In the Commonwealth Court of Pennsylvania

No. 1071 CD 2023

ANGELA COULOUMBIS,

Petitioner,

v.

SENATE OF PENNSYLVANIA,

Respondent.

BRIEF OF RESPONDENT,
SENATE OF PENNSYLVANIA

On appeal from the August 25, 2023 Final Determination
of the Appeals Officer, at LRB Appeal 2023-01

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SCOPE AND STANDARD OF REVIEW

The standard of review is *de novo* and scope of review is plenary. *Swoboda v. Pa. Dep't of State (OOR)*, 304 A.3d 105, 110 n.7 (Pa. Commw. 2023) (citing *Bowling v. OOR*, 75 A.3d 453, 477 (Pa. 2013)).

This does not mean, however, that the Court has to ignore the appeals officer's findings. The Court still is free to rely on them. The Right-to-Know Law allows for "the adoption of the appeals officer's factual findings and legal conclusions when appropriate." *Tech. & Entrepreneurial Ventures Law Grp. v. Pa. State Police*, 2021 WL 5997396, *2 n.4 (Pa. Commw. 2021) (quoting *ACLU v. Pa. State Police*, 232 A.3d 654, 662-63 (Pa. 2020)); *see also Pa. PUC v. Nase*, 302 A.3d 264, 269 (Pa. Commw. 2023) (stating same).

QUESTION INVOLVED

Do "communications" fall outside the scope of Right-to-Know Law disclosure by the Senate of Pennsylvania, given they are not on the statutory list of 19 items defined as "legislative records" subject to potential release?

Answered in the affirmative by the appeals officer.

STATEMENT OF THE CASE

In this Right-to-Know Law case, the requester asked for "communications" from the Senate of Pennsylvania. The RTKL specifies 19 types of "legislative records" that the Senate presumptively is to provide. "Communications" are not on that list, so the Senate correctly denied the request.

A. Requester asks the Senate for "communications" under the Right-to-Know Law.

The requester, Angela Couloumbis, is a reporter for Spotlight PA. She submitted a RTKL request to the Senate in July 2023. Requester asked for "communications" between the Senate and lobbyists regarding the lobbyists' client.[1] (R. 1a.) Her request covered all these "communications" for a period of more than two years—May 15, 2021 to the date of the request. (*Id.*)

[1] In her brief, requester explains why she made her request. (Br. 5-7.) This is both irrelevant and unsupported by the record. *See Commonwealth v. Engelkemier*, 148 A.3d 522, 531 (Pa. Commw. 2016) ("a requester's intent—*i.e.*, the purpose or motivation underlying a request—is not a relevant consideration under the RTKL"); Pa.R.A.P. 2117(a)(4) (statement of the case to be comprised of necessary facts and record citations); *Keller v. Scranton City Treasurer*, 29 A.3d 436, 440 n.8 (Pa. Commw. 2011) (admonishing counsel for unsupported statements in briefs).

B. The Senate denies the request because it is not required to disclose "communications."

Later the same month, the Senate timely issued its response to the request. (R. 2a-4a.) As it carefully explained, any responsive items that may exist "are not included within" the meaning of the defined RTKL term "legislative record." (R. 3a.) The Senate elaborated that materials "that do not fall within the definition" of "legislative record" are not subject to disclosure. It also pointed out a series of appeals officer decisions uniformly holding the Senate is not required to disclose "communications." The Senate thus denied the request and described the steps needed if the requester wished to appeal. (*Id.*)

C. Requester appeals the Senate's denial.

Requester appealed the Senate's denial later in July 2023. (R. 5a-6a.) She challenged it in three ways. First, requester conceded that "communications" fall outside the definition of "legislative record," but asserted those items might be located somewhere within the 19 categories in that definition. (R. 5a.) Second, she asserted the Senate had to attest to a good faith search for records even though it determined the RTKL did not require disclosure to begin with. (R. 5a-6a.) Third, requester argued that RTKL exemption 29 mandates the Senate's disclosure of what she requested. (R. 6a.)

The Senate's appeals officer acknowledged receipt of the appeal, recused himself, and referred the matter to the Legislative Reference Bureau[2] for decision. (R. 7a.) The Bureau assigned the matter to appeals officer Kristin M. Kayer, Esquire, to be assisted by Suellen M. Wolf, Esquire. (R. 8a.) The appeals officer then afforded each of requester and the Senate the opportunity to make written submissions in support of their positions. (R. 9a-10a.)

For its part, the Senate submitted a detailed letter brief. (R. 11a-19a.) It described how the denial was correct under the RTKL's unambiguous text. (R. 12a-14a.) The Senate also explained why each of the three grounds asserted in the requester's appeal lack merit. First, "communications" are not on the RTKL's list of 19 types of "legislative records," and thus the request did not call for materials subject to disclosure. (R. 15a-16a.) Second, the RTKL does not require a search attestation for every request. (R. 16a-17a.) Third, RTKL exemption 29 prevents disclosure; it does not create a production obligation. Finding otherwise would be to graft a new 20th category onto the "legislative records" list. (R. 17a-18a.)

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[2] Requester describes the Bureau as "the Senate's own in-house open records office." (Br. 2.) That is inaccurate. The Bureau, which pre-dates the RTKL by a century, was established by law and has prescribed duties in service of the General Assembly, Governor, state agencies, and the Commonwealth's citizens. *See generally* 46 P.S. §451 to §465. It does much more than handle RTKL matters.

Requester submitted a short response. She maintained that exemption 29 affirmatively requires disclosure of the "communications" she requested. (R. 20a.)

D. The appeals officer rules for the Senate because it is not required to disclose "communications."

After review of the parties' submissions, the Legislative Reference Bureau appeals officer issued a timely 12-page final determination. (*Appendix A* to requester's brief.) In that thorough decision, she sustained the Senate's denial.

The appeals officer began by explaining that legislative agencies like the Senate "are only required to provide statutorily defined legislative records." (*Id.* 6.) "Legislative records are limited in scope and comprise only those records specifically designated as such in the RTKL." If a "document sought does not satisfy the definition of a legislative record," then the inquiry ends. There is "no need to discuss whether the document is in the possession, custody or control of the legislative agency or whether there are exemptions to disclosure." (*Id.*)

The appeals officer noted that requester seemed to be trying to change her request on appeal to fit within the definition of "legislative record." (*Id.* 8.) But Pennsylvania judicial decisions do not allow RTKL requests to be changed on appeal. The inquiry is solely whether the "original request" sought "legislative records." (*Id.*) And requester's "original request" was for "communications"—

"an entirely new class of record." (*Id.* 9.) "Communications" are "not explicitly listed under the definition of 'legislative record' under the RTKL." (*Id.*)

The appeals officer then considered requester's exemption 29 argument. The officer explained that the exemption's first sentence "denies access" to constituent correspondence. (*Id.* 10.) While its second sentence removes a subset of materials from exemption, this does not change that "communications" are not "legislative records" in the first place. And there is no "indication that the General Assembly intended to transform otherwise inaccessible correspondence into legislative records through this exception provision." (*Id.*)

The appeals officer finally considered the requester's contention that the Senate had to conduct a good-faith records search. (*Id.* 11.) The officer explained that an agency's initial obligation is to determine whether the material requested is subject to potential disclosure. Because the Senate determined "communications" were not, it complied, and had no search duty. (*Id.*)

E. Requester appeals to this Court.

Requester petitioned this Court for review. In her brief, requester includes a new legislative history argument. The Senate now timely submits this merits brief and asks the Court to affirm the appeals officer's decision.

SUMMARY OF THE ARGUMENT

This Court should affirm because the Senate is not required to disclose "communications" under the Right-to-Know Law's unambiguous text.

The RTKL states that "legislative agencies" like the Senate can provide only "legislative records" in response to a request. A "legislative record" is statutorily defined as 19 kinds of items. Here, requester asked for Senate "communications" with lobbyists. They are not on the list of "legislative records." The RTKL thus does not call for the Senate to disclose them. The analysis ends there. The Senate has no further obligation, and so it need not search for anything requested.

The RTKL's itemization of potentially-accessible records is unique to the Legislative and Judicial Branches. It differs from the RTKL's broad, general presumption of access to Commonwealth and local agency records. Delineated treatment of legislative and judicial records respects the separation of powers and the exclusive constitutional powers of these co-equal Branches of government.

At the same time, the RTKL facilitates disclosure of a trove of legislative and judicial materials. This includes financial records, bills, resolutions, votes, memoranda, transcripts, minutes, calendars, reports, rules, and manuals. Plenty of legislative and judicial information is available to the public and press.

The issue here was decided 15 years ago, right after the RTKL went into effect. In 2009, a reporter asked for correspondence between Senators and lobbyists. That request was denied based on the RTKL's plain text. The appeals officer sustained the denial. Several later requests met the same fate.

Despite all this, requester still brings the issue to this Court. She essentially asks the Court to insert a new 20th category—legislative communications with lobbyists—into the statutory definition of "legislative records." She gets there through RTKL exemption 29, which she says requires disclosure. But it does not. It prevents disclosure of constituent requests for assistance. This exemption ensures citizens can privately write to legislators for help without fearing that writing might become public if it winds up in the hands of another agency.

Requester also extensively relies on legislative history. Pennsylvania law precludes her many attempts to read legislative tea leaves to divine the intent behind unambiguous statutes. What's more, her selective recitation paints an inaccurate picture. She does not mention a legislative vote decisively rejecting a proposal for disclosure of what she seeks here. She also leaves out comments showing legislative intent for unique treatment of the legislature and judiciary.

For these reasons, detailed below, this Court should affirm the appeals officer's decision.

ARGUMENT

A. The Senate is not required to produce its "communications" under the Right-to-Know Law.

1. "Communications" are not on the unambiguous statutory list of 19 types of "legislative records."

This appeal is over the meaning of the Right-to-Know Law. *See* 65 P.S. §67.101 to §67.3104. The analysis here begins, and ends, with its plain words.

Statutory language is the "clearest indication of legislative intent." *Office of Governor v. Donahue*. 59 A.3d 1165, 1168 (Pa. Commw. 2013), *aff'd*, 98 A.3d 1223, 1237-38 (Pa. 2014). The import of a law's words is found using common meaning and rules of grammar. 1 Pa.C.S. §1903(a). Common meaning is found in the dictionary. *Commonwealth v. Chisebwe*, 310 A.3d 262, 269 (Pa. 2024).

If a statute is unambiguous, the inquiry ends. "No further investigation" is allowed. *Reibenstein v. Barax*, 286 A.3d 222, 230 (Pa. 2022) (citation omitted). There is "no need to resort to other indicia of legislative intent." *Donahue*, 59 A.3d at 1168-69. This is because "[w]e may not disregard [a statute's] unambiguous language in service of what we believe to be the spirit of the law." *Reibenstein*, 286 A.3d at 230 (citation omitted); *see Levy v. Senate of Pa.*, 65 A.3d 361, 380 (Pa. 2013) (same); 1 Pa.C.S. §1921(b) (same). And "we must not

overlabor to detect or manufacture ambiguity where the language reveals none." *Reibenstein*, 286 A.3d at 230 (citation omitted).

The RTKL language here is clear and unambiguous. The Senate of Pennsylvania is a "legislative agency." 65 P.S. §67.102. A "legislative agency" presumptively is to provide only a requested "legislative record." *Id.*, §67.303(a). A "legislative record" is defined as 19 kinds of items:

(1) financial records;

(2) bills and resolutions;

(3) fiscal notes;

(4) cosponsorship memoranda;

(5) journals of the Senate and House;

(6) minutes, attendance records, and recorded votes of public hearings and committee meetings;

(7) transcripts of public hearings;

(8) calendars for executive nominations;

(9) rules of the Senate and House;

(10) recorded votes of Senate and House sessions;

(11) administrative staff manuals and written policies;

(12) audit reports;

(13) final and annual reports that must be submitted to the General Assembly;

(14) reports of the Legislative Budget and Finance Committee;

(15) calendars, including marked calendars, of daily legislative sessions;

(16) legislative appointment communications to agencies;

(17) legislative appointee resignation communications;

(18) proposed, final-form, and final-omitted regulations submitted to legislative agencies; and

(19) results of certain public opinion surveys, polls, focus groups, and marketing research.

Id., §67.102.

In sum, the RTKL's plain language allows for potential Senate disclosure of the above 19 types of items. Nothing else. *See Johnson v. Lansdale Borough*, 146 A.3d 696, 711 (Pa. 2016) ("when interpreting a statute we must listen attentively to what the statute says, but also to what it does not say"). The statutory definition of "legislative record" is "binding." *Pa. Associated Builders & Contractors v. Dep't of Gen. Servs.*, 932 A.2d 1271, 1278 (Pa. 2007); *see also Lower Swatara Twp. v. Pa. Lab. Relations Bd.*, 208 A.3d 521, 530 (Pa. Commw. 2019) (the "legislature may create its own dictionary," and when "it does define the words used in a statute, the courts … must accept the statutory definitions" (citation omitted)). And because the General Assembly chose to define "legislative record" with an itemized list, we must presume it intended to exclude from potential disclosure

anything it did not expressly list. *See Yount v. Pa. Lawyers Fund for Client Security*, 291 A.3d 349, 354 & n.21 (Pa. 2023) ("the inclusion of a specific matter in a statute implies the exclusion of other matters" under the rule of *expressio unius* (citation omitted)).

Here, the request is for "communications." Communications are not on the above list of "legislative records." The RTKL's plain language does not require the Senate to produce them. Thus, the appeals officer correctly sustained the Senate's denial.[3] *See Office of Governor v. Bari*, 20 A.3d 634 641-45 (Pa. Commw. 2011) (holding materials requested not subject to potential disclosure because they did not fall within the meaning of RTKL terms); *Highmark Inc. v. Voltz*, 163 A.3d 485, 496 (Pa. Commw. 2017) (same); *Meguerian v. Office of the Atty. Gen.*, 86 A.3d 924, 931 (Pa. Commw. 2013) (same); *see also Uniontown Newspapers v. Roberts*, 839 A.2d 185, 190 (Pa. 2003) (holding there is no common law right of access to legislative records and they are available only if and to the extent the General Assembly provides for access by statute).

[3] This is not a "close case," so there is no need to consider requester's various arguments about the RTKL's presumption of access. (Br. 33-38.) And since "communications" plainly are not subject to potential disclosure, there is no need to consider if anything is exempt, protected by a privilege, or shielded by other law, regulation, or judicial order. 65 Pa.C.S. §67.305(b).

2. The RTKL protects Legislative and Judicial Branch independence—but still facilitates transparency.

The unique, prescriptive treatment of "legislative records" dovetails with the Legislature's status as an independent and co-equal Branch of Commonwealth government. *See* PA. CONST. art. II, §1, art. IV, §2, & art. V, §1 (allocating legislative, executive, and judicial powers among the three Branches). Under the separation of powers, each of the three Branches must be kept free of external encroachments to ensure the unfettered exercise of its exclusive powers. *See Renner v. Court of Common Pleas*, 234 A.3d 411, 419-21 (Pa. 2020) (describing the separation of powers). The RTKL respects this constitutional limitation.

The General Assembly also is protected by Speech or Debate or Legislative Immunity. This constitutional protection guards the Senate, House, and legislators from being "questioned in any other place" for their actions in the legislative sphere. PA. CONST. art. II, §15. It guarantees "that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 330 (Pa. 1986) (citation omitted). Speech or Debate protection is expressly incorporated into the RTKL. *See* 65 P.S. §67.102 ("privilege" defined to include Speech or Debate protection; "public record" defined as something "not

protected by a privilege"); *id.*, §67.305(b)(2) ("legislative records" access is not allowed if "the record is protected by a privilege").

Speech or Debate or Legislative Immunity extends to a "host of kindred activities" beyond literal speech or debate. *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 630 (1st Cir. 1995).[4] It applies to speaking in the legislative chamber, voting, subpoenaing records, preparing an investigative report, and addressing a legislative committee. *Youngblood v. DeWeese*, 352 F.3d 836, 840 (3d Cir. 2003). Speech or Debate protection also covers a legislator's statements and other communications on potential subjects of legislation. *Firetree, Ltd. v. Fairchild*, 920 A.2d 913, 919-22 (Pa. Commw. 2007).

Courts have repeatedly held communications like the ones here protected by the Speech or Debate Clause. *See, e.g.*, *HIRA Educ. Servs. N. Am. v. Augustine,* 991 F.3d 180, 190 (3d Cir. 2021) (holding Pennsylvania state legislators' correspondence protected by absolute legislative immunity); *Ray v. Proxmire*, 581 F.2d 998, 999-10000 (D.C. Cir. 1978) (holding legislator's correspondence protected); *Rusack v. Harsha*, 470 F. Supp. 285, 296 (M.D. Pa. 1978) (same).

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[4] Pennsylvania courts rely on federal decisions given the scope of this legislative protection is identical under the Pennsylvania and federal constitutions. *Consumers Educ. & Prot. Ass'n v. Nolan*, 368 A.2d 675, 681 (Pa. 1977).

The separation of powers and the General Assembly's unique status and protections show the RTKL's text strikes an appropriate balance. By itemizing what is subject to potential disclosure, the statute provides a bright line. This minimizes the constitutional risks associated with requests to probe the affairs of an independent, co-equal Branch. *See Grine v. County of Centre*, 138 A.3d 88, 99 (Pa. Commw. 2015) ("allowing OOR to direct an agency to disclose a record showing activities of a judicial agency violates the separation of powers").

The RTKL shows the same respect for the judiciary. Judicial agencies, too, may produce only specified categories of materials—namely, "financial records" and items listed in court rules and orders.[5] 65 P.S. §67.304(a); *see id.*, §67.301 to §67.304 (presuming disclosure of all "public records" by Commonwealth and local agencies, but only "legislative records" by legislative agencies and "financial records" by judicial agencies). Our courts have long recognized this prescriptive limit and how it differs from the treatment of Commonwealth and local agencies. *See, e.g.*, *Miller v. County of Centre*, 173 A.3d 1162, 1168 (Pa. 2017) (describing

[5] After the RTKL was enacted, the Supreme Court amended Rule of Judicial Administration 509 to further detail the judiciary's already-existing open records policy as for financial records. *See* 201 Pa. Code Rule 509 (Official Note) (stating that Rule 509, as amended, was issued both under the Supreme Court's constitutional authority over court administration and Section 304 of the RTKL).

the "contrast" between RTKL access to records possessed by Commonwealth and local agencies, on the one hand, and judicial agencies, on the other); *Scolforo v. County of York*, 298 A.3d 193, 206 (Pa. Commw. 2023) ("the RTKL treats the records of judicial agencies differently"); *Court of Com. Pl. of Lackawanna County v. OOR*, 2 A.3d 810, 813 (Pa. Commw. 2010) ("The RTKL limits the records that judicial agencies must disclose to financial records.").

Even though the RTKL respects constitutional limits and protects Branch independence, it still makes a wealth of legislative materials available to enable public and press awareness. The law requires disclosure of the text of all bills and resolutions and the cosponsorship memoranda that explain their background and purpose. 65 P.S. §67.102(2), (4). It calls for disclosure of transcripts of floor activity in the legislative journals, votes taken during session, and legislative calendars. *Id.*, §67.102(5), (8), (10), (15). The same goes for legislative hearings and committees; the law compels disclosure of transcripts, minutes, attendance, and votes in those settings. *Id.*, §67.102(6), (7).

The RTKL also calls for the legislature's production of financial records and fiscal notes to show how taxpayer money is used.[6] *Id.*, §67.102(1), (3). The law

[6] As noted, the law similarly provides for the judiciary's disclosure of financial records. *Id.*, §67.304(a).

specifies the disclosure of audit, final, annual, and budget reports. *Id.*, §67.102(12), (13), (14). It mandates production of legislative operating rules, manuals, and procedures. *Id.*, §67.102(9), (11). The law requires transparency as for legislative appointments and regulations. *Id.*, §67.102(16), (17), (18). And the RTKL calls for production of public opinion surveys, polls, focus groups, and marketing research results paid for with public money. *Id.*, §67.102(19).

3. The issue here has been settled for 15 years.

This case is not the first time a reporter has tested the RTKL's limits as they apply to the General Assembly. One of requester's media colleagues made the same request as the one here right after the General Assembly enacted the RTKL in 2008. There, the appeals officer held the RTKL does not require the Senate to disclose "communications." Appeals officers in later decisions reached the same conclusion. And none of those requesters appealed to this Court.

On January 1, 2009, the day the RTKL took effect, Mark Scolforo of the Associated Press submitted a RTKL request to the Senate. *Appeal of Scolforo*, RTK Appeals 01-2009 & 02-2009, Final Determination, at 1 (Feb. 24, 2009).[7]

[7] All of the appeals officer decisions referenced here are publicly available at this website: www.secretary.pasen.gov/RTKL.cfm.

Like the requester here, Scolforo asked for correspondence between Senators and lobbyists. (*Id.* 1.) The request was denied, and Scolforo appealed.

The appeals officer affirmed. He explained that the RTKL defines "legislative record" "in a very specific and exhaustive manner." (*Id.* 3.) While "[t]here are nineteen different types of legislative documents listed" that could be disclosed, "[n]owhere in this list" is there any "mention of correspondence between members of the Senate and registered lobbyists." (*Id.* 3-4.) 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." (*Id.* 4.) The appeals officer thus sustained the denial. Scolforo did not appeal to this Court.[8]

An unbroken line of ensuing decisions track *Scolforo*. In 2012, an appeals officer sustained the denial of a request for Senate "communications" and "correspondence." *Appeal of Carollo*, RTK Appeal 02-2012, Final Determination, at 1-2, 5 (June 18, 2012). In 2014, an officer upheld the denial of a request for

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[8] But he did write an article quoting a newspaper association attorney as saying she "generally agreed with the appeals officers' analysis." Mark Scolforo, *Rulings keep secret Pa. lawmaker-lobbyist contacts*, ASSOCIATED PRESS, Feb. 24, 2009. Requester says she and other journalists "extensively" covered the Right-to-Know Law's enactment and mentions an article she wrote about it about the time of Scolforo's. (Br. 2 & n.2) Presumably she knew about Scolforo's request. That makes it puzzling for her to claim she was "surprised" by the denial here. (*Id.*)

Senate "email correspondence." *Appeal of Miller*, RTK Appeal 01-2013, Final Determination, at 1, 3-6 (Jan. 17, 2014). And in 2017, an officer affirmed the denial of a request for Senate "email correspondence." *Appeal of Pellington*, RTK Appeal 02-2016, Final Determination, at 1, 11-17 (Jan. 20, 2017).

Like Scolforo, none of those requesters appealed to this Court. Apparently, none of them saw any potential that this Court could see the matter differently than the appeals officers. So, for 15 years, the issue here was settled—until this case.

B. Requester asks this Court to rewrite the RTKL to add a 20th category—"lobbyist communications"—to the definition of "legislative records."

Even though the issue here appeared to have been resolved, requester still submitted her request to the Senate for "communications" with lobbyists. As with the prior requests, her request was denied and the appeals officer affirmed. But this time, requester took the matter up with this Court.

Despite its length, requester's brief never says the quiet part out loud. She is asking the Court to order the Senate to produce something not on the 19-item statutory list of "legislative records." To get to requester's desired result, the Court will have to add a new, 20th category to the statutory definition of "legislative records." That bridge cannot be crossed, of course. Courts will not "add, by interpretation, to a statute, a requirement which the legislature did not see fit to

include." *Summit School v. Dep't of Educ.*, 108 A.3d 192, 199 (Pa. Commw. 2015); *see also Dep't of Health v. OOR*, 4 A.3d 803, 812 (Pa. Commw. 2010) (a court may not "insert a word the legislature failed to supply into a statute"). Requester's appeal must fail for this basic reason.

But even putting aside the problematic underlying premise of requester's appeal, her specific arguments lack merit. Each is discussed below.

1. RTKL exemption 29 is just that—an exemption; it does not create an affirmative basis for disclosure.

Requester begins her analysis with exemption 29. (Br. 12-13.) She claims it "confirms" that legislative correspondence is subject to release. (*Id.*)

Requester's analysis skips the first step: determining, in the first place, whether "communications" are even subject to Senate disclosure at all. She instead presumes a general right of access to anything the Senate has. Requester treats legislative agencies (and, by extension, judicial agencies) as no different than Commonwealth or local agencies. As explained above, that is wrong. The RTKL provides for distinct treatment of legislative and judicial agencies. The law specifies potential access only for prescribed types of "legislative records"—not anything and everything the Senate has. 65 P.S. §67.303(a) & §67.102.

The next problem is that requester is trying to use a RTKL exemption to reverse-engineer an affirmative disclosure requirement. Exemption 29 is found in

section 708 of the RTKL. That statute does not enable disclosure. It provides a series of safeguards against it. Section 708 is entitled "Exceptions for Public Records" and states that "the following are exempt from access by a requester under this act." *Id.*, §67.708(b). The materials "exempt from access" include "correspondence between a person and a member of the General Assembly" and accompanying records that "would identify a person that requests assistance or constituent services." *Id.*, §67.708(b)(29).

Exemption 29's next sentence narrows its scope for a select subset of materials: lobbying correspondence. But that second sentence neither states nor suggests any intent to create a new, 20th category of "legislative records" possibly subject to disclosure. It is just a targeted narrowing of the broader protection of "correspondence."

2. Lobbyist correspondence may be subject to disclosure in some cases, just not here.

Requester relatedly contends the Senate's argument is "categorical"—that lobbyist correspondence is never subject to disclosure. (Br. 2-3, 4, 9, 11, 18, 20.) According to requester, this results in impermissible statutory surplusage. (*Id.* 19.)

Requester overstates the Senate's argument. Its position leaves room for potential disclosure of lobbyist correspondence in other situations. To reiterate: the Senate maintains that the RTKL's plain text does not require the Senate to

produce "communications" (with a lobbyist or anyone else) because they are not on the list of 19 "legislative records." 65 P.S. §67.303(a) & §67.102.

This does not make exemption 29's first sentence surplus. That language still operates to protect constituent correspondence with legislators when it is in the possession of an agency with a disclosure obligation broader than the Senate's.[9] *See, e.g.*, *Monaghan v. Lycoming County*, No. AP 2023-2427, 2023 WL 8697939, *9 (OOR 2023) (finding constituent email messages in local agency's possession protected by exemption 29); *accord Scolforo*, Final Determination, at 5-6.

The same is true of exemption 29's second sentence. It narrows the exemption for lobbyist correspondence with legislators when it is in the possession of an agency with a disclosure obligation broader than the Senate's. *See, e.g.*, *Spatz v. Phila. Gas Works*, No. AP 2021-0718, 2021 WL 4392186, *4 (OOR 2021) (finding lobbying email messages in local agency's possession not protected, given exemption 29's second sentence); *accord Scolforo*, Final Determination, at 5-6.

[9] The same analysis holds true as for requester's argument about draft bills. (Br. 34.) Commonwealth and local agencies may have copies of draft bills. They are exempt from disclosure if requested from those agencies. 65 P.S. §67.708(b)(9). The exemption thus is not surplus even though draft bills are not "legislative records" that can be requested from legislative agencies. *Id.*, §67.102.

In short, under the Senate's interpretation, all of exemption 29's language is effective and has meaning.

3. Requester finds no support in statutory interpretation rules.

Requester next tries to patch together several canons of statutory construction to create a disclosure obligation here. (Br. 16-20.) This, too, fails.

Requester begins by pointing to section 1921(b) of the Statutory Construction Act, which states that the goal of statutory interpretation is to find General Assembly intent. (*Id.* 16) (citing 1 Pa.C.S. §1921(a)). But she neglects to mention subsection (b) in the same statute. It specifies that intent is found solely in a statute's text if it is unambiguous. 1 Pa.C.S. §1921(b). Here, it is.

Requester next mentions *expressio unius*. (Br. 17.) But she never reckons with the omission of "communications" from the 19-category definition of "legislative record." That omission suggests an intent to exclude under this canon.

Then requester relies on "specific controls general." (Br. 17-18.) But she does explain how exemption 29 is, in some way, a "more specific" version of any of the long list of specifics found in the "legislative record" definition.

Finally, requester references the whole-act canon. (Br. 18-19.) But her appeal does not give effect to all RTKL provisions. It instead asks the Court to

ignore or rewrite several of them, including the definition of a "legislative record" and the requirement of what a "legislative agency" like the Senate has to produce.

4. Requester cannot use legislative history—and it does not help her anyway.

Requester's next argument, which takes up much of her brief, is that legislative history supports her request. (Br. 20-35.)

This is new. Requester did not argue legislative history before the appeals officer. Thus, she waived this argument for failing to preserve it. *See Crocco v. Pa. Dep't of Health*, 214 A.3d 316, 321 (Pa. Commw. 2019) (a requester waives arguments that she does not raise in the appeal to the RTKL appeals officer).

Even if requester had preserved her new legislative history argument, it may not be considered—at all—because the RTKL language here is unambiguous. And requester's recitation of the history is inaccurate in any event.

a. Pennsylvania law forbids the use of legislative history to interpret unambiguous statutes.

"As is often the case, we can with diligent effort mine from some nook or cranny of the legislative record comments from individual legislators who either favored or feared the sponsor's purported intent." *In re Jordan*, 277 A.3d 519, 531 (Pa. 2022). "But we are bound by the statute's text, not by the to and fro of

legislative floor debates." *Id.* The "governing text" controls, not "whatever some may have intended." *Id.*

"We may not disregard [a statute's] unambiguous language in service of what we believe to be the spirit of the law." *Reibenstein v. Barax*, 286 A.3d 222, 230 (Pa. 2022) (citation omitted); *see* 1 Pa.C.S. §1921(b) (stating same). Only when "the words of the statute are not explicit" may a court look at "contemporaneous legislative history" to try to unearth legislative intent. 1 Pa.C.S §1921(c)(7); *see Matter of Private Sale of Prop. by Millcreek Twp. Sch. Dist.*, 185 A.3d 282, 291 (Pa. 2018) ("Only if the statute is ambiguous, and not explicit, do we resort to other means of discerning legislative intent.").

Given these settled principles, our courts regularly reject invitations to consider legislative history to interpret unambiguous statutes. *See, e.g.*, *Office of Admin. v. State Employees' Ret. Bd.*, 180 A.3d 740, 752 n.10 (Pa. 2018) ("Because the language of the relevant provisions of the [legislative act] are unambiguous, we may not consider the arguments based upon legislative history proffered by Appellants."); *Laurel Rd. Homeowners Ass'n v. Freas*, 191 A.3d 938, 945 (Pa. Commw. 2018) ("Because our reading of [the statute] is based upon the clear and unambiguous language of that proviso, there is no legal justification for this Court to look beyond the statute and consider … legislative history."); *McCloskey v. Pa. PUC*, 219 A.3d 692, 701-03 (Pa. Commw. 2019) (refusing to consider legislative

history, given law's plain test); *Pa. Liquor Control Bd. v. Burns*, 2020 WL 3256836, *7-*8 (Pa. Commw. 2020) (same).

Requester never argues that any RTKL provision is ambiguous. She thus gives the Court no basis to look past the statutory text and consider legislative history. Instead, she invites the Court to find ambiguity on its own. (Br. 9, 11, 16.) But it is not the Court's job to develop requester's arguments. She had to develop an ambiguity argument in her brief. Because she did not, she waived this issue. *See Yannone v. Town of Bloomsburg Code Appeal Bd.*, 218 A.3d 1002, 1010 (Pa. Commw. 2019) (holding argument waived due to appellant's failure to develop it for the Court's review).

Because the RTKL provisions here are unambiguous, and requester fails to argue otherwise, the Court cannot consider any of requester's references to legislative history. All of them must be disregarded.

b. A proposal for legislative disclosure of lobbyist "communications" was voted down.

Even if the Court could probe legislative proceedings, they offer requester no support.

The Right-to-Know Law began as Senate Bill 1 of the 2007-2008 legislative session.[10] The bill's original version did not define "legislative record" and required a "legislative agency" like the Senate to disclose only "financial records." SB 1, Printer's No. 772 (Mar. 29, 2007), §102 & §303(a). Months later, the Senate amended the bill to specify that a legislative agency could disclose only 17 categories of defined "legislative records." SB 1, PN 1583 (Nov. 27, 2007), §102 & §303(a). None of those categories included communications or correspondence with a lobbyist or anyone else. The word "lobbyist" appeared nowhere in the bill. The Senate passed that version of the bill and sent it to the House.

During House debate, a Representative introduced an amendment to allow disclosure of lobbyist "communications" with public officials. House Journal, Dec. 10, 2007, at 2861 (Amendment No. A04981). This was met with immediate skepticism. A parade of other Representatives rose with concerns that this amendment would create impossible administrative burdens, invade confidential discussions, and duplicate the transparency provisions in the newly-enacted

[10] The Bill's history (including bill versions, transcripts of floor debate, and Senate and House votes) is available on the General Assembly's website at this link: https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2007&sInd=0&body=s&type=b&bn=1.

Lobbying Disclosure Act.[11] *Id.* at 2862-68. Apparently, their views held sway, as the amendment was rejected on a bipartisan vote of 140 to 62. *Id.* at 2868.

The House ultimately passed an amended version of the bill that retained the defined list of "legislative records," but expanded it to 19 categories. SB 1, PN 1646 (Dec. 10, 2007), §102 & §303(a). Those categories still did not include either communications or correspondence with a lobbyist or anyone else. And the word "lobbyist" still appeared nowhere in the bill.

Next, the Senate passed a more refined version of the bill. It kept the House's revised 19-category list of defined "legislative records." SB 1, PN 1726 (Jan. 29, 2008), §102 & §303(a). That list still did not include communications or correspondence. The Senate also added a pertinent new protection: exemption 29. It shielded "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." *Id.*, §708(b)(29). Correspondence with lobbyists was excluded from this exemption. *Id.*

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[11] Act 134 of 2006, P.L. 1213 (effective Jan. 1, 2007; codified at 65 Pa.C.S. §13A01 to §13A11). Requester suggests the RTKL's reference to the Lobbying Disclosure Act supports her view. (Br. 14-16, 19.) But the floor debate shows the opposite; this separate lobbying-specific transparency law made additional RTKL measures unnecessary. *See* 65 Pa.C.S. §13A05 (requiring regular disclosure of lobbyist and principal information, lobbying subjects, and lobbying costs).

The House then amended the bill a final time. It kept all of the Senate's above changes. SB 1, PN 1763 (Feb. 11, 2008), §102, §303(a), & §708(b)(29). Each chamber passed this version, and the Governor signed it into law.

In her brief, requester eschews anything resembling the above holistic recitation of Senate Bill 1's development. She makes no mention of the House's rejection of an amendment calling for disclosure of legislators' "communications" with lobbyists (what she seeks here). Requester instead cherry-picks isolated legislator comments to craft an alternative story. (Br. 1, 12, 23-24, 28-32.) Our courts frown on that practice. *See Snyder Bros. v. Pa. PUC*, 198 A.3d 1056, 1083 (Pa. 2018) (Wecht, J., concurring) ("using legislative history to discern the General Assembly's intent is … 'the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends'" (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring)).

Requester's selective approach inevitably leads her to take legislators out of context. She quotes two parts of a speech by the bill's prime sponsor on the Senate floor. (Br. 32) (quoting Senate Journal, Nov. 28, 2007, at 1405 & 1406). But this leaves out something important in between. There, the prime sponsor explained that the bill treated the judiciary and legislature differently than Commonwealth and local agencies. Under the bill, "judicial agencies are required to provide

financial records" and "legislative agencies are required to provide 17 different categories of records." Senate Journal, Nov. 28, 2007, at 1405. He explained why:

> [T]he legislature and judiciary are created differently than the executive agencies and local agencies. Some think that the legislature and judiciary should be treated the same. I do not agree. Each branch of government has a unique set of constitutional responsibilities, and the structure of Senate Bill No. 1 respects those differences.

Id. at 1406. Requester never mentions this passage, sandwiched between two quotes she does include in her brief.

What is more, none of the legislators that requester quotes specified that their comments were about the actual RTKL text here. Their comments mostly express general conceptual support for transparency. Some did not have the chance to review bill text before commenting. Others seem to have been commenting on provisions not at issue here or language left out of the final bill. Given all these uncertainties, requester is left only guessing about what "could have been the reason" for some proposed changes. (Br. 33.)

In sum, requester's many citations to legislative history do not help her argument. If anything, the distorted picture she paints shows exactly why our courts have a rule against using legislative history to explain unambiguous statutes.

5. The Senate did not need to search for records the RTKL does not require it to produce.

Requester's final argument is that the Senate had to search for records no matter what. She says the RTKL required a search here because Senate email messages and other communications might "contain" some of the 19 types of "legislative records" and thus could be subject to disclosure. (Br. 10-11, 38-42.)

Once again, requester skips the first step: "Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a … legislative record." 65 P.S. §67.901. That is what the Senate did here. It made a good-faith determination that "communications" are not on the list of 19 categories and thus are not "legislative records." That ends the inquiry. The Senate was not required to search for materials it does not have to disclose under the RTKL to begin with. *See Office of Governor v. Bari*, 20 A.3d 634, 640 (Pa. Commw. 2011) (the "preliminary, threshold issue that must be decided" is whether information even constitutes a "public record"); *Office of Budget v. OOR*, 11 A.3d 618, 622 (Pa. Commw. 2011) (under section 901, "the agency must: first, make a good faith effort to ascertain if the requested record is a public, legislative or financial record").

Requester's contention that some of the 19 categories of "legislative records" may be found within what she requested also seems like an attempt to

change her request on appeal. She similarly tries to recast her request as seeking "emails." (Br. 2-3, 11, 16, 38, 41.) But requester did not ask for any of the 19 categories of "legislative records." Nor did she ask for "emails." She asked solely for "communications." Requester cannot change her request now. *See Smith Butz v. Pa. Dep't of Envtl. Prot.*, 142 A.3d 941, 945 (Pa. Commw. 2016) ("Once an RTKL request is submitted, a requester is not permitted to expand or modify the request on appeal."). And the Senate was obliged only to apply the common meaning of the request's plain words. *See Office of the Dist. Attorney v. Bagwell*, 155 A.3d 1119, 1142-43 (Pa. Commw. 2017) ("an agency should rely on the common meaning of words and phrases … and construe the specificity of the request in the context of the request, rather than envisioning everything the request might conceivably encompass").

Even if requester could alter her request now, then it would lack specificity. Her "revised" request would seek email messages "between any Senate employee or senator" and six lobbyists over a period exceeding two years. Responding would require the Senate to undertake an arduous search across a massive universe of materials for anything in 19 categories of legislative records connected to this much broader request. Burdensome requests like that lack sufficient specificity. *See, e.g.*, *Pa. Dept. of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121, 1124 (Pa.

Commw. 2015) (holding "all emails" request insufficiently specific); *Mollick v. Township of Worcester*, 32 A.3d 859, 871-72 (Pa. Commw. 2011) (same).

CONCLUSION

For these reasons, respondent, Senate of Pennsylvania, requests that this Court affirm the appeals officer's decision.

Respectfully submitted,

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Dated: April 19, 2024

CERTIFICATE OF COMPLIANCE: WORD COUNT

I, Karl S. Myers, certify that the above document complies with the 14,000-word limit prescribed by Pa.R.A.P. 2135 because, excluding exempt parts, the document contains 6,958 words.

/s/ Karl S. Myers
Karl S. Myers

Dated: April 19, 2024