

Respondent.

, J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

SIMON CAMPBELL,

Petitioner,

vs.

PENNSYLVANIA
INTERSCHOLASTIC ATHLETIC
ASSOCIATION,

Respondent.

CASE NO. 25 CD 2021

APPLICATION TO FILE ANSWER TO PETITION FOR REVIEW UNDER
PA. R.A.P. 123

AND NOW, comes the Respondent, Pennsylvania Interscholastic Athletic Association (“PIAA” or “Respondent”),¹ by and through its undersigned counsel and files the foregoing Application to File Answer to Petition for Review under Pa. R.A.P. 123, respectfully averring as follows:

1. Respondent files this Application in accordance with Pa. R.A.P. 123 for the purpose of obtaining permission to file an Answer to the Petition for Review filed in this matter.

¹ PIAA’s actual name is the Pennsylvania Interscholastic Athletic Association, Inc. As set forth in the underlying materials, PIAA was incorporated as a nonprofit corporation in 1978.

2. Under Pa. R.A.P. 1516(a), answers to petitions for review filed in this Court's appellate jurisdiction are not ordinarily permitted.

3. However, under Pa. R.A.P. 1516(b), a party may file an answer to a petition for review addressed to this Court's original jurisdiction.

4. In the present case, the Petition for Review asks this Court to both reverse a decision made by an Office of Open Records Appeals Officer and to impose penalties for alleged "bad faith" by Respondent under Sections 1304 and 1305 of the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101-3104.

5. The RTKL is a unique statute in that a court reviewing a decision from an Appeals Officer exercises "both ... trial-like and appellate-like functions." See *American Civil Liberties Union of Pennsylvania v. Pennsylvania State Police*, 232 A.3d 654, 665 (Pa. 2020) (analyzing *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013)).

6. The question of whether an agency acted in bad faith "would entail **judicial** fact-finding." *Mission Pennsylvania, LLC*, 212 A.3d 119, 139 (Pa. Commw. Ct. 2019) (emphasis added), *appeal pending* 5 MAP 2020 (Pa.); *see also Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, __ A.3d ___, No 76 MAP 2019, 2020 WL 7502321 (Pa. Dec. 22, 2020) (affirming a judicial finding of bad faith made in the Commonwealth Court's **original jurisdiction** in an enforcement action); *Bowling*,

75 A.3d at 470 (“Section 1304 is explicit that the Chapter 13 court is the fact-finder”).

7. As a reviewing court exercises both appellate and trial court powers in reviewing decisions of Appeals Officers under the RTKL, Respondent respectfully asks this Court for permission to file an Answer to the Petition for Review.

8. Respondent’s proposed Answer is attached hereto as Exhibit A.

WHEREFORE, Respondent specifically asks this Honorable Court to enter an order permitting Respondent to file an Answer to the Petition for Review.

Respectfully submitted,

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Date: January 29, 2021

CERTIFICATE OF COMPLIANCE

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

Submitted by: J. Chadwick Schnee, Esq.

Signature: /s/ J. Chadwick Schnee, Esq.

Name: J. Chadwick Schnee, Esq.

Attorney No. (if applicable): 306907

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

SIMON CAMPBELL,

Petitioner,

vs.

PENNSYLVANIA
INTERSCHOLASTIC ATHLETIC
ASSOCIATION,

Respondent.

CASE NO. 25 CD 2021

ANSWER TO PETITION FOR REVIEW

AND NOW, comes the Respondent, Pennsylvania Interscholastic Athletic Association (“PIAA” or “Respondent”),¹ by and through its undersigned counsel and files the foregoing Answer to Petition for Review, respectfully averring as follows:

I. STATEMENT OF BASIS FOR JURISDICTION OF THE COURT

1. Admitted.

II. NAME OF PARTIES

2. Admitted by way of information and belief.

3. Denied. For the reasons set forth herein, in Respondent’s original jurisdiction action docketed as *Pennsylvania Interscholastic Athletic Association v. Commonwealth of Pennsylvania*, 661 M.D. 2020, and the underlying appeal in this matter, Respondent is not either a Commonwealth agency or a state-affiliated entity.

¹ PIAA’s actual name is the Pennsylvania Interscholastic Athletic Association, Inc. As set forth in the underlying materials, PIAA was incorporated as a nonprofit corporation in 1978.

III. ORDER SOUGHT TO BE REVIEWED

4. Admitted in part and denied in part. It is admitted that Petitioner seeks to appeal a portion of the Final Determination issued by an Appeals Officer for the Office of Open Records (“OOR”); however, it is specifically denied that Petitioner’s appeal is meritorious or that he is entitled to any of the relief he seeks.

5. Admitted that, on November 2, 2020, Petitioner emailed to PIAA an eight-part request under the Pennsylvania Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101-.3104.

6. Admitted. By way of further answer, Respondent, to the extent that the RTKL applies to it, complied with its obligations under the RTKL.

7. Admitted that, on December 7, 2020, Respondent responded to the request. Its response speaks for itself. By way of further answer, Respondent, to the extent that the RTKL applies to it, complied with its obligations under the RTKL. By way of further response, PIAA has since provided the requested audits (item 5) that it informed Petitioner that it would provide once received by PIAA.

8. Admitted.

9. Admitted.

10. Admitted in part and denied in part. It is admitted that Respondent filed a motion seeking a stay of the appeal on December 21, 2020. The remaining averments are specifically denied. By way of further answer, Respondent’s motion seeking a stay is a written document that speaks for itself, and any characterization thereof is specifically denied.

11. Admitted. By way of further response, the OOR Appeals Officer instructed both parties that they could submit additional written documents until 11:59:59 p.m. on December 30, 2020.

12. Denied as stated. Respondent (unlike Petitioner) timely submitted additional argument and an affidavit signed under penalty in conformity with the

deadline set by the OOR Appeals Officer. By way of further answer, these documents are writings that speak for themselves, and any characterization thereof is specifically denied. While Respondent timely submitted materials, Petitioner submitted no argument or other evidence prior to expiration of the initial OOR deadline.

13. Admitted that Petitioner, having missed the deadline set by the OOR for both parties to make submissions, and offering no excuse for doing so, asked the OOR Appeals Officer to further extend the deadline for parties to submit evidence and argument after the record had already closed. It is also admitted that the OOR Appeals Officer allowed the parties additional time to submit written documents at Petitioner's request. By way of further answer, it is denied that Petitioner's December 31, 2020 request for an extension asserted that PIAA acted in bad faith.

14. Admitted in part and denied in part. It is admitted that both parties filed additional written submissions to the OOR in accordance with the new deadline that Petitioner requested. Those documents are writings that speak for themselves, and any characterization thereof is denied. By way of further answer, PIAA submitted both legal argument and evidence to the OOR Appeals Officer in support of its position throughout the appeals process.

15. Admitted.

IV. STATEMENT OF ERRORS AS TO THE FINAL DETERMINATION

16. Admitted in part and denied in part. It is admitted that Petitioner makes various assertions in this averment. It is specifically denied, however, that the OOR erred in any of the respects listed in this Paragraph.

17. Denied as stated. This averment contains only a partial quote of Item 7 of Petitioner's request. By way of further answer, Item 7 of Petitioner's request is included within a written document that speaks for itself, and any characterization thereof is denied.

18. Denied as stated. As the OOR overwhelmingly chooses to not conduct hearings, Respondent submitted written legal arguments and an affidavit signed under penalty of perjury by its Executive Director, who is also PIAA's open records officer. The OOR correctly held that Respondent met its evidentiary burden (properly following the preponderance of the evidence standard). *See generally Carey v. Dep't of Corr.*, 61 A.3d 367, 374 (Pa. Commw. Ct. 2013) ("A preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to 'a more likely than not' inquiry"). By way of further answer, Respondents' legal arguments and evidentiary submissions are written documents that speak for themselves, and any characterization thereof is denied.

19. Denied as stated. The averments of Paragraph 18 are incorporated herein by reference, and the OOR's decision speaks for itself.

20. Admitted.

21. The averments of Paragraph 21 are denied as conclusions of law to which no responsive pleading is required. By way of further answer, Dr. Lombardi's affidavit is a writing that speaks for itself, and any characterization thereof is specifically denied. Dr. Lombardi's affidavit was not conclusory. To the contrary, he specifically affirmed under penalty of perjury that he is the only individual at PIAA who potentially could possess responsive documents, that he conducted a search of PIAA records for any responsive documents and that his discussions with legal counsel on the subject entirely occurred orally without the exchange of any written documents. While Petitioner proposes that Dr. Lombardi should have been required to consult with numerous other individuals of Petitioner's choosing (he identifies all Board members and all other employees), he does not articulate why such a duty would exist when the Executive Director has personal knowledge of all communications between the organization and its legal counsel on a subject that affects the entire organization.

22. Denied as stated. By way of further answer, the OOR Final Determination is a written document that speaks for itself, and any characterization thereof is denied. Additionally, the OOR Appeals Officer erred in suggesting that Dr. Lombardi should have asked “PIAA’s IT Department[] to determine if there were any applicable software programs,” as such an inquiry goes beyond the limited scope of the simple question of whether a screenshot exists (rather than whether various software programs exist). Nevertheless, the PIAA has since undertaken to create this record and has provided it to the Petitioner, making this portion of the request moot.

23. The averments of Paragraph 23 are denied as conclusions of law to which no responsive pleading is required. By way of further answer, the OOR Final Determination and Dr. Lombardi’s affidavit are written documents that speak for themselves, and any characterization thereof is denied.

24. The averments of Paragraph 24 are conclusions of law to which no responsive pleading is required.

25. Admitted in part and denied in part. It is admitted that Petitioner makes certain allegations; however, it is specifically denied that the OOR committed any error in accepting the evidence submitted by Respondent as sufficient evidence to meet its burden of proof by a preponderance of the evidence and in concluding that Respondent complied with its duties under the RTKL, to the extent that the RTKL applies to Respondent. By way of further answer, to the extent that Petitioner wished to challenge the sufficiency of the evidence provided by Respondent during his appeal to the OOR or desired to cross-examine Respondent’s personnel, Petitioner could have asked the OOR to conduct a hearing on the subject, especially since the OOR left the record open for a period of time after Dr. Lombardi’s affidavit had been submitted. There is no evidence, however, that Petitioner made such a request.

26. Admitted.

27. Admitted.

28. The averments of Paragraph 28 are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these averments are specifically denied, and strict proof thereof is demanded. Respondent's responses to Paragraphs 15-23 above are incorporated as if set forth in full.

29. The averments of Paragraph 29 are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these averments are specifically denied, and strict proof thereof is demanded. By way of further answer, Respondent, to the extent it is subject to the RTKL, complied with its obligations under the RTKL. Further, to the extent that Respondent is an agency, it is entitled to the presumption that it acted in good faith in "discharging [its] statutory duties under the RTKL," *Office of the Governor v. Donahue*, 98 A.3d 1223, 1226 (Pa. 2014), and "[a]bsent evidence of bad faith, the veracity of an agency's submissions is not reasonably questioned." *Butler v. Dauphin County District Attorney's Office*, 163 A.3d 1139, 1146 (Pa. Commw. Ct. 2017) (citing *Office of Governor v. Scolforo*, 65 A.3d 1095 (Pa. Commw. Ct. 2013)). Additionally, Respondent has since provided, at no charge and in advance of the deadline set forth in the underlying final determination, documents responsive to Items 5 and 8 of the Request to Petitioner.

30. The averments of Paragraph 30 are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these averments are specifically denied and strict proof thereof is demanded. By way of further answer, the OOR has repeatedly held that an open records officer only has a duty to conduct a search that is "reasonably calculated to uncover all responsive documents," which does not invariably require directing requests to all agency personnel in every instance. *See, e.g., Chester Community Charter School v. Delaware County*, OOR Dkt. AP 2020-2368 (holding that an agency met its burden of proof where its open records officer only "contacted individuals **likely** to possess the records responsive to the Request") (emphasis added).

31. The averments of Paragraph 31 are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these averments are specifically denied, and strict proof thereof is demanded. By way of further answer, where Dr. Lombardi submitted evidence that he was the **only person** in PIAA who would potentially have any responsive documents with respect to Item 7 of the Request, it was unnecessary to ask others who would **not** be likely to possess any records, especially where Dr. Lombardi affirmed that he nevertheless conducted a search for responsive documents. Moreover, while PIAA does have member schools throughout the state, as Petitioner himself avers, PIAA is a small office, with a total of 15 staff. Petition for Review, ¶ 21. There exists no requirement that Dr. Lombardi engage in acts of futility in seeking records from Board members who would not be likely to have any responsive records. Additionally, to the extent that Petitioner believed that Respondent did not adequately search for responsive records and desired to cross-examine Respondent's personnel, Petitioner could have requested an evidentiary hearing before the OOR. However, upon information and belief, he did not do so. Further, the legal arguments and evidence submitted by Respondent during the course of the appeal are written documents that speak for themselves, and any characterization thereof is specifically denied.

32. The averments of Paragraph 32 are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these averments are specifically denied and strict proof thereof is demanded. There is no evidence of record of any "consistent pattern of failing to make a good faith search for responsive records" and, to the contrary, in every prior instance in which the OOR has ruled on a matter relating to PIAA, it has either sustained PIAA's response or required limited production of certain additional records. By way of further response, PIAA's response to the averments of the preceding paragraphs are incorporated herein by reference.

33. Admitted in part and denied in part. It is admitted that Dr. Lombardi timely responded to Petitioner's request by informing him that no "electronic copies" of responsive legal invoices exist in Respondent's possession and that redactions would be required. It is also admitted that, as of December 30, 2020, Dr. Lombardi had requested electronic copies of the sought records but had not yet received electronic copies of legal invoices from its counsel. By way of further answer, Respondent's response, legal argument and evidence submitted during the appeal before the OOR, are written documents that speak for themselves and any characterization thereof is denied. The remaining averments of Paragraph 33 are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these averments are specifically denied and strict proof thereof is demanded.

34. Denied. Respondent's response, legal argument and evidence submitted during the appeal before the OOR are written documents that speak for themselves and any characterization thereof is denied. The remaining averments of Paragraph 34 are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these averments are specifically denied, and strict proof thereof is demanded.

35. Denied. Respondent's response, legal argument and evidence submitted during the appeal before the OOR are written documents that speak for themselves and any characterization thereof is denied. The remaining averments of Paragraph 35 are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these averments are specifically denied, and strict proof thereof is demanded.

36. Denied. Respondent's response, legal argument and evidence submitted during the appeal before the OOR are written documents that speak for themselves and any characterization thereof is denied. The remaining averments of Paragraph 36

are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these averments are specifically denied and strict proof thereof is demanded. By way of further answer, Item 5 of the Request sought “electronic copies” of independent audited financial statements, and Dr. Lombardi affirmed under penalty of perjury that Respondent only receives such documents “in hard copy.” Further, as stated by Dr. Lombardi, pursuant to Petitioner’s request, he sought electronic copies of the records from Respondent’s accountants and stated that they would be produced upon receipt. Respondent subsequently did obtain an electronic version of the documents and has provided them to Petitioner.

37. Denied. The OOR Final Determination is a written document that speaks for itself, and any characterization thereof is denied. By way of further answer, the averments of Paragraph 22 are incorporated herein by reference. Additionally, it was not an error for the OOR to refuse to “make a finding of bad faith” where only a court – and not the OOR – has the power to award attorney fees, costs and civil penalties. *See* 65 P.S. § 67.1304(a) (allowing for the imposition of costs and attorney fees only “**if the court finds**” it warranted under the statute); 65 P.S. § 67.1305(a) (only allowing “[a] court” to issue a civil penalty); *Mission Pennsylvania, LLC v. McKelvey*, 212 A.3d 119, 138 (Pa. Commw. Ct. 2019) (“[T]he statute is clear that only a court may make a finding regarding an agency’s bad faith”), *appeal pending* 5 MAP 2020 (Pa.). Further, while Respondent could not locate the requested record, it did subsequently create this screenshot and provided it to Petitioner.

38. The averments of Paragraph 38 are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these averments are specifically denied, and strict proof thereof is demanded. By way of further answer, the averments of Paragraph 37 are incorporated herein by reference.

39. The averments of Paragraph 39 are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these

averments are specifically denied, and strict proof thereof is demanded at trial. By way of further answer, it is denied that Respondent has any duties under the RTKL but, to the extent that the RTKL applies to it, Respondent complied with its duties by timely issuing an extension notice, searching for responsive records, timely issuing a substantive response to Petitioner's request, and timely submitting evidence and legal argument during the appeal in accordance with the directives of the OOR Appeals Officer. Additionally, in advance of the deadline imposed by the underlying final determination, Respondent provided documents responsive to Item 5 of Petitioner's request and created and provided a document responsive to Item 8 of Petitioner's request.

40. The averments of Paragraph 40 are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these averments are specifically denied, and strict proof thereof is demanded.

41. The averments of Paragraph 41 are conclusions of law to which no responsive pleading is required. To the extent that an answer is required, these averments are specifically denied, and strict proof thereof is demanded.

V. STATEMENT OF RELIEF SOUGHT

42. Admitted in part and denied in part. It is admitted that Petitioner seeks relief. It is specifically denied, however, that Petitioner is entitled to any of the relief he seeks.

43. Admitted in part and denied in part. It is admitted that Petitioner seeks relief. It is specifically denied, however, that Petitioner is entitled to any of the relief he seeks.

44. Admitted in part and denied in part. It is admitted that Petitioner seeks relief. It is specifically denied, however, that Petitioner is entitled to any of the relief he seeks.

WHEREFORE, Respondent specifically asks this Honorable Court to enter an order denying all relief sought by Petitioner.

NEW MATTER

(Failure to state a claim upon which relief may be granted)

45. The averments of the preceding Paragraphs are incorporated herein by reference.

46. Numerous paragraphs within the Petition for Review purport to ask this court – in its appellate capacity – to “reverse” the Appeals Officer’s “failure to make a finding of bad faith.”

47. However, no provisions within the RTKL empower an Appeals Officer to “make a finding of bad faith.” *See* 65 P.S. §§ 67.101-.3101.1; *Mission Pennsylvania, LLC*, 212 A.3d at 138 (“[T]he statute is clear that only a court may make a finding regarding an agency’s bad faith”).

48. Instead, the RTKL vests reviewing courts with the responsibility of issuing decisions containing “findings of fact and conclusions of law based upon the evidence as a whole.” 65 P.S. § 67.1301(a); 65 P.S. § 67.1302(a).

49. In reviewing decisions of OOR Appeals Officers, a reviewing court serves as the “ultimate finder of fact.” *See American Civil Liberties Union of Pennsylvania v. Pennsylvania State Police*, 232 A.3d 654, 664–65 (Pa. 2020) (analyzing *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013)).

50. Section 1304 of the RTKL provides that, only “if the court finds” that bad faith has occurred, can penalties be imposed by a court. *See* 65 P.S. § 67.1304(a).

51. Similarly, Section 1305 of the RTKL only permits a “court” (and not the OOR) to issue a civil penalty. *See* 65 P.S. § 67.1305(a).

52. Because only a court (and not an OOR Appeals Officer) is empowered to issue any findings regarding bad faith, no “reversal” of the OOR Appeals Officer’s Final

Determination as to bad faith can occur. *See Mission Pennsylvania, LLC*, 212 A.3d at 139 (“Whether [an agency’s] approach amounted to bad faith would entail **judicial** fact-finding”) (emphasis added).

53. To the extent that Petitioner seeks to appeal the failure of the OOR Appeals Officer to find that Respondent acted in bad faith, Petitioner has failed to state a claim upon which relief may be granted.

WHEREFORE, Respondent specifically asks this Honorable Court to enter an order dismissing the Petition for Review to the extent it seeks to “reverse” the OOR Appeals Officer’s “failure to make a finding of bad faith” and otherwise dismiss the Petition for Review.

NEW MATTER

(Mootness as to Items 5 and 8)

54. The averments of the preceding Paragraphs are incorporated herein by reference.

55. Petitioner seeks certain relief with respect to Items 5 and 8 of his RTKL request.

56. The underlying final determination directed Respondent to provide documents responsive to Items 5 and 8 of Petitioner’s request by February 12, 2021.

57. On January 25, 2021, Respondent provided documents responsive to Items 5 and 8 of Petitioner’s request.

58. To the extent that Petitioner seeks any relief with respect to Items 5 and 8 of his request, the appeal is moot as to those portions of the request.

WHEREFORE, Respondent specifically asks this Honorable Court to enter an order dismissing the Petition for Review as moot to the extent it seeks relief concerning Items 5 and 8 of Petitioner's request.

Respectfully submitted,

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Date: _____, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

: 25 CD 2021
:
:

PROOF OF SERVICE

I hereby certify that this 29th day of January, 2021, I have served the attached document(s) to the persons on the date(s)
and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served: Craig James Staudenmaier
Service Method: eService
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Service Date: 1/29/2021
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Representing: Petitioner Simon Campbell

Served: Joshua D. Bonn
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ J Chadwick Schnee

(Signature of Person Serving)

Person Serving: Schnee, J Chadwick
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