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IN THE SUPREME COURT OF PENNSYLVANIA

No. 76 MAP 2019
No. 77 MAP 2019

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OFFICE OF OPEN RECORDS

UNIONTOWN NEWSPAPERS, INC., *d/b/a* THE HERALD STANDARD, and CHRISTINE HAINES,

Appellees,

v.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS,

Appellant.

BRIEF OF AMICUS CURIAE PENNSYLVANIA NEWSMEDIA ASSOCIATION IN SUPPORT OF APPELLEES

Appeals by allowance from the Orders of the Commonwealth Court of Pennsylvania (Simpson, J.) at No. 66 MD 2015 issued on March 23, 2018 and October 29, 2018

Respectfully submitted by:

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INTEREST OF THE AMICUS CURIAE

The Pennsylvania NewsMedia Association ("PNA") is a Pennsylvania nonprofit corporation with its headquarters located in Harrisburg, Pennsylvania. Founded in 1925, the Association represents the interests of over three hundred (300) daily and weekly newspapers and other media organizations across the Commonwealth of Pennsylvania in ensuring that the press can gather information and report to the public. A significant part of the PNA's mission is to defend the media's statutory and constitutional rights of access to public records in Pennsylvania. The media's ability to access public records of public agencies plays an indispensable role in providing the oversight that is a foundational element of a democratic society.

The present case raises important issues regarding public access to records under Pennsylvania's Right to Know Law ("RTKL"), including the nature and scope of agencies' duties to operate in good faith in response to requests, and the availability of penalties when agencies fail to do so. If this Court were to adopt the position of the Appellant, Pennsylvania Department of Corrections ("DOC"), and its *amici* in this case, it would constitute a significant departure from the express language and remedial intent of the RTKL, and would negatively impact the public's ability to access public information.

The PNA seeks to participate pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure, both to emphasize the important public access issues raised by this case, and to stress the legal and policy considerations that mandate an interpretation of the RTKL in favor of full, meaningful review and response by agencies receiving requests, and sanctions when agencies fail to do so in bad faith.

No party, person or entity other than the PNA financed or authored this brief.

SUMMARY OF THE ARGUMENT

The PNA fully supports and wholly adopts the reasoning and legal analysis set forth in the brief of Appellees, Uniontown Newspapers, Inc., d/b/a, The Herald Standard, and Christine Haines (collectively, the "Newspaper"), to this Honorable Court. In an effort to comply with Rule 531 and the comments thereto, the PNA writes separately to bring the Court's attention to matters not previously briefed by the parties, namely, the legislative history of the law and its support for Judge Simpson's holding below and the Newspaper's position in this case, and to address the issue of burden raised by the DOC and the DOC's *amici*.

The legislative history makes clear that arguments put forth by the DOC - and its *amici* - regarding the availability of sanctions under Section 1304 of the RTKL are incorrect. The DOC's position in this case would make the award of attorneys' fees more difficult to pursue and less likely to be awarded than the penalties available under the prior, more restrictive version of the RTKL. This cannot be the result of remedial legislation intended to improve public access and accountability.

The remedial RTKL was enacted to reverse decades of abysmal government transparency in the Commonwealth, an environment that fostered a culture of secrecy that has yet to be completely reversed. The presumption of access and burden of proof enshrined in the law reflect the clear legislative intent to improve public access and increase accountability. The law's remedial intent is only

effectuated if agencies, as an initial, threshold matter are required to make a good faith effort to locate and review responsive records upon receipt of each and every request, with agencies subject to sanctions when they do not.

The law must be interpreted in a manner consistent with its plain language regarding an agency's duties to respond and its legislative intent to increase the availability of penalties to requestors forced to litigate when an agency fails to perform its statutory duties in good faith.

ARGUMENT

As part of the legislative process leading up to passage of the RTKL in 2008, the PNA worked closely and constructively with the RTKL's prime sponsor as well as other legislators and stakeholders, including the DOC's *amici*[1] in this case. Senate Legislative Journal 2007, page 1406. Therefore, in other words, the PNA had a front-row seat in the legislative workings behind the RTKL. Accordingly, the PNA seeks to offer the Court insights, which it collected first-hand, about the legislative record and other resources that underscore the remedial nature of the law, its foundational underpinnings and the legislature's intent to remedy the mischief that resulted from the prior, more restrictive law.

The legislative record highlights the fact that the DOC's position ignores the legislative intent to increase the potential for sanctions and make penalties more readily available to requestors forced litigate as a result of agency bad faith. If adopted by this Court, the DOC's position on penalties would negate the RTKL's remedial nature and the improvements in access and accountability that have resulted from it.

[1] The DOC *amici* in this case are The County Commissioners Association of Pennsylvania, Pennsylvania State Association of Township Supervisors, Pennsylvania School Boards Association, and Pennsylvania Municipal Authorities Association.

Further, the DOC and its *amici's* position with regard to burden on agencies is not supported by facts and would render the RTKL's presumption of access and burden of proof meaningless.

I. The Right to Know Law is remedial legislation that must be construed in favor of requestors.

The prime sponsor of the RTKL, former Pennsylvania Senator (now Judge in the Court of Common Pleas of Delaware County) Dominic Pileggi, noted during legislative debate that "Pennsylvania needs a stronger open records law because openness builds trust in government." Senate Legislative Journal 2007, page 1405.

The RTKL's legislative history is replete with evidence of the General Assembly's understanding of the need for remedial legislation and its intent to improve the existing law and public's ability to access government records.

Senator A.H. Williams noted, for example:

> We are cutting through a variety of bureaucratic tape to allow for the constituents across the Commonwealth of Pennsylvania to have access to their government, and more importantly, to have confidence in their government and confidence in those leaders, to know what they are talking about, to know why they are talking about it, and ultimately, to be confident in the decisions that we make and represent in this legislative chamber.

Senate Legislative Journal 2007, page 1406.

Senator Furlo further noted:

> [W]hen I first started looking at the issue of open records as a State Senator...I did not really know that this law had not really been reviewed or substantively changed since the mid-1950s. So I agree with the characterization that it is far too long and long overdue that this reform is now before us today.

Senate Legislative Journal 2008, page 1558.

Representative DeWeese called it "the most significant piece of reform legislation in years and years, if not decades and decades...." House Legislative Journal 2008, page 353. He also aptly noted:

> Relative to our open records law that we worked together on in a bipartisan way, four quick points: One, the presumption of openness is now flipped and government documents will be available, and it will be up to the government to prove why they should not be made open. Number two, for the first time in history, thanks to a bipartisan, bicameral arrangement, the Pennsylvania legislature will be incorporated into the open records proposal. Number three, due to the financial accountability activities that are prescribed in this measure, the public will know exactly how their tax dollars are being spent. Fourth and finally, a State Office of Open Records will be created. There will be an appeals process, and I think that our Commonwealth will go to the forefront among the 50 states for a very aggressive and successful open records law.

House Legislative Journal 2008, page 418.

Representative Benninghoff noted: "We have been embarrassed as a Commonwealth as one of the few States for not having a good open records law." House Legislative Journal 2008, page 371.

Representative Thomas opined:

> I know how long we have had this conversation about open records, and, Mr. Speaker, I am somewhat troubled that in 2008 Pennsylvania does not have a proactive open records law. Many other States have moved from darkness into light and put in place a progressive and proactive open records law....We should not even in 2008 be discussing whether the public should have access to certain records. That should be a moot issue in 2008....

House Legislative Journal 2008, page 373.

Senator Pileggi also remarked on the transparency landscape under the prior version of the RTKL and noted that he encountered an "increasing degree of cynicism and distrust of State government." Senate Legislative Journal 2007, page 1405. This statement illustrated the pernicious effects of the former RTKL[2], which was ranked among the worst in the nation. *See* "Better Government Association State FOIA Ratings 2007" (Pennsylvania received an "F" rating), *available at* https://www.nfoic.org/states-failing-foi-responsiveness, https://www.nfoic.org/sites/default/files/results1.pdf, *last visited* 01/17/2020.

The prior law created significant obstacles to public access, including a presumption of secrecy and the burden of proof being borne by requestors. *See* 65 P.S. §§ 66.1-9, *repealed.* These obstacles eroded trust in government and led to the need for change noted by Senator Pileggi and other lawmakers.

[2] The Right to Know Act, 65 P.S. § 66.1, et seq. *repealed.*

For all these reasons, and after comprehensive legislative debate and amendment, the RTKL was enacted as remedial legislation, intended to address the shortcomings of the prior law and improve public access. *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010) (en banc), *aff'd*, 621 Pa. 133, 75 A.3d 453 (Pa. 2013) (holding RTKL "is remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions ...."); *see also Office of Dist. Att'y of Phila. v. Bagwell (Phila. DA)*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) ("the RTKL is remedial in nature ... ").

Pennsylvania's appellate courts have consistently recognized the importance of the RTKL's remedial nature and the fundamental shift in the public access landscape envisioned by the General Assembly. *See Pa. State Police v. Grove*, 640 Pa. 1, 161 A.3d 877, 892 (Pa. 2017) (stating "[W]hen the General Assembly replaced the [former RTKA] in 2009 with the current RTKL, it 'significantly expanded public access to governmental records . . . with the goal of promoting government transparency.'); *see also Bowling v. Office of Open Records*, 75 A.3d 453, 457 (Pa. 2013) (the RTKL "significantly broadened access to public records.").

The remedial nature of the law is its cornerstone, and all statutory interpretations of it must flow from that vantage. The DOC's position on Section 1304 of the RTKL cannot survive when analyzed in the context of the RTKL's

remedial language and intent. The DOC's interpretation reapplies the bureaucratic red tape so clearly chastised by Senator Williams, reverses the proactivity of the RTKL sought by Representative Thomas, and threatens to return the Commonwealth to the public distrust cited by Senator Pileggi.

II. Sanctions for bad faith were intended to be more easily obtained than those available under the prior, more restrictive law.

The DOC argues that "Section 1304(a) of the RTKL clearly limits court costs and fees imposed to two instances --- reversal of the appeals officer or grant of a deemed denial." (DOC Brief, at 22). This interpretation cannot be squared with the legislative intent of the RTKL.

The Newspaper, and Judge Simpson below, correctly note the ambiguity of the language in section 1304(a). When the words of a statute are clear, the text alone controls. 1 Pa.C.S.A. § §1921(b); *Walker v. Eleby*, 842 A.2d 389, 400 (Pa. 2004). However, when the text is unclear, as in this case, courts may consider various factors when attempting to ascertain the intention of the General Assembly, including, for example:

(1) The occasion and necessity for the statute.
(2) The circumstances under which it was enacted.
(3) The mischief to be remedied.
(4) The object to be attained.
(5) The former law, if any, including other statutes upon the same or similar subjects.
(6) The consequences of a particular interpretation.
(7) The contemporaneous legislative history.
(8) Legislative and administrative interpretations of such statute.

1 Pa. C.S. §1921(c); *Cty. of York v. Pa. Office of Open Records*, 13 A.3d 594, 598-99 (Pa. Commw. Ct. 2011). When using the legislative history and statements by legislators, this Court has stated:

> While the Court is not bound to accept the statements made in floor debates, we may look at the legislative history and floor debates held during the consideration and passage of the Act only as guides to the legislative intent....

1 Pa. C.S. §1921(c); *Coretsky v. Board of Commissioners of Butler Township*, 555 A.2d 72, 74 (Pa. 1989). The DOC's interpretation of Section 1304 is clearly at odds with the RTKL's legislative history and intent.

Senator Dominic Pileggi, the prime sponsor of the RTKL, addressed the issue of penalties during legislative debate and made clear that the bad faith penalty provisions were intended to be easier to obtain and consistent with the law's remedial intent. These penalty provisions were further necessary because the new version of the bill removed an alternate enforcement tool: criminal sanctions. Senate Legislative Journal 2008, page 1406.

The prior, more restrictive RTKL had allowed for the imposition of criminal sanctions for violations since it was first enacted in 1957.[3] Senator Pileggi, in his

[3] 65 P.S. §66.5, *repealed,* made it a summary offense to intentionally violate the law, punishable by a fine of up to $300, plus costs of prosecution. This provision also imposed a civil penalty of up to $300 per day on agencies or public officials for failing to promptly comply with a court order granting access. Id.

comments on the RTKL's third consideration and final passage in the Senate, addressed criticism that removing the criminal penalties would harm the public's ability to enforce the law and discourage agency compliance. In affirming the safeguards for the public's enforcement rights, Senator Pileggi noted:

> Although Senate Bill No. 1 removes the criminal penalties, it also significantly strengthens civil penalties for noncompliance and *makes it easier for a plaintiff to recover attorneys' fees if an agency acts in bad faith*. I believe these are things that will have a practical, meaningful effect on people's ability to obtain records.

Senate Legislative Journal 2007, page 1406 (emphasis added).

The prospect of criminal sanctions was a deterrent to bad faith under the prior law and removing it was supported because the RTKL's civil penalty provisions were strengthened and made easier to enforce under section 1304. These amendments were intended to spur agency compliance and act as a deterrent to bad faith by having "a practical, meaningful effect" on the public's rights under the law, which was the RTKL's legislative sponsors' goal. *Id.* The DOC's position conflicts with the legislative intent that underpins Section 1304 and formed the basis for removing criminal sanctions as a deterrent and an enforcement tool.

In addition to the legislative record, the Court must also consider the effects of a particular interpretation. 1 Pa. C.S. §1921(c)(6); *Mt. Vill. v. Bd. of Supervisors*, 874 A.2d 1, 2 (Pa. 2005) ("we are mandated to consider, among other specified

criteria, the object to be attained by the statute and the consequences of a particular interpretation").

If the Court were to adopt the DOC's position in this case, the public would have fewer and more restricted enforcement rights under the remedial law than under the prior, more restrictive version. This would be an absurd and unreasonable result of remedial legislation, and it conflicts with the rules of statutory construction. 1 Pa.C.S. §1922(1) ("the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.").

Moreover, the DOC's position would encourage bad faith and unreasonable interpretations of the law by limiting requestors' enforcement options and the circumstances under which they could be pursued. Under the DOC's position, as long as the agency responds in some fashion to a RTKL request (*i.e.*, avoids a "deemed denial" scenario), or loses at the Office of Open Records, the only downside it faces if a requestor chooses to pursue an appeal to the judiciary (which, of course, are expensive and relatively rare when compared to the number of appeals handled by the OOR), is a potential order of access and $1,500 fine. The prospect of fee shifting is the only real deterrent to bad faith under the RTKL and should be available to combat each and every instance of bad faith. Requestors should not be forced to litigate for access and bear the entire financial burden of the same, especially when access is presumed for public records under the RTKL.

Courts "are obliged to liberally construe the [RTKL] to effectuate its salutary purpose of promoting 'access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions'" and as such, the RKTL cannot be interpreted in a manner that makes it more difficult for requestors to seek and obtain penalties for bad faith than the prior, more restrictive law. *Dep't of Pub. Welfare v. Eiseman*, 125 A.3d 19, 29 (Pa. 2015) (citation omitted).

The legislative record and the consequences of DOC's interpretation weigh heavily in favor of the Newspaper's position in this case.

III. The DOC *amici's* position with regard to undue burden on agencies is not supported by facts.

Contrary to arguments put forth by the DOC and its *amici,* the RTKL does not impose the duty to locate and review responsive records on one specific individual at an agency, and Judge Simpson's holding does not impose such a duty. 65 P.S. § 67.901. The law, and Judge Simpson's holding, require "*an agency*... 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. 65 P.S. § 67.901 (emphasis added). It defies logic

to suggest an agency can respond in accordance with the RTKL,[4] let alone in any amount of good faith, if they have not located and reviewed potentially responsive records.

A good faith response – either to produce records or assert an exemption – cannot occur absent a good faith search, followed by collection and review of responsive records, so an agency has actual knowledge about the contents of the relevant documents. One of the foundational principles of the RTKL is that it does not elevate records' form over their content. 65 P.S. § 67.102 ("[R]ecord – [I]nformation, *regardless of physical form or characteristics*, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.") *emphasis added*; *see also Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Commw. Ct. 2012). The DOC's position in this case would allow agencies to ignore the actual content of records and instead rely on assumptions or general familiarity with the form or characteristics of the records requested, ignoring the definitions and duties enshrined in the law.

Moreover, the alleged efficiency of denying a request without a search is instantly outweighed by the immediate aftershocks: (1) the denial could dissuade a

[4] Under Chapter 9 of the RTKL, the agency has three options to respond to a request: grant the request and facilitate access to the requestor; request additional time in certain limited circumstances; or deny access and explain the legal basis for doing so. *See* 65 P.S. Chapter 9.

novice requestor from pursuing the records, which results in a complete denial of access; (2) if the requestor appeals the blanket, rote denial of a public record, the OOR (and, potentially thereafter, the judiciary) is burdened with the issue; or (3) if the agency had good faith and well-supported defenses, which could have been determined via a review of the records, the burden of disposing of the issues is similarly moved down the line. The agency as a whole must make a good faith effort to locate and review responsive records upon receipt of a request, and Judge Simpson imposed sanctions because the DOC's actions, *as a whole*, in failing to do so constituted bad faith.

The law, implicitly recognizing the vast differences in size and resources of local and commonwealth agencies, allows agencies discretion to determine the best means to meet the good faith response requirements of the law by imposing the duty to respond on "the agency" rather than a specific individual. 65 P.S. § 67.901. However, refusing to locate and review responsive records because of perceived burden cannot be among an agency's response options. Moreover, agencies do not have discretion to ignore the requirements of section 901. *See, e.g., Heavens v. Pa. Dep't of Envtl. Prot.*, 65 A.3d 1069 (Pa. Commw. Ct. 2013) (holding Dept. of Environmental Protection had the burden of determining whether records existed that were not within an exception for purposes of complying with a records request).

Despite the clear language of the law and the courts' interpretation of it, the DOC *amici* argue that requiring agencies to locate and review records in response to requests is too burdensome. DOC *amici* argue, for instance, that "many localities lack the manpower and administrative capacity to timely review the breadth of documents that might be implicated in a RTK request." (*Amici* Brief at 24). The argument that RTKL compliance is too burdensome on agencies is often made, but it is simply not borne out by facts, let alone permissible under the law.

In response to concerns raised by government agencies about burdens associated with RTKL compliance, the House of Representatives passed House Resolution 2017-15, which directed the Legislative Budget and Finance Committee ("LBFC") to conduct a comprehensive review of the impact of RTKL compliance on state and local government agencies. House Resolution 2017-15. After gathering data statewide from all levels of local and commonwealth agencies, the LBFC determined "most of Pennsylvania's state and local government agencies receive few RTKL requests, most of the requests received are easily fulfilled at a relatively low cost, and only a small percentage of the requests are appealed." *See* Legislative Budget and Finance Committee Report, "Costs to Implement the Right-to-Know Law," page 2, *available at* http://lbfc.legis.state.pa.us/Resources/Documents/Reports/610.pdf, last visited January 20, 2020.

Further, the committee also found that "the issue of burdensome requests appears to be highly dependent on what the agency perceives to be burdensome" suggesting that "the issue is more directly related with concerns about the type of request being made or who is making the request. *Id.* at 36.

The DOC *amici's* position is inconsistent with the facts outlined in the LBFC's comprehensive report and the duties imposed by Section 901, and ultimately, *Amici's* brief concedes this point. First, *Amici* argue that it is enough to be "familiar" with documents before asserting defenses. (*Amici* Brief at 10). This ignores the express requirements of Section 901 and would erode the public's faith in and ability to rely on any defenses asserted by an agency.

Agencies and requestors are free to operate informally under the law[5], but when a requestor files a formal, written RTKL request, it triggers the RTKL's legal process and allows requestors "to pursue the relief and remedies" provided for by law. 65. P.S. § 67.702. Requestors are held to a high standard when beginning the formal legal process under the RTKL, including, for example, an entire body of case law governing the necessary elements of specificity. 65 P.S. § 67.703; see *e.g. Pa. Dep't of Educ. v. Pittsburgh Post-Gazette,* 119 A.3d 1121 (Pa. Commw. Ct. 2015) (holding request insufficient for failing to specify the transaction or activity of the

[5] 65 P.S. § 67.702, allowing agencies to fulfill verbal, written or anonymous verbal or written requests for access to records under this act.

agency); *see also Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013) (holding a request sufficiently specific when it contained a subject matter and a finite time frame and sought a discrete group of documents, either by type, as communications, or by recipient).

In turn, as a step in the RTKL's formal, legal process, agency responses must be fulsome, meaningful and based on the agency locating and reviewing the content of the requested records. *Amici's* position on review and assessment seemingly concedes this point when later in their brief they argue that review and assessment of potentially responsive documents requires knowledge of "the specific contents of the documents." (*Amici* Brief at 21). Notwithstanding its earlier, apparent contention that burdensomeness excuses an agency's failure to search for records, *Amici* ultimately concede that an agency must collect responsive documents to satisfy its RTKL duties – and this must occur prior to deciding what is responsive and might be protected by an exception.

The DOC *amici's* position on agency burden is contradicted by the LBFC's comprehensive study on the issue and the legal process prescribed by the General Assembly. The LBFC report made clear that neither the express language of the law nor the courts' interpretation of it have been unduly burdensome or detrimental to local or commonwealth agencies when they are required to locate and review responsive records. Regardless, the DOC's and its *amici's* redress is with the

legislature, not the courts. Public agencies cannot ignore the clear obligations of a statute, or ask for a judicial revision of the same, merely because an alleged, unsupported burden ensues.

Ultimately, the argument that compliance with the RTKL is burdensome is irrelevant. *Commw. Dep't of Envtl. Prot. v. Legere*, 50 A.3d 260, 266 (Pa. Commw. Ct. 2012) ("[T]here is simply nothing in the RTKL that authorizes an agency to refuse to search for and produce documents based on the contention it would be too burdensome to do so."). Every law creates duties and responsibilities for government agencies, but when the General Assembly passes a law, they determine that the purpose served by the law is an appropriate expenditure of public resources. RTKL compliance consumes public resources, without a doubt, but in passing the law, the General Assembly affirmed that governmental transparency is an appropriate, fundamental and absolutely necessary function of local and commonwealth agencies.

CONCLUSION

For all the foregoing reasons, *Amicus Curiae* respectfully requests this Honorable Court to grant the relief sought by Appellees and affirm the decision of the Honorable Judge Simpson below.

Dated: January 21, 2020

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMITATION

I hereby certify that the content of the foregoing *amicus* brief falls within the word limits enumerated in Pa.R.A.P. 531(b)(3).

Dated: January 21, 2020 */s/ Melissa Bevan Melewsky*

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing 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 requires filing confidential information and documents differently than non-confidential information and documents.

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:::

Uniontown Newspapers, Inc., d/b/a The Herald Standard; and Christine Haines, Appellees

v.

Pennsylvania Department of Corrections, Appellant

76 MAP 2019

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IN THE SUPREME COURT OF PENNSYLVANIA

/s/ Melissa Bevan Melewsky

(Signature of Person Serving)

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