4) A cosponsorship memorandum.
- (5) The journal of a chamber.
- (6) The minutes of, record of attendance of members at a public hearing or a public committee meeting and all recorded votes taken in a public committee meeting.
- (7) The transcript of a public hearing when available.
- (8) Executive nomination calendars.
- (9) The rules of a chamber.
- (10) A record of all recorded votes taken in a legislative session.
- (11) Any administrative staff manuals or written policies.
- (12) An audit report

- (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.

Id. § 67.102.

“Communications” appear nowhere on the list, except with respect to certain records under items 16 and 17. Petitioner’s argument that “communications”² could entail any one of the nineteen categories of legislative records, Pet’r’s Br. 41-42, requires this Court to look beyond not only the statutory definitions contained within the RTKL (*e.g.*, “financial record”), but also the “common meaning” of the terms contained within the definition of “legislative records.” *See*

² “Communication” is defined as “1. The interchange of message or ideas by speech, writing, gestures, or conduct; the process of bringing an idea to another’s perception. 2. The message or ideas so expressed or exchanged.” *Communication*, BLACK’S LAW DICTIONARY (11th ed. 2019).

Office of the Dist. Attorney v. Bagwell, 155 A.3d 1119, 1142-43 (Pa. Commw. Ct. 2017) (citing *Pa. State Police v. Office of Open Records*, 995 A.2d 515, 517 (Pa. Commw. Ct. 2010)).

2. Petitioner’s application of the exemption at Section 708(b)(29) to legislative records available from Respondent is improper.

Petitioner’s application of 65 P.S. §708(b)(29) to legislative records available from Respondent is improper. While the section does not add a new category to the definition of “legislative records,” it is not mere surplusage. Rather, its plain and intended meaning authorizes local and Commonwealth agencies to protect certain correspondence received from or sent to Members of the General Assembly when the local or Commonwealth agency receives a RTKL request.

Whether a record is available pursuant to the RTKL depends on the type of agency to which the request is made, and the type of record that is being requested. Under the RTKL, there are four types of government agencies: Commonwealth, local, legislative, and judicial. Commonwealth and local agencies are required to provide public records. 65 P.S. §§ 67.301 and 67.302. Judicial agencies are required to provide financial records, *id.* § 67.304, and legislative agencies are required to provide legislative records, *id.* § 67.303. The language of the RTKL and the application of that law by Pennsylvania courts is clear that legislative records (and judicial records) are treated differently than public records:

(a) General rule.--A *record* in the possession of a *Commonwealth agency or local agency* shall be presumed to be a *public record*.

....

(b) Legislative records and financial records.--A *legislative 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 this act*.

Id. § 67.305 (emphasis added). See *Pa. State Police v. McGill*, 83 A.3d 476, 479 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Commw. Ct. 2013)).

The exemption in 708(b)(29) applies to what would otherwise be considered “public records” (or records in the possession of state or local agencies). Nothing in the exemption, nor in any jurisprudence examining the exemption, would lead one to believe that the exemption should be construed to open the floodgates for requests for records that would otherwise be a “legislative record.” See *Office of Governor v. Bari*, 20 A.3d 634, 640 (Pa. Commw. Ct. 2011) (“Whether sought after information constitutes a “public record” is a preliminary, threshold issue that must be decided before reaching the question of whether any exceptions under Section 708 of the RTKL apply.”). Because “communications” are neither legislative nor financial records, the application of the exemption is to correspondence constituting a “public record” within the control and possession of a local or Commonwealth agency.

Thus, any information including 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” that documents a transaction or activity of a Commonwealth or local agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the Commonwealth or local agency, may be subject to disclosure if it is not protected by privilege or otherwise exempt, including under 708(b)(29). *Id.* § 67.102. This may include, in some instances, various forms of “communications.” *See, e.g., Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Commw. Ct. 2012); *Mollick v. Twp. of Worcester*, 32 A.3d 859 (Pa. Commw. Ct. 2011); *In re Silberstein*, 11 A.3d 629 (Pa. Commw. Ct. 2011).

Communications, including correspondence,³ between Members of the General Assembly and a local or Commonwealth agency may be subject to disclosure when a records request is made to the local or Commonwealth agency and the correspondence is a public record not otherwise exempt from disclosure. The same rule applies to correspondence between Members and a person other than a local or Commonwealth agency, when the correspondence is a public record

³ It is unclear whether Petitioner is using these terms interchangeably, as Petitioner relies upon the exemption for “correspondence” in support of a request for “communications.”

not exempt from disclosure under the RTKL and in the Commonwealth or local agency's possession.

However, any such correspondence in the possession of the local or Commonwealth agency that identifies a person requesting assistance or constituent services from a legislator would not be subject to disclosure because it is exempt under Section 708(b)(29). Correspondence between a Member of the General Assembly and a lobbyist that identifies a person requesting assistance or constituent services would be accessible under the RTKL from the local or Commonwealth agency because the exemption under Section 708(b)(29) does not apply to such correspondence. *See Van Sickle v. London Grove Twp.*, OOR Docket No. AP 2013-0623 (Final Determination May 3, 2023) (emails in a township's possession were exempt under Section 708(b)(29) because they were emails between a constituent and legislators, whereas emails between the same constituent and board of supervisors were not exempt); *Kitchen & Pennsylvania Spotlight v. York County*, OOR Docket No. AP 2021-1416 (Amended Final Determination, Oct. 6, 2021) (emails in a county's possession were exempt under Section 708(b)(29) because they were emails between legislators and constituents regarding constituent service that were forwarded by legislative staff to the county); *Van Sickle v. London Grove Twp.*, OOR Docket No. AP 2013-1096 (Final Determination July 25, 2013) (documents referenced in emails in a township's

possession were exempt from disclosure under Section 708(b)(29) as they are letters drafted as correspondence between a person and a Member of the General Assembly).

Amici note Petitioner's point that the exemption for lobbyist communication makes "perfect sense" in its attempt to protect the privacy of individuals who might disclose personal information in order to seek legislative assistance or constituent services versus lobbyists who are paid to influence legislation and other official actions on behalf of principals and clients. Pet'r's Br. 31-33. *See Shackner v. West Chester Univ.*, OOR Docket AP 2014-0834, *aff'd in part*, 124 A.3d 382 (Pa. Commw. Ct. 2015). While it's certainly a reasonable thought, it is moot given the clear and unambiguous language of the statute.

Nowhere does the RTKL, including Section 708(b)(29), contemplate the disclosure of communications the likes of which are the subject of this appeal by a legislative agency. "Communications" is not enumerated as one of the nineteen categories of legislative records. The attempt to obtain communications, including correspondence with lobbyists, from a legislative agency by pointing to the exemption at Section 708(b)(29) is an attempt to improperly create another category of legislative records. Such an attempt should be rejected. *See Appeal of Scolforo*, Senate RTK Appeal 01-2009 & 02-009 (Final Determination & Order Feb. 24, 2009).

3. Petitioner’s appeal fails to demonstrate that Respondent did not make a good faith effort as required by the RTKL.

The RTKL requires a legislative agency to make a good faith effort to determine if the record requested is a legislative record and whether the agency has possession, custody or control of the identified record. 65 P.S. § 67.901. In its denial of a request for records, the legislative agency must also provide “specific reasons for the denial.” *Id.* § 67.903(2). Petitioner has failed to demonstrate that Respondent did not make a good faith effort as required by the RTKL.

In its denial, Respondent clearly states the reason for denial: “The request is hereby denied as the records requested, if any exist, are not included within the definition of legislative record. Records that do not fall within the definition of legislative record are not covered by the presumption of accessibility under the RTKL.” R.R. 003a.

Respondent clearly indicated that the reason for denial was because the request was not for a legislative record. Respondent did not claim that any responsive records do or do not exist, or whether any of the requested records are or are not in Respondent’s control, possession, or custody. Thus, the LRB’s decision that no affidavit is required in this case should be upheld. *See Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1190-92 (Pa. Commw. 2011); *Gray v. Philadelphia District Attorney’s Office*, No. 800 C.D. 2021, 2024 WL 715489, at *7-8 (Pa. Commw. Ct. Feb. 22, 2024).

III. CONCLUSION

For all the foregoing reasons, *Amici* respectfully request that this Court grant the relief sought by Respondent and affirm the Final Determination of the LRB that the denial of Petitioner’s appeal is appropriate and that Respondent is not required to take any further action on the request.

Respectfully submitted,

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Date: April 19, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains 2,476 words. In making this certification, I have relied upon the word count function of the word-processing system used to prepare this Brief.

I further certify that this Brief complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am this day effectuating service of the foregoing document upon the persons and in the manner indicated below, which satisfies the requirements of Pa.R.A.P. 121:

Service by PACFile eService as follows:

All counsel of record

Respectfully submitted,

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