

Subject: RTK Request 2201121245 Morris - Denied In Part / Granted In Part
Date: Thursday, January 20, 2022 at 10:31:09 AM Eastern Standard Time
From: RTKofficer
To: AO Records

EXTERNAL SENDER

Dear Mr. Morris,

I am responding to your recent RTK request which was received on Wednesday, January 12, 2022 in which you requested the following:

- 1. Records sufficient to identify the names and job titles of each employee assigned to the Senate Intergovernmental Operations Committee's investigation of elections in Pennsylvania, or of those working in support of those assigned to the committee's investigation. For request item 1, please provide all responsive records for each month spanning July 2021 through December 2021 (i.e., July 2021, August 2021 . December 2021).*
- 2. Records sufficient to identify the Senate Intergovernmental Operations Committee's actual or prospective budget for any investigations of elections (including, but not limited to, relevant employee salaries and election fraud investigation expenses). For request item 2, please provide all responsive records reflecting the described budgets for fiscal years 2021 and 2022.*
- 3. Records sufficient to identify all costs and expenses incurred by the Senate Intergovernmental Operations Committee for any investigations of elections (for example, relevant employee and contractor payments, including, but not limited to, those made to Envoy Sage, and election fraud investigation expenses). For request item 3, please provide all responsive records reflecting the described costs and expenses for fiscal years 2021 and 2022. All portions of this request should be interpreted to include any investigations undertaken by former committee chair Sen. Mastriano as well as the investigation led by current committee chair Sen. Dush.*

In reviewing your request, the following sections of the Right-to-Know Law (RTKL), 65 P.S. § 67.101 et. seq., are relevant:

Section 303(a) of the RTKL provides that “[a] legislative agency shall provide legislative records in accordance with this act.” 65 P.S. § 67.303(a). Section 102 defines “legislative agency” to include the Senate. 65 P.S. § 67.102.

Section 305(b) provides that “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; (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.” 65 P.S. § 67.305(b). Accordingly, if the record requested is not considered a “Legislative record” under the RTKL, it is not presumed to be available to the public.

Section 102 of the Act provides the following definition of “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 co-sponsorship memorandum.*
- (5) *The journal of a chamber.*
- (6) *The minutes of, record of attendance of members at a public hearing or a public committee meeting and all recorded votes taken in a public committee meeting.*
- (7) *The transcript of a public hearing when available.*
- (8) *Executive nomination calendars.*
- (9) *The rules of a chamber.*
- (10) *A record of all recorded votes taken in a legislative session.*
- (11) *Any administrative staff manuals or written policies.*
- (12) *An audit report prepared pursuant to the act of June 30, 1970 (P.L.442, No.151) entitled, "An act implementing the provisions of Article VIII, Section 10 of the Constitution of Pennsylvania, by designating the Commonwealth officers who shall be charged with the function of auditing the financial transactions after the occurrence thereof of the Legislative and Judicial branches of the government of the Commonwealth, establishing a Legislative Audit Advisory Commission, and imposing certain powers and duties on such commission."*
- (13) *Final or annual reports required by law to be submitted to the General Assembly.*
- (14) *Legislative Budget and Finance Committee reports.*
- (15) *Daily legislative session calendars and marked calendars.*
- (16) *A record communicating to an agency the official appointment of a legislative appointee.*
- (17) *A record communicating to the appointing authority the resignation of a legislative appointee.*
- (18) *Proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency.*
- (19) *The results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency." 65 P.S. § 67.102.*

Section 102 further provides for the definition of "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.” 65 P.S. § 67.102.

Section 102 also defines:

“Confidential proprietary information.” Commercial or financial information received by an agency:

- (1) which is privileged or confidential; and*
- (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information. 65 P.S. § 67.102*

Section 704. provides for “[e]lectronic access.

(a) General rule.--In addition to the requirements of section 701, an agency may make its records available through any publicly accessible electronic means.

(b) Response.—

- (1) In addition to the requirements of section 701, an agency may respond to a request by notifying the requester that the record is available through publicly accessible electronic means or that the agency will provide access to inspect the record electronically.*
- (2) If the requester is unwilling or unable 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.*

Section 705 of the Act states “[w]hen 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 in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705.

Section 706 allows for the redaction of information.

Section 706. Redaction.

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9. 65 P.S. § 67.706.

Section 708. Exceptions for public records.

(a) Burden of proof.--

(2) The burden of proving that a legislative record is exempt from public access shall be on the legislative agency receiving a request by a preponderance of the evidence.

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

(11) - A record that constitutes or reveals a trade secret or confidential proprietary information. 65 P.S. § 67.708(b)(11).

Section 901 provides the general rule for responding to RTK requests.

Section 901. General rule.

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 public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request. All applicable fees shall be paid in order to receive access to the record requested. The time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency. If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied. 65 P.S. § 67.901.

The request for “[r]ecords sufficient to identify the names and job titles of each employee assigned to the Senate Intergovernmental Operations Committee’s investigation of elections in Pennsylvania, or of those working in support of those assigned to the committee’s investigation” is denied as no such legislative record exists nor is such a record maintained as requested – “...assigned to the ...investigation...” Pursuant to Section 705, a record is not required to be created. Additionally, a request must seek records, rather than answers to questions – such as “...records sufficient to identify the names and job titles of each employee assigned...” which is more or less a question seeking an answer. *Walker v. Pa. Ins. Dep’t*, No. 1485 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 425 at *16 (Pa. Commw. Ct. 2012). There is no provision within the RTKL that would require an agency to respond to questions. *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *14 (Pa. Commw. Ct. 2012) (noting that the portion of a request “set forth as a question” did not “trigger a response”).

However, you may wish to view the online [legislative directory](#) for the Senate staff. This directory provides the names and position of every Senate employee, member and officer. Select “Senate” and then a member or office to see a specific listing or you may select “all offices” to view all.

The request for “...the Senate Intergovernmental Operations Committee’s actual or prospective budget for any investigations of elections (including, but not limited to, relevant employee salaries and election fraud investigation expenses)” is denied as there are no legislative records responsive to the specifics of the request. The appropriations received by the Senate are allocated as outlined in the budget ([2021-2022](#)) and generally the caucuses determine the use of the funds, on a case by case basis, and as expenses are incurred and submitted for processing.

Pursuant to Sections 704, 706 & 708(b)(11), request 3 is hereby granted in part and denied in part.

Please see the link to the contract on the [State Treasury Contract e-Library Database website](#) - (Contract # [3921111601A](#))

Within the contract, the redaction code “65 P.S. § 708(b)(11)” was limitedly applied to information that the contractor asserts is confidential proprietary information.

The redacted information is deemed denied and the process for appeal is provided below. As of this time, there are no other financial records associated with the contract as no expenses have been processed for payment.

Therefore, this part of the request is denied as there are no responsive records. Please note that pursuant to Section 704, the Senate publishes [monthly expense reports](#) on the Senate website.

If you have any questions, please contact Michael Sarfert of my staff.

Sincerely,

Donetta M. D’Innocenzo, Open Records Officer
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Link to Senate RTKL website - <http://www.pasen.gov/RTKL/index.cfm>

RIGHT TO APPEAL

In accordance with Section 903 of the Right-to-Know Law, you are hereby notified of your rights to appeal a denial under Chapter 11 of the Act. 65 P.S. §67.903.

The Senate has appointed the Secretary of the Senate, to serve as Appeals Officer. 65 P.S. §67.503. The Appeals Officer can be contacted as follows:

Megan Martin
Senate Appeals Officer
Room 462, State Capitol Building
Harrisburg, PA 17120-3053
Telephone: (717) 787-5920
RTKAppeals@os.pasen.gov

Please be sure to include your complete contact information with any appeal, a copy of the original request and this denial.

Chapter 11 of the law governs the appeals process and provides for the following:

1. An appeal must be filed with the Senate’s Appeals Officer within 15 business days of the mailing date of this response.
2. An appeal shall state the grounds upon which the requester asserts that the record is a legislative record, which includes a financial record and shall address any grounds stated by the agency for delaying or denying the request. 65 P.S. §67.1101(a)(1). An appeal must also be filed in accordance with the provisions of Chapter 7 of Title 104 (Senate of Pennsylvania) of the Pennsylvania Code.
<http://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/104/chapter7/chap7toc.html&d>
3. The Appeals Officer is required to make a final determination, in writing, within 30 days of receiving an appeal. Prior to making the final determination, the Appeals Officer may hold a hearing.

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