

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.,	:	
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	:	
Petitioner,	:	
	:	
v.	:	NO. 661 M.D. 2020
	:	
COMMONWEALTH OF PENNSYLVANIA and PENNSYLVANIA OFFICE OF OPEN RECORDS,	:	
	:	
	:	
Respondents,	:	

NOTICE TO PLEAD

To:	Pennsylvania Interscholastic Athletic Association, Inc.	
	c/o Alan R. Boynton, Jr., Esq.	c/o J. Chadwick Schnee, Esq.
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	P.O. Box 1166	
	Harrisburg, PA 17108-1166	

You are hereby notified to file a written response to the enclosed Preliminary Objections to the Petition for Review within thirty (30) days of service hereof or judgment may be entered against you.

Respectfully submitted,

/s/ Charles Rees Brown
Charles Rees Brown
Chief Counsel
Supreme Court No. 70612
Pennsylvania Office of Open Records
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Dated: March 18, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA INTERSCHOLASTIC
ATHLETIC ASSOCIATION, INC.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
and PENNSYLVANIA OFFICE OF
OPEN RECORDS,

Respondents,

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NO. 661 M.D. 2020

ORDER

AND NOW, this ____ day of _____, 2021, upon consideration of the Office of Open Records' Preliminary Objections to the Petitioner's Amended Petition for Review, and any response thereto, it is ORDERED that the preliminary objections are SUSTAINED. It is further ORDERED that the Amended Petition for Review is hereby DISMISSED WITH PREJUDICE.

, J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**PENNSYLVANIA INTERSCHOLASTIC
ATHLETIC ASSOCIATION, INC.,**

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v.

**COMMONWEALTH OF PENNSYLVANIA
and PENNSYLVANIA OFFICE OF
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NO. 661 M.D. 2020

**PRELIMINARY OBJECTIONS TO
THE PETITION FOR REVIEW**

AND NOW, pursuant to Pa.R.C.P. 1028, Respondent, Pennsylvania Office of Open Records (“OOR”), files these Preliminary Objections to the Amended Petition for Review, and, in support thereof, states as follows:

1. Petitioner, Pennsylvania Interscholastic Athletic Association, Inc. (“PIAA”) filed a Petition for Review in this Court’s original jurisdiction, naming the Commonwealth of Pennsylvania (“Commonwealth”) and the OOR. *Petition.*
2. The Petition seeks declaratory and injunctive relief regarding the applicability of the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, to PIAA. *Id.*
3. Specifically, the Petition seeks a declaration that the RTKL is unconstitutional to the extent that it applies to PIAA, and, furthermore, seeks an injunction to prohibit the OOR from adjudicating any appeal of a request for records directed to PIAA. *Id.*

**PRELIMINARY OBJECTION FOR
FAILURE TO EXHAUST A STATUTORY REMEDY**

4. The foregoing paragraphs are incorporated herein by reference.
5. This matter involves a request for records made to PIAA, pursuant to the RTKL, by a member of the public. *Petition, para. 27.*
6. PIAA responded to the request for records and objected to PIAA's inclusion in the RTKL. *Petition, para. 28.*
7. PIAA's response to the request was appealed to the OOR. *Petition, para. 29.*
8. The OOR docketed the appeal of PIAA's response to the request at Docket Number AP 2020-2639 and issued a case management order specifying the date by which evidence and argument must be submitted to the OOR. *Petition.*
9. The Petition alleges that PIAA is not subject to the RTKL. *Petition.*
10. The Petition seeks to enjoin the OOR from adjudicating any appeal under the RTKL involving PIAA. *Petition, para. 3.*
11. The RTKL classifies PIAA as a "state-affiliated agency." *Petition, para. 15.*
12. The RTKL defines a "state-affiliated agency" to be a "Commonwealth agency." *Petition, para. 14.*
13. "Commonwealth agencies" are subject to the RTKL. *Petition, para. 12.*
14. Section 1301 of the RTKL, 65 P.S. § 67.1301, provides that decisions of the OOR of RTKL appeals involving a Commonwealth agency may be appealed to the Commonwealth Court, and the OOR should not be named as a party. *Padgett v. Pa. State Police*, 73 A.3d 644,648 n.5 (Pa. Commw. Ct. 2013).
15. PIAA has not appealed any decision of the OOR concerning the aforementioned RTKL appeal to the Commonwealth Court.
16. Declaratory and injunctive relief is not available where the petitioner has an

adequate remedy at law. *Mazin v. Bureau of Prof'l & Occupational Affairs*, 950 A.2d 382 (Pa. Commw. Ct. 2008).

17. PIAA has an adequate remedy at law thorough the appeals process set forth in the RTKL and has not exhausted that statutory remedy.

WHEREFORE, the Amended Petition for Review should be dismissed for failure to exhaust administrative and statutory remedies. Pa.R.C.P. 1028(a)(7).

PRELIMINARY OBJECTION FOR FAILURE TO STATE A CLAIM (DEMURRER)

18. The foregoing paragraphs are incorporated herein.

19. In Count I, Petitioner seeks a judicial declaration that the legislature's decision to specifically include PIAA in Section 102 is "wholly inconsistent with, and contrary to" the legislature's definition of "Commonwealth authority." *Petition, para. 49.*

20. In Count V, Petitioner seeks a judicial declaration that a nonprofit corporation registered to do business under the Pennsylvania Nonprofit Corporation Law, 15 Pa. C.S. §§ 5501-6107, cannot be subject to the RTKL because "the record access provisions of the RTKL conflict with those found within the Pennsylvania Nonprofit Corporation Law." *Petition, para. 121.*

21. All "Commonwealth agencies" are subject to the RTKL. 65 P.S. § 67.301.

22. The definition of a "Commonwealth agency" includes a "State- affiliated entity," which *expressly* includes, among other entities, PIAA. 65 P.S. § 67.102.

23. "[W]here there is a conflict between two provisions of a statute, one of which is specific and the other merely general, the specific provisions thereof will control unless it is clear that the legislature intended otherwise, or some other canon of

statutory construction compels a contrary conclusion.” *In re Waits' Estate*, 336 Pa. 151, 7 A.2d 329, 330 (1939).

24. Additionally, nonprofit corporations can be subject to the RTKL. For example, under Pennsylvania law, “[a]ny nonprofit corporation which leases lands, offices or accommodations to the Commonwealth for any department, board, commission or agency with a rental amount in excess of one million five hundred thousand dollars (\$1,500,000) per year shall be deemed an agency as defined by . . . the Right-to-Know Law, and any such nonprofit corporation shall be subject to and governed by the provisions of . . . the Right-to-Know Law.” 71 P.S. § 632(d); *see generally Harristown Dev. Corp. v. Com., Dep’t of Gen. Servs.*, 532 Pa. 45, 614 A.2d 1128 (1992) (upholding the constitutionality of Section 632(d)).
25. Whether PIAA might otherwise meet the general definition of “Commonwealth authority” in the RTKL or not be subject to public disclosures under the general provisions of the Nonprofit Corporation Law does not matter because the legislature *specifically and expressly* included PIAA within the definition of “State-affiliated entity.”
26. The more specific inclusion of PIAA within the definition of “State- affiliated entity” controls over any other interpretation of the RTKL or Nonprofit Corporation Law that might appear to be to the contrary.
27. As our Supreme Court has succinctly stated, absent a constitutional limitation, PIAA “is an agency if the General Assembly says it is.” *See Harristown Dev. Corp.*, 614 A.2d at 1131.

WHEREFORE, Counts I & V of the Amended Petition for Review should be

dismissed with prejudice. Pa.R.C.P (a)(4).

PRELIMINARY OBJECTION FOR FAILURE TO STATE A CLAIM (DEMURRER)

28. The foregoing paragraphs are incorporated by reference.
29. Counts III and IV challenge PIAA's inclusion as a state agency in the RTKL under the Equal Protection Clauses of the United States Constitution and Pennsylvania Constitution, respectively. Additionally, Count III brings a substantive due process claim.
30. The Equal Protection Clauses of the United States Constitution and Pennsylvania Constitution are analyzed using identical standards. *Fouse v. Saratoga Partners, L.P.*, 204 A.3d 1028, 1033 n.9 (Pa. Cmwlth. 2019).
31. Additionally, the analysis for equal protection and for a claim under Article III, Section 32 of the Pennsylvania Constitution are "sufficiently similar to warrant like treatment." *Harristown Dev. Corp.*, 614 A.2d at 1132 (quoting *Laudenberger v. Port Auth. of Allegheny Co.*, 496 Pa. 52, 67 n. 13, 436 A.2d 147, 155 n. 13 (1981)).
32. Where a plaintiff is not a member of a protected class, it can proceed on a "class of one" equal protection theory. Under a "class of one" theory of equal protection, "a plaintiff must allege that (1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment." *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006).
33. "Typically, a legislative act will withstand substantive due process challenge if the government identifies a legitimate state interest that the legislature could

rationality conclude was served by the statute.” *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000) (internal citation and quotation marks omitted).

34. In conducting a constitutional analysis, “[a] statute duly enacted by the General Assembly is presumed valid.” *W. Mifflin Area Sch. Dist. v. Zahorchak*, 607 Pa. 153, 4 A.3d 1042, 1048 (2010).

35. PIAA has not pled facts to overcome this presumption of validity.

36. PIAA is *not* the only private nonprofit corporation subject to the RTKL. *See, e.g., Harristown Dev. Corp.*, 614 A.2d at 1130 (holding that the Harristown Development Corporation, a private nonprofit corporation, was subject to the RTKL).

37. PIAA fails to identify any other interscholastic athletic or academic organization that (i) includes “almost all” public junior and senior high schools as members and (ii) generates significant revenue from the participation of these public schools, *see* Our Story – PIAA, <http://www.piaa.org/about/story.aspx> (last visited March 15, 2021), but that is treated differently under the RTKL for no rational purpose. *See Harristown Dev. Corp.*, 614 A.2d at 1132 (noting that the party challenging the state law carries a “heavy burden of persuasion”).

38. The Commonwealth has a legitimate interest in the manner in which sporting events involving public schools are conducted.

39. It is rational for the legislature to conclude that an entity like PIAA, that is considered a state actor for Section 1983 purposes, should be subject to the RTKL.

40. It is rational for the legislature to conclude that an entity like PIAA, that generates most of its revenue from the sale of tickets to sporting events involving public schools, should be subject to the RTKL.
41. It was rational for the legislature to include PIAA within the RTKL.
42. Neither equal protection nor due process precludes the legislature from including PIAA within its definition of “State-affiliated entity” in the RTKL.
43. Because there is no equal protection claim, there is no violation of Article III, Section 32 of the Pennsylvania Constitution.

WHEREFORE, Counts II, III, and IV of the Amended Petition for Review should be dismissed with prejudice. Pa.R.C.P. 1028(a)(4).

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Respectfully submitted,

/s/ Charles Rees Brown

Charles Rees Brown

Chief Counsel

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Counsel for Office of Open Records

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	:	
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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Preliminary Objection on behalf of the Office of Open Records upon the following via PAC File, email and regular mail which satisfies Pa.R.A.P. 121:

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Dated: March 18, 2021