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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ANGELA COULOUMBIS,

Petitioner-Appellant,

v.

SENATE OF PENNSYLVANIA,

Respondent-Appellee.

On Appeal from a Final Determination of the Legislative Reference Bureau, entered on Aug. 25, 2023, LRB Appeal 2023-01, Senate RTKL Appeal 01-2023

REPLY BRIEF FOR APPELLANT

Paula Knudsen Burke
No. 87607
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
P.O. Box 1328
Lancaster, PA 17608
(717) 370-6884
pknudsen@rcfp.org

Jim Davy
No. 321631
ALL RISE TRIAL & APPELLATE
P.O. Box 15216
Philadelphia, PA 19125
(215) 792-3579
jimdavy@allriselaw.org

Counsel for Appellant

Date: May 10, 2024

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INTRODUCTION

Appellee's theory of this case and of the Right to Know Law ("RTKL") is wrong, and its Response Brief helps explain why. Appellee's briefing both depends on and responds to a mischaracterization of Ms. Couloumbis's arguments. At bottom, Ms. Couloumbis does not seek to create a new category of legislative records. Her argument, instead, is that at least some of the law's enumerated categories of legislative records encompass records contained in emails from lobbyists, and thus, records responsive to her request. Indeed, the General Assembly struck a considered balance that if such records happened to fall within email communications, those records would be subject to release—a compromise reflected in both the text of the law, including the (b)(29) exemption, and in the legislative history, including the legislature's stated reasons for rejecting a more expansive amendment that would have opened all such emails to the public.

The Senate insists that because "communications" is not included in the nineteen defined categories of "legislative records," the RTKL's plain language does not require the Senate to produce them, or even search for them. *See* R.003a (Senate denial letter explaining that "The request is hereby denied as the records requested, if any exist, are not

included within the definition of legislative record."). But under Appellee's own theory, some of those records are subject to release. Despite the RTKL's clear mandate that "an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record," Appellee undertook no such search for records its theory would categorize as responsive, nor made any attempt to determine if responsive records existed at all. *See* 65 P.S. § 67.901. This alone should result in reversal, and in an accompanying remand for Appellee to conduct that search in good faith and invoke specific exemptions as to any responsive records that may exist.

Finally, Appellee's invocation of several unrelated or inapposite doctrines does not change this analysis. Precedents under the speech and debate clause protecting members of the legislature from *civil liability* for their acts as legislators have no bearing on an open records question. Waiver doctrine has no place here either because citing to legislative history is not itself an argument—it supports the legal arguments that Ms. Couloumbis has made all along. And Appellee's citation to denials of

pro se requests by journalists only underscores the difficulty obtaining representation occasioned by the law's presumption against fee-shifting.

ARGUMENT

I. Records responsive to Ms. Couloumbis's request fall within the enumerated categories of legislative records.

Appellee repeatedly accuses Ms. Couloumbis of trying to add a "new" "20th category" onto the list of Legislative records.[1] Response Br. at 5, 9, 20, 22. But this mischaracterizes Ms. Couloumbis's argument, and it helps explain both why the Senate mishandled her request initially and why its arguments to this Court miss the mark. The Senate's mischaracterization and resulting arguments depend upon two related mistakes: first, the Senate takes an unduly narrow view of the word "communications" that cannot stand against the meaning and purpose of the RTKL; second, the Senate argues that its own unduly narrow view of Ms. Couloumbis's request falls entirely outside of the categories of legislative records. Those mistakes help explain why this Court should reverse.

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[1] "Legislative record" is defined to include nineteen categories of records. *See* 65 P.S. § 67.102.

As this Court has repeatedly explained, "we construe the RTKL's access provisions liberally, and we construe its exemptions strictly." *Mountz v. Columbia Borough*, 260 A.3d 1046, 1053 (Pa. Commw. Ct. 2021); *see also, e.g.*, *Highlands Sch. Dist. v. Rittmeyer*, 243 A.3d 755, 762 (Pa. Commw. Ct. 2020). When considering the text of requests specifically, this means that the entity receiving a request "should rely on the common meaning of words and phrases," while being "mindful of the remedial purpose of the RTKL"—which cuts against reading requests unduly narrowly to frustrate disclosure. *Office of the Dist. Att'y of Phila. v. Bagwell*, 155 A.3d 1119, 1142–43 (Pa. Commw. Ct. 2017). Indeed, "an attempt to construe the request in any particular adverse manner" might amount to bad faith that supports the rare assessment of attorneys' fees against a public entity responding to such a request. *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.* (*Uniontown III*), 243 A.3d 19, 23 (Pa. 2020); *see also Bagwell*, 155 A.3d at 1126 (affirming a trial court that had affirmed an OOR finding that "the District Attorney had construed the request too narrowly").

Here, then, the Appellee's skewed view of Ms. Couloumbis's request comes into focus. The Senate, in initially responding to Ms. Couloumbis's

request and in its briefing to this Court, repeatedly construes the word "communications" as narrowly as possible and treats the absence of that specific word from the statutory list of categories of legislative records as dispositive. *E.g.* Response Br. at 8, 10–13. But "communications" as a word is not defined so narrowly, and its most plain and ordinary reading encompasses records that fall within the enumerated list of categories of legislative records. Merriam-Webster's 1a definition for "communication" is "a process by which information is exchanged between individuals through a common system of symbols, signs, or behavior," and its 2a definition—the one most in line with Ms. Couloumbis's request—is "information communicated: information transmitted or conveyed." *Communication*, Merriam-Webster (2024).[2] Such "information" includes not just the text of an email itself, but attachments and other information included in those messages. Ms. Couloumbis has previously explained—and the Senate does not dispute—that communications from registered lobbyists might well include attachments or other information that fall within even the most narrowly-defined heartland of legislative records.

[2] *Available at*: https://www.merriam-webster.com/dictionary/communication.

See Opening Br. at 41 (discussing likelihood registered lobbyists might email (or email about) a "bill or resolution," qualifying "fiscal notes," and "the results of public opinion surveys" (quoting 65 P.S. § 67.102)). Because a normal reading of "communications" encompasses information that explicitly falls within existing categories of legislative records, Appellee's entire framing of the request as one seeking a "new, 20th category" of records falls apart.

Appellant's position comports with the understanding of the statute that Appellee's and *amici*'s members articulated during the legislative process. This Court can of course consider the relevant legislative history, *see, infra* Section III, and as Ms. Couloumbis explained in her Opening Brief, her understanding of the law is reflected by both the amendments that the legislature passed and those that it did *not* pass. Appellee makes much of the legislature voting down an amendment that would have made *all* of its members' emails public. *See* Response Br. at 28–29 (discussing Amendment No. A04981). But contrary to Appellee's assertion that Ms. Couloumbis "ma[de] no mention" of that in her brief, *id.* at 30, Ms. Couloumbis not only discussed it, but did so to explain *why* the members rejected it and why that rejection supports her argument

here. As Ms. Couloumbis explained, *see* Opening Br. at 24 (discussing S.B. 1, Printer's No. 1646, Reg. Sess. (Pa. Dec. 10, 2007)), after lengthy debate on numerous amendments, including Amendment No. A04981 and others, the legislature rejected the more all-encompassing amendments because it transgressed the "very well-crafted compromise" reached by the House's lead negotiator and many other members, whereby "there are certain defined public records and if they happen to be e-mail, then they are recoverable, and if you can provide them in another form, then you can provide it in that form and meet any request for that information. That is a reasonable approach to take." 2007 H.R. Legis. Journal, Reg. Sess. 2864 (Pa. Dec. 10, 2007) (statement of Rep. Daylin Leach).[3] Under the circumstances, if responsive legislative records happen to be contained in communications with registered lobbyists, those records are subject to release and specifically not protected by the (b)(29) exemption.

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[3] *Available at*: https://www.legis.state.pa.us/WU01/LI/HJ/2007/0/20071210.pdf#page=11.

II. Under the Senate's own theory, at least some responsive legislative records exist for which the Senate undertook no search.

Appellee offers its own reading of the RTKL that would render the (b)(29) exemption something other than pure surplusage. But Appellee's magnanimous-seeming concession about the availability of member-lobbyist communications under some circumstances is neither a meaningful concession nor correct under the law. Appellee's view is unsupported by the authority it offers, and ultimately, this Court should reject it. But even if this Court were to adopt it wholesale, under the Senate's own theory that the (b)(29) exemption has some meaning because the records at issue become public records of an agency when a state legislator passes constituent requests along, the Senate therefore likely holds *public* records responsive to Ms. Couloumbis's request—more even than Ms. Couloumbis's own argument supposes. And, as Ms. Couloumbis explained in the opening brief, Appellee's failure to undertake a good faith search for qualifying records should dictate reversal here.

First, Appellee argues that its interpretation of the meaning of "legislative record" does not render the (b)(29) exemption pure

surplusage because it could still operate "to protect constituent correspondence with legislators when it is in the possession of an agency with a disclosure obligation broader than the Senate's." Response Br. at 23. In support, it cites *Monaghan v. Lycoming County*, No. AP 2023-2427, 2023 WL 8697939, at *9 (Pa. Off. Open Recs. Dec. 7, 2023). But *Monaghan* only illustrates the problem here. For whatever value *Monaghan* offers through less than one page of analysis into application of the (b)(29) exemption in that matter, it illustrates that the OOR there applied the (b)(29) exemption to another type of record entirely—email correspondence between a state senator and a county commissioner, that happened to concern a constituent's request for assistance. *See id.* The subsequent act of a state legislator passing a constituent request for assistance along to a third-party agency is a categorically different type of communication than the constituent's communication to the state legislator in the first instance.

Second, however, and worst for the Appellee Senate: its position would actually require release in many circumstances, and of more records even than Ms. Couloumbis's reading of law would. This is because Appellee suggests that the moment a state senator sends a constituent

(or lobbyist) email to a separate public entity subject to the RTKL—a county government, a Commonwealth agency, etc.—that constituent (or lobbyist) email transforms from being not a record at all to a public record of the other public entity subject to exemption (b)(29). *See* Response Br. at 22–24. And if the Senate believes that it holds qualifying "public records" of an agency or local government, those records would be subject to potential release—including by the Senate itself. 65 P.S. § 67.901, the "General rule" about an agency response to a records request, requires agencies to make a good faith effort "to determine if the record requested is a public record, legislative record, or financial record." *Id*. "Agency," to be clear, includes "a legislative agency" like the Senate. 65 P.S. § 67.102. Taken together, the Senate has an obligation to produce qualifying public records that it holds. *See Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81, 88 (Pa. Commw. Ct. 2013) (observing that "only one party needs to be an agency to lead to RTKL disclosure" and remanding for consideration of individualized exemptions). Of course, as Ms. Couloumbis has explained and the Senate confirmed, the Senate never undertook such a search at all. *See* Opening Br. at 32–36. So the Senate's own view would compel reversal.

The Senate's view actually dictates broader requester access to records than Ms. Couloumbis's does. The Senate, generally, does not possess many "public records," since those are defined as a record "of a Commonwealth or local agency." 65 P.S. § 67.102. But under the Senate's view of the law, any time a state legislator passes along correspondence they have received to any other Commonwealth or local agency, that record becomes a public record of the Commonwealth or local agency, and accordingly, subject to the Senate's own good faith duty to release such records in response to a request. Under its theory, the Senate would have a responsibility to produce *all* lobbyist emails—absent invocation of a specific exemption—that any member passes on to any other Commonwealth or local agency. The Senate's position also offers less protection to constituents who receive needed assistance that they seek—because their messages might be subject to release by the third-party public entity, with redactions to comply with exemption (b)(29). *See Cent. Dauphin Sch. Dist. v. Hawkins*, 253 A.3d 820, 834 (Pa. Commw. Ct. 2021), *aff'd*, 286 A.3d 726 (Pa. 2022) (requiring release with redactions to comport with remedial purpose of RTKL). Ms. Couloumbis's view—shared by the drafters of the law, *see* Opening Br. at 25; Section I, *supra*—

would merely entitle requesters to communications between members of the legislature and registered lobbyists, if those messages included or contained information that happens to fall within the enumerated categories of legislative records.

III. The Senate's other arguments are inapposite or unavailing.

Appellee invokes several doctrines or precedents that simply have no bearing on the outcome or analysis of this appeal.

First, the Senate's citation to background principles such as the Speech and Debate Clause of the Constitution and associated immunity, *see* Response Br. at 14–18, has no bearing on this appeal. Appellee twists its members' immunity from suits for *civil damages* for acts undertaken in their capacity as legislators to say that courts "have repeatedly held communications like the ones here protected by the Speech [and] Debate Clause." *Id.* at 15. But the case it cites, *HIRA Educ. Servs. N. Am. v. Augustine*, 991 F.3d 180 (3d Cir. 2021), had nothing to do with the propriety of releasing members' correspondence—indeed, the very reason some legislators in that case had been sued was precisely *because* that correspondence was already very public. *Id.* at 190 (discussing a "letter to Governor Wolf" that the civil plaintiff complained "made disparaging

public comments" about it). Furthermore, this Court has already concluded in a previous RTKL case involving these parties that "the speech and debate privilege categorically cannot protect subject matters in engagement letters and invoices and therefore may not be relied upon by the Senate to support its redactions." *See Couloumbis v. Senate of Pa.*, 300 A.3d 1093, 1105 n.12 (Pa. Commw. Ct. 2023). For the same reason, the speech and debate privilege is irrelevant to Ms. Couloumbis's request for records accessible to the public under a separate statute.

Second, Ms. Couloumbis has not "waived" her ability to argue her appeal by citing relevant legislative history. Legislative history is a form of legal authority and an "appropriate" tool "to help interpret a statute." *Paskel v. Heckler*, 768 F.2d 540, 543 (3d Cir. 1985); *see also* 1 Pa. C.S. § 1921(c)(7). And as numerous courts have explained, "a party can raise new authorities on appeal in support of a preserved issue." *Meyers v. U.S. Att'y Gen.*, No. 20-14721, 2024 WL 1928360, at *13 (11th Cir. May 2, 2024) (collecting cases from the Fifth, First, and D.C. Circuits saying the same). Where an issue has clearly been preserved, a court "should . . . use its full knowledge of its own and other relevant precedents" to decide the issue. *Id.* (internal quotation marks and alterations omitted) (quoting

Elder v. Holloway, 510 U.S. 510, 516 (1994)). So too, here, as Appellee's and *amici*'s members understood when debating the RTKL and various amendments. 2007 H.R. Legis. Journal, *supra*, at 2822 (statement of Speaker Dennis M. O'Brien) (Speaker of the House observing that "[t]he Statutory Construction Act is the vehicle they use to determine the legislative intent. The Journal is also something that can be included in that process.").

Third, Appellee seems to suggest that a modest number of decisions by the Legislative Reference Bureau should put the issues raised on this appeal beyond debate. *See, e.g.*, Response Br. at 19 (discussing "[a]n unbroken line" of decisions of the Legislative Reference Bureau blocking access in response to similar requests). But Appellee's observation that journalists denied access to similar records "did not appeal to this Court," *id.*, does not make the point Appellee believes it does. All the matters cited[4] appear to involve journalists proceeding *pro se* in making their

[4] *See* Response Br. at 18 (citing Final Determination, *Appeal of Scolforo*, Senate RTK Appeal Nos. 01-2009, 02-2009 (Feb. 24, 2009)); *id.* at 19 (citing Final Determination, *Appeal of Carollo*, Senate RTK Appeal No. 02-2012 (June 18, 2012)); *id.* at 20 (citing Final Determination, *Appeal of Miller*, Senate RTK Appeal No. 01-2013 (Jan. 17, 2014)); *id.* (citing Final Determination, *Appeal of Pellington*, Senate RTK Appeal No. 02-2016 (Jan. 20, 2017)).

requests. And *every one* of those four L.R.B. decisions explicitly note in identical language that the *pro se* requester "has not availed himself of the opportunity to file any further documentation or a memorandum of law to support his appeal." *Appeal of Scolforo*, *supra*, at 5; *Appeal of Carollo*, *supra*, at 2; *Appeal of Miller*, *supra*, at 2; *Appeal of Pellington*, *supra*, at 5. Under the circumstances, Appellee has merely proven that because the RTKL does not make attorneys' fees available in all but very rare circumstances, *see, e.g.*, *Uniontown III*, 243 A.3d at 34, journalists often undertake their requests without legal assistance and lack the resources to appeal to this Court upon L.R.B. denials absent, as here, nonprofit counsel acting *pro bono*. The Court should treat the issue presented by this appeal as the open question that it is, and resolve it with the benefit of the Parties' briefing in this case, rather than in reference to a few short L.R.B. decisions issued after one-sided arguments.

CONCLUSION

For the foregoing reasons, in addition to those in the Opening Brief, the judgment of the Legislative Reference Bureau should be reversed.

Respectfully submitted,

/s/ Jim Davy

Jim Davy
ALL RISE TRIAL & APPELLATE
P.O. Box 15216
Philadelphia, PA 19125
(215) 792-3579
jimdavy@allriselaw.org

Counsel for Appellant

Paula Knudsen Burke
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
P.O. Box 1328
Lancaster, PA 17608
(717) 370-6884
pknudsen@rcfp.org

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/s/ Jim Davy

Jim Davy

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I certify that I have served this Brief on all other Parties by filing via PACFile, because all Parties are counseled and will receive notice via that system.

/s/ Jim Davy

Jim Davy