

March 23, 2021

FILED VIA PACFILE

Michael Krimmel, Esq.
Prothonotary
Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 2100
Harrisburg, PA 17106-2575

RE: Submission of Record in:
Pennsylvania Interscholastic Athletic Association v. Simon Campbell,
No. 107 CD 2021

Dear Mr. Krimmel:

We hereby submit the record in the above-referenced matter. Section 1303 of the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*, (“RTKL”), defines the Record on Appeal as “the record before a court shall consist of the request, the agency’s response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer.” Pursuant to *Department of Transportation v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010), this record includes all “evidence and documents admitted into evidence by the appeals officer pursuant to Section 1102(a)(2).” The record in this matter consists of the following:

Office of Open Records Docket No. 2020-2639:

1. The appeal filed by Simon Campbell (“Requester”) to the Office of Open Records (“OOR”), received December 10, 2020.
2. Official Notice of Appeal dated December 11, 2020, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Pennsylvania Interscholastic Athletic Association (“PIAA”) Motion for Stay of Proceedings dated December 21, 2020.
4. OOR email dated December 21, 2020, asking the Requester if he would like an opportunity to respond to PIAA’s Motion for Stay of Proceedings.
5. Requester response dated December 21, 2020.

6. Requester email dated December 21, 2020 noting a correction in his response.
7. Requester submission dated December 22, 2020.
8. OOR email dated December 22, 2020 denying PIAA's Motion for Stay and establishing submission deadlines.
9. Requester submission dated December 22, 2020.
10. PIAA submission dated December 30, 2020.
11. Requester email dated December 31, 2020, requesting additional time to respond to PIAA submission.
12. PIAA email dated December 31, 2020, objecting to the Requester's request for additional time to make a submission.
13. OOR dated December 31, 2020 responding to the submission deadlines and asking the Requester for additional time to issue the final determination.
14. Requester email dated December 31, 2020, 9:49 a.m., approving extending the final determination issuance date.
15. Requester email dated December 31, 2020, 12:04 p.m.
16. OOR email dated December 31, 2020 establishing supplemental submission deadlines.
17. Requester submission received January 4, 2021.
18. PIAA supplemental submission dated January 5, 2021.
19. Requester supplemental submission dated January 5, 2021.
20. Final Determination issued by the OOR on January 13, 2021.
21. PIAA Petition for Reconsideration dated January 25, 2021.
22. Email chain dated January 26, 2021 regarding the Petition for Reconsideration.
23. Requester email dated January 26, 2021.
24. OOR correspondence dated February 5, 2021 denying the Petition for Reconsideration.

Prothonotary
Commonwealth Court of Pennsylvania

March 23, 2021
Page Three

The OOR has discretion to hold a hearing on appeals filed but chose not to do so in this matter. Therefore, there is no transcript to transmit. Certification of the record in this case is attached to this letter. Please feel free to contact us for any reason in connection with this matter.

Sincerely,

A handwritten signature in black ink, appearing to be 'CRB', with a large, sweeping loop at the end.

Charles Rees Brown
Chief Counsel

Attachments

cc: See certificate of service

Commonwealth of Pennsylvania

Agency Docket Number: AP 2020-2639

Appellate Court Docket Number: 107 CD 2021

I, Elizabeth Wagenseller, certify that the accompanying electronically transmitted materials are true and correct copies of all materials filed in the Office of Open Records and constitute the record for :

Pennsylvania Interscholastic Athletic
Association, Inc.,
Petitioner

v.

Simon Campbell (Office of Open
Records),
Respondent

/s/ Elizabeth Wagenseller

03/23/2021

Executive Director

Volumes:

Agency Record (2)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA INTERSCHOLASTIC
ATHLETIC ASSOCIATION

Petitioner,

v.

SIMON CAMPBELL

Respondent.

:
:
:
:
:
:
:
:
:
:

No. 107 CD 2021

CERTIFIED RECORD

Charles Rees Brown
Chief Counsel
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2334
Phone: (717) 346-9903
Fax: (717) 425-5343
E-mail: CharleBrow@pa.gov

March 23, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION	:	
Petitioner,	:	
	:	
v.	:	No. 107 CD 2021
	:	
SIMON CAMPBELL	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Certified Record upon the following by Email at the email listed below:

Craig J. Staudenmaier, Esquire
Joshua D. Bonn, Esquire
Jennifer Bruce, Esquire
Nauman Smith Shissler & Hall
200 North 3rd Street, 18th Floor
Harrisburg, PA 17101
cjstaud@nssh.com
jdbonn@nssh.com
jbruce@nssh.com

J. Chadwick Schnee, Esquire
Law Office of Tucker Hull, LLC
108 Main Street
Annville, PA 17003
chadwick@tucker-hull-law.com

Alan R. Boynton, Jr., Esquire
Logan Hetherington, Esquire
Austin D. Hughey, Esquire
McNees Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
ABoynton@mcneeslaw.com
LHetherington@mcneeslaw.com
AHughey@mcneeslaw.com



Faith Henry, Administrative Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: fahenry@pa.gov

Dated: March 23, 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION	:	
Petitioner,	:	
	:	
v.	:	No. 107 CD 2021
	:	
SIMON CAMPBELL	:	
Respondent.	:	
	:	

**TABLE OF CONTENTS
RECORD**

Simon Campbell v. Pennsylvania Interscholastic Athletic Association,
OOR Dkt. AP 2020-2639

Office of Open Records Docket No. 2020-2639:

1. The appeal filed by Simon Campbell (“Requester”) to the Office of Open Records (“OOR”), received December 10, 2020.
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OOR Exhibit 1

Devenyi, Dylan

From: no-reply@openrecordspennsylvania.com
Sent: Thursday, December 10, 2020 6:42 PM
To: parighttoknow@gmail.com
Subject: [External] PA Office of Open Records - Appeal Confirmation

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.



pennsylvania
DEPARTMENT OF OPEN RECORDS

You have filed an appeal of an agency's response to a request for records under the Right-to-Know Law.

Name:	Simon Campbell
Company:	
Address 1:	668 Stony Hill Rd #298
Address 2:	
City:	Yardley
State:	Pennsylvania
Zip:	19067
Phone:	267-229-3165
Email:	parighttoknow@gmail.com
Agency (list):	Pennsylvania Interscholastic Athletic Association (PIAA)
Agency Address 1:	550 Gettysburg Rd
Agency Address 2:	
Agency City:	Mechanicsburg
Agency State:	Pennsylvania
Agency Zip:	17055
Agency Phone:	717-697-0374
Agency Email:	rlombardi@piaa.org

Records at Issue in this Appeal:	See attached request. The agency's final answer reflects a denial or deemed denial of all seven (7) request items. The agency's refusal to provide records responsive to all seven (7) request items is challenged on appeal. The agency acted in bad faith/wanton disregard of law by refusing to conduct a timely good faith search for, and timely release of, responsive records that do, in fact, exist.
Request Submitted to Agency Via:	e-mail
Request Date:	11/02/2020
Response Date:	12/07/2020
Deemed Denied:	No
Agency Open Records Officer:	Robert Lombardi
Attached a copy of my request for records:	Yes
Attached a copy of all responses from the Agency regarding my request:	Yes
Attached any letters or notices extending the Agency's time to respond to my request:	Yes
Agree to permit the OOR additional time to issue a final determination:	No
Interested in resolving this issue through OOR mediation:	No
Attachments:	<ul style="list-style-type: none"> • 11-2-20 RTKL Request of PIAA.pdf • 11-6-20 30-Day Extension.pdf • 12-8-20 Final Answer.pdf

I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.



PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.

550 Gettysburg Road • P.O. Box 2008
Mechanicsburg, Pennsylvania 17055-0708
(800) 382-1392 • (717) 697-0374
FAX (717) 697-7721
WEB SITE: www.plaa.org

December 7, 2020

Mr. Simon Campbell
668 Stony Hill Road #298
Yardley, PA 19067

Mr. Campbell:

The purpose of this letter is to respond to the Right To Know Law (RTKL) request sent by you on November 2, 2020 and received by me the same date. Under Section 902 of the RTKL, PIAA requested an extension of 30 days to respond to your request. Our responses to your requests are as follows:

General objection: PIAA is not a Commonwealth authority or entity. It is a 501(c)(3) nonprofit membership corporation that receives no tax dollars and was not created by an Act of the General Assembly. For this reason, it is not subject to the Pennsylvania Right To Know Law. Please be on notice that it is the intention of PIAA to litigate this issue in response to this request.

Specific responses:

Request #1: All legal invoices that already exist in electronic form that were paid by PIAA to any and all attorneys/law firms between the dates of January 1, 2012 and the present.

Response #1: PIAA has no documents responsive to this request. Law firms paid by PIAA since 2012 are believed to have thousands of pages of invoices but PIAA is not aware of how many of those are in an electronic format. All such records, if they exist, must be redacted prior to productions.

Request #2: the fronts of all electronic cleared check images that already exist in electronic form for all financial accounts owned/operated by PIAA between the dates of June 1, 2019 and the present.

Response #2: PIAA has no documents that exist which are responsive to this request. The security features of our banking institution do not allow for modification of electronic images to remove confidential information. PIAA also has no current means of obtaining, preserving and producing the requested records in an electronic format.

Request #3: electronic copies of all monthly bank (or other financial institution) statements that already exist in electronic form for all financial records owned or operated by PIAA between the dates of December 1, 2013 and the present.

Response #3: There are no documents that exist which are responsive to this request nor any current means to obtain, preserve and produce electronic files from such institutions in an electronic format.

Request #4: all posted line item transactions in all bank (or other financial institution) accounts that already exist in electronic form for all financial records owned or operated by PIAA between the dates of June 1, 2019 and the present.

Response #4: There are no documents that exist which are responsive to this request nor any current means to obtain, preserve and produce electronic files from such institutions in an electronic format.

Request #5: PIAA's most recent three (3) years of independent audited financial statements that already exist in electronic form.

Response #5: PIAA has requested these records from its auditors but has not yet received them. They will be produced upon receipt.

Request #6: PIAA's most recent Form 990 filing with the IRS that already exist in electronic form.

Response#6: The IRS 990 Form is available for public view on the IRS site. This may be accessed at www.irs.gov

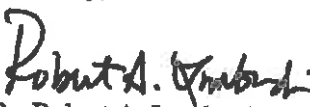
Request #7: all electronic copies of written communications that already exist in electronic form and that were exchanged between PIAA officials' (and between PIAA officials and legal counsel) between the dates of January 1, 2020 and the present that discuss the topic of PIAA being improperly included in the RTKL.

Response #7: There are no documents responsive to this request.

Request #8: Please send me a screenshot image showing the name of the software program in PIAA's possession, custody or control that can perform electronic redactions on PDF files and/or other electronic type files.

Response #8: PIAA is not aware of any record responsive to this request.

Sincerely,


Dr. Robert A. Lombardi
Executive Director

RAL/bl



**PENNSYLVANIA INTERSCHOLASTIC
ATHLETIC ASSOCIATION, INC.**

550 Gettysburg Road • P.O. Box 2008
Mechanicsburg, Pennsylvania 17055-0708
(800) 382-1392 • (717) 697-0374
FAX (717) 697-7721
WEB SITE: www.plaa.org

November 6, 2020

Mr. Simon Campbell
668 Stony Hill Road #298
Yardley, PA 19067

Mr. Campbell:

The purpose of this letter is to respond to the Right To Know Law (RTKL) request received by me Sunday, November 1, 2020, but dated by you Monday, November 2, 2020.

Your request requires an extension of time under Section 902 of the RTKL to review and analyze your request, gather any documents responsive to this request, and appropriately consider any sort of confidential and/or privileged information that may be contained in any responsive documents. Therefore, we will provide a response to you on or before Monday, December 7, 2020.

Sincerely,

Dr. Robert A. Lombardi
Executive Director

RAL/bl



pennsylvania
OFFICE OF OPEN RECORDS

Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Pennsylvania Interscholastic Athletic Association (PIAA) (Attn: AORO)

Date of Request: November 2, 2020 Submitted via: ☒ Email ☐ U.S. Mail ☐ Fax ☐ In Person

PERSON MAKING REQUEST:

Name: Simon Campbell Company (if applicable): _____

Mailing Address: 668 Ston Hill Rd #298

City: Yardley State: PA Zip: 19067 Email: parighttoknow@gmail.com

Telephone: 267-229-3165 Fax: _____

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☒ Email ☐ U.S. Mail

RECORDS REQUESTED: *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.*

Please see attached and below. The specificity of my request/s is important. Right-to-Know Law (RTKL) legal analysis cannot be assessed against records that are simply not requested. An agency may not amend the request nor attempt to produce records not sought. Only the Requester has authority to define the breadth and scope of the request. 65 P.S. §67.703. See also Section 102 definition of a Record ("information, regardless of physical form or characteristics ...stored or maintained electronically"). I am exclusively seeking electronic information.

DO YOU WANT COPIES? ☐ Yes, printed copies (default if none are checked)

[No printed copies] ☒ Yes, electronic copies preferred if available **ONLY (see attached)**

☐ No, in-person inspection of records preferred (may request copies later)

Do you want certified copies? ☐ Yes (may be subject to additional costs) ☒ No

RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than ☐ \$100 (or) ☒ \$ 0.00.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: \$ _____

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

NOTE: *In most cases, a completed RTKL request form is a public record.
More information about the RTKL is available at <https://www.openrecords.pa.gov>*

Form updated Feb. 3, 2020



RIGHT TO KNOW LAW REQUEST ITEMS

Introduction

When I refer to "PIAA" throughout my request items it should be apparent, but is nonetheless here stated for clarity, that I incorporate reference to any and all of the twelve administrative districts of PIAA. These districts may be responsible for their local finances but they are all part of PIAA. It is understood that most people/entities do not manage their finances by storing cash under the bed. They have bank accounts. It is further understood that modern financial institutions provide online banking features where transactions and statements can be viewed online and/or downloaded in electronic form. Given that some financial institutions limit the period of time an account holder can "look back" online for certain records, I posit that PIAA should not delay in preserving requested online banking records for the time periods that I seek because PIAA is required to act in good faith when responding to RTKL requests.

Making a RTKL request is not merely a statutory right in Pennsylvania it is also a constitutionally-protected *Noerr-Pennington* petitioning right under the First Amendment. See *Campbell et al. v. PSBA et al*, 336 F. Supp. 3d 482 - Dist. Court, ED Pennsylvania 2018. ("...courts have regularly recognized that statutorily authorized petitions are protected by the First Amendment. E.g., *Herr v. Pequea Twp.*, 274 F.3d 109, 119 n.9 (3d Cir. 2001) (applications to county planning commission); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (reports to state and federal agencies). There is no reason why petitions pursuant to statutory authority should be given less protection than petitions independent of that authority"); *aff'd* in relevant part by the Third Circuit Court of Appeals, No. 18-3112.

ITEM 1

Using the cheapest redaction (if necessary), copy, and delivery methods possible, please send me electronic copies of all legal invoices that **already exist in electronic form** that were paid by PIAA to any and all attorneys/law firms between the dates of January 1, 2012 and the present. If legal invoices in the possession or constructive possession of PIAA only exist in paper form then such paper records do not constitute part of my request. No Section 701 analysis should occur on records not requested¹. Moreover, a Requester defines the scope and breadth of the request, not

¹ See "[a] record being provided to a Requester ..." 65 P.S. § 67.701. [I am not requesting that paper records be provided. PIAA must not think it can amend my request to provide something I do not want].

PIAA². That said, PIAA must still perform a 'constructive possession' search under Section 901³ and/or Section 506(d)⁴ for responsive electronic records that might exist in the possession of applicable third parties such as the retained lawyers/law firms that generated the requested electronic legal invoices (self-evidently a client 'controls' the attorney-client relationship).⁵

ITEM 2

Using the cheapest redaction (if necessary), copy, and delivery methods possible, please send me electronic copies of the fronts of all electronic cleared check images that **already exist in electronic form** (e.g. via online banking) for all financial accounts owned/operated by PIAA between the dates of June 1, 2019 and the present. A redacted illustration of what I seek is shown below. Most financial institutions have online banking features where cleared check images can be viewed by the account owner. I am looking for snapshot copies of such check images in whatever electronic form PIAA might wish to take the electronic copies e.g. screenshot capture, print to PDF, etc. I do not authorize PIAA to print any cleared check image to paper because, again, I am not seeking paper copies of electronic records (Requester defines the scope and parameters of the request, not the PIAA; 65 P.S. § 67.703). To the extent the requested electronic cleared check images are not in the PIAA's actual possession I posit that they are in PIAA's constructive possession ("control") via the applicable financial institutions' online banking features. Example:

² 65 P.S. § 67.703 ("[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested").

³ 65 P.S. § 67.901 ("[w]hether the agency has possession, custody or control of the identified record").

⁴ 65 P.S. § 67.506(d).

⁵ See *Uniontown Newspapers, Inc. v. Pa. Department of Corrections*, 185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) ("When records are not in an agency's physical possession, an open records officer has a **duty to contact agents within its control**, including third-party contractors ... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL").

Check Details

X

Item 7 of 29 [Show full image *](#)

EXAMPLE OF A CLEARED CHECK IMAGE OBTAINED VIA ONLINE BANKING.

 Print

Check Number

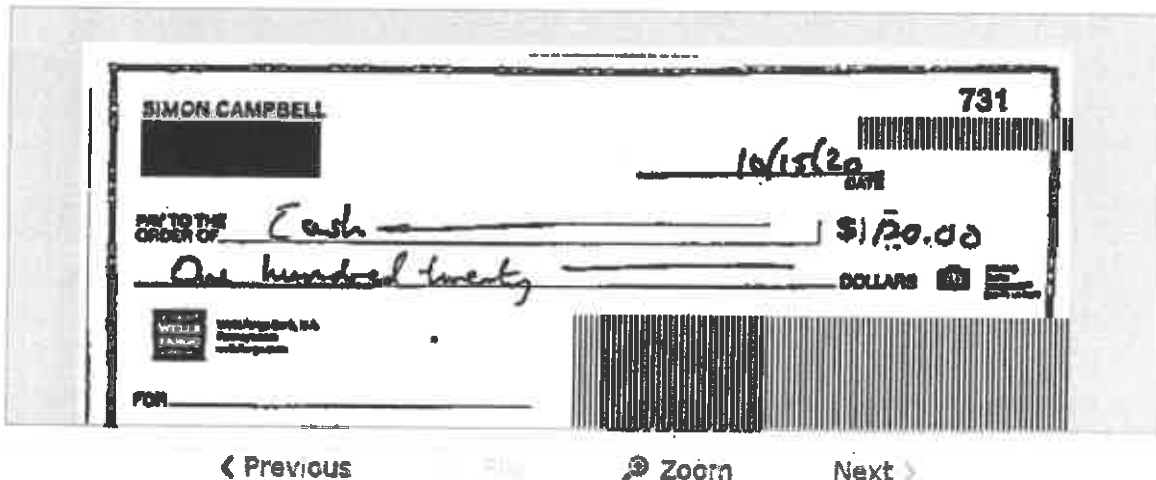
731

Date Posted

10/15/20

Check Amount

\$120.00



* For your security, information like account numbers, signatures, and the ability to view the backs of checks have been removed from the images. You can see full or partial fronts and backs of the images by using the link at the top of the window.

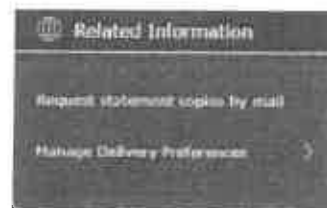
 Equal Housing Lender

ITEM 3

Using the cheapest redaction (if necessary), copy, and delivery methods possible, please send me electronic copies of all monthly bank (or other financial institution) statements that **already exist in electronic form** for all financial accounts owned/operated by PIAA between the dates of December 1, 2013 and the present. Again, no paper records are requested. Example:

Statements and Documents

It's easy to access your account documents online. Wells Fargo offers a secure, convenient, and environmentally friendly way to manage your documents from one central place - helping you reduce clutter and stay organized.



Statements and Disclosures

Select account



For time period

Recent statements



Statements

Deposit account statements are available online for up to 7 years.

[Statement 09/30/20 \(23K, PDF\)](#)

[Statement 08/31/20 \(21K, PDF\)](#)

[Statement 07/31/20 \(21K, PDF\)](#)

[Statement 06/30/20 \(24K, PDF\)](#)

[Statement 05/31/20 \(21K, PDF\)](#)

[Statement 04/30/20 \(22K, PDF\)](#)

[Statement 03/31/20 \(22K, PDF\)](#)

[Statement 02/29/20 \(22K, PDF\)](#)

[Statement 01/31/20 \(23K, PDF\)](#)

[Statement 12/31/19 \(24K, PDF\)](#)

[Statement 11/30/19 \(24K, PDF\)](#)

**EXAMPLE OF MONTHLY BANK
STATEMENTS BEING
READILY AVAILABLE ONLINE,
FOR UP TO 7 YEARS, IN
ELECTRONIC FORM (PDF).**

Wells Fargo will notify you when your account statement is available online. If we do not have a valid email address for you, we cannot provide this notice and will have to switch future online statements to paper statements via U.S. mail. As an online customer, you are responsible for notifying us if you change your email address. Please refer to the [Online Access Agreement](#) for details. If you receive both paper and online statements on an account, we will not notify you by email when your online statement is ready.

ITEM 4

Using the cheapest redaction (if necessary), copy, and delivery methods possible⁶, please send me all posted line item transactions in all bank (or other financial institution) accounts that **already exist in electronic form** for all financial accounts owned/operated by PIAA between the dates of June 1, 2019 and the present. Again, no paper records are requested. Example:

⁶ For Request Item 4 I seek the delivery method of comma delimited (ASCII, Spreadsheet) if it is an available option, otherwise any available electronic form and electronic delivery method will suffice.

Download Your Account Activity

Personal Accounts What is this?

Upgrade to Direct Connect and you can automatically download all your eligible accounts and pay bills directly through Quicken or QuickBooks - just select Wells Fargo Bank from within your software.

- See fees and learn more about using Online Banking and Bill Pay with Quicken or QuickBooks
- Need financial management software? Purchase discounted QuickBooks software.

Download your account information by following these steps:

Step 1: Choose an account.¹

Account



EXAMPLE OF ONLINE BANKING FEATURE THAT ALLOWS LINE ITEM TRANSACTIONS TO BE DOWNLOADED ELECTRONICALLY

Step 2: Verify the pre-filled date range.²

For the selected account, you can download up to 18 months of previous account history.

Note: Always confirm "From" and "To" dates before downloading account activity.

Date Range



Step 3: Select a file format to download.³

File Format

- Quicken³ (Web Connect)
- QuickBooks³ (Web Connect)
- QuickBooks³ (.QIF) (More Information)
- Comma Delimited (.CSV) (Spreadsheet)

Download

¹ Account Disclosures

² Only posted transactions are available for download.

Please note that if PIAA downloads the requested line item transactions into a manipulable database format and then redacts certain information I think it is important to identify in the file itself what information has been redacted. Unlike a blacked out image on a document or image file, I cannot visibly "see" if a column, row, or cell box has been deleted.

ITEM 5

Using the cheapest redaction (if necessary), copy, and delivery methods possible, please send me PIAA's most recent three (3) years of independent audited financial statements that already exist in electronic form. If they do not already exist in electronic form then the financial statements are not requested (if necessary, PIAA must check with the auditors to see if the auditors possess them in electronic form).

ITEM 6

Using the cheapest redaction (if necessary), copy, and delivery methods possible, please send me PIAA's most recent Form 990 filing with the IRS⁷ that **already exists in electronic form**. If the requested document does not already exist in electronic form then it is not requested (if necessary, PIAA must check with its Form 990 preparer to see if he/she possesses it in electronic form).

ITEM 7

This request item stems from my curiosity about a recent Office of Open Records ("OOR") Final Determination, *Francis Scarella & the Daily Item v. PIAA*; Dkt. No. AP 2020-1371. On September 2, 2020, PIAA submitted argument to the OOR via counsel. On page 2 footnote 1 of that pleading, PIAA stated:

"[PIAA] does not receive any tax money⁸ ...Unless all not-for-profit corporations that have schools for members are Commonwealth authorities or entities, PIAA believes that it is improperly included in the RTKL. For purposes of the current proceeding, it has chosen not to object to the request submitted by Requester on this ground nor pursue this issue here as the OOR is not the appropriate venue to address the validity and/or constitutionality of the legislative enactment."

I quote the above because I wish to be clear what records I am seeking. Using the cheapest redaction (if necessary), copy, and delivery methods possible, please send me electronic copies of all written communications that **already exist in electronic form**, and that were exchanged between PIAA officials (and between PIAA officials and counsel) between the dates of January 1, 2020 and the present, that discuss the topic of PIAA being improperly included in the RTKL.

When I use the term "PIAA officials" I am referring to the PIAA's Board of Directors, Executive Committee (President, Vice President, and Treasurer), and Executive Director. When I use the term "written communications" I am referring to any and all non-verbal communications (examples would include emails, text messages, social media messages) irrespective of whether

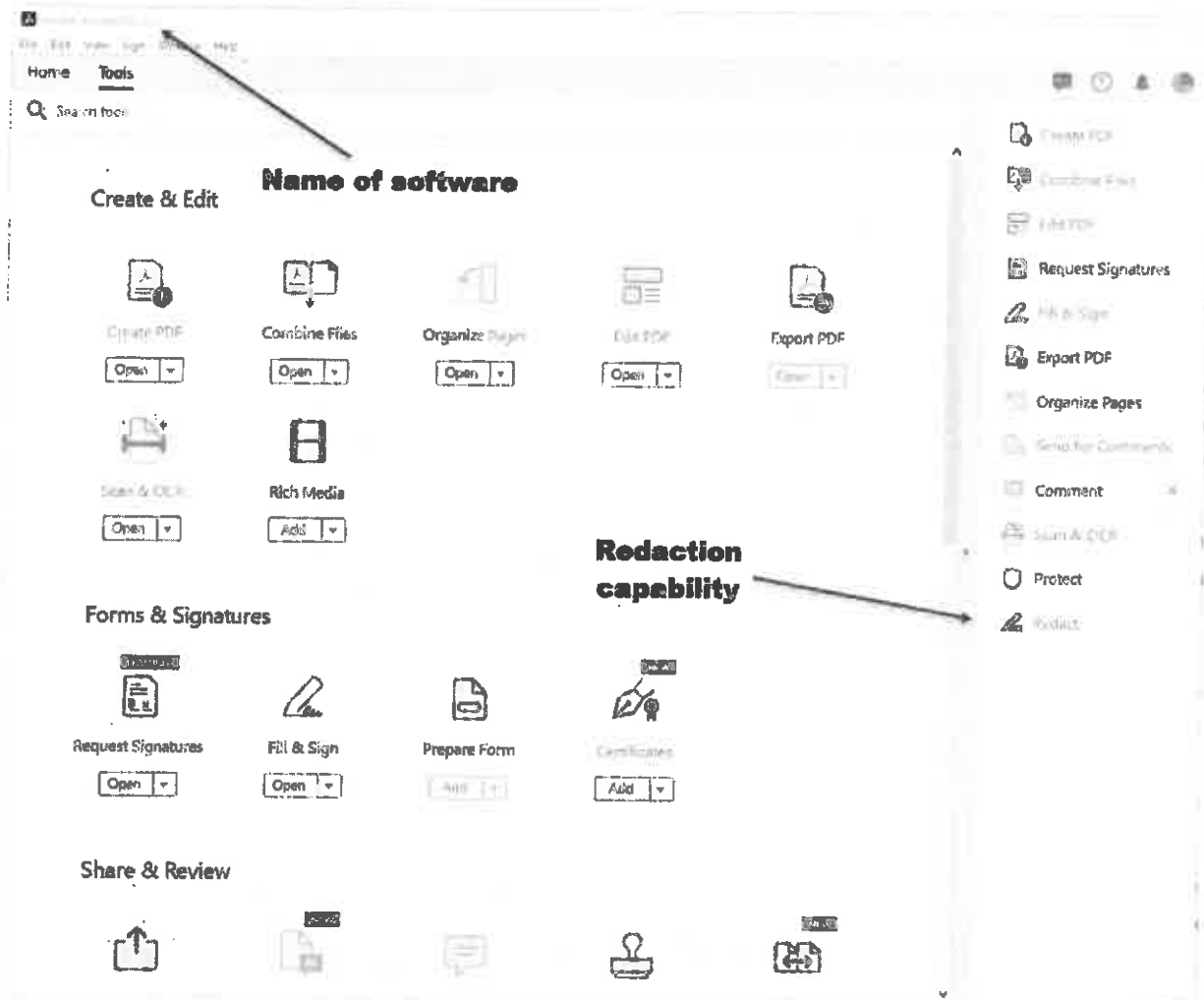
⁷ "Return of Organization Exempt from Income Tax" (Form 990).

⁸ A disingenuous argument to make. PIAA's member public schools are not private donors. They are public entities funded by taxpayers; and for constitutional purposes PIAA is a pervasively entwined State Actor. See *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001); also see *Campbell et al v. PSBA et al*, 336 F. Supp. 3d 482 - Dist. Court, ED Pennsylvania 2018 (PSBA Motion to Dismiss denied, June 19, 2018). PIAA should not seek to bypass the statutory scheme of the RTKL if wishing to argue that the RTKL is unconstitutional as to PIAA's inclusion. Any legal action taken by PIAA outside of the RTKL, involving my request items, would be First Amendment retaliation. PIAA can make any arguments it likes but it must do so via the RTKL statutory process to which I am clearly entitled. PIAA cannot presume the RTKL is unconstitutional and must therefore follow it. PIAA is required to act in good faith and can be sanctioned if it does not. 65 P.S. § 67.1304. Put plainly, PIAA can hold whatever fanciful legal theories it likes if it wants to sue the Commonwealth of Pennsylvania and have the Attorney General defend against such suit as required by the Commonwealth Attorneys Act. But such fanciful legal theories must be pursued within the confines of the RTKL process. That said, it is hard to imagine any public relations consultant counseling that PIAA use taxpayer-sourced member dues for such a speculative headline-grabbing endeavor. Even harder to imagine the media and general assembly being impressed by such move. If anything, it might trigger the general assembly to add the likes of PSBA into the RTKL. That would be a good amendment. All pervasively entwined State Actors should be accountable to the public that *de facto* funds them.

such communications occurred on the agency officials' personal communication devices. I posit that PIAA's "good faith effort" (Section 901) to search for responsive records necessitates the PIAA's Open Records Officer asking the agency officials to preserve (then release to the Open Records Officer for analysis) all responsive records on any personal communication devices.

ITEM 8

Please send me a screenshot image showing the name of the software program/s in PIAA's possession, custody or control that can perform electronic redactions on PDF files and/or other electronic file types. By way of example one software program that I use myself to perform such tasks is called Adobe Acrobat Pro:



POSITION STATEMENT/S OF REQUESTER

It seems from reading the appeal submissions to OOR in *Francis Scarcella and The Daily Item v. Pennsylvania Interscholastic Athletic Association*, OOR Dkt. AP 2020-1371, that PIAA District IV may be run by people unfamiliar with modern banking tools and modern software tools. The

Glenn Fogel (District IV Treasurer) affidavit of September 2, 2020, stated in paragraph 12 "As Treasurer, I keep almost all District IV third party records, such as ...bank records⁹, in paper format" and in paragraph 15 "I am not aware of any records of District IV that were requested by Mr. Scarcella that are kept electronically". If District IV has a bank account then it is irrelevant what bank records Mr. Fogel personally keeps or what banking facilities he may be unaware of. What is relevant is what online banking facilities he (or the appropriate PIAA official) has the **actual ability to access** even if he has never done it before and even if he isn't personally aware that online records exist. Ignorance is a not a valid denial argument under the RTKL. The Daily Item newspaper did not press these issues so these issues were not adjudicated. By contrast, I am putting PIAA on notice to think about these issues. If local Treasurers have never done things like set up an online banking username and password, or never accessed online banking records before, it doesn't mean they can avoid doing it now in response to my request items. PIAA has a *duty* to retrieve what I seek if PIAA possesses or controls access to the records in the electronic medium that I seek them.

Aside from Adobe Acrobat Pro I possess an inexpensive software tool called "SnagIt" that, like Adobe Acrobat Pro, can be used to capture screen images and create blacked out areas to redact image files like .gif, .jpg, .tiff, etc. (and do it far more securely than a black sharpie pen on a piece of paper, where holding up the paper to a bright light can reveal the redaction underneath¹⁰). By no means are these software tool examples meant to be exhaustive of all possibilities for how electronic records may be electronically redacted by PIAA. In 2020, we live in a modern world with modern software tools that are readily available to us.

The particular electronic form of the sought-after electronic copies is irrelevant to my request items. Aside from the the limited (additional) specificity of re: Item 4, PIAA is welcome to use any electronic format and any electronic medium of its choice to grant and deliver my requested items (e.g. image files, database files, document files, etc.). Since fee disputes can be adjudicated separately to PIAA's position on the merits of requested information being public or nonpublic, please do not actually incur any allegedly chargeable fees to process any of my request items without first seeking agreement from me that I will pay the allegedly chargeable fees (see Section 1304; PIAA required to act in good faith¹¹). My position is that any redactions (which are not

⁹ The phrase "bank records" was not probed by the Requester but self-evidently it speaks to the existence of a bank account. Should it become relevant here I ask that PIAA attorneys provide careful counsel to affiants, given the potential of a Requester to seek sanctions in court for perjury.

¹⁰ OOR has no statutory authority to include non-defined phrases like "secure redaction" in its fee schedule (footnote 6) when no such phrase exists in the statute. Section 706 (redactions) does not mention either the word "secure" or "securely". OOR has no statutory authority to set redaction costs on electronic records in its fee schedule. That OOR has acted outside the scope of its statutory authority in establishing its current fee schedule, re: redacting electronic records, cannot be used as a denial basis by PIAA. OOR cannot cite a single case for the premise that it can unilaterally declare, via its fee schedule, that agencies have a "right" to print pieces of paper (at \$0.25 per page cost to the Requester) from electronic records in order to take out a black sharpie pen and redact them. PIAA is obliged to follow the law not OOR's unlawful power grab.

¹¹ See also OOR Final Determination, *Francis Scarcella and The Daily Item v. Pennsylvania Interscholastic Athletic Association*, OOR Dkt. AP 2020-1371 (PIAA not entitled to copy fees where Requester objection is on record).

admitted is necessary) on electronic records would need to be performed electronically in accordance with Sections 706 and 1307(g) of the RTKL¹².

My position (given the specificity of my requests) is that Section 1307(b) – which references the OOR's fee schedule - is not triggered, at least in terms of redaction, by any of my request items¹³. I do not agree that any paper copy fees can be charged because I am only seeking electronic copies of records that *already exist* in electronic form. Put another way, it is not a 'necessarily incurred' cost to print electronic records onto paper in order to redact or copy them.¹⁴

My position is that the only permissible fees that may be charged to me is the delivery method by which the electronic information is sent. If the granted records are too large to send as e-mail attachments PIAA should seek the lowest cost alternative delivery method to send me the released records. Examples might include mailing me a USB stick or DVD (where the cost of the thumb drive/disc plus postage might be chargeable). Or, even better, PIAA could use a free file-share cloud service like Google Drive, OneDrive, Dropbox etc¹⁵. I encourage PIAA to enter into constructive dialogue with me about delivery costs rather than assume PIAA is entitled to charge whatever PIAA wants to charge.

If PIAA disagrees with any of my position statements and wishes to charge paper copy fees, please estimate (but do not actually incur) the allegedly chargeable fees into a dollar amount and please explain the rationale behind such position, including providing legal citation as required by Section 903(2) of the RTKL when issuing PIAA's final answer.

In recent days I googled and found these media stories about PIAA:

"Open records office rules PIAA can't charge for some documents"

https://www.dailymail.com/news/open-records-office-rules-piaa-cant-charge-for-some-documents/article_492b9e20-1557-11eb-9f8a-eb810ce71104.html

"Legislators want to discuss District IV concerns with PIAA Oversight Committee"

¹² Numerous software tools exist – many for free – that can be used to electronically redact a range of different electronic file types. If the PIAA wishes to allege that it doesn't possess any applicable software redaction tool and further wishes to argue it is under no obligation to obtain one, please state that position when issuing the PIAA's final answer because my position is that the PIAA would be required to obtain such software tool.

¹³ The RTKL only authorizes OOR to establish "fees for duplication" not fees for redaction. 65 P.S. § 67.1307(b)(1). Any necessarily incurred costs for redaction "must be reasonable" and fall under Section 1307(g). See OOR Final Determination, *Mezzacappa v. Colonial Intermediate Unit 20*, Dkt. No. 2019-1922 ("[t]he {PIAA's} redactions are governed by Section 1307(g) of the RTKL").

¹⁴ Redaction costs are limited to costs that the "agency necessarily incurs ...for complying with the request, and such fees must be reasonable." 65 P.S. § 67.1307(g) (emphasis added).

¹⁵ Many options exist at no cost. See <https://www.computerworld.com/article/3262636/top-10-file-sharing-options-dropbox-box-google-drive-onedrive-and-more.html>. I encourage PIAA to review the statutory language of Section 1307(g) in this regard (i.e. "necessarily incurs" and "such fees must be reasonable"). To me, it seems so, well, 1950s to think of mailing items on a USB stick. I'm not sure it's necessary. PIAA could probably tap into the expertise of a 14 year high school member to see how to use a free file-share service. If PIAA wants to have a fight about 1307(g) I encourage PIAA to read *Mezzacappa v. Colonial Intermediate Unit 20*, Dkt. No. AP 2019-1922 (July 31, 2010); footnotes 8 & 9.

https://www.dailyitem.com/news/legislators-want-to-discuss-district-iv-concerns-with-piaa-oversight-committee/article_dfe4c2f2-c6be-11ea-956f-f76d6997bd3a.html

It seems like there is no love lost between PIAA and the Daily Item newspaper when it comes to the RTKL. But as the Pennsylvania Newspaper Association attorney Melissa Melewsky was quoted in the second article: "PIAA's position on the use of the RTKL is unfortunate ...[t]he RTKL was not intended to be an adversarial process, but one designed to inform the public and improve government function. Reasonableness and collaboration can go a long way in easing the process along."

Indeed so.

I want to know what is going on with the millions of dollars of taxpayer-sourced money that flows into PIAA and I want to understand why PIAA thinks it should be unaccountable to the public for any of that money by suggesting that PIAA not be included in the RTKL. To any extent it may be relevant please know that I intend to publish all released records on the internet.

I look forward to hearing from PIAA within the required five (5) business days.

Sincerely,
Simon Campbell

PS. OOR recently invited the public to provide input into its decision-making process for the biannual review of its fee schedule. See <https://openrecords.pennsylvania.com/2020/10/27/or-solicits-comments-on-biannual-review-of-rtkl-fee-schedule/>. FYI, to help PIAA better understand my position on copy fees, I attach my own feedback to OOR. I encourage PIAA not to rely on statutory authority that OOR does not possess when deciding what fees PIAA thinks might be chargeable, and instead focus only on what the RTKL says. Put plainly, if the only argument PIAA has about copy fees is "the OOR fee schedule says we can do it" then we have a problem in which OOR could become an indispensable party because there are certain things that OOR is not allowed to say in its fee schedule that PIAA can do.



Simon Campbell <parighttoknow@gmail.com>

OOR's fee schedule - revisions needed

1 message

Simon Campbell <parighttoknow@gmail.com>

Sat, Oct 31, 2020 at 6:13 PM

To: FeeReviewOOR@pa.gov

Cc: Erik Arneson <earneson@pa.gov>, Nathanael <nbyerly@pa.gov>, "Brown, Charles (OOR)" <charlebrow@pa.gov>, "Lantz-Johnson, Delene" <dlantz-joh@pa.gov>, "Spiess, George" <gespiess@pa.gov>

Dear OOR,

What's the expression for activist Judges? Legislating from the bench, I believe. Why would OOR do that from an administrative office? I was happy to see the general assembly limit OOR's 1307(b) statutory authority to "fees for duplication". I can only assume that whomever fell in love, inside OOR, with a "securely redacting" black sharpie pen several years ago (see current OOR fee schedule footnotes 4 & 6) that person wanted to re-write the RTKL to give more power to OOR than the general assembly gave to OOR.

See OOR Final Determination, page 8:

<https://www.openrecords.pa.gov/Appeals/DocketGetFile.cfm?id=55570>

[Quote]: "With respect to the electronic invoices that were in Dr. Lombardi's possession, the OOR's Fee Schedule does not permit fees to be imposed for redactions, see 65 P.S. § 67.1307(g), but does state that "[i]f a requester seeks records requiring redaction, an agency may copy or print the records to provide for secure redaction. Accordingly, the agency may charge the fees noted above for ... copies, as appropriate."

May I suggest OOR pen more succinct FDs?. The above verbiage - making the exact same legal points - would be better written:

"With respect to the electronic invoices that were in Dr. Lombardi's possession, the OOR's Fee Schedule does not permit fees to be imposed for redactions, see 65 P.S. § 67.1307(g), but OOR does it anyway."

Of course, even the more succinct version doesn't address the underlying cultural problem at OOR. The problem right now, and the reason so many citizens are continuing to be ripped off with unlawful copy fees being imposed on them by an OOR with General Assembly aspirations, is not OOR's fee schedule per se. The structural problem is that OOR is addressing things in its fee schedule that OOR is not allowed to address in its fee schedule.

Specifically, OOR is not statutorily authorized to suggest, infer, or otherwise rule in its fee schedule that agencies have a right to print electronic records onto paper to redact them with a black sharpie pen. That entire mentality at OOR is far removed from OOR's statutory authority in Section 1307(b). OOR may adjudicate but OOR may not legislate. Different agencies might have different costs for e-redaction. Not all agencies possess the same, if any, software redaction tools. "Necessary" costs may vary between agencies. Different arguments may be put forth by different agencies. And the wording of requests may vary between requesters.

Such realities suggest that redaction cost disputes be assessed on a case-by-case basis where OOR acts only as an adjudicator not as a legislator. In setting its upcoming revised fee schedule OOR needs to resist a desire to still be King. Section 1307(b) should be seen as restricting not as all encompassing.

Redaction costs for all electronic records are properly analyzed under Section 1307(g) not Section 1307(b). See OOR Final Determination, *Mezzacappa v. Colonial Intermediate Unit 20*, Dkt. No. AP 2019-1922(July 31, 2010)("The Unit's redactions are governed by Section 1307(g) of the RTKL"). The electronic records at issue in *Mezzacappa* were video records. It is absurd for OOR to believe that one type of electronic record (video) can have redaction costs assessed under 1307(g) while another type of electronic record (non-video) has redaction costs assessed under 1307(b). *Mezzacappa* drew its own authority from a PA Supreme Court case. *Easton Area Sch. Dist. v. Miller* 13 MAP 2019, 2020 Pa. LEXIS 3378:

"Thus, insofar as the video itself is a public record subject to disclosure under the RTKL but contains the images of school students which are not subject to disclosure, which, in our view, it is and does, the District is obligated to redact students' images by, for example, blurring or darkening portions of the video revealing the students' identities, and to subsequently provide access to the redacted video." [Footnote 15]: "We do not suggest the District is obligated to finance such redaction, which responsibility may fall either to the District or to the Requester depending upon other laws, policies, or legal directives that are not before the Court in the present appeal."

Notably, the PA Supreme Court did not state that redaction costs on e-records could be established by the OOR in its fee schedule. The OOR's sound reasoning in *Mezzacappa* flowed from this Supreme Court decision. Different facts presented by different cases are going to arise over the issue of redaction costs on electronic records. It is not appropriate for OOR to declare or suggest, via its fee schedule, how redactions on electronic records must occur and what the costs associated with such redaction can be.

Part of the challenge is that OOR was operating in the 1920s under Terry Mutchler in terms of being a forward-looking entity. Mr.

Ameson has at least elevated OOR into the 1950s. But all this obsession about paper records is an obsession that only government officials get wrapped up in. What agency does NOT keep its records in some computer form or another? Why are we talking about paper copies in 2020? It is a dinosaur mentality where type-writers and filing cabinets still rule the day. Such dinosaur mentality has been ripping citizens off for years. \$0.25 per page copy fees? Come on. Even if an agency really did live in the 1950s with a type-writer and filing cabinet instead of a computer, you can go to Staples and get paper copies done for \$0.10 per page. As a reminder, OOR is limited in terms of what it can do by the language of Section 1307(b)(2). I Hope someone at OOR is surveying local business entities.

OOR lives in an ivory tower when it comes to seeing the RTKL. It is a sheltered governmental world where OOR never sees the ordinary Requester who gets beaten down with denials and who quits because they think (often, all too correctly) the system is stacked against them. OOR needs to stop listening to the government people and the 'advocacy' self-serving special interest groups who cater to them. OOR needs to re-focus on the ordinary citizen and the law itself. This time around, OOR needs to pay much greater attention to what it is NOT ALLOWED to establish in terms of fees. There can be no King OOR. Section 1307(b) fee-setting needs to be an exercise in restraint. In line with case law and the statutory limits imposed on OOR by the general assembly, I propose the follow changes to the OOR's current fee schedule:

Footnote 4: Problem. The 1950s dinosaur is in town (i.e. someone still in love with paper records and black sharpie pens). The current phrase "records which require redactions in electronic format" makes no legal sense because the word "records" doesn't differentiate between paper records and electronic records (how can paper records "require" electronic redaction?). Redactions for paper records have costs assessed under 1307(b) whereas redactions for electronic records have costs assessed under 1307(g). Solution: eliminate this footnote in its entirety. Stop telling agencies they can live in the 1950s. Stop legislating. OOR doesn't have statutory authority to establish, in its fees schedule, any costs relating to redaction. Let such issues be decided on a case-by-case basis via Final Determinations.

Footnote 6: Same problem. Same solution. Scrap it.

Additional Notes

Inspection of Redacted Records: Similar problem. Current phraseology is legally contradictory ("An agency may not charge the requester for the redaction itself. However, an agency may charge (in accordance with the OOR's Official Fee Structure) for any copies it must make [to do the redaction]"). The implication is that the agency "must" print paper to perform the redaction. Where does such thinking come from? Certainly not the law. It is the 1950s dinosaur mentality again. Suppose the Requester wanted to inspect a screenshot image that needed to be redacted. Under the current phraseology OOR falls right back into the trap of Footnotes 4 and 6. When in fact the agency might be easily able to redact the screenshot electronically and present it for inspection electronically. By setting fees for things OOR is not authorized to set fees for (redaction costs of e-records) OOR is shutting out legal arguments - good legal arguments - that citizens could otherwise make during an appeal. Instead of adjudicating the law, OOR has fallen into the trap of becoming the law. The solution again is to simply abolish this particular additional note in its entirety.

All other aspects of the OOR's fee schedule are fine as they are. Don't mess with what works. Just fix the stuff that has been ripping citizens off because King OOR has been exceeding its statutory authority.

Do I win a free black sharpie pen if my ideas are deemed the best?

SC.

00R Exhibit 2

NOTICE RELATED TO THE CORONAVIRUS (COVID-19) EMERGENCY

Pennsylvania is currently under a declared state of emergency related to the coronavirus (COVID-19). Some agencies and requesters may face challenges in regard to their ability to meaningfully participate in Right-to-Know Law (RTKL) appeals. Accordingly, and to ensure due process, the Office of Open Records (OOR) is taking the following temporary steps.

The timeline for this RTKL appeal may be extended by the OOR during the appeal. This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on **January 11, 2021**.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline.*

Submissions in this case are currently due on **December 22, 2020**.

If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.

Every staff member of the OOR is working remotely, and we are only able to receive postal mail on a limited basis at this time. Accordingly, we urge agencies and requesters to use email for all communication with the OOR at this time.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters during this time to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.



pennsylvania
OFFICE OF OPEN RECORDS

December 11, 2020

Via Email Only:

Mr. Simon Campbell
668 Stony Hill Rd #298
Yardley, PA 19067
parighttoknow@gmail.com

Via Email Only:

Robert Lombardi
Agency Open Records Officer
Pennsylvania Interscholastic Athletic
Association (PIAA)
550 Gettysburg Rd
Mechanicsburg, PA 17055
rlombardi@piaa.org

RE: OFFICIAL NOTICE OF APPEAL - Campbell v. Pennsylvania Interscholastic Athletic Association (PIAA) OOR Dkt. AP 2020-2639

Dear Parties:

Review this information and all enclosures carefully as they affect your legal rights.

The Office of Open Records ("OOR") received this appeal under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. on December 10, 2020. A binding Final Determination ("FD") will be issued pursuant to the timeline required by the RTKL, **subject to the enclosed information regarding the coronavirus (COVID-19).**

Notes for both parties (more information in the enclosed documents):

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,

Erik Arneson
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

The Office of Open Records ("OOR") has received the enclosed appeal, which was filed under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the enclosed information regarding the coronavirus (COVID-19). If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

Submissions to the OOR Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer. Please contact the Appeals Officer as soon as possible.

Any information provided to the OOR must be provided to all parties involved in this appeal. Information submitted to the OOR will not be considered unless it is also shared with all parties.

Include the docket number on all submissions.

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Generally, submissions to the OOR — other than *in camera* records — will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

Agency Must Notify Third Parties

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; or are held by a contractor or vendor, the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer assigned to this case (see 65 P.S. Â§ 67.1101(c)).

The Commonwealth Court has held that "the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt." (*Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

A third party's failure to participate in a RTKL appeal before the OOR may be construed as a waiver of objections regarding release of requested records.

NOTE TO AGENCIES: If you have questions about this requirement, please contact the Appeals Officer immediately.

Statements of Fact & Burden of Proof

Statements of fact **must** be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.**

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, openrecords.pa.gov.

Any evidence or legal arguments not submitted or made to the OOR may be waived.

Preserving Responsive Records

The agency must preserve all potentially responsive records during the RTKL appeal process, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had “a mandatory duty” to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that “a fee award holds an agency accountable for its conduct during the RTKL process...”

Mediation

The OOR offers a mediation program as an alternative to the standard appeal process. To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court — saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.



pennsylvania

OFFICE OF OPEN RECORDS

APPEALS OFFICER:

Magdalene C. Zeppos-Brown, Esq.

CONTACT INFORMATION:

**Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234**

FACSIMILE:

(717) 425-5343

EMAIL:

mazepposbr@pa.gov

**Preferred method of contact and
submission of information:**

EMAIL

**Please direct submissions and correspondence related to this appeal to the above Appeals Officer.
Please include the case name and docket number on all submissions.**

**You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot
speak to parties individually without the participation of the other party.**

**The OOR website, <https://openrecords.pa.gov>, is searchable and both parties are encouraged to review
prior final determinations involving similar records and fees that may impact this appeal.**

**The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff
are also available to provide general information about the appeals process by calling (717) 346-9903.**

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____

Today's date: _____

Name: _____

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Address/City/State/Zip _____

E-mail _____

Fax Number: _____

Name of Requester: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Name of Agency: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Record at issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- ☐ An employee of the agency
- ☐ The owner of a record containing confidential or proprietary information or trademarked records
- ☐ A contractor or vendor
- ☐ Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, _____ (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

OOOR Exhibit 3

Zeppos-Brown, Magdalene

From: Boynton, Alan <ABoynton@mcneeslaw.com>
Sent: Monday, December 21, 2020 1:57 PM
To: Zeppos-Brown, Magdalene
Cc: Simon Campbell <parighttoknow@gmail.com> (parighttoknow@gmail.com)
Subject: [External] AP 2020-2639
Attachments: A7839949.PDF

Follow Up Flag: Follow up
Flag Status: Flagged

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Ms. Zeppos-Brown,

Attached hereto is Respondent's request to stay this proceeding pending disposition of a Petition for Review filed by Respondent in the Commonwealth Court on December 18, 2020 challenging application of the Pennsylvania Right To Know Law to Respondent. As noted by Mr. Campbell in his appeal, Respondent notified him in Respondent's response to his request that PIAA intended to litigate this issue. A copy of the Petition for Review is attached to the request for stay.

Alan Boynton



Alan R. Boynton, Jr.

McNees Wallace & Nurick LLC

100 Pine Street | Harrisburg, PA 17101

Tel: 717.237.5352 | Fax: 717.260.1665

Cel: 717.418.2354

[LinkedIn](#) | [Website](#)

The foregoing message may be protected by the attorney-client privilege. If you believe it has been sent to you in error, do not read it. Please reply to the sender that you have received the message in error, then delete it. Thank you.

PENNSYLVANIA OFFICE OF OPEN RECORDS

IN THE MATTER OF:

Simon Campbell,
Requester

v.

Pennsylvania Interscholastic
Athletic Association, Inc.,
Respondent

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Docket Number: AP 2020-2639

**MOTION OF RESPONDENT PENNSYLVANIA
INTERSCHOLASTIC ATHLETIC
ASSOCIATION, INC. FOR STAY OF PROCEEDINGS**

This appeal arises out of a request for records dated November 2, 2020, submitted by Simon Campbell ("Requester") to Respondent Pennsylvania Interscholastic Athletic Association, Inc ("PIAA"), under the Pennsylvania Right-To-Know Law ("RTKL").¹ On December 7, 2020, PIAA responded to Requester's request and informed Requester, *inter alia*, that:

PIAA is not a Commonwealth authority or entity. It is a nonprofit membership corporation that receives no tax dollars. For this reason, it is not subject to the Pennsylvania Right To Know Law. Please be on notice that it is the intention of PIAA to litigate this issue in response to this request.

Requester appealed PIAA's response to the Pennsylvania Office of Open Records ("OOR") on December 10, 2020. The following day, the OOR directed the parties to file submissions to the OOR on or before December 22, 2020.

On December 18, 2020, PIAA filed a Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief ("Petition") with the Commonwealth Court of Pennsylvania in the court's original jurisdiction. The Petition, docketed at

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

Number 661 MD 2020, references this appeal as creating a case and controversy requiring declaratory relief and specifically challenges the validity and constitutionality of PIAA's inclusion in the RTKL as a "State-affiliated entity," defined by Section 102 of the RTKL, 65 P.S. § 67.102, since PIAA is neither a Commonwealth authority nor entity. The Petition further asserts that the inclusion of PIAA in the RTKL constituted special legislation and is a violation of PIAA's equal protection rights under the United States and Pennsylvania Constitutions. As such, PIAA has requested an order declaring that PIAA is not a "State-affiliated entity" under the RTKL and that the RTKL is not applicable to PIAA. A true and correct copy of the Petition is attached hereto as Exhibit A.

The issue is being pursued in the Commonwealth Court as the OOR does not have the authority to determine the validity or constitutionality of the RTKL's inclusion of PIAA nor grant the declaratory and injunctive relief requested by PIAA in the Petition. *See Pa. Indep. Oil & Gas Ass'n v. Dep't of Env'tl. Prot.*, 135 A.3d 1118, 1129 (Pa. Cmwlth. 2015).

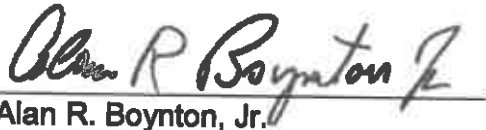
If the relief requested in the Petition is granted, PIAA would not be required to disclose or produce the records sought by Requester under the RTKL. It is well-established that an order "stay[ing] proceedings in a case pending the outcome of another case, where the latter's result might resolve or render moot the stayed case," is proper. *Israelit v. Montgomery County*, 1997 Pa. Commw. LEXIS 891, 703 A.2d 722, 724 n.3 (Pa. Cmwlth. 1997). A stay in this matter will therefore promote administrative efficiency as the Commonwealth Court's adjudication of the Petition may render this appeal moot and negate the OOR's need to resolve this matter. Further, staying this appeal will negate the possibility of multiple appeals of the same issue since

Respondent has, in its response to the request, expressly raised the issue of the constitutionality of PIAA's inclusion within the RTKL and informed Requester of its intent to litigate that issue, which cannot be resolved by the OOR. A stay of this matter will not prejudice Requester as his appeal to the OOR will remain pending until final disposition of the Petition by the Commonwealth Court.

WHEREFORE, Respondent requests that this matter be stayed pending Commonwealth Court disposition of action 661 MD 2020.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

Alan R. Boynton, Jr.
I.D. No. 39850
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000

Dated: December 21, 2020

*Attorneys for Pennsylvania Interscholastic
Athletic Association, Inc*

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA INTERSCHOLASTIC :
ATHLETIC ASSOCIATION, INC., :

Petitioner, :

v. :

COMMONWEALTH OF :
PENNSYLVANIA and PENNSYLVANIA :
OFFICE OF OPEN RECORDS, :

Respondents :

NOTICE

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Petitioner. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

**MIDPENN LEGAL SERVICES
213-A NORTH FRONT STREET
HARRISBURG, PA 17101
(717) 232-0581**

**DAUPHIN COUNTY LAWYER REFERRAL SERVICE
DAUPHIN COUNTY BAR ASSOCIATION
213 North Front Street
Harrisburg, PA 17101
(717) 232-7536**

A V I S O

USTED HA SIDO DEMANDADO/A EN CORTE. Si usted desea defenderse de las demandas que se presentan más adelante en las siguientes páginas, debe tomar acción dentro de los próximos veinte (20) días después de la notificación de esta Demanda y Aviso radicando personalmente o por medio de un abogado una comparecencia escrita y radicando en la Corte por escrito sus defensas de, y objeciones a, las demandas presentadas aquí en contra suya. Se le advierte de que si usted falla de tomar acción como se describe anteriormente, el caso puede proceder sin usted y un fallo por cualquier suma de dinero reclamada en la demanda o cualquier otra reclamación o remedio solicitado por el demandante puede ser dictado en contra suya por la Corte sin más aviso adicional. Usted puede perder dinero o propiedad u otros derechos importantes para usted.

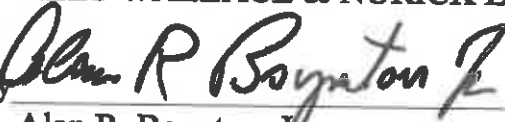
USTED DEBE LLEVAR ESTE DOCUMENTO A SU ABOGADO INMEDIATAMENTE. SI USTED NO TIENE UN ABOGADO, LLAME O VAYA A LA SIGUIENTE OFICINA. ESTA OFICINA PUEDE PROVEERLE INFORMACION A CERCA DE COMO CONSEGUIR UN ABOGADO.

SI USTED NO PUEDE PAGAR POR LOS SERVICIOS DE UN ABOGADO, ES POSIBLE QUE ESTA OFICINA LE PUEDA PROVEER INFORMACION SOBRE AGENCIAS QUE OFREZCAN SERVICIOS LEGALES SIN CARGO O BAJO COSTO A PERSONAS QUE CUALIFICAN.

MIDPENN LEGAL SERVICES
213-A NORTH FRONT STREET
HARRISBURG, PA 17101
(717) 232-0581

DAUPHIN COUNTY LAWYER REFERRAL SERVICE
213 North Front Street
Harrisburg, PA 17101
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McNEES WALLACE & NURICK LLC

By 

Alan R. Boynton, Jr.
Pa. I.D. No. 39850
Logan Hetherington
Pa I.D. No. 326048
Austin D. Hughey
Pa. I.D. No. 326309
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000

Dated: December 18, 2020

*Attorneys for Petitioner Pennsylvania
Interscholastic Athletic Association*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA INTERSCHOLASTIC :
ATHLETIC ASSOCIATION, INC., :

Petitioner, :

v. :

COMMONWEALTH OF :
PENNSYLVANIA and PENNSYLVANIA :
OFFICE OF OPEN RECORDS, :

Respondents :

**PETITION FOR REVIEW IN THE NATURE OF A
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Petitioner Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA"), by and through its attorneys, McNees Wallace & Nurick LLC, invokes this Court's original jurisdiction and submits the following Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief ("Petition") against Respondents Commonwealth of Pennsylvania and the Office of Open Records to challenge application of the Pennsylvania Right To Know Law ("RTKL") to PIAA. In support of this Petition, Petitioner avers as follows:

I. STATEMENT OF JURISDICTION

1. This Court has jurisdiction over this matter by reason of 42 Pa. C.S. § 761. This Petition is addressed to the Court's original jurisdiction and is in the nature of a Complaint for declaratory and injunctive relief.

2. This Petition seeks to declare the inclusion of PIAA within the definition "State-affiliated entity" of Section 102 of the RTKL as unenforceable and/or unconstitutional on the grounds that (1) the provision is inherently contradictory as it defines a "State-affiliated entity" as "a Commonwealth authority or entity" but then expressly identifies PIAA as being covered by the definition when PIAA is not, nor has it ever been, either a Commonwealth authority or entity; (2) the provision singling out PIAA is special legislation targeting a specific corporation and imposing on PIAA obligations that are not imposed on other analogous entities; and (3) the provision violates PIAA's federal and state constitutional rights of equal protection since the provision arbitrarily singles out PIAA and imposes on it obligations and duties not imposed on any other interscholastic athletic organization in the Commonwealth nor any other private membership corporation in the Commonwealth.

3. Petitioner further seeks to preliminarily and permanently enjoin application of Section 102's definition of State-affiliated entity to PIAA and to

further enjoin the Pennsylvania Office of Open Records (“OOR”) from having jurisdiction over any matters relating to PIAA based on Section 102’s inclusion of PIAA as a State-affiliated entity.

II. PARTIES

4. Petitioner is the Pennsylvania Interscholastic Athletic Association, Inc. (“PIAA”), a Pennsylvania not-for-profit voluntary membership corporation.

5. Respondent Commonwealth of Pennsylvania is established and governed by the Constitution of the Commonwealth of Pennsylvania.

6. Respondent Pennsylvania Office of Open Records (“OOR”) is acting by and through the powers and authority granted it by under Section 1310 of the Pennsylvania Right To Know Law, Act 3 of 2008, 65 P.S. § 67.101, *et. seq.*

III. STATEMENT OF FACTS

A. PIAA

7. In December 1913, the Pennsylvania Interscholastic Athletic Association was established by a group of high school principals as an unincorporated membership association.

8. The entity was established as a voluntary association of schools for the purpose of establishing uniform rules and eliminating abuses in the growing phenomenon of interscholastic athletics.

9. In September 1978, the association filed Articles of Incorporation with the Commonwealth Department of State, Corporation Bureau. A copy of the Articles of Incorporation is attached hereto as Exhibit A.

10. PIAA's membership consists of both public and private schools that choose to join the organization.

B. The Right To Know Law and PIAA

11. The Pennsylvania General Assembly, through Act 3 of 2008, adopted the Pennsylvania Right To Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*

12. Pursuant to Section 301(a) of the RTKL, "Commonwealth agencies" are subject to the RTKL.

13. Section 102 of the RTKL defines terms used in the RTKL.

14. A "Commonwealth agency" is defined under Section 102 of the RTKL to include a "State-affiliated entity."

15. A "State-affiliated entity" is defined under Section 102 of the RTKL as follows:

State-affiliated entity. A Commonwealth authority or Commonwealth entity. The term includes the Pennsylvania Higher Education Assistance Agency and any entity established thereby, the Pennsylvania Gaming Control Board, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, the Pennsylvania Housing Finance Agency, the Pennsylvania Municipal Retirement Board, the State System of Higher Education, a community college, the Pennsylvania Turnpike Commission, the Pennsylvania Public Utility Commission, the Pennsylvania Infrastructure Investment Authority, the State Public School Building Authority, the Pennsylvania Interscholastic Athletic Association and the Pennsylvania Educational Facilities Authority. The term does not include a State-affiliated institution.

Emphasis added.

16. Although expressly identified within the scope of the definition of “State-affiliated entity,” PIAA is not, nor has it ever been, a “Commonwealth authority,” nor has it ever been an “authority” of any kind.

17. Although expressly identified within the scope of the definition of “State-affiliated entity,” PIAA is not, nor has it ever been, a “Commonwealth entity.”

18. Of the entities identified under Section 102’s definition of “State-affiliated entity,” all save one (PIAA) were expressly created by enabling legislation adopted by the General Assembly.

19. PIAA receives no tax dollars or other funding from the Commonwealth of Pennsylvania.

20. PIAA has not been granted any powers or authority by the General Assembly other than that possessed by all corporations registered with the Corporation Bureau of the Department of State.

21. PIAA rules apply to only its member schools and only to those certain sports over which it has chosen to accept responsibility.

22. PIAA member schools are free to join other organizations and participate in non-PIAA sports without any involvement by PIAA.

23. There are numerous organizations in Pennsylvania which govern athletic and academic competitions between high schools and high school students, and which are joined by public and private high schools in Pennsylvania.

24. Among others organizations which regulate non-PIAA interscholastic athletic competition in Pennsylvania are Rugby PA, the Inter-Academic Association of Philadelphia and Vicinity (Inter-Act League), Central Pennsylvania Interscholastic Hockey League (ice hockey), the Mid-Atlantic Prep League (MAPL), Pennsylvania Independent Schools Athletic Association (PISAA), the Interstate Preparatory League, the Pennsylvania Interscholastic Cycling League, and the Pennsylvania Interscholastic Esports Association.

25. Among the many organizations which regulate interscholastic academic competition in Pennsylvania, and which are joined by Pennsylvania high

schools, or for which schools pay fees to enter competition, are the Pennsylvania High School Speech League, local chapters of the National Forensics League, the Pennsylvania Bar Association (for the Statewide Mock Trial Competition), the Pennsylvania Math League, and the Pennsylvania Interscholastic Marching Band Association.

26. None of the above interscholastic competition organizations are identified in the RTKL as State-affiliated entities.

C. The Simon Campbell Request

27. On November 2, 2020, PIAA received an extensive request for records from Simon Campbell. A true and correct copy of the request is attached hereto as Exhibit B.

28. On December 7, 2020, PIAA responded to Mr. Campbell's request, providing a substantive response, and also informing him that PIAA intended to challenge its inclusion under the RTKL in response to his request.

29. On December 11, 2020, Mr. Campbell appealed PIAA's response to the OOR.

30. On December 11, 2020, the OOR directed that the parties provide submissions to the OOR on the appeal on or before December 22, 2020.

31. The OOR lacks the authority to declare PIAA's inclusion in the definition of State-affiliated entity to be unconstitutional and/or otherwise unenforceable as applied to PIAA.

32. The requirement of the OOR that PIAA respond to the appeal of Mr. Campbell creates a case or controversy requiring this Court's intervention.

COUNT I: THE SECTION 102 DEFINITION OF "STATE-AFFILIATED ENTITY" PRECLUDES ITS APPLICATION TO PIAA

33. Petitioner incorporates Paragraphs 1 – 32 herein as if set forth in full.

34. Section 102 defines a "State-affiliated entity" as a "Commonwealth authority or entity."

35. PIAA is not, nor has it ever been, a Commonwealth authority or entity.

36. PIAA was not created by enabling legislation by the General Assembly.

37. PIAA has no power or authority granted to it by the Commonwealth.

38. PIAA does not receive taxes or funding from the Commonwealth.

39. PIAA is not a State-affiliated entity as that term is defined in Section 102 of the RTKL.

40. The inclusion of PIAA within the definition of "State-affiliated entity" is wholly inconsistent with, and contrary to, the definition of that term.

41. Because PIAA is not a State-affiliated entity, it is not a "Commonwealth agency" as defined under Section 102 of the RTKL.

42. Because PIAA is not a Commonwealth agency as defined by the RTKL, it is not subject to requirements and obligations of the RTKL.

**COUNT II: VIOLATION OF PENNSYLVANIA
CONSTITUTION BAR ON SPECIAL LEGISLATION**

43. Petitioner incorporates Paragraphs 1 - 32 herein as if set forth in full.

44. Article III, Section 32 of the Constitution of the Commonwealth of Pennsylvania provides in pertinent part that "[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law[.]" PA. CONST., Article III, § 32.

45. The Pennsylvania Constitution's proscription on special legislation mandates that like persons in like circumstances must be treated similarly by the Commonwealth.

46. Legislative classifications set by the General Assembly must be reasonable and have a fair and substantial relationship to a legitimate object of the legislation.

47. "[L]egislative classifications must be founded on real distinctions in the subjects classified and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition." *Pa. Tpk. Comm'n*, 899 A.2d at 1095.

48. There are multiple incorporated and unincorporated associations which govern athletic and academic competition between Pennsylvania high schools and their students.

49. No other interscholastic athletic or academic organization in Pennsylvania is identified in the RTKL as a State-affiliated entity.

50. There are numerous private corporations in the Commonwealth that were not expressly created by the General Assembly.

51. By including PIAA within the scope of the RTKL through the definition of State-affiliated entity, the Commonwealth has imposed duties and obligations on PIAA that do not apply to any other interscholastic athletic or academic association nor to any other corporation not expressly created by the General Assembly.

52. By including PIAA within the scope of the RTKL through the definition of State-affiliated entity, the Commonwealth has denied PIAA privileges enjoyed by other interscholastic athletic associations and other corporations not expressly created by the General Assembly.

53. Although specifically identified within the definition of "State-affiliated entity," PIAA does not meet the definition therein of a State-affiliated entity.

54. The specific inclusion of PIAA in the definition of "State-affiliated entity" is arbitrary and capricious, and in violation of the prohibition on special laws.

55. The inclusion of PIAA in the definition of "State-affiliated entity" creates a class of one member because PIAA is the only entity included within that definition that was not granted any power or authority by the General Assembly, was not created by enabling legislation by the General Assembly, and does not receive funds from the Commonwealth or any other through state-approved funding mechanisms.

56. Every other entity identified in Section 102 as a "State-affiliated entity" was created by the General Assembly, given powers by the Commonwealth and receives funds from the Commonwealth or through state-approved funding mechanisms.

57. The inclusion of PIAA in the definition of a State-affiliated entity under Section 102 of the RTKL renders it an unconstitutional special law as

applied to PIAA because no other non-profit corporations not expressly created by the General Assembly are subject to the RTKL.

58. Moreover, no other similar organizations in Pennsylvania which govern interscholastic athletic and/or academic competitions, and which are joined by public and private high schools in Pennsylvania, are subject to the Section 102 definition of a State-affiliated entity.

59. The inclusion of PIAA in the RTKL is in direct conflict with the Constitution of the Commonwealth of Pennsylvania and violates that charter's prohibition of special legislation.

**COUNT III: VIOLATION OF EQUAL PROTECTION RIGHTS UNDER
THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS**

60. Petitioner incorporates Paragraphs 1 - 32 herein as if set forth in full.

61. Both the 14th Amendment to the Constitution of the United States and Article I, Sections 1 and 26, of the Constitution of the Commonwealth of Pennsylvania entitle PIAA to equal protection of the law.

62. Claims of violation of the equal protection provisions of the Pennsylvania Constitution are analyzed under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment.

63. An equal protection violation occurs when a party has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.

64. PIAA is a private membership corporation registered to do business with the Department of State Corporations Bureau.

65. There are numerous private membership corporations operating in the Commonwealth of Pennsylvania.

66. The Commonwealth does not require private membership corporations to comply with the terms of the RTKL.

67. PIAA is the only private membership corporation included within the scope of the RTKL.

68. PIAA is not the only athletic association of high schools operating in the Commonwealth of Pennsylvania.

69. PIAA is the only athletic association of high schools operating in the Commonwealth of Pennsylvania that is included within the scope of the RTKL.

70. The RTKL's inclusion of PIAA through Section 102's definition of State-affiliated entities violates PIAA's equal protection rights because it places PIAA into a class of one whereby PIAA is the only interscholastic athletic

association and only private membership corporation in Pennsylvania made subject to the RTKL through this provision.

71. Section 102 of the RTKL violates PIAA's equal protection rights because the Commonwealth treats PIAA differently than similarly situated corporations and interscholastic athletic associations.

72. The RTKL specifically identifies and singles out PIAA in an arbitrary and capricious manner as it is the only private membership corporation and only interscholastic athletic association that is named therein.

73. PIAA is the only entity identified in Section 102's definition of State-affiliated entities that was not created by enabling legislation of the General Assembly.

74. PIAA is the only entity identified in Section 102's definition of State-affiliated entities that is not granted governmental powers and/or authority by the General Assembly.

75. The RTKL's inclusion of PIAA through Section 102's definition of State-affiliated entities violates PIAA's equal protection rights because it places PIAA into a class of one whereby PIAA is the only entity included therein not created by enabling legislation nor having state-granted powers and funding made subject to the RTKL through this provision.

76. Section 102's definition of State-affiliated entity specifically identifies and singles out PIAA in an arbitrary and capricious manner as it is the only entity identified therein that was not created by the General Assembly.

77. The inclusion of PIAA in the RTKL through Section 102's definition of State-affiliated entity does not have a rational basis, does not serve any compelling state interest, and is arbitrary and capricious in nature.

78. PIAA seeks relief under 42 U.S.C. § 1983 for violation of PIAA's constitutional right to equal protection and further seeks relief for violation of PIAA's equal protection rights under the Pennsylvania Constitution.

RELIEF SOUGHT

79. Petitioner seeks declaratory and preliminary and permanent injunctive relief.

80. Petitioner seeks a declaration that the inclusion of PIAA within the scope of Section 102's definition of a State-affiliated entity is improper and unenforceable.

81. Petitioner seeks a declaration that PIAA is not a Commonwealth agency under the definition of that term as set forth in Section 102 of the RTKL.

82. As to PIAA's request for injunctive relief, PIAA seeks to enjoin any application of the RTKL as to PIAA's based on the definition of State-affiliated entity under Section 102 of the RTKL.

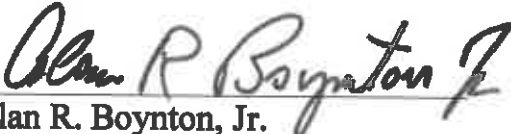
83. PIAA further requests that any and all proceedings under the RTKL as applied to PIAA be dismissed as PIAA is not a Commonwealth agency as that term is defined under the RTKL.

84. Permanent injunctive relief is needed to prevent a legal wrong for which PIAA has no adequate redress at law and because PIAA has a clear right to relief.

WHEREFORE, Petitioner respectfully requests that this Honorable Court declare the definition of "state-affiliated entity" in Section 102 of the Pennsylvania Right To Know Law inapplicable to PIAA and unconstitutional as it applies to

PIAA, enjoin application of that provision to PIAA, and grant such other relief as the Court deems appropriate.

McNEES WALLACE & NURICK LLC

By 

Alan R. Boynton, Jr.

Pa. I.D. No. 39850

Logan Hetherington

Pa I.D. No. 326048

Austin D. Hughey

Pa. I.D. No. 326309

100 Pine Street

P.O. Box 1166

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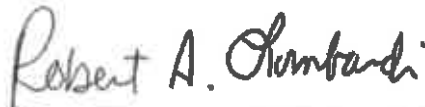
(717) 232-8000

Dated: December 18, 2020

*Attorneys for Petitioner Pennsylvania
Interscholastic Athletic Association, Inc.*

VERIFICATION

I, Robert A. Lombardi, Executive Director of the Pennsylvania Interscholastic Athletic Association, Inc., hereby verify that the facts contained in the foregoing document are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.



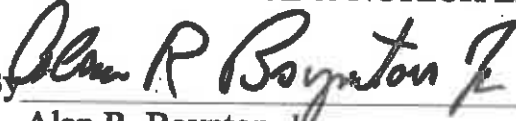
Robert A. Lombardi

Date: December 18, 2020

CERTIFICATE OF COMPLIANCE

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 require filing confidential information and documents differently than non-confidential information and documents.

McNEES WALLACE & NURICK LLC

By 

Alan R. Boynton, Jr.

Pa. I.D. No. 39850

Logan Hetherington

Pa I.D. No. 326048

Austin D. Hughey

Pa. I.D. No. 326309

100 Pine Street

P.O. Box 1166

Harrisburg, PA 17108-1166

(717) 232-8000

Dated: December 18, 2020

*Attorneys for Petitioner Pennsylvania
Interscholastic Athletic Association, Inc.*

EXHIBIT A

APPLICANT'S ACC'T NO.

DSCB- 15-7316 (Rev. 11-72)

Filing Fee: \$75
AIN-0

Articles of
Incorporation—
Domestic Nonprofit Corporation

1978

(Line for numbering)

637396
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
CORPORATION BUREAU

Filed is 12th day of
September, 1978

Commonwealth of Pennsylvania
Department of State

Barton A. Fields
Secretary of the Commonwealth

In compliance with the requirements of 15 Pa. S. §7316 (relating to articles of incorporation) the undersigned, desiring to be incorporated as a nonprofit corporation, hereby certifies (certify) that:

j1w

1. The name of the corporation is:

Pennsylvania Interscholastic Athletic Association Inc.

2. The location and post office address of the initial registered office of the corporation in this Commonwealth is:

1104

(NUMBER)

Fernwood Avenue

(STREET)

Camp Hill

(CITY)

Pennsylvania

17011

(ZIP CODE)

3. The corporation is incorporated under the Nonprofit Corporation Law of the Commonwealth of Pennsylvania for the following purpose or purposes:

1. Health.

To organize, develop, and direct an interscholastic athletic program which will promote, protect and conserve the health and physical welfare of all participants.

2. Education.

To formulate and maintain policies that will safeguard the educational values of interscholastic athletics and cultivate high ideals of good sportsmanship.

3. Competition.

To promote uniformity of standards in all interscholastic athletic competition.

(CONTINUED ON ATTACHED RIDER)

The corporation does not contemplate pecuniary gain or profit, incidental or otherwise.

4. The term for which the corporation is to exist is: perpetual

7841 1991

DSCB 15-7316 (Rev. 11-72)-2

5. The corporation is organized upon a nonstock basis.
6. (Strike out if inapplicable) The corporation shall have no members.
7. (Strike out if inapplicable) The incorporators constitute a majority of the members of the committee authorized to incorporate Pennsylvania Interscholastic Athletic Association (NAME OF UNINCORPORATED ASSOCIATION) by the requisite vote required by the organic law of the association for the amendment of such organic law.
8. The name(s) and post office address(es) of each incorporator(s) is (are):

NAME

ADDRESS
(including street and number, if any)

I. Charles McCullough, 309 Keith Road, Mechanicsburg, PA 17055

Michael Arbutina RD #2, Box 500, Engle Road, Industry, PA 15052

William Holland West Church Street, Lock Haven, PA 17745

James Manners 100 Alexander Street, Brockway, PA 15824

**

IN TESTIMONY WHEREOF, the incorporator(s) has (have) signed and sealed these Articles of Incorporation this 1st day of August, 19 78.

J. Charles McCullough (SEAL)

x William Holland (SEAL)

Michael Arbutina (SEAL)

James L Manners (SEAL)

INSTRUCTIONS FOR COMPLETION OF FORM:

- A. For general instructions relating to the incorporation of nonprofit corporations see 19 Pa. Code Ch. 29 (relating to nonprofit corporations generally). These instructions relate to such matters as corporate name, stated purposes, term of existence, authorized share structure, inclusion of names of first directors in the Articles of Incorporation, provisions on incorporation of unincorporated associations, etc.
- B. One or more corporations or natural persons of full age may incorporate a nonprofit corporation.
- C. If the corporation is to be organized upon a stock share basis Paragraph 5 should be modified accordingly.
- D. Optional provisions required or authorized by law may be added as Paragraphs 9, 10, 11 . . . etc.
- E. The following shall accompany this form:
- (1) Any necessary copies of Form DSCB: 17.2 (Consent to Appropriation of Name) or Form DSCB: 17.3 (Consent to Use of Similar Name).
- (2) Any necessary governmental approvals.
- F. 15 Pa. S. §7317 (relating to advertisement) requires that the incorporators shall advertise their intention to file or the corporation shall advertise the filing of articles of incorporation. Proofs of publication of such advertising should not be delivered to the Department, but should be filed with the minutes of the corporation.

(**SEE ATTACHED RIDER FOR ADDITIONAL PROVISIONS)

RIDER

(No. 3, continued:)

and, in addition the corporation shall have unlimited power to engage in and to do any lawful act concerning the foregoing purposes.

(Additional Provisions)

9. No part of the net earnings of the corporation shall inure to the benefit of or be distributable to its directors, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services actually rendered and to make payments and distributions in furtherance of the purposes and objects set forth herein. No substantial part of the activities of the corporation shall be the carrying on of propaganda or otherwise attempting to influence legislation and the corporation shall not participate in or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office.
10. Notwithstanding any other provision of these Articles, the corporation shall not conduct or carry on any activities not permitted to be conducted or carried on by an organization exempt under Section 501(c)(3) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent Federal tax laws, or by an organization, contributions to which are deductible under Section 170(c)(2) of such Code or corresponding provisions of any subsequent Federal tax laws.
11. Upon the dissolution of the corporation or the winding up of its affairs, after payment of all liabilities is made or provided for, the assets of the corporation shall be distributed exclusively for charitable, religious, scientific, testing for public safety, literary, or educational purposes to organizations which are then exempt from Federal tax under Section 501(c)(3) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent Federal tax laws, and to which contributions are then deductible under Section 170(c)(2) of such Code or corresponding provisions of any subsequent Federal tax laws.
12. Notwithstanding any other provision set forth in these Articles of Incorporation, during any period the corporation is deemed to be a private foundation as defined in Section 509 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent Federal tax laws, the corporation shall distribute its income for each taxable year at such time and in such manner as not to become subject to the tax on undistributed income imposed by Section 4942 of the Internal Revenue Code of 1954 or corresponding provisions of

12. continued

any subsequent Federal tax laws; the corporation shall not engage in any act of self-dealing as defined in Section 4941(d) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent Federal tax laws; the corporation shall not retain any excess business holdings as defined in Section 4943(c) of the Internal Revenue Code of 1954 or corresponding provisions of any Federal tax laws; the corporation shall not make any investments in such manner as to subject the corporation to the tax under Section 4944 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent Federal tax laws; and the corporation shall not make any taxable expenditures as defined in Section 4945(d) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent Federal tax laws.

EXHIBIT B

NOTICE RELATED TO THE CORONAVIRUS (COVID-19) EMERGENCY

Pennsylvania is currently under a declared state of emergency related to the coronavirus (COVID-19). Some agencies and requesters may face challenges in regard to their ability to meaningfully participate in Right-to-Know Law (RTKL) appeals. Accordingly, and to ensure due process, the Office of Open Records (OOR) is taking the following temporary steps.

The timeline for this RTKL appeal may be extended by the OOR during the appeal. This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on January 11, 2021.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline.*

Submissions in this case are currently due on December 22, 2020.

If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.

Every staff member of the OOR is working remotely, and we are only able to receive postal mail on a limited basis at this time. Accordingly, we urge agencies and requesters to use email for all communication with the OOR at this time.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters during this time to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.



pennsylvania
OFFICE OF OPEN RECORDS

December 11, 2020

Via Email Only:

Mr. Simon Campbell
668 Stony Hill Rd #298
Yardley, PA 19067
parighttoknow@gmail.com

Via Email Only:

Robert Lombardi
Agency Open Records Officer
Pennsylvania Interscholastic Athletic
Association (PIAA)
550 Gettysburg Rd
Mechanicsburg, PA 17055
rlombardi@piaa.org

RE: OFFICIAL NOTICE OF APPEAL - Campbell v. Pennsylvania Interscholastic Athletic Association (PIAA) OOR Dkt. AP 2020-2639

Dear Parties:

Review this information and all enclosures carefully as they affect your legal rights.

The Office of Open Records ("OOR") received this appeal under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. on December 10, 2020. A binding Final Determination ("FD") will be issued pursuant to the timeline required by the RTKL, **subject to the enclosed information regarding the coronavirus (COVID-19).**

Notes for both parties (more information in the enclosed documents):

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,

Erik Arneson
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

The Office of Open Records ("OOR") has received the enclosed appeal, which was filed under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the enclosed information regarding the coronavirus (COVID-19). If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

Submissions to the OOR

Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer. Please contact the Appeals Officer as soon as possible.

Any information provided to the OOR must be provided to all parties involved in this appeal. Information submitted to the OOR will not be considered unless it is also shared with all parties.

Include the docket number on all submissions.

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Generally, submissions to the OOR — other than *in camera* records — will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

Agency Must Notify Third Parties

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; or are held by a contractor or vendor, the agency **must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.**

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer assigned to this case (see 65 P.S. Â§ 67.1101(c)).

The Commonwealth Court has held that "the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt." (*Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

A third party's failure to participate in a RTKL appeal before the OOR may be construed as a waiver of objections regarding release of requested records.

NOTE TO AGENCIES: *If you have questions about this requirement, please contact the Appeals Officer immediately.*

Statements of Fact & Burden of Proof

Statements of fact **must** be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). To meet this burden, the agency **must** provide evidence to the OOR.

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, openrecords.pa.gov.

Any evidence or legal arguments not submitted or made to the OOR may be waived.

Preserving Responsive Records

The agency must preserve all potentially responsive records during the RTKL appeal process, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had “a mandatory duty” to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that “a fee award holds an agency accountable for its conduct during the RTKL process...”

Mediation

The OOR offers a mediation program as an alternative to the standard appeal process. To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court — saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.



pennsylvania

OFFICE OF OPEN RECORDS

APPEALS OFFICER:

Magdalene C. Zeppos-Brown, Esq.

CONTACT INFORMATION:

**Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234**

FACSIMILE:

(717) 425-5343

EMAIL:

mazepposbr@pa.gov

**Preferred method of contact and
submission of information:**

EMAIL

**Please direct submissions and correspondence related to this appeal to the above Appeals Officer.
Please include the case name and docket number on all submissions.**

**You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot
speak to parties individually without the participation of the other party.**

**The OOR website, <https://openrecords.pa.gov>, is searchable and both parties are encouraged to review
prior final determinations involving similar records and fees that may impact this appeal.**

**The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff
are also available to provide general information about the appeals process by calling (717) 346-9903.**

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____

Today's date: _____

Name: _____

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Address/City/State/Zip _____

E-mail _____

Fax Number: _____

Name of Requester: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Name of Agency: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Record at Issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- ☐ An employee of the agency
- ☐ The owner of a record containing confidential or proprietary information or trademarked records
- ☐ A contractor or vendor
- ☐ Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, _____ (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

Devenyi, Dylan

From: no-reply@openrecordspennsylvania.com
Sent: Thursday, December 10, 2020 6:42 PM
To: parighttoknow@gmail.com
Subject: [External] PA Office of Open Records - Appeal Confirmation

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.



pennsylvania
OFFICE OF OPEN RECORDS

You have filed an appeal of an agency's response to a request for records under the Right-to-Know Law.

Name:	Simon Campbell
Company:	
Address 1:	668 Stony Hill Rd #298
Address 2:	
City:	Yardley
State:	Pennsylvania
Zip:	19067
Phone:	267-229-3165
Email:	parighttoknow@gmail.com
Agency (list):	Pennsylvania Interscholastic Athletic Association (PIAA)
Agency Address 1:	550 Gettysburg Rd
Agency Address 2:	
Agency City:	Mechanicsburg
Agency State:	Pennsylvania
Agency Zip:	17055
Agency Phone:	717-697-0374
Agency Email:	rlombardi@piaa.org

Records at Issue in this Appeal:	See attached request. The agency's final answer reflects a denial or deemed denial of all seven (7) request items. The agency's refusal to provide records responsive to all seven (7) request items is challenged on appeal. The agency acted in bad faith/wanton disregard of law by refusing to conduct a timely good faith search for, and timely release of, responsive records that do, in fact, exist.
Request Submitted to Agency Via:	e-mail
Request Date:	11/02/2020
Response Date:	12/07/2020
Deemed Denied:	No
Agency Open Records Officer:	Robert Lombardi
Attached a copy of my request for records:	Yes
Attached a copy of all responses from the Agency regarding my request:	Yes
Attached any letters or notices extending the Agency's time to respond to my request:	Yes
Agree to permit the OOR additional time to issue a final determination:	No
Interested in resolving this issue through OOR mediation:	No
Attachments:	<ul style="list-style-type: none"> • 11-2-20 RTKL Request of PIAA.pdf • 11-6-20 30-Day Extension.pdf • 12-8-20 Final Answer.pdf

I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.



PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.

550 Gettysburg Road • P.O. Box 2008
Mechanicsburg, Pennsylvania 17055-0708
(800) 382-1392 • (717) 697-0374
FAX (717) 697-7721
WEB SITE: www.piaa.org

December 7, 2020

Mr. Simon Campbell
668 Stony Hill Road #298
Yardley, PA 19067

Mr. Campbell:

The purpose of this letter is to respond to the Right To Know Law (RTKL) request sent by you on November 2, 2020 and received by me the same date. Under Section 902 of the RTKL, PIAA requested an extension of 30 days to respond to your request. Our responses to your requests are as follows:

General objection: PIAA is not a Commonwealth authority or entity. It is a 501c(3) nonprofit membership corporation that receives no tax dollars and was not created by an Act of the General Assembly. For this reason, it is not subject to the Pennsylvania Right To Know Law. Please be on notice that it is the intention of PIAA to litigate this issue in response to this request.

Specific responses:

Request #1: All legal invoices that already exist in electronic form that were paid by PIAA to any and all attorneys/law firms between the dates of January 1, 2012 and the present.

Response #1: PIAA has no documents responsive to this request. Law firms paid by PIAA since 2012 are believed to have thousands of pages of invoices but PIAA is not aware of how many of those are in an electronic format. All such records, if they exist, must be redacted prior to productions.

Request #2: the fronts of all electronic cleared check images that already exist in electronic form for all financial accounts owned/operated by PIAA between the dates of June 1, 2019 and the present.

Response #2: PIAA has no documents that exist which are responsive to this request. The security features of our banking institution do not allow for modification of electronic images to remove confidential information. PIAA also has no current means of obtaining, preserving and producing the requested records in an electronic format.

Request #3: electronic copies of all monthly bank (or other financial institution) statements that already exist in electronic form for all financial records owned or operated by PIAA between the dates of December 1, 2013 and the present.

Response #3: There are no documents that exist which are responsive to this request nor any current means to obtain, preserve and produce electronic files from such institutions in an electronic format.

Request #4: all posted line item transactions in all bank (or other financial institution) accounts that already exist in electronic form for all financial records owned or operated by PIAA between the dates of June 1, 2019 and the present.

Response #4: There are no documents that exist which are responsive to this request nor any current means to obtain, preserve and produce electronic files from such institutions in an electronic format.

Request #5: PIAA's most recent three (3) years of independent audited financial statements that already exist in electronic form.

Response #5: PIAA has requested these records from its auditors but has not yet received them. They will be produced upon receipt.

Request #6: PIAA's most recent Form 990 filing with the IRS that already exist in electronic form.

Response#6: The IRS 990 Form is available for public view on the IRS site. This may be accessed at www.irs.gov

Request #7: all electronic copies of written communications that already exist in electronic form and that were exchanged between PIAA officials' (and between PIAA officials and legal counsel) between the dates of January 1, 2020 and the present that discuss the topic of PIAA being improperly included in the RTKL.

Response #7: There are no documents responsive to this request.

Request #8: Please send me a screenshot image showing the name of the software program in PIAA's possession, custody or control that can perform electronic redactions on PDF files and/or other electronic type files.

Response #8: PIAA is not aware of any record responsive to this request.

Sincerely,



Dr. Robert A. Lombardi
Executive Director

RAL/bl



**PENNSYLVANIA INTERSCHOLASTIC
ATHLETIC ASSOCIATION, INC.**

550 Gettysburg Road • P.O. Box 2008
Mechanicsburg, Pennsylvania 17055-0708
(800) 382-1392 • (717) 697-0374
FAX (717) 697-7721
WEB SITE: www.plaa.org

November 6, 2020

Mr. Simon Campbell
668 Stony Hill Road #298
Yardley, PA 19067

Mr. Campbell:

The purpose of this letter is to respond to the Right To Know Law (RTKL) request received by me Sunday, November 1, 2020, but dated by you Monday, November 2, 2020.

Your request requires an extension of time under Section 902 of the RTKL to review and analyze your request, gather any documents responsive to this request, and appropriately consider any sort of confidential and/or privileged information that may be contained in any responsive documents. Therefore, we will provide a response to you on or before Monday, December 7, 2020.

Sincerely,

Dr. Robert A. Lombardi
Executive Director

RAL/bl



pennsylvania
OFFICE OF OPEN RECORDS

Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Pennsylvania Interscholastic Athletic Association (PIAA) (Attn: AORO)

Date of Request: November 2, 2020 Submitted via: ☒ Email ☐ U.S. Mail ☐ Fax ☐ In Person

PERSON MAKING REQUEST:

Name: Simon Campbell Company (if applicable): _____

Mailing Address: 668 Stony Hill Rd #298

City: Yardley State: PA Zip: 19067 Email: parighttoknow@gmail.com

Telephone: 267-229-3165 Fax: _____

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☒ Email ☐ U.S. Mail

RECORDS REQUESTED: *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.*

Please see attached and below. The specificity of my request/s is Important. Right-to-Know Law (RTKL) legal analysis cannot be assessed against records that are simply not requested. An agency may not amend the request nor attempt to produce records not sought. Only the Requester has authority to define the breadth and scope of the request. 65 P.S. §67.703. See also Section 102 definition of a Record ("Information, regardless of physical form or characteristics ...stored or maintained electronically"). I am exclusively seeking electronic information.

DO YOU WANT COPIES? ☐ ~~Yes, printed copies (default if none are checked)~~

[No printed copies] ☒ Yes, electronic copies ~~preferred if available~~ **ONLY (see attached)**

☐ ~~No, in-person inspection of records preferred (may request copies later)~~

Do you want certified copies? ☐ Yes (may be subject to additional costs) ☒ No

RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than ☐ \$100 (or) ☒ \$ 0.00.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: \$ _____

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

NOTE: In most cases, a completed RTKL request form is a public record.
More information about the RTKL is available at <https://www.openrecords.pa.gov>

Form updated Feb. 3, 2020



RIGHT TO KNOW LAW REQUEST ITEMS

Introduction

When I refer to "PIAA" throughout my request items it should be apparent, but is nonetheless here stated for clarity, that I incorporate reference to any and all of the twelve administrative districts of PIAA. These districts may be responsible for their local finances but they are all part of PIAA. It is understood that most people/entities do not manage their finances by storing cash under the bed. They have bank accounts. It is further understood that modern financial institutions provide online banking features where transactions and statements can be viewed online and/or downloaded in electronic form. Given that some financial institutions limit the period of time an account holder can "look back" online for certain records, I posit that PIAA should not delay in preserving requested online banking records for the time periods that I seek because PIAA is required to act in good faith when responding to RTKL requests.

Making a RTKL request is not merely a statutory right in Pennsylvania it is also a constitutionally-protected *Noerr-Pennington* petitioning right under the First Amendment. See *Campbell et al v. PSBA et al*, 336 F. Supp. 3d 482 - Dist. Court, ED Pennsylvania 2018. ("...courts have regularly recognized that statutorily authorized petitions are protected by the First Amendment. E.g., *Herr v. Pequea Twp.*, 274 F.3d 109; 119 n.9 (3d Cir. 2001) (applications to county planning commission); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (reports to state and federal agencies). There is no reason why petitions pursuant to statutory authority should be given less protection than petitions independent of that authority"); *aff'd* in relevant part by the Third Circuit Court of Appeals, No. 18-3112.

ITEM 1

Using the cheapest redaction (if necessary), copy, and delivery methods possible, please send me electronic copies of all legal invoices that **already exist in electronic form** that were paid by PIAA to any and all attorneys/law firms between the dates of January 1, 2012 and the present. If legal invoices in the possession or constructive possession of PIAA only exist in paper form then such paper records do not constitute part of my request. No Section 701 analysis should occur on records not requested¹. Moreover, a Requester defines the scope and breadth of the request, not

¹ See "[a] record being provided to a Requester ..." 65 P.S. § 67.701. [I am not requesting that paper records be provided. PIAA must not think it can amend my request to provide something I do not want].

PIAA². That said, PIAA must still perform a 'constructive possession' search under Section 901³ and/or Section 506(d)⁴ for responsive electronic records that might exist in the possession of applicable third parties such as the retained lawyers/law firms that generated the requested electronic legal invoices (self-evidently a client 'controls' the attorney-client relationship).⁵

ITEM 2

Using the cheapest redaction (if necessary), copy, and delivery methods possible, please send me electronic copies of the fronts of all electronic cleared check images that **already exist in electronic form** (e.g. via online banking) for all financial accounts owned/operated by PIAA between the dates of June 1, 2019 and the present. A redacted illustration of what I seek is shown below. Most financial institutions have online banking features where cleared check images can be viewed by the account owner. I am looking for snapshot copies of such check images in whatever electronic form PIAA might wish to take the electronic copies e.g. screenshot capture, print to PDF, etc. I do not authorize PIAA to print any cleared check image to paper because, again, I am not seeking paper copies of electronic records (Requester defines the scope and parameters of the request, not the PIAA; 65 P.S. § 67.703). To the extent the requested electronic cleared check images are not in the PIAA's actual possession I posit that they are in PIAA's constructive possession ("control") via the applicable financial institutions' online banking features. Example:

² 65 P.S. § 67.703 ("[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested").

³ 65 P.S. § 67.901 ("[w]hether the agency has possession, custody or control of the identified record").

⁴ 65 P.S. § 67.506(d).

⁵ See *Uniontown Newspapers, Inc. v. Pa. Department of Corrections*, 185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) ("When records are not in an agency's physical possession, an open records officer has a **duty to contact agents within its control**, including third-party contractors ... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL").

Check Details

X

Item 7 of 29 [Show full image](#) *

EXAMPLE OF A CLEARED CHECK IMAGE OBTAINED VIA ONLINE BANKING.

 Print

Check Number

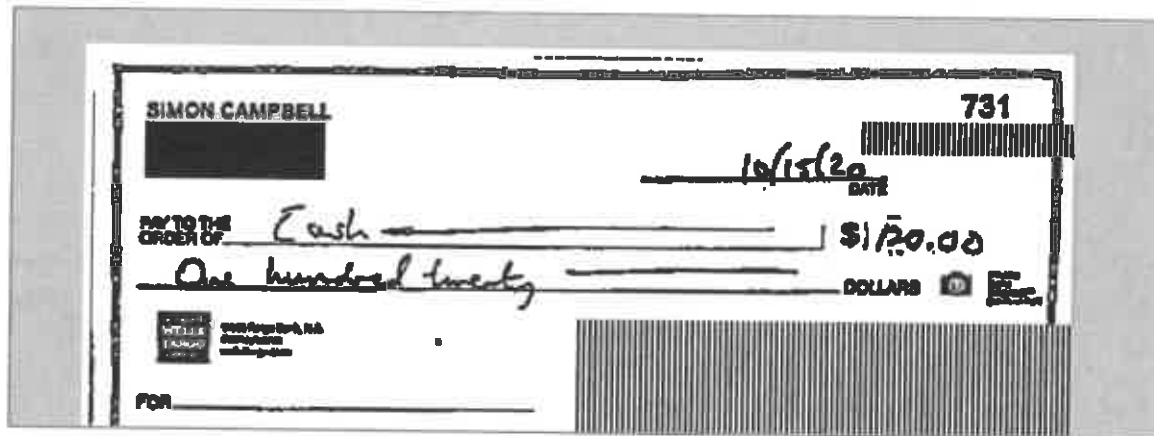
731

Date Posted

10/15/20

Check Amount

\$120.00



[< Previous](#)

[Flip](#)

[Zoom](#)

[Next >](#)

* For your security, information like account numbers, signatures, and the ability to view the backs of checks have been removed from the images.

You can see full or partial fronts and backs of the images by using the link at the top of the window.

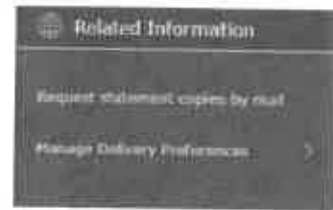
 Equal Housing Lender

ITEM 3

Using the cheapest redaction (if necessary), copy, and delivery methods possible, please send me electronic copies of all monthly bank (or other financial institution) statements that **already exist in electronic form** for all financial accounts owned/operated by PIAA between the dates of December 1, 2013 and the present. Again, no paper records are requested. Example:

Statements and Documents

It's easy to access your account documents online. Wells Fargo offers a secure, convenient, and environmentally friendly way to manage your documents from one central place – helping you reduce clutter and stay organized.



⊖ Statements and Disclosures

Select account For time period Recent statements

Statements

Deposit account statements are available online for up to 7 years.

[Statement 09/30/20 \(23K, PDF\)](#)

[Statement 08/31/20 \(21K, PDF\)](#)

[Statement 07/31/20 \(21K, PDF\)](#)

[Statement 06/30/20 \(24K, PDF\)](#)

[Statement 05/31/20 \(23K, PDF\)](#)

[Statement 04/30/20 \(22K, PDF\)](#)

[Statement 03/31/20 \(22K, PDF\)](#)

[Statement 02/29/20 \(22K, PDF\)](#)

[Statement 01/31/20 \(23K, PDF\)](#)

[Statement 12/31/19 \(24K, PDF\)](#)

[Statement 11/30/19 \(24K, PDF\)](#)

EXAMPLE OF MONTHLY BANK STATEMENTS BEING READILY AVAILABLE ONLINE, FOR UP TO 7 YEARS, IN ELECTRONIC FORM (PDF).

Wells Fargo will notify you when your account statement is available online. If we do not have a valid email address for you, we cannot provide this notice and will have to switch future online statements to paper statements via U.S. mail. As an online customer, you are responsible for notifying us if you change your email address. Please refer to the [Online Access Agreement](#) for details. If you receive both paper and online statements on an account, we will not notify you by email when your online statement is ready.

ITEM 4

Using the cheapest redaction (if necessary), copy, and delivery methods possible⁶, please send me all posted line item transactions in all bank (or other financial institution) accounts that **already exist in electronic form** for all financial accounts owned/operated by PIAA between the dates of June 1, 2019 and the present. Again, no paper records are requested. Example:

⁶ For Request Item 4 I seek the delivery method of comma delimited (ASCII, Spreadsheet) if it is an available option, otherwise any available electronic form and electronic delivery method will suffice.

Download Your Account Activity

Personal Accounts [What is this?](#)

Upgrade to **Direct Connect** and you can automatically download all your eligible accounts and pay bills directly through QuickScan or QuickBooks - just select Wells Fargo Bank from within your software.

- See fees and learn more about using Online Banking and Bill Pay with QuickScan or QuickBooks.
- Need financial management software? Purchase discounted QuickBooks software.

Download your account information by following these steps:

Step 1: Choose an account.¹

Account



Step 2: Verify the pre-filled date range.²

For the selected account, you can download up to 18 months of previous account history.

Note: Always confirm "From" and "To" dates before downloading account activity.

Data Range

06/01/19 to 10/31/20

Step 3: Select a file format to download.³

File Format

- ☐ QuickScan® (Web Connect)
- ☐ QuickBooks® (Web Connect)
- ☐ QuickBooks® (.IIF) (More Information)
- ☐ Comma Delimited (ASCII, Spreadsheet)

Download

* Account Disclosures

¹Only posted transactions are available for download.

Please note that if PIAA downloads the requested line item transactions into a manipulable database format and then redacts certain information I think it is important to identify in the file itself what information has been redacted. Unlike a blacked out image on a document or image file, I cannot visibly "see" if a column, row, or cell box has been deleted.

ITEM 5

Using the cheapest redaction (if necessary), copy, and delivery methods possible, please send me PIAA's most recent three (3) years of independent audited financial statements that **already exist in electronic form**. If they do not already exist in electronic form then the financial statements are not requested (if necessary, PIAA must check with the auditors to see if the auditors possess them in electronic form).

ITEM 6

Using the cheapest redaction (if necessary), copy, and delivery methods possible, please send me PIAA's most recent Form 990 filing with the IRS⁷ that **already exists in electronic form**. If the requested document does not already exist in electronic form then it is not requested (if necessary, PIAA must check with its Form 990 preparer to see if he/she possesses it in electronic form).

ITEM 7

This request item stems from my curiosity about a recent Office of Open Records ("OOR") Final Determination, *Francis Scarella & the Daily Item v. PIAA*; Dkt. No. AP 2020-1371. On September 2, 2020, PIAA submitted argument to the OOR via counsel. On page 2 footnote 1 of that pleading, PIAA stated:

"[PIAA] does not receive any tax money⁸ ... Unless all not-for-profit corporations that have schools for members are Commonwealth authorities or entities, PIAA believes that it is improperly included in the RTKL. For purposes of the current proceeding, it has chosen not to object to the request submitted by Requester on this ground nor pursue this issue here as the OOR is not the appropriate venue to address the validity and/or constitutionality of the legislative enactment."

I quote the above because I wish to be clear what records I am seeking. Using the cheapest redaction (if necessary), copy, and delivery methods possible, please send me electronic copies of all written communications that **already exist in electronic form**, and that were exchanged between PIAA officials (and between PIAA officials and counsel) between the dates of January 1, 2020 and the present, that discuss the topic of PIAA being improperly included in the RTKL.

When I use the term "PIAA officials" I am referring to the PIAA's Board of Directors, Executive Committee (President, Vice President, and Treasurer), and Executive Director. When I use the term "written communications" I am referring to any and all non-verbal communications (examples would include emails, text messages, social media messages) irrespective of whether

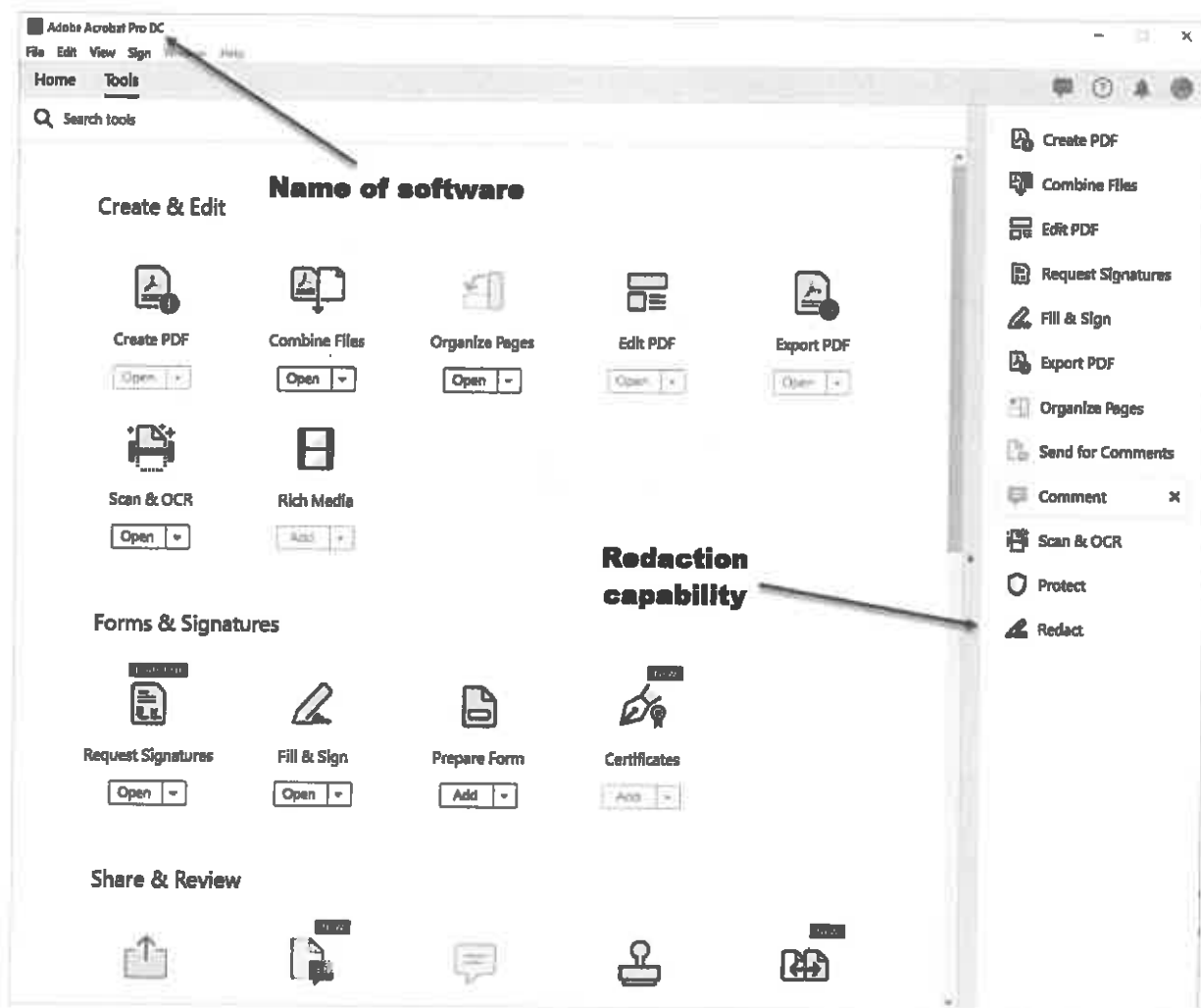
⁷ "Return of Organization Exempt from Income Tax" (Form 990).

⁸ A disingenuous argument to make. PIAA's member public schools are not private donors. They are public entities funded by taxpayers; and for constitutional purposes PIAA is a pervasively entwined State Actor. *See Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001); *also see Campbell et al v. PSBA et al*, 336 F. Supp. 3d 482 - Dist. Court, ED Pennsylvania 2018 (PSBA Motion to Dismiss denied, June 19, 2018). PIAA should not seek to bypass the statutory scheme of the RTKL if wishing to argue that the RTKL is unconstitutional as to PIAA's inclusion. Any legal action taken by PIAA outside of the RTKL, involving my request items, would be First Amendment retaliation. PIAA can make any arguments it likes but it must do so via the RTKL statutory process to which I am clearly entitled. PIAA cannot presume the RTKL is unconstitutional and must therefore follow it. PIAA is required to act in good faith and can be sanctioned if it does not. 65 P.S. § 67.1304. Put plainly, PIAA can hold whatever fanciful legal theories it likes if it wants to sue the Commonwealth of Pennsylvania and have the Attorney General defend against such suit as required by the Commonwealth Attorneys Act. But such fanciful legal theories must be pursued within the confines of the RTKL process. That said, it is hard to imagine any public relations consultant counseling that PIAA use taxpayer-sourced member dues for such a speculative headline-grabbing endeavor. Even harder to imagine the media and general assembly being impressed by such move. If anything, it might trigger the general assembly to add the likes of PSBA into the RTKL. That would be a good amendment. All pervasively entwined State Actors should be accountable to the public that *de facto* funds them.

such communications occurred on the agency officials' personal communication devices. I posit that PIAA's "good faith effort" (Section 901) to search for responsive records necessitates the PIAA's Open Records Officer asking the agency officials to preserve (then release to the Open Records Officer for analysis) all responsive records on any personal communication devices.

ITEM 8

Please send me a screenshot image showing the name of the software program/s in PIAA's possession, custody or control that can perform electronic redactions on PDF files and/or other electronic file types. By way of example one software program that I use myself to perform such tasks is called Adobe Acrobat Pro:



POSITION STATEMENT/S OF REQUESTER

It seems from reading the appeal submissions to OOR in *Francis Scarcella and The Daily Item v. Pennsylvania Interscholastic Athletic Association*, OOR Dkt. AP 2020-1371, that PIAA District IV may be run by people unfamiliar with modern banking tools and modern software tools. The

Glenn Fogel (District IV Treasurer) affidavit of September 2, 2020, stated in paragraph 12 "As Treasurer, I keep almost all District IV third party records, such as ...bank records⁹, in paper format" and in paragraph 15 "I am not aware of any records of District IV that were requested by Mr. Scarcella that are kept electronically". If District IV has a bank account then it is irrelevant what bank records Mr. Fogel personally keeps or what banking facilities he may be unaware of. What is relevant is what online banking facilities he (or the appropriate PIAA official) has the **actual ability to access** even if he has never done it before and even if he isn't personally aware that online records exist. Ignorance is a not a valid denial argument under the RTKL. The Daily Item newspaper did not press these issues so these issues were not adjudicated. By contrast, I am putting PIAA on notice to think about these issues. If local Treasurers have never done things like set up an online banking username and password, or never accessed online banking records before, it doesn't mean they can avoid doing it now in response to my request items. PIAA has a *duty* to retrieve what I seek if PIAA possesses or controls access to the records in the electronic medium that I seek them.

Aside from Adobe Acrobat Pro I possess an inexpensive software tool called "SnagIt" that, like Adobe Acrobat Pro, can be used to capture screen images and create blacked out areas to redact image files like .gif, .jpg, .tiff, etc. (and do it far more securely than a black sharpie pen on a piece of paper, where holding up the paper to a bright light can reveal the redaction underneath¹⁰). By no means are these software tool examples meant to be exhaustive of all possibilities for how electronic records may be electronically redacted by PIAA. In 2020, we live in a modern world with modern software tools that are readily available to us.

The particular electronic form of the sought-after electronic copies is irrelevant to my request items. Aside from the the limited (additional) specificity of re: Item 4, PIAA is welcome to use any electronic format and any electronic medium of its choice to grant and deliver my requested items (e.g. image files, database files, document files, etc.). Since fee disputes can be adjudicated separately to PIAA's position on the merits of requested information being public or nonpublic, please do not actually incur any allegedly chargeable fees to process any of my request items without first seeking agreement from me that I will pay the allegedly chargeable fees (see Section 1304; PIAA required to act in good faith¹¹). My position is that any redactions (which are not

⁹ The phrase "bank records" was not probed by the Requester but self-evidently it speaks to the existence of a bank account. Should it become relevant here I ask that PIAA attorneys provide careful counsel to affiants, given the potential of a Requester to seek sanctions in court for perjury.

¹⁰ OOR has no statutory authority to include non-defined phrases like "secure redaction" in its fee schedule (footnote 6) when no such phrase exists in the statute. Section 706 (redactions) does not mention either the word "secure" or "securely". OOR has no statutory authority to set redaction costs on electronic records in its fee schedule. That OOR has acted outside the scope of its statutory authority in establishing its current fee schedule, re: redacting electronic records, cannot be used as a denial basis by PIAA. OOR cannot cite a single case for the premise that it can unilaterally declare, via its fee schedule, that agencies have a "right" to print pieces of paper (at \$0.25 per page cost to the Requester) from electronic records in order to take out a black sharpie pen and redact them. PIAA is obliged to follow the law not OOR's unlawful power grab.

¹¹ See also OOR Final Determination, *Francis Scarcella and The Daily Item v. Pennsylvania Interscholastic Athletic Association*, OOR Dkt. AP 2020-1371 (PIAA not entitled to copy fees where Requester objection is on record).

admitted is necessary) on electronic records would need to be performed electronically in accordance with Sections 706 and 1307(g) of the RTKL¹².

My position (given the specificity of my requests) is that Section 1307(b) – which references the OOR’s fee schedule – is not triggered, at least in terms of redaction, by any of my request items¹³. I do not agree that any paper copy fees can be charged because I am only seeking electronic copies of records that *already exist* in electronic form. Put another way, it is not a ‘necessarily incurred’ cost to print electronic records onto paper in order to redact or copy them.¹⁴

My position is that the only permissible fees that may be charged to me is the delivery method by which the electronic information is sent. If the granted records are too large to send as e-mail attachments PIAA should seek the lowest cost alternative delivery method to send me the released records. Examples might include mailing me a USB stick or DVD (where the cost of the thumb drive/disc plus postage might be chargeable). Or, even better, PIAA could use a free file-share cloud service like Google Drive, OneDrive, Dropbox etc¹⁵. I encourage PIAA to enter into constructive dialogue with me about delivery costs rather than assume PIAA is entitled to charge whatever PIAA wants to charge.

If PIAA disagrees with any of my position statements and wishes to charge paper copy fees, please estimate (but do not actually incur) the allegedly chargeable fees into a dollar amount and please explain the rationale behind such position, including providing legal citation as required by Section 903(2) of the RTKL when issuing PIAA’s final answer.

In recent days I googled and found these media stories about PIAA:

“Open records office rules PIAA can’t charge for some documents”

https://www.dailyitem.com/news/open-records-office-rules-piaa-cant-charge-for-some-documents/article_492b9e20-1557-11eb-9f8a-eb810ce71104.html

“Legislators want to discuss District IV concerns with PIAA Oversight Committee”

¹² Numerous software tools exist – many for free – that can be used to electronically redact a range of different electronic file types. If the PIAA wishes to allege that it doesn’t possess any applicable software redaction tool and further wishes to argue it is under no obligation to obtain one, please state that position when issuing the PIAA’s final answer because my position is that the PIAA would be required to obtain such software tool.

¹³ The RTKL only authorizes OOR to establish “fees for duplication” not fees for redaction. 65 P.S. § 67.1307(b)(1). Any necessarily incurred costs for redaction “must be reasonable” and fall under Section 1307(g). See OOR Final Determination, *Mezzacappa v. Colonial Intermediate Unit 20*, Dkt. No. 2019-1922 (“[t]he {PIAA’s} redactions are governed by Section 1307(g) of the RTKL”).

¹⁴ Redaction costs are limited to costs that the “agency necessarily incurs ...for complying with the request, and such fees must be reasonable.” 65 P.S. § 67.1307(g) (emphasis added).

¹⁵ Many options exist at no cost. See <https://www.computerworld.com/article/3262636/top-10-file-sharing-options-dropbox-box-google-drive-onedrive-and-more.html>. I encourage PIAA to review the statutory language of Section 1307(g) in this regard (i.e. “necessarily incurs” and “such fees must be reasonable”). To me, it seems so, well, 1950s to think of mailing items on a USB stick. I’m not sure it’s necessary. PIAA could probably tap into the expertise of a 14 year high school member to see how to use a free file-share service. If PIAA wants to have a fight about 1307(g) I encourage PIAA to read *Mezzacappa v. Colonial Intermediate Unit 20*, Dkt. No. AP 2019-1922 (July 31, 2010); footnotes 8 & 9.

https://www.dailyitem.com/news/legislators-want-to-discuss-district-iv-concerns-with-piaa-oversight-committee/article_dfe4c2f2-c6be-11ea-956f-f76d6997bd3a.html

It seems like there is no love lost between PIAA and the Daily Item newspaper when it comes to the RTKL. But as the Pennsylvania Newspaper Association attorney Melissa Melewsky was quoted in the second article: "PIAA's position on the use of the RTKL is unfortunate ...[t]he RTKL was not intended to be an adversarial process, but one designed to inform the public and improve government function. Reasonableness and collaboration can go a long way in easing the process along."

Indeed so.

I want to know what is going on with the millions of dollars of taxpayer-sourced money that flows into PIAA and I want to understand why PIAA thinks it should be unaccountable to the public for any of that money by suggesting that PIAA not be included in the RTKL. To any extent it may be relevant please know that I intend to publish all released records on the internet.

I look forward to hearing from PIAA within the required five (5) business days.

Sincerely,
Simon Campbell

PS. OOR recently invited the public to provide input into its decision-making process for the biannual review of its fee schedule. See <https://openrecords.pennsylvania.com/2020/10/27/oor-solicits-comments-on-biannual-review-of-rtkl-fee-schedule/>. FYI, to help PIAA better understand my position on copy fees, I attach my own feedback to OOR. I encourage PIAA not to rely on statutory authority that OOR does not possess when deciding what fees PIAA thinks might be chargeable, and instead focus only on what the RTKL says. Put plainly, if the only argument PIAA has about copy fees is "the OOR fee schedule says we can do it" then we have a problem in which OOR could become an indispensable party because there are certain things that OOR is not allowed to say in its fee schedule that PIAA can do.



Simon Campbell <parighttoknow@gmail.com>

OOR's fee schedule - revisions needed

1 message

Simon Campbell <parighttoknow@gmail.com>

Sat, Oct 31, 2020 at 6:13 PM

To: FeeReviewOOR@pa.gov

Cc: Erik Ameson <eameson@pa.gov>, Nathanael <nbyerly@pa.gov>, "Brown, Charles (OOR)" <charlebrow@pa.gov>, "Lantz-Johnson, Delene" <dlantz-joh@pa.gov>, "Spless, George" <gespiess@pa.gov>

Dear OOR,

What's the expression for activist Judges? Legislating from the bench, I believe. Why would OOR do that from an administrative office? I was happy to see the general assembly limit OOR's 1307(b) statutory authority to "fees for duplication". I can only assume that whomever fell in love, inside OOR, with a "securely redacting" black sharpie pen several years ago (see current OOR fee schedule footnotes 4 & 6) that person wanted to re-write the RTKL to give more power to OOR than the general assembly gave to OOR.

See OOR Final Determination, page 8:

<https://www.openrecords.pa.gov/Appeals/DocketGetFile.cfm?id=55570>

[Quote]: "With respect to the electronic invoices that were in Dr. Lombardi's possession, the OOR's Fee Schedule does not permit fees to be imposed for redactions, see 65 P.S. § 67.1307(g), but does state that "[i]f a requester seeks records requiring redaction, an agency may copy or print the records to provide for secure redaction. Accordingly, the agency may charge the fees noted above for ... copies, as appropriate."

May I suggest OOR pen more succinct FDs?. The above verbiage - making the exact same legal points - would be better written:

"With respect to the electronic invoices that were in Dr. Lombardi's possession, the OOR's Fee Schedule does not permit fees to be imposed for redactions, see 65 P.S. § 67.1307(g), but OOR does it anyway."

Of course, even the more succinct version doesn't address the underlying cultural problem at OOR. The problem right now, and the reason so many citizens are continuing to be ripped off with unlawful copy fees being imposed on them by an OOR with General Assembly aspirations, is not OOR's fee schedule per se. The structural problem is that OOR is addressing things in its fee schedule that OOR is not allowed to address in its fee schedule.

Specifically, OOR is not statutorily authorized to suggest, infer, or otherwise rule in its fee schedule that agencies have a right to print electronic records onto paper to redact them with a black sharpie pen. That entire mentality at OOR is far removed from OOR's statutory authority in Section 1307(b). OOR may adjudicate but OOR may not legislate. Different agencies might have different costs for e-redaction. Not all agencies possess the same, if any, software redaction tools. "Necessary" costs may vary between agencies. Different arguments may be put forth by different agencies. And the wording of requests may vary between requesters.

Such realities suggest that redaction cost disputes be assessed on a case-by-case basis where OOR acts only as an adjudicator not as a legislator. In setting its upcoming revised fee schedule OOR needs to resist a desire to still be King. Section 1307(b) should be seen as restricting not as all encompassing.

Redaction costs for all **electronic records** are properly analyzed under Section 1307(g) not Section 1307(b). See OOR Final Determination, *Mezzacappa v. Colonial Intermediate Unit 20*, Dkt. No. AP 2019-1922(July 31, 2010)("The Unit's redactions are governed by Section 1307(g) of the RTKL"). The electronic records at issue in *Mezzacappa* were video records. It is absurd for OOR to believe that one type of electronic record (video) can have redaction costs assessed under 1307(g) while another type of electronic record (non-video) has redaction costs assessed under 1307(b). *Mezzacappa* drew its own authority from a PA Supreme Court case. *Easton Area Sch. Dist. v. Miller* 13 MAP 2019, 2020 Pa. LEXIS 3378:

"Thus, insofar as the video itself is a public record subject to disclosure under the RTKL but contains the images of school students which are not subject to disclosure, which, in our view, it is and does, the District is obligated to redact students' images by, for example, blurring or darkening portions of the video revealing the students' identities, and to subsequently provide access to the redacted video." [Footnote 15]: "We do not suggest the District is obligated to finance such redaction, which responsibility may fall either to the District or to the Requester depending upon other laws, policies, or legal directives that are not before the Court in the present appeal."

Notably, the PA Supreme Court did not state that redaction costs on e-records could be established by the OOR in its fee schedule. The OOR's sound reasoning in *Mezzacappa* flowed from this Supreme Court decision. Different facts presented by different cases are going to arise over the issue of redaction costs on electronic records. It is not appropriate for OOR to declare or suggest, via its fee schedule, how redactions on electronic records must occur and what the costs associated with such redaction can be.

Part of the challenge is that OOR was operating in the 1920s under Terry Mutchler in terms of being a forward-looking entity. Mr.

Ameson has at least elevated OOR into the 1950s. But all this obsession about paper records is an obsession that only government officials get wrapped up in. What agency does NOT keep its records in some computer form or another? Why are we talking about paper copies in 2020? It is a dinosaur mentality where type-writers and filing cabinets still rule the day. Such dinosaur mentality has been ripping citizens off for years. \$0.25 per page copy fees? Come on. Even if an agency really did live in the 1950s with a type-writer and filing cabinet instead of a computer, you can go to Staples and get paper copies done for \$0.10 per page. As a reminder, OOR is limited in terms of what it can do by the language of Section 1307(b)(2). I Hope someone at OOR is surveying local business entities.

OOR lives in an Ivory tower when it comes to seeing the RTKL. It is a sheltered governmental world where OOR never sees the ordinary Requester who gets beaten down with denials and who quits because they think (often, all too correctly) the system is stacked against them. OOR needs to stop listening to the government people and the 'advocacy' self-serving special interest groups who cater to them. OOR needs to re-focus on the ordinary citizen and the law itself. This time around, OOR needs to pay much greater attention to what it is NOT ALLOWED to establish in terms of fees. There can be no King OOR. Section 1307(b) fee-setting needs to be an exercise in restraint. In line with case law and the statutory limits imposed on OOR by the general assembly, I propose the follow changes to the OOR's current fee schedule:

Footnote 4: Problem. The 1950s dinosaur is in town (i.e. someone still in love with paper records and black sharpie pens). The current phrase "records which require redactions in electronic format" makes no legal sense because the word "records" doesn't differentiate between paper records and electronic records (how can paper records "require" electronic redaction?). Redactions for paper records have costs assessed under 1307(b) whereas redactions for electronic records have costs assessed under 1307(g). Solution: eliminate this footnote in its entirety. Stop telling agencies they can live in the 1950s. Stop legislating. OOR doesn't have statutory authority to establish, in its fees schedule, any costs relating to redaction. Let such issues be decided on a case-by-case basis via Final Determinations.

Footnote 6: Same problem. Same solution. Scrap it.

Additional Notes

Inspection of Redacted Records: Similar problem. Current phraseology is legally contradictory ("An agency may not charge the requester for the redaction itself. However, an agency may charge (in accordance with the OOR's Official Fee Structure) for any copies it must make [to do the redaction]"). The implication is that the agency "must" print paper to perform the redaction. Where does such thinking come from? Certainly not the law. It is the 1950s dinosaur mentality again. Suppose the Requester wanted to inspect a screenshot image that needed to be redacted. Under the current phraseology OOR falls right back into the trap of Footnotes 4 and 6. When in fact the agency might be easily able to redact the screenshot electronically and present it for inspection electronically. By setting fees for things OOR is not authorized to set fees for (redaction costs of e-records) OOR is shutting out legal arguments - good legal arguments - that citizens could otherwise make during an appeal. Instead of adjudicating the law, OOR has fallen into the trap of becoming the law. The solution again is to simply abolish this particular additional note in its entirety.

All other aspects of the OOR's fee schedule are fine as they are. Don't mess with what works. Just fix the stuff that has been ripping citizens off because King OOR has been exceeding its statutory authority.

Do I win a free black sharpie pen if my ideas are deemed the best?

SC.

OOR Exhibit 4

Zeppos-Brown, Magdalene

From: Zeppos-Brown, Magdalene
Sent: Monday, December 21, 2020 2:27 PM
To: Boynton, Alan; Simon Campbell <parighttoknow@gmail.com>
(parighttoknow@gmail.com)
Subject: RE: [External] AP 2020-2639

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Mr. Campbell:

In light of the below email, the OOR wishes to afford you the opportunity to issue a response before making a determination. Kindly provide your position on the requested stay on or before December 22, 2020. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
(717) 346-9903 | mazepposbr@pa.gov
<https://openrecords.pa.gov> | @OpenRecordsPA

From: Boynton, Alan <ABoynton@mcneeslaw.com>
Sent: Monday, December 21, 2020 1:57 PM
To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>
Cc: Simon Campbell <parighttoknow@gmail.com> (parighttoknow@gmail.com) <parighttoknow@gmail.com>
Subject: [External] AP 2020-2639

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Ms. Zeppos-Brown,

Attached hereto is Respondent's request to stay this proceeding pending disposition of a Petition for Review filed by Respondent in the Commonwealth Court on December 18, 2020 challenging application of the Pennsylvania Right To Know Law to Respondent. As noted by Mr. Campbell in his appeal, Respondent notified him in Respondent's response to his request that PIAA intended to litigate this issue. A copy of the Petition for Review is attached to the request for stay.

Alan Boynton



McNees

Alan R. Boynton, Jr.

McNees Wallace & Nurick LLC

100 Pine Street | Harrisburg, PA 17101

Tel: 717.237.5352 | Fax: 717.260.1665

Cel: 717.418.2354

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The foregoing message may be protected by the attorney-client privilege. If you believe it has been sent to you in error, do not read it. Please reply to the sender that you have received the message in error, then delete it. Thank you.

00R Exhibit 5

Zeppos-Brown, Magdalene

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Monday, December 21, 2020 10:57 PM
To: Zeppos-Brown, Magdalene
Cc: Boynton, Alan; rlombardi@piaa.org
Subject: [External] Re: AP 2020-2639

Follow Up Flag: Follow up
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ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Dear Ms. Zeppos-Brown,

I have now read the PIAA's irrelevant motion to the OOR in this docket (OOR Dkt. No. AP 2020-2639). I say "irrelevant" because, absent my permission, OOR lacks statutory authority to delay the issuance of an OOR Final Determination in this matter. Only the Requester has standing to permit an extension of time for the OOR to issue a final determination. 65 P.S. § 67.1101(b)(1) ("Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).") (emphasis added).

I do not consent to any extension of time in this matter for OOR to issue a Final Determination beyond the current deadline of January 11, 2021. Given this statement OOR has a statutory duty to timely issue a Final Determination. Failure to do so would constitute statutory dereliction of duty on the part of OOR and would result in a deemed denial of my appeal. 65 P.S. § 67.1101(b)(2) ("If the appeals officer fails to issue a final determination within 30 days, the appeal is deemed denied"). If the OOR refuses to perform its statutory duty under 65 P.S. § 67.1101(b)(1) - by refusing to timely issue a Final Determination - I would not be bound by such OOR decision. The law is the law. On the 31st day I would have the right to file an appeal at Commonwealth Court based on the refusal of OOR to perform its statutory duty. I would have to name OOR as a respondent alongside PIAA in that appeal if I was arguing that OOR lacked statutory authority to stay the proceedings because I would have my own deadline for when I must file at Commonwealth Court to avoid a late filing with that Court. In other words, one deadline affects another.

Given that my permission is not granted to extend the deadline for OOR final determination in OOR Dkt. AP 2020-2639 and given the lack of any Restraining Order against OOR to timely perform its statutory duty then OOR must continue to do its job in the timeframe of the law. Either PIAA meets its burden of proof in this OOR or PIAA doesn't meet its burden of proof in this appeal. That is the only decision-making task before OOR.

It appears I wasn't served copy of the PIAA's alleged filing in Commonwealth Court on December 18, 2020. Nothing has arrived via email and I checked my postal mail today. It could be argued that I am an indispensable party to this alleged PIAA litigation. Indeed there is an argument that could be made to suggest that OOR is an indispensable party to it. I am guessing that PIAA sued the Commonwealth of Pennsylvania to allege that the RTKL is unconstitutional as to the inclusion of PIAA, and I am guessing PIAA has served the Attorney General since it is the AG's job to defend the constitutionality of duly enacted law. I am not saying I would participate in PIAA's wild goose chase but at a minimum I should have been served copy of the lawsuit so I could decide if I wanted to intervene or not. I am, after all, the reason why PIAA is able to argue there is a live controversy.

It is not the OOR's job to deny or delay a timely adjudication of this matter just because an entity - explicitly named in the RTKL - doesn't like the law and embarks on a speculative wild goose chase that I doubt the Commonwealth Court will

entertain for long. Duly enacted laws are presumed to be constitutionally sound and any person arguing otherwise has a very heavy burden to bear. It is OOR's job to presume the RTKL is constitutionally unsound. The decision before the OOR on the PIAA's "Motion ...for Stay of [OOR] Proceedings" must be denied because I refuse to agree to any extension of time. Moreover, PIAA waived any right to challenge the applicability of the RTKL as to PIAA by virtue of PIAA's issuing a final answer to me, and by virtue of PIAA's decision to participate in several OOR appeals involving other Requesters. The principle of collateral estoppel applies.

Absent a restraining Court Order preventing OOR from timely issuing a Final Determination in this matter on January 11, 2021 and absent any permission from me to extend the deadline for OOR to issue its Final Determination, the OOR is compelled by law to timely issue a Final Determination (65 P.S. § 67.1101(b) "shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal").

By copy to PIAA counsel,

I am putting your client on notice that if it does not participate in any meaningful way in this OOR appeal to try and prove the denial/deemed denial of records that I was issued in PIAA's final answer then I will seek sanctions against PIAA in Commonwealth Court under Sections 1304 and 1305 of the RTKL. You don't get a pass, Attorney Boynton, on your client's duty under the law, to follow that law, just because your client has a speculative theory about the RTKL. Kindly send me a copy, without delay, of the litigation your client allegedly filed in Commonwealth Court on December 18, 2020. It is an action that has implications as to my legal rights. If you refuse to provide me with a copy of it by the end of tomorrow then PIAA will receive a RTKL request from me to be sent it. And I will use the refusal to send my copy, against PIAA, when making my Section 1304/1305 bad faith arguments. Furthermore, that you are telling OOR that PIAA has filed an action in Commonwealth Court on 12-18-20 does not constitute actual evidence of a filing. Evidence would be a sworn affidavit from you attaching the litigation and attesting that it is a true and accurate copy. You are asking OOR to rule on a matter without sending a copy of relevant legal material for OOR (or me) to review.

What PIAA should have done in this situation is participate in the OOR appeal while making its wild goose chase theories in order to preserve them for a Petition for Review of the OOR's Final Determination (if the OOR decision was adverse to PIAA). Instead PIAA is attempting to leapfrog over the OOR's jurisdiction and deny me my legal right to a timely adjudication of my appeal. Requester identity is irrelevant under the RTKL. Commonwealth Court case law is clear in that a Requester - any Requester - sits in the seat of the public when making RTKL requests and filing RTKL appeals. The general assembly is presumed to act in the public interest not the private interest. 1 Pa.C.S. § 1922(5).

Mr. Boynton, to be candid, you must think I am a sap. What you should have done is read Section 1101(b)(1)'s "unless the Requester agrees otherwise" language and picked up the phone to call me to see if I would agree to an OOR extension of time, before you filed your Motion to Stay. If you had obtained my agreement you could have said so in the Motion. Instead you ignored me. You lack standing to ignore me because you are a lawyer. Only my wife has such standing and that's only because, unlike you, she has suffered decades of my endearing wit. I suspect you are going to need a Preliminary/Emergency/Restraining Injunction Court Order to stop OOR from doing the job the law requires OOR to do. Which begs the following question. How are you going to obtain such a Court Order if you didn't name OOR as a party? Relying on me to be a sap is a poor legal strategy. Anyhow, kindly send me copy of the alleged 12-18-20 filed litigation so I can send it to the media and opine about it on YouTube (it'll spare your client another RTKL request). PIAA receives funding from public school entities whose own funding comes from taxpayers so the public needs to see whether its tax dollars are being wisely spent on PIAA. Mr. Lombardi, PIAA CEO, by copy, I have a question. Have you told all the public school entities that send PIAA money that PIAA is using a portion of their taxpayer-sourced money to file a frivolous lawsuit arguing against the legislature's inclusion of PIAA in the RTKL? Have any of your members voted to approve a frivolous lawsuit? PIAA needs to withdraw its frivolous lawsuit and instead focus its attention on this OOR appeal.

Appeals Officer Zeppos-Brown, apologies for my sassiness, but patience never was my strong point when I see ridiculousness. My argument for the release of requested records will be in before the stated OOR record-closing

deadline of December 22, 2020 (per OOR docketing instructions of 12-11-20). PIAA needs to act in good faith and put its own denial arguments, full and complete, into the record by the same stated OOR deadline.

Regards
Simon Campbell

On Mon, Dec 21, 2020 at 2:27 PM Zeppos-Brown, Magdalene <mazepposbr@pa.gov> wrote:

Dear Mr. Campbell:

In light of the below email, the OOR wishes to afford you the opportunity to issue a response before making a determination. Kindly provide your position on the requested stay on or before December 22, 2020. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

(717) 346-9903 | mazepposbr@pa.gov

<https://openrecords.pa.gov> | @OpenRecordsPA

From: Boynton, Alan <ABoynton@mcneeslaw.com>
Sent: Monday, December 21, 2020 1:57 PM
To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>
Cc: Simon Campbell <parighttoknow@gmail.com> (parighttoknow@gmail.com) <parighttoknow@gmail.com>
Subject: [External] AP 2020-2639

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Ms. Zeppos-Brown,

Attached hereto is Respondent's request to stay this proceeding pending disposition of a Petition for Review filed by Respondent in the Commonwealth Court on December 18, 2020 challenging application of the Pennsylvania Right To Know Law to Respondent. As noted by Mr. Campbell in his appeal, Respondent notified him in Respondent's response to his request that PIAA intended to litigate this issue. A copy of the Petition for Review is attached to the request for stay.

Alan Boynton

 **McNees**
Alan R. Boynton, Jr.

McNees Wallace & Nurick LLC
100 Pine Street | Harrisburg, PA 17101
Tel: 717.237.5352 | Fax: 717.260.1665

Cel: 717.418.2354

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OOOR Exhibit 6

Zeppos-Brown, Magdalene

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Monday, December 21, 2020 11:19 PM
To: Zeppos-Brown, Magdalene
Cc: Boynton, Alan; rlombardi@piaa.org
Subject: [External] Re: AP 2020-2639

Follow Up Flag: Follow up
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Apologies for a typo. Where I wrote "It is OOR's job to presume the RTKL is constitutionally unsound" I meant to say "It is not the OOR's job to presume the RTKL is constitutionally unsound".

On Mon, Dec 21, 2020 at 10:57 PM Simon Campbell <parighttoknow@gmail.com> wrote:

Dear Ms. Zeppos-Brown,

I have now read the PIAA's irrelevant motion to the OOR in this docket (OOR Dkt. No. AP 2020-2639). I say "irrelevant" because, absent my permission, OOR lacks statutory authority to delay the issuance of an OOR Final Determination in this matter. Only the Requester has standing to permit an extension of time for the OOR to issue a final determination. 65 P.S. § 67.1101(b)(1) ("Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).") (emphasis added).

I do not consent to any extension of time in this matter for OOR to issue a Final Determination beyond the current deadline of January 11, 2021. Given this statement OOR has a statutory duty to timely issue a Final Determination. Failure to do so would constitute statutory dereliction of duty on the part of OOR and would result in a deemed denial of my appeal. 65 P.S. § 67.1101(b)(2) ("If the appeals officer fails to issue a final determination within 30 days, the appeal is deemed denied"). If the OOR refuses to perform its statutory duty under 65 P.S. § 67.1101(b)(1) - by refusing to timely issue a Final Determination - I would not be bound by such OOR decision. The law is the law. On the 31st day I would have the right to file an appeal at Commonwealth Court based on the refusal of OOR to perform its statutory duty. I would have to name OOR as a respondent alongside PIAA in that appeal if I was arguing that OOR lacked statutory authority to stay the proceedings because I would have my own deadline for when I must file at Commonwealth Court to avoid a late filing with that Court. In other words, one deadline affects another.

Given that my permission is not granted to extend the deadline for OOR final determination in OOR Dkt. AP 2020-2639 and given the lack of any Restraining Order against OOR to timely perform its statutory duty then OOR must continue to do its job in the timeframe of the law. Either PIAA meets its burden of proof in this OOR or PIAA doesn't meet its burden of proof in this appeal. That is the only decision-making task before OOR.

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to approve a frivolous lawsuit? PIAA needs to withdraw its frivolous lawsuit and instead focus its attention on this OOR appeal.

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Regards
Simon Campbell

On Mon, Dec 21, 2020 at 2:27 PM Zeppos-Brown, Magdalene <mazepposbr@pa.gov> wrote:

Dear Mr. Campbell:

In light of the below email, the OOR wishes to afford you the opportunity to issue a response before making a determination. Kindly provide your position on the requested stay on or before December 22, 2020. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
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Harrisburg, PA 17101-2234

(717) 346-9903 | mazepposbr@pa.gov

<https://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

From: Boynton, Alan <ABoynton@mcneeslaw.com>

Sent: Monday, December 21, 2020 1:57 PM

To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>

Cc: Simon Campbell <parighttoknow@gmail.com> (parighttoknow@gmail.com) <parighttoknow@gmail.com>

Subject: [External] AP 2020-2639

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Ms. Zeppos-Brown,

Attached hereto is Respondent's request to stay this proceeding pending disposition of a Petition for Review filed by Respondent in the Commonwealth Court on December 18, 2020 challenging application of the Pennsylvania Right To Know Law to Respondent. As noted by Mr. Campbell in his appeal, Respondent notified him in Respondent's response to his request that PIAA intended to litigate this issue. A copy of the Petition for Review is attached to the request for stay.

Alan Boynton

 **McNees**
Alan R. Boynton, Jr.

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OOR Exhibit 7

Zeppos-Brown, Magdalene

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Tuesday, December 22, 2020 12:42 PM
To: Zeppos-Brown, Magdalene
Cc: Boynton, Alan; rlombardi@piaa.org; Arneson, Erik; Byerly, Nathanael; Brown, Charles (OOR); Lantz-Johnson, Delene; Spiess, George
Subject: [External] Re: AP 2020-2639

Follow Up Flag: Follow up
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Ms. Zeppos-Brown,

Given the statutory language of Section 1101(b)(1) ("Unless a requester agrees otherwise ...") my legal position affects how OOR responds to the PIAA SLAPP suit filed on December 18, 2020. For that reason OOR should include these emails when responding to the PIAA SLAPP suit.

Last night I barely skimmed the PIAA's Motion to Stay Proceedings last night and I missed the fact that PIAA included their SLAPP suit (Strategic Lawsuit Against Public Participation) as an attachment to their Motion for OOR to Stay this appeal.. I now see that PIAA has sued OOR in addition to the Commonwealth. Notably, PIAA did not sue me. Maybe they are shy, I don't know. But it is clear that without me there would not have been any live controversy, and it is clear that my legal right to timely obtain the records I sought would be impacted by this litigation PIAA has filed if such dispute were to start moving favorably for PIAA (which, at this stage, I have no reason to believe will occur).

It is SLAPP litigation because I am the public in this matter. I am the public interest. *Hunsicker v. State Police* is the Commonwealth Court case where Requester identity was deemed to be irrelevant. The litigation resulted from my RTKL request. It stands little to no chance of success and is merely a stone-walling tactic by PIAA to try and avoid transparency. It is ironic that PIAA would seek an Injunction against the legal interests of the public (i.e. the Requester) yet not think that the public (the Requester) was an indispensable party. It is not my job to defend the constitutionality of the RTKL. That is indeed the role of AG Shapiro. But AG Shapiro has no interest in the records I seek. Neither does OOR.

The public (me) should not have to pay a lawyer to get the public's voice heard in this dispute. Unless there is a restraining Order against OOR, or unless the OOR does something I have argued would be unlawful for OOR to do (i.e. extend the deadline in violation of OOR's statutory duty to issue it within 30 days), I don't see why I would care about the Teletubbie waste of time that PIAA has inflicted on our Commonwealth Court, the OOR and the AG's office. To be candid, as of right now, PIAA and Government lawyers can all waste the Commonwealth Court's time without me being involved. I have a pending records appeal and OOR's job is to adjudicate that appeal. Of course, if OOR refuses to do its job - or there is a restraining Order against OOR - then I would re-evaluate my position at that time.

It is unacceptable and bad faith conduct on the part of PIAA that I had no idea about this SLAPP litigation until the evening of December 21, 2020 (I didn't read my email from earlier in the day until the evening) given the existing OOR deadline of today for appeal submissions. I expect, and OOR should expect, that PIAA justifies its denial basis today. PIAA had nearly TWELVE YEARS to challenge the constitutionality of the RTKL. Why did it wait until now? The legal concept of *laches* applies.

Under Pennsylvania law, the doctrine of laches has two elements: (1) inexcusable delay; and (2) prejudice. *Jacobs v. Halloran*, 710 A.2d 1098, 1102 (Pa. 1998). PIAA has sat on its hands so long that its hands must be numb at this point. As OOR knows, PIAA has made its frivolous argument - rejected many times by OOR - on scores of prior disputes with other Requesters. When PIAA wrote that a "stay of this matter will not prejudice Requester as his appeal to the OOR will remain pending until final disposition of the Petition by the Commonwealth Court", that is not true. Both OOR and our courts must reject that idea. Of course I would be negatively impacted by any stay of the OOR proceedings. I want records and I don't want them three months from Sunday. I want them now. I am entitled, by law, to a timely adjudication of my OOR appeal within the timeframe that the law requires of OOR. I have the legal right to a timely and expeditious resolution of my records request. So says the PA Supreme Court. "The overall statutory scheme of the [RTKL] clearly indicates the General Assembly's intent that issues regarding access to public records be resolved expeditiously and efficiently." *Bowling v. Office of Open Records*, 75 A.3d 453.

That is the law as written and neither OOR nor our Courts can presume laws to be unconstitutional.

In the absence of any court restraining Order OOR must, as a matter of law, issue its Final Determination by January 11, 2020. I see no way for PIAA to convince Commonwealth Court Judges of the need for preliminary/emergency injunctive relief given that they've sat on their hands twiddling their fingers for nearly twelve years. They can't even allege any harm by having to participate in the proceedings at OOR. They haven't given me the records I requested and so long as they don't give me the records there is no harm to PIAA (i.e. they would have the right to challenge an adverse OOR Final Determination). For PIAA to obtain an emergency/injunctive order they'd have to convince the Commonwealth Court that it would cause them terrible harm to make arguments at OOR.

Given that OOR has been sued I am copying OOR executives on the following lobbying request. I propose that OOR's response to PIAA's SLAPP suit be written as follows:

"Dear PA Commonwealth Court, it's OOR here, responding to PIAA's suit. We've had years of dealing with limey Simon in OOR appeals. We can't be his advocate in this suit because we're an impartial adjudicator. But we do see potential for him to be an indispensable party to PIAA's position. Failure to name an indispensable party can be fatal. Trouble is, Simon might agree or not agree with the idea that he's indispensable. It depends on the particular phase of the nonsense going on as to what he might think. He can be a bit feisty sometimes because he has a pro se brain that gets bored with lawyers. He's the only Requester ever to win an OOR appeal against OOR. We had to rule against ourselves. See <https://www.mcall.com/opinion/mc-opi-pa-open-records-office-overrules-itself-muschick-20180711-story.html> ("State public records enforcer cracks down on itself for withholding records"). Simon probably told the Morning Call reporter that the reason OOR ruled that OOR broke the law is because OOR is full of govt. lawyers, therefore OOR doesn't know anything about the RTKL. That's kind of how he is, when it comes to First Amendment critique. He thinks this PIAA SLAPP suit is complete bollocks. He thinks you are wise enough to toss it out and do the right thing for the public, without needing his direct participation in the SLAPP litigation. He's the kind of limey that could sue OOR if we unilaterally extended the deadline for Final Determination - in the absence of a restraining order - that he argues the law does not allow us to do. Who knows what his involvement might look like. Maybe he'd file a mandamus action against OOR? Maybe he'd petition to intervene in the SLAPP litigation? With a limey like him, you just never know. It's best not to have Simon show up in front of you, pro se, on a Petition to Intervene because he plays by the Rules of Conduct for Unlicensed First Amendment tea-drinkers. Meaning he'd be very polite. For example, he'd never say "Your Honors, I feel for you having to deal with Teletubbie syndrome in your courtroom today. Which one of these government lawyers at OOR and AG is Tinky Winky to PIAA's Dipsy? I have a great idea. On behalf of the missing public, why don't you throw all the Teletubbies out of your courtroom for wasting your time? Let's face it, it is a bit silly that, after twelve years of waiting, PIAA now wants emergency relief. And the emergency relief they seek is that they don't want to have to make arguments at OOR because a law must be presumed to be unconstitutional. Please just tell PIAA that they can come back to Commonwealth Court after the OOR does its job, and they can argue their arguments at that point. True; PIAA would have to name me as the opposing party at that point, but that's the fun part, isn't it? Did you notice how they missed me off the SLAPP suit? I think they figured OOR lawyers are nicey nice and I am meanie mean. But as you consider the missing public's position your Honors, I think they deserve me. Just not in this bollocks SLAPP litigation because it's bollocks and I don't pay lawyers for bollocks. Instead, on a Petition for Review of an OOR Final Determination after I

defeat PIAA in the OOR appeal for issuing such a lousy third class final answer denial to my RTKL request. Rest assured, if PIAA does come back to you on a Petition for Review of an adverse OOR Determination, and I am pro se, please know I promise not to say Teletubbie when referring to opposing counsel. It shall be enough that you know I am thinking it."

Put plainly, OOR executives, your response to PIAA in Commonwealth Court should refer to your MANDATE stated inside Section 1101(b)(1). You don't have a choice. I have tied your hands. Just include these emails to the Commonwealth Court as evidence that I have tied OOR hands. If you need me to take the witness stand at a hearing let me know. Blame me for tying your hands. I would gladly plead guilty. Guilty of demanding that OOR follow the law as written, not as some anti-transparency group might want it written.

On a related note of legal interest:

PIAA is a pervasively entwined state actor consistent with the U.S. Supreme Court's ruling in *Brentwood Academy v. Tennessee Secondary School Athletic Assn.* 531 US 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001). See also, an action that I am involved in:

Simon Campbell et al v. Pennsylvania School Boards Association et al; United States District Court, E.D. Pennsylvania, Civil Action No. 18-892 (Motion to Dismiss denied June 19, 2018):

"In *Brentwood*, the Supreme Court concluded that a state athletic association of public and private high schools acted under color of state law because the "private character of the Association [was] overborne by the pervasive entwinement of public institutions and public officials in its composition and workings." 531 U.S. at 298. The Supreme Court reached that conclusion because 84% of the Association's members were public schools, each school was entitled to vote for the members of the Association's governing board, and the Association's governance of "[i]nterscholastic athletics obviously play[ed] an integral part in the public education of Tennessee." *Id.* at 299-300.

The same analysis applies in this case. Although PSBA is a private entity, its membership is composed entirely of public schools represented by their school board officials. As in *Brentwood*, those schools vote for the members of the PSBA's Governing Board, each of whom must also serve as an elected school board official. Furthermore, the PSBA, at the direction of its board, provides key services to its public school members, including legal advice, lobbying of the state legislature, and the filing of the state suit at issue in this case. Taking the allegations of the Verified Complaint as true, the Court concludes, pursuant to *Brentwood*, that defendants are state actors for purposes of plaintiffs' First Amendment claims."

- Hon. Judge, Jan DuBois; [PSBA] Motion to Dismiss denied; June 10, 2018.

This finding by the District Court on June 19, 2018, at the Motion to Dismiss stage, was left untouched by the subsequent district and third circuit court orders which focused on other issues in dispute between myself and PSBA. Like PSBA, PIAA does not dispute that it receives money from public school entities - money that is sourced from taxpayers. That the general assembly saw fit to include PIAA in the RTKL and not PSBA does not make the RTKL unconstitutional. To the contrary (in my opinion) PSBA should have been included in the RTKL. Maybe the general assembly saw PIAA as having a more direct impact on children - given its sports engagement - than it saw PSBA. I don't know. But that's a policy decision for the general assembly to make, not for the courts to make. It is not a "constitutional right" to receive taxpayer dollars (via government entities) with no accountability to the taxpayers. Were PIAA's frivolous constitutional argument to be taken to its logical conclusion then no private third party that contracted with a govt. entity to perform a govt. function would have any accountability under the RTKL.

As far as I'm concerned OOR has one job to do, here: adjudicate my OOR appeal in the timeframe that the law requires. Unless OOR refuses to do its job, and/or is unable to do its job, then I have better things to do with my time that waste it

getting involved in yet another SLAPP suit, with yet another self-serving organization that doesn't want accountability for the tax dollars that flow into its coffers via govt. entity funding.

Sincerely,
Simon Campbell

On Mon, Dec 21, 2020 at 11:18 PM Simon Campbell <parighttoknow@gmail.com> wrote:
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On Mon, Dec 21, 2020 at 10:57 PM Simon Campbell <parighttoknow@gmail.com> wrote:
Dear Ms. Zeppos-Brown,

I have now read the PIAA's irrelevant motion to the OOR in this docket (OOR Dkt. No. AP 2020-2639). I say "irrelevant" because, absent my permission, OOR lacks statutory authority to delay the issuance of an OOR Final Determination in this matter. Only the Requester has standing to permit an extension of time for the OOR to issue a final determination. 65 P.S. § 67.1101(b)(1) ("Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).") (emphasis added).

I do not consent to any extension of time in this matter for OOR to issue a Final Determination beyond the current deadline of January 11, 2021. Given this statement OOR has a statutory duty to timely issue a Final Determination. Failure to do so would constitute statutory dereliction of duty on the part of OOR and would result in a deemed denial of my appeal. 65 P.S. § 67.1101(b)(2) ("If the appeals officer fails to issue a final determination within 30 days, the appeal is deemed denied"). If the OOR refuses to perform its statutory duty under 65 P.S. § 67.1101(b)(1) - by refusing to timely issue a Final Determination - I would not be bound by such OOR decision. The law is the law. On the 31st day I would have the right to file an appeal at Commonwealth Court based on the refusal of OOR to perform its statutory duty. I would have to name OOR as a respondent alongside PIAA in that appeal if I was arguing that OOR lacked statutory authority to stay the proceedings because I would have my own deadline for when I must file at Commonwealth Court to avoid a late filing with that Court. In other words, one deadline affects another.

Given that my permission is not granted to extend the deadline for OOR final determination in OOR Dkt. AP 2020-2639 and given the lack of any Restraining Order against OOR to timely perform its statutory duty then OOR must continue to do its job in the timeframe of the law. Either PIAA meets its burden of proof in this OOR or PIAA doesn't meet its burden of proof in this appeal. That is the only decision-making task before OOR.

It appears I wasn't served copy of the PIAA's alleged filing in Commonwealth Court on December 18, 2020. Nothing has arrived via email and I checked my postal mail today. It could be argued that I am an indispensable party to this alleged PIAA litigation. Indeed there is an argument that could be made to suggest that OOR is an indispensable party to it. I am guessing that PIAA sued the Commonwealth of Pennsylvania to allege that the RTKL is unconstitutional as to the inclusion of PIAA, and I am guessing PIAA has served the Attorney General since it is the AG's job to defend the constitutionality of duly enacted law. I am not saying I would participate in PIAA's wild goose chase but at a minimum I should have been served copy of the lawsuit so I could decide if I wanted to intervene or not. I am, after all, the reason why PIAA is able to argue there is a live controversy.

It is not the OOR's job to deny or delay a timely adjudication of this matter just because an entity - explicitly named in the RTKL - doesn't like the law and embarks on a speculative wild goose chase that I doubt the Commonwealth Court will entertain for long. Duly enacted laws are presumed to be constitutionally sound and any person arguing otherwise has a very heavy burden to bear. It is OOR's job to presume the RTKL is constitutionally unsound. The decision before the OOR on the PIAA's "Motion ...for Stay of [OOR] Proceedings" must be denied because I refuse to agree to any extension of time. Moreover, PIAA waived any right to challenge the applicability of the RTKL as to PIAA by virtue of

PIAA's issuing a final answer to me, and by virtue of PIAA's decision to participate in several OOR appeals involving other Requesters. The principle of collateral estoppel applies.

Absent a restraining Court Order preventing OOR from timely issuing a Final Determination in this matter on January 11, 2021 and absent any permission from me to extend the deadline for OOR to issue its Final Determination, the OOR is compelled by law to timely issue a Final Determination (65 P.S. § 67.1101(b) "shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal").

By copy to PIAA counsel,

I am putting your client on notice that if it does not participate in any meaningful way in this OOR appeal to try and prove the denial/deemed denial of records that I was issued in PIAA's final answer then I will seek sanctions against PIAA in Commonwealth Court under Sections 1304 and 1305 of the RTKL. You don't get a pass, Attorney Boynton, on your client's duty under the law, to follow that law, just because your client has a speculative theory about the RTKL. Kindly send me a copy, without delay, of the litigation your client allegedly filed in Commonwealth Court on December 18, 2020. It is an action that has implications as to my legal rights. If you refuse to provide me with a copy of it by the end of tomorrow then PIAA will receive a RTKL request from me to be sent it. And I will use the refusal to send my copy, against PIAA, when making my Section 1304/1305 bad faith arguments. Furthermore, that you are telling OOR that PIAA has filed an action in Commonwealth Court on 12-18-20 does not constitute actual evidence of a filing. Evidence would be a sworn affidavit from you attaching the litigation and attesting that it is a true and accurate copy. You are asking OOR to rule on a matter without sending a copy of relevant legal material for OOR (or me) to review.

What PIAA should have done in this situation is participate in the OOR appeal while making it's wild goose chase theories in order to preserve them for a Petition for Review of the OOR's Final Determination (if the OOR decision was adverse to PIAA). Instead PIAA is attempting to leapfrog over the OOR's jurisdiction and deny me my legal right to a timely adjudication of my appeal. Requester identity is irrelevant under the RTKL. Commonwealth Court case law is clear in that a Requester - any Requester - sits in the seat of the public when making RTKL requests and filing RTKL appeals. The general assembly is presumed to act in the public interest not the private interest. 1 Pa.C.S. § 1922(5).

Mr. Boynton, to be candid, you must think I am a sap. What you should have done is read Section 1101(b)(1)'s "unless the Requester agrees otherwise" language and picked up the phone to call me to see if I would agree to an OOR extension of time, before you filed your Motion to Stay. If you had obtained my agreement you could have said so in the Motion. Instead you ignored me. You lack standing to ignore me because you are a lawyer. Only my wife has such standing and that's only because, unlike you, she has suffered decades of my endearing wit. I suspect you are going to need a Preliminary/Emergency/Restraining Injunction Court Order to stop OOR from doing the job the law requires OOR to do. Which begs the following question. How are you going to obtain such a Court Order if you didn't name OOR as a party? Relying on me to be a sap is a poor legal strategy. Anyhow, kindly send me copy of the alleged 12-18-20 filed litigation so I can send it to the media and opine about it on YouTube (it'll spare your client another RTKL request). PIAA receives funding from public school entities whose own funding comes from taxpayers so the public needs to see whether it's tax dollars are being wisely spent on PIAA. Mr. Lombardi, PIAA CEO, by copy, I have a question. Have you told all the public school entities that send PIAA money that PIAA is using a portion of their taxpayer-sourced money to file a frivolous lawsuit arguing against the legislature's inclusion of PIAA in the RTKL? Have any of your members voted to approve a frivolous lawsuit? PIAA needs to withdraw its frivolous lawsuit and instead focus its attention on this OOR appeal.

Appeals Officer Zeppos-Brown, apologies for my sassiness, but patience never was my strong point when I see ridiculousness. My argument for the release of requested records will be in before the stated OOR record-closing deadline of December 22, 2020 (per OOR docketing instructions of 12-11-20). PIAA needs to act in good faith and put its own denial arguments, full and complete, into the record by the same stated OOR deadline.

Regards

Simon Campbell

On Mon, Dec 21, 2020 at 2:27 PM Zeppos-Brown, Magdalene <mazepposbr@pa.gov> wrote:

Dear Mr. Campbell:

In light of the below email, the OOR wishes to afford you the opportunity to issue a response before making a determination. Kindly provide your position on the requested stay on or before December 22, 2020. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

(717) 346-9903 | mazepposbr@pa.gov

<https://openrecords.pa.gov> | [@OpenRecordsPA](#)

From: Boynton, Alan <ABoynton@mcneeslaw.com>

Sent: Monday, December 21, 2020 1:57 PM

To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>

Cc: Simon Campbell <parighttoknow@gmail.com> (parighttoknow@gmail.com) <parighttoknow@gmail.com>

Subject: [External] AP 2020-2639

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Ms. Zeppos-Brown,

Attached hereto is Respondent's request to stay this proceeding pending disposition of a Petition for Review filed by Respondent in the Commonwealth Court on December 18, 2020 challenging application of the Pennsylvania Right To Know Law to Respondent. As noted by Mr. Campbell in his appeal, Respondent notified him in Respondent's response to his request that PIAA intended to litigate this issue. A copy of the Petition for Review is attached to the request for stay.

Alan Boynton

 **McNees**
Alan R. Boynton, Jr.

McNees Wallace & Nurick LLC
100 Pine Street | Harrisburg, PA 17101
Tel: 717.237.5352 | Fax: 717.260.1665

Cel: 717.418.2354

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OOR Exhibit 8

Zeppos-Brown, Magdalene

From: Zeppos-Brown, Magdalene
Sent: Tuesday, December 22, 2020 4:20 PM
To: Boynton, Alan
Cc: Simon Campbell <parighttoknow@gmail.com> (parighttoknow@gmail.com)
Subject: RE: [External] AP 2020-2639

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Parties:

The Motion to Stay filed in the above matter is hereby **denied**. Both parties will be afforded through December 30, 2020 to make submissions. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
(717) 346-9903 | mazepposbr@pa.gov
<https://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

From: Boynton, Alan <ABoynton@mcneeslaw.com>
Sent: Monday, December 21, 2020 1:57 PM
To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>
Cc: Simon Campbell <parighttoknow@gmail.com> (parighttoknow@gmail.com) <parighttoknow@gmail.com>
Subject: [External] AP 2020-2639

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Ms. Zeppos-Brown,

Attached hereto is Respondent's request to stay this proceeding pending disposition of a Petition for Review filed by Respondent in the Commonwealth Court on December 18, 2020 challenging application of the Pennsylvania Right To Know Law to Respondent. As noted by Mr. Campbell in his appeal, Respondent notified him in Respondent's response to his request that PIAA intended to litigate this issue. A copy of the Petition for Review is attached to the request for stay.

Alan Boynton



Alan R. Boynton, Jr.

McNees Wallace & Nurick LLC

100 Pine Street | Harrisburg, PA 17101

Tel: 717.237.5352 | Fax: 717.260.1665

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OOR Exhibit 9

Zeppos-Brown, Magdalene

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Tuesday, December 22, 2020 7:08 PM
To: Boynton, Alan
Cc: Zeppos-Brown, Magdalene; rlombardi@paa.org; Brown, Charles (OOR); Lantz-Johnson, Delene; Arneson, Erik; Spiess, George; Byerly, Nathanael
Subject: [External] Re: AP 2020-2639

Follow Up Flag: Follow up
Flag Status: Flagged

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Attorney Boynton,

You are currently digging your client a bad faith hole under Sections 1304/1305. My next RTKL request will be of the Pennsylvania General Assembly. I want to see what legal contracts your law firm might have with any arm of the legislature and I'll want to know how much taxpayer money your firm may have received over the years. Moreover, I'll need to obtain campaign finance reports to see which lawmakers your law firm may have made political contributions to. The public deserves full transparency.

Let's get one thing clear. When PIAA wrote inside it's Final Answer to me (12-7-20): "Please be on notice that it is the intention of PIAA to litigate this issue in response to this request" I assumed that PIAA was talking about litigating the issue through the OOR appeals process. I had no idea that PIAA intended to initiate a separate lawsuit. It didn't occur to me that PIAA would be so reckless. You embarked on a legal strategy known as "ignore Simon Campbell". You didn't bother naming me as respondent in the lawsuit and you didn't bother sending me courtesy copy of it on the day you filed it on December 18, 2020. You could have contacted me ahead of time to see if I would agree to an extension of time for OOR to issue a Final Determination, given the statutory language of Section 1101(b)(1). But you couldn't be bothered. You sprung that on me/OOR, just one day before the (original) record-losing deadline at OOR. You have needlessly forced me to take out of my life, last minute, to deal with PIAA's nonsense. Now that your arrogance has thankfully not been rewarded by OOR, what is your client's next move? Is it to seek an emergency court order against OOR to try and prevent your client from PIAA needing to make legal argument by the new record-closing deadline of December 30, 2020. What terrible nightmare harm are you envisioning for your client if it has to make argument at OOR? What possible emergency could exist after twelve years of PIAA sitting on its hands doing nothing with its frivolous constitutional theories, such that PIAA now doesn't need to even make argument at OOR?

I think the Commonwealth Court will see through PIAA's nonsense in less than two minutes. I see next to no chance of your client winning an emergency court order to halt this OOR appeal. You should have the wisdom to have your client back off. Focus on getting your client's appeal argument into the OOR record by the new deadline of 12-30-20, trying to explain why I was denied access to public records and let's get this case adjudicated by OOR. Thereafter, you can always petition the Commonwealth Court for a review of the OOR decision if it is adverse to PIAA. At that point you wouldn't need to sue OOR. You'd have to take me to Court and bring the Attorney General along for the ride since it's not my job to do his job. If your client refuses to put any effort into making a viable appeal argument at OOR trying to substantiate why I was denied access to records, then your client will be gifting me Section 1304/1305 bad faith arguments. Focus on the merits of the records release, Mr. Boynton, because you have a fiduciary duty to PIAA to not land your client in hot legal waters for no reason.

Self-evidently, I have an interest in my legal right to a timely OOR adjudication but I don't have patience for bollocks SLAPP litigation that seeks to waste my time, the OOR's time, the AG's time, and the Commonwealth Court's time - at taxpayer expense. Since I have an interest in getting a timely OOR adjudication of this appeal, how would you see any emergency injunctive relief hearing going, without me involved? What happens if the Judge says "where's Mr. Campbell? Isn't he indispensable to PIAA's position?" Maybe OOR counsel could say "we're not sure you're honor. We did get an email from him with a YouTube link in it over the weekend. Only when we clicked on it, it was a scene from the Teletubbies. Apparently the McNess lawyer is Dipsy, the Attorney General is Tinky Winky, and I'm La La. He said something in the video like he can't be arsed with bollocks, your Honor. Whether that makes him indispensable or not, none of us know. We're just hoping he hires a lawyer soon because apparently he doesn't know how to behave himself."

Now that OOR has decided to do the job the law requires it to do my position, as of today at least, is that government lawyers from OOR and the AG's Office can all have a Teletubbie charade with PIAA at Commonwealth Court with PIAA for all I carebecause I have an OOR appeal to focus on. I pity the poor Judge dealing with such bollocks. That said, I would appreciate it if one of the parties to the Teletubbie charade would serve me courtesy copy of any filings as they happen. Erik, OOR could have forwarded to me, as a courtesy the PIAA bollocks filing when OOR got it on December 18th. OOR is not my advocate but an FYI courtesy copy would have been appropriate. You surely agree that such records are public records of OOR. I shouldn't have to make a weekly RTKL request of OOR's Open Records Officer seeking "any court filings in the last week from the Teletubbie charade" because OOR's Open Records Officer might deny me access on the basis that my request was insufficiently specific and I'd have to appeal to OOR to have OOR overrule OOR because everyone knows what Teletubbie charade means.

Why don't we do this, to make sure the public stays informed ...

Dear Copied OOR Executives,

You are Government and I am a citizen. Pretty polly please with bells on, pursuant to the Noerr-Pennington petitioning doctrine of the First Amendment to the U.S. Constitution I am asking you to take government action. I am prospectively asking that you please send my copy of any and all court filings in the Commonwealth Court matter docketed at Number 661 MD 2020 as soon as the OOR receives them from either PIAA or the AG, and also any that OOR sends to the Court. I'd like to stay abreast of the Teletubbie charade in the event I might decide to gate-crash it with a Petition to Intervene. I am also asking that you send me any off-the-record communication between OOR and PIAA and the AG regarding this litigation docket. I prospectively ask you to take this government action to avoid me needing to make weekly RTKL requests of OOR. Please remember, OOR, that nobody needs to make a RTKL request to get records from OOR. I can just ask you for them informally.

Better yet, OOR/Erik, why don't you post on OOR's website all the filings in Commonwealth Court docket number 661 MD 2020. That way the entire world can see how and why OOR is being sued for doing its job. It is nothing more than transparency in Govt. is it not? Thank you kindly for considering my petitioning.

SC.

ps. Mr. Lombardi, PIAA CEO, please check out the relevant part of this court decision:
https://scholar.google.com/scholar_case?case=166746459112061579

What happened is that I lobbied every public school entity in PA to terminate their financial relationship with PSBA because PSBA is a waste of taxpayer money in my mind. PSBA flipped out and sued me for (allegedly) tortiously interfering in their business relationships with government entities. It was a SLAPP suit. I sued them back in federal court for retaliating against my First Amendment rights. The District Court (and this part was affirmed by the Third Circuit) ruled that the entirety of PSBA's lawsuit was "objectively baseless" because the entirety of my commentary and petitioning was protected by the First Amendment. Read the relevant part from Summary Judgment at the District Court:

The constitutional protection of "peaceable" petitioning is not determined by either the speaker's motivation or the economic impact of the petitioning on others, "at least insofar as the ... campaign [is] directed toward obtaining governmental action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (quoting *E. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 495*495 U.S. 127, 140, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)).

First, courts have regularly recognized that statutorily authorized petitions are protected by the First Amendment. E.g., *Herr v. Pequea Twp.*, 274 F.3d 109, 119 n.9 (3d Cir. 2001) (applications to county planning commission); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (reports to state and federal agencies). There is no reason why petitions pursuant to statutory authority should be given less protection than petitions independent of that authority.

What does this mean? It means my right to contact all of PIAA's government members and ask them to sever all ties with your organization is a protected constitutional right, no matter if my lobbying is so successful that it puts PIAA out of business or negatively affects PIAA revenue. Similarly, if McNees Wallace does legal work for any part of the state legislature I can lobby the legislature to fire that law firm. PIAA decided to pick a fight with me. It is not my job to act like a sap who rolls over in the face of a taxpayer-funded bully. PIAA filed this suit at Commonwealth Court docket number 661 MD 2020 because I made a RTKL request. Well guess what? My right to make a RTKL request isn't just a statutory right. As Judge Dubois pointed out in my suit against PSBA, is it a protected constitutional right because a RTKL request is a "petition" of Government. Your organization is guilty of filing a SLAPP suit and PIAA Government members should now take action to defund your anti-transparency group. Your lawyer's strategy of ignoring me was naive. I've already spoken to one media outlet today and will have no trouble speaking with more. Welcome to the First Amendment. BTW, since PIAA is also a pervasively entwined State Actor for the same reasons that PSBA is, don't assume that at the back of my mind I am not already thinking of a possible First Amendment retaliation claim against PIAA. PIAA must take care not to get involved in any legal move that would palpably infringe on my First Amendment rights.

On Tue, Dec 22, 2020 at 4:20 PM Zeppos-Brown, Magdalene <mazepposbr@pa.gov> wrote:

Dear Parties:

The Motion to Stay filed in the above matter is hereby **denied**. Both parties will be afforded through December 30, 2020 to make submissions. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

(717) 346-9903 | mazepposbr@pa.gov

From: Boynton, Alan <ABoynton@mcneeslaw.com>
Sent: Monday, December 21, 2020 1:57 PM
To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>
Cc: Simon Campbell <parighttoknow@gmail.com> (parighttoknow@gmail.com) <parighttoknow@gmail.com>
Subject: [External] AP 2020-2639

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Ms. Zeppos-Brown,

Attached hereto is Respondent's request to stay this proceeding pending disposition of a Petition for Review filed by Respondent in the Commonwealth Court on December 18, 2020 challenging application of the Pennsylvania Right To Know Law to Respondent. As noted by Mr. Campbell in his appeal, Respondent notified him in Respondent's response to his request that PIAA intended to litigate this issue. A copy of the Petition for Review is attached to the request for stay.

Alan Boynton

 **McNees**
Alan R. Boynton, Jr.

McNees Wallace & Nurick LLC
100 Pine Street | Harrisburg, PA 17101
Tel: 717.237.5352 | Fax: 717.260.1665

Cel: 717.418.2354

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OOR Exhibit 10

Zeppos-Brown, Magdalene

From: Caley, Danielle <DCaley@mcneeslaw.com>
Sent: Wednesday, December 30, 2020 11:55 PM
To: Zeppos-Brown, Magdalene; parighttoknow@gmail.com
Cc: Boynton, Alan
Subject: [External] Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc.
Docket Number: AP 2020-2639
Attachments: RTKL - Campbell - OOR Brief (A7854118).pdf; RTKL-Campbell-Lombardi Affidavit (A7854114).pdf

Follow Up Flag: Follow up
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Good Evening,

Attached please find the Pennsylvania Interscholastic Athletic Association, Inc., ("P.I.A.A.") Submission of Opposition to the Appeal of the Requestor and accompanying Affidavit of Robert A. Lombardi for the above-referenced proceeding.

Should you have any questions regarding this matter, please do not hesitate to contact Attorney Boynton.

Thank you,

Danielle Caley
Secretary to:
Alan R. Boynton, Jr., Esq.
Thomas Markey, Esq.
Rachael R. Hadrick, Esq.
Christian Wolgemuth, Esq.

 **McNees**
McNees Wallace & Nurick, LLC
100 Pine Street, | Harrisburg, PA 17108-1166
Tel: 717.237.5333
[Email](#) | [Website](#)

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PENNSYLVANIA OFFICE OF OPEN RECORDS

IN THE MATTER OF:

Simon Campbell,
Requester

v.

Pennsylvania Interscholastic
Athletic Association, Inc.,
Respondent

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Docket Number: AP 2020-2639

**SUBMISSION OF RESPONDENT PENNSYLVANIA
INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC., IN
OPPOSITION TO APPEAL OF REQUESTER SIMON CAMPBELL**

This appeal arises out of a November 2, 2020 request for records submitted by Simon Campbell ("Requester") to Respondent Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA"). The request purported to be submitted under the Pennsylvania Right-To-Know Law ("RTKL").¹ On December 7, 2020, PIAA responded to the request and informed Requester, *inter alia*, that:

PIAA is not a Commonwealth authority or entity. It is a nonprofit membership corporation that receives no tax dollars. For this reason, it is not subject to the Pennsylvania Right To Know Law. Please be on notice that it is the intention of PIAA to litigate this issue in response to this request.

As more fully discussed below, PIAA also addressed each of the specific requests.

On December 10, 2020, Requester appealed PIAA's response to the Pennsylvania Office of Open Records ("OOR"). On December 18, 2020, PIAA filed a Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief ("Petition") with the Commonwealth Court of Pennsylvania in the court's original jurisdiction. The Petition, docketed at Number 661 MD 2020 specifically challenges the

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

validity and constitutionality of PIAA's inclusion in the RTKL as a "State-affiliated entity," defined by Section 102 of the RTKL, 65 P.S. § 67.102, since PIAA is neither a Commonwealth authority nor Commonwealth entity.

The Petition further asserts that the inclusion of PIAA in the RTKL under the definition of State-affiliated entity constituted special legislation and is a violation of PIAA's equal protection rights under the United States and Pennsylvania Constitutions as it singles out PIAA for special treatment different from that applicable to all other corporations in Pennsylvania that were not created by the General Assembly, which are not funded by Commonwealth revenues and which are not administered by Commonwealth-appointed officials. As such, PIAA requested an order declaring that PIAA is not a "State-affiliated entity" under the RTKL and that the RTKL is unconstitutional.

The OOR has directed the parties to file submissions to the OOR on this appeal on or before December 30, 2020. PIAA submits the following response to the appeal.

I. BACKGROUND

A. PIAA.

PIAA is a Pennsylvania nonprofit corporation and a voluntary membership organization comprised of public and private schools that choose to join the organization. See Affidavit of PIAA Executive Director Dr. Robert A. Lombardi, submitted herewith as Exhibit 1 ("Lombardi Affid."), ¶ 5. PIAA's membership consists of approximately 1,435 public and private high schools and junior high/middle schools that have applied for membership and been accepted. *Id.*, ¶ 7. PIAA is not, and has never been, a Commonwealth agency, authority or entity. *Id.*, ¶ 8. It receives no state tax

money or state revenues of any kind nor was it created by the General Assembly or granted any governmental powers or authority. *Id.*, ¶ 9. No member of the PIAA Board of Directors is appointed by the General Assembly or the Governor's office. *Id.*, ¶ 10. PIAA is a nonprofit corporation analogous to the thousands of private corporations registered with the Corporations Bureau of the Department of State and the dozens of other local, state and national entities which public and private schools, in their discretion, choose to join and which receive no statutory or other Commonwealth funding. *Id.*, ¶ 11.

PIAA consists of twelve geographic districts, each of which is administered by a volunteer district committee elected by member schools located in that district. *Id.*, ¶ 12. Each district committee is responsible for athletic competitions between member schools within its boundaries. *Id.*, ¶ 13. Each district pays the officials/referees and other game personnel for district games. *Id.*, ¶ 14. The PIAA headquarters also organizes and pays for an inter-district championship tournament in each sport (PIAA sponsors over 22 sports, most with separate boys' and girls' tournaments). *Id.*, ¶¶ 15-16. PIAA similarly pays for all officials and game personnel for each competition. *Id.*, ¶ 17. In any given year, there are many thousands of checks issued and hundreds of pages of check registers. *Id.*, ¶ 18. Because each district has separate administrative structures, treasuries, and financial records, obtaining extensive records from each is time-consuming and burdensome. *Id.*, ¶ 19.

B. SIMON CAMPBELL

Requester Simon Campbell has been described by the Third Circuit Court of Appeals as "an active and persistent user of the Pennsylvania Right to Know Law...."

Campbell v. Pennsylvania School Boards Ass'n, 972 F.3d 213, 2020 U.S. App. LEXIS 27338, 2020 WL 5049051 (3d Cir. Aug. 27, 2020). In recent years, he has turned his attention to private nonprofit corporations, such as the Pennsylvania School Boards Association ("PSBA"). The *Campbell* case granted summary judgment for the PSBA in a suit brought by Campbell challenging the PSBA's state court tort suit against him "to 'stop' PFUR [a Campbell-created entity] from harassing districts with ... unreasonable request[s] [and] to stop defaming members of the organization." *Id.*, 972 F.3d at 217, 2020 U.S. App. LEXIS *6.² Here, as is more extensively discussed below, Campbell's request seeks what amount to tens of thousands of individualized records of PIAA.

II. ARGUMENT

A. THE REQUEST IS IMPROPER AS PIAA IS NOT SUBJECT TO THE RIGHT TO KNOW LAW.

A fundamental issue to be addressed in this appeal is whether PIAA is even subject to the RTKL. In the past, PIAA has voluntarily complied with requests for documents under the RTKL but, in matters before the OOR, has consistently reserved its objection to inclusion within the statute. *Lombardi Affid.*, ¶ 20. To date, no OOR decision relating to PIAA has been addressed by any court which, unlike the OOR, has the power to declare statutes unconstitutional. *Id.*, ¶ 21.

The RTKL is a law of limited scope applicable to governmental entities. As noted by the Pennsylvania Supreme Court, the RTKL is intended to provide access by people to "information concerning the activities of *their government*." *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012) (emphasis added). It is further designed

² PSBA, like PIAA, is a nonprofit membership organization. Its membership consists of public school boards. However, unlike PIAA, no provision of the RTKL specifies its inclusion under that law.

"to promote access to official government information... [to] scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. 2010) (emphasis added), *aff'd*, 75 A.3d 453 (Pa. 2013). There is no suggestion that the RTKL was intended to compel disclosure of private corporations that were not created by the Commonwealth, do not receive Commonwealth funding, and are not administered by Commonwealth-appointed officials.

The threshold inquiry here is whether PIAA is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Pursuant to Section 301(a) of the RTKL, "Commonwealth agencies" are subject to the RTKL. Section 102 of the RTKL defines a "Commonwealth agency" as follows:

- (1) Any office, department, authority, board, multistate agency or commission of the executive branch; and independent agency; and a State-affiliated entity. The term includes:
 - (i) The Governor's Office.
 - (ii) The Office of Attorney General, the Department of the Auditor General and the Treasury Department.
 - (iii) An organization established by the Constitution of Pennsylvania, a statute or an executive order which performs or is intended to perform an essential governmental function.

PIAA is not part of the Governor's Office, the Office of the Attorney General, the Department of the Auditor General or the Treasury Department. It is also not an organization established by the Constitution of Pennsylvania, a statute or executive order. It is also not an office, department, authority, board, multistate agency or commission of the executive branch. *Lombardi Affid.*, ¶ 22.

PIAA is also not, as defined by the courts and the OOR, an independent agency. See *Goppelt v. Pennsylvania Automobile Theft Prevention Auth.*, No. AP 2016-0018 (Feb. 3, 2016), at 9 (holding that the ATPA was not an independent agency because it does not provide an essential governmental function since it “does not provide services mandated by the Pennsylvania Constitution or required for the continued existence of the Commonwealth and is not statutorily-defined as providing essential services”); *Scott v. Delaware Valley Regional Planning Comm’n*, 56 A.3d 40, 45-57 (Pa. Commw. 2012); *S.A.V.E. v. Delaware Valley Regional Planning Comm’n*, 819 A.2d 1235, 1238 (Pa. Commw. 2003). Here, while high school sports are no doubt important to many, PIAA does not provide services mandated by the Pennsylvania Constitution or required for the continued existence of the Commonwealth and is not statutorily-defined as providing essential services. It is not an “independent agency.”

The only remaining provision under which PIAA could be included under the RTKL is that including a “State-affiliated entity.” Section 102 of the RTKL defines a “State-affiliated entity” as follows:

“State-affiliated entity.” A Commonwealth authority or Commonwealth entity. The term includes the Pennsylvania Higher Education Assistance Agency and any entity established thereby, the Pennsylvania Gaming Control Board, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, the Pennsylvania Housing Finance Agency, the Pennsylvania Municipal Retirement Board, the State System of Higher Education, a community college, the Pennsylvania Turnpike Commission, the Pennsylvania Public Utility Commission, the Pennsylvania Infrastructure Investment Authority, the State Public School Building Authority, the Pennsylvania Interscholastic Athletic Association and the Pennsylvania Educational Facilities Authority. The term does not include a State-related institution.

In *Goppelt*, the OOR assessed whether the ATPA was a State-affiliated entity, concluding that it was because it “was created by statute as ‘a body corporate and

politic.' 40 P.S. § 326.4(a)." *Id.*, at 5. Further, the ATPA was vested by the Commonwealth with express powers and oversaw a fund that was generated under state law. The OOR concluded that the ATPA was a "Commonwealth authority" because it was (1) "created by statute;" (2) "funded through statutorily-mandated assessments on insurance companies;" (3) "composed, with the exception of the Attorney General, entirely of individuals appointed by the Governor;" (4) exercising Commonwealth-wide powers and duties;" and (5) "annually reporting on its activities to the Governor and the General Assembly."

By contrast, PIAA meets none of the criteria discussed in *Goppelt*. PIAA was not created by any statute. Indeed, PIAA is the only entity listed under the RTKL definition of State-affiliated entity that was not created by enabling legislation from the General Assembly. Instead, it was created by a group of high school principals in 1913 as an unincorporated voluntary membership association and was later incorporated by several individuals in 1978. Lombardi Affid., ¶ 6. Also, unlike the ATPA, it has not been vested by the Commonwealth with express powers and does not oversee a fund created by state law. *Id.*, ¶¶ 23-24.

Moreover, on the critical issue of a financial relationship between PIAA and the Commonwealth (the Commonwealth Court has made clear that "the financial relationship between the Commonwealth and the agency in question is a primary factor in determining whether the agency is a Commonwealth agency." *S.A.V.E.*, 819 A.2d at 1238), PIAA receives no state tax money nor any other funding of any kind from the Commonwealth. *Id.*, ¶ 24.

As for the exercise of Commonwealth-wide governmental powers, PIAA has no such power. *Id.*, ¶ 23. Its authority over its member schools is contractual only. See *Rottmann v. Pennsylvania Interscholastic Athletic Association, Inc.*, 349 F.Supp.2d 922 (W.D. Pa. 2004) ("The PIAA exercises no sovereign power over North Catholic or plaintiff...."). Finally, unlike the ATPA or any of the other entities listed in the definition of State-affiliated entity, PIAA's Board does not consist of any members appointed by the Governor or the General Assembly.³ Lombardi Affid., ¶ 10.

But for the express inclusion of PIAA as an example of an entity included within the definition, there would be no question that PIAA is not a State-affiliated entity as it does not come remotely close to meeting the definition. Indeed, that same definition is used in other statutes and no one has ever applied it to PIAA. For example, Section 103 of the Pennsylvania Procurement Code, 62 Pa. C.S. § 103, defines the term "State-affiliated entity" identically as in the RTKL as "a Commonwealth authority or a Commonwealth entity." As with the RTKL, it also expressly includes examples, including many of those identified under the RTKL definition, but does not include PIAA.⁴ Under that statute, if PIAA is indeed a State-affiliated entity (using the identical

³ PIAA's member schools have chosen to permit the Department of Education to appoint one member to PIAA's 32-member Board of Directors. That authorization, found in Article VI, Section 2L, of the PIAA Constitution, was adopted by the member schools and is not required by statute. It can be changed at any time by PIAA.

⁴ The definition therein (62 Pa. C.S. § 301) is as follows:

"State-affiliated entity." — A Commonwealth authority or a Commonwealth entity. The term includes the Pennsylvania Turnpike Commission, the Pennsylvania Housing Finance Agency, the Pennsylvania Municipal Retirement System, the Pennsylvania Infrastructure Investment Authority, the State Public School Building Authority, the Pennsylvania Higher Educational Facilities Authority and the State System of Higher Education.

definition), then all buildings owned by PIAA are considered "State-owned buildings" and PIAA would be subject to the state procurement code.⁵ No one has ever taken the position that such is the case.

The express reference to PIAA as an example under the RTKL's definition of State-affiliated entity notwithstanding, PIAA does not meet the definition of the term and inclusion of it, as a private corporation that was not created by the Commonwealth, not given any Commonwealth funding and not administered by Commonwealth-appointed officials, is itself wholly inconsistent with the express purpose of the RTKL, which is to apply to governmental entities, not private corporations. As PIAA does not meet the definition of State-affiliated entity, nor is it included within the scope of the RTKL based on any other provision, the RTKL is not applicable to PIAA and the OOR has no jurisdiction over requests for records made to PIAA.⁶ Requester's appeal should be denied in its entirety.

The term does not include any court or other officer or agency of the unified judicial system, the General Assembly and its officers and agencies, any State-related institution, political subdivision or any local, regional or metropolitan transportation authority.

⁵ That term is defined as a "building owned by ... a State-affiliated entity...." P.S. § 401.1.

⁶ In his response to the request for a stay, Requester asserts that PIAA is barred from challenging its inclusion in the RTKL by the doctrine of collateral estoppel and laches. Neither is applicable. The test for whether collateral estoppel applies under Pennsylvania law is as follows:

Collateral estoppel applies if (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privity to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding[;] and

B. APPLICATION OF THE RTKL TO PIAA UNDER THE DEFINITION OF STATE-AFFILIATED ENTITY CONSTITUTES UNCONSTITUTIONAL SPECIAL LEGISLATION.

PIAA recognizes that the OOR does not have the authority to grant declaratory and/or equitable relief on a challenge to the constitutionality of a statute. *See Pa. Indep. Oil & Gas Ass'n v. Dep't of Env'tl. Prot.*, 135 A.3d 1118, 1129 (Pa. Commw. 2015). Consequently, a separate action has been filed to address the constitutionality of inclusion of PIAA within the RTKL. Nevertheless, the issue is further addressed herein so as to raise and preserve it for appeal in this matter.

Article III, Section 32, of the Constitution of the Commonwealth of Pennsylvania provides in pertinent part that "[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law[.]" PA. CONST., Article III, § 32. The Constitution's proscription on special legislation mandates that like

(5) the determination in the prior proceeding was essential to the judgment.

Pittsburgh v. Zoning Bd. of Adjustment, 559 A.2d 896, 901 (Pa. 1989). Neither the OOR nor any court has ever addressed the issue of whether PIAA meets the definition of a state-affiliated entity nor has the constitutionality of the RTKL's inclusion of PIAA in the definition been addressed or resolved by the OOR or any court. There has certainly been no judgment entered by any court on that issue.

As for laches, that doctrine only applies where a party makes an equitable claim and its delay in so doing causes prejudice to the other party. *Nigro v. City of Philadelphia*, 174 A.3d 693, 699 (Pa. Commw. 2017). "The party alleging the delay must demonstrate prejudice." *Lipschutz v. Lipschutz*, 391 Pa. Super. 537, 546, 571 A.2d 1046, 1051 (1990). "Delay alone, no matter how long, does not itself establish laches." *Jackman v. Pelusi*, 379 Pa. Super. 361, 369, 550 A.2d 199, 203 (1988). The prejudice must be such that the delay caused a change in position of the party asserting the doctrine and would cause an injustice to that party to permit assertion of the claim. *Ketsirithawinwong v. Wells*, 2020 Pa. Super. Unpub. LEXIS 1399 (Apr. 24, 2020). Here, there has been no prejudice to Requester from the lack of determination of this issue.

persons in like circumstances must be treated similarly by the Commonwealth and that specific entities may not be singled out or targeted. To survive challenge, classifications must be genuine and not illusory. See *Warren v. Ridge*, 2000 Pa. Commw. LEXIS 606, 762 A.2d 1126 (2000) (holding that the creation of an effectively closed class consisting of a single school district "creates a class of one that is merely illusory, and, therefore, does not meet the threshold determination of a 'genuine class.'").

In *Pittsburgh v. Blue Cross of Western Pa.*, 4 Pa. Commw. 262, 267, 286 A.2d 475, 477-478 (1971), *rev'd on other grounds sub nom Pittsburgh v. Insurance Dep't of Pennsylvania*, 448 Pa. 466, 294 A.2d 892 (1972), the court noted that:

Indeed, we might test this by considering whether or not the Legislature itself could by legislative enactment pass legislation specifically referring to Blue Cross of Western Pennsylvania and stating in the legislation that a specific corporation was entitled to charge a specific rate to subscribers. There can be no question that such legislation would be special legislation which is prohibited by the Constitution.

See also *Harrisburg School Dist. v. Hickok*, 563 Pa. 391, 761 A.2d 1132 (2000) (affirming order enjoining enforcement of legislative enactment targeting Harrisburg School District for special treatment with no rational basis for the special treatment); *West Mifflin School Dist. v. Zahorchak*, 607 Pa. 153, 163, 4 A.3d 1042, 1048 (2010) ("legislation creating a class of one member that is closed or substantially closed to future membership is *per se* unconstitutional."); *Pa. Tpk. Comm'n v Commonwealth*, 587 Pa. 347, 899 A.2d 1085, 1098 (2006) (holding that "a statute may be deemed *per se* unconstitutional if, under the classification, the class consists of one member and is closed or substantially closed to future membership").

Here, while the general definition of State-affiliated entity meets constitutional scrutiny as it is capable of being open to future membership, the express inclusion of

PIAA, especially when it does not meet the definition of the class under which it is listed, is a different story. Because PIAA is the only entity listed under that definition that was not created by legislative enabling act, is not funded by Commonwealth revenues, and is not subject to having its board appointed, at least in part, by the Governor and/or General Assembly, it is in a classification of one and there is essentially no possibility of that class being expanded.

PIAA has been singled out in a manner not applicable to any analogous entity. PIAA member schools are, for example, free to join other organizations which are organized, funded and administered similarly to PIAA. Lombardi Affid., ¶¶ 11, 25. Yet, none of those organizations is listed as a State-affiliated entity and none would qualify as they also do not meet the definition. Among other organizations which regulate non-PIAA interscholastic athletic competition in Pennsylvania are Rugby PA, the Inter-Academic Association of Philadelphia and Vicinity (Inter-Act League), Central Pennsylvania Interscholastic Hockey League (ice hockey), the Mid-Atlantic Prep League (MAPL), Pennsylvania Independent Schools Athletic Association (PISAA), the Interstate Preparatory League, the Pennsylvania Interscholastic Cycling League, and the Pennsylvania Interscholastic Esports Association. *Id.*, ¶ 26. Non-athletic organizations joined by schools include ones regulating interscholastic academic competitions, such as the Pennsylvania High School Speech League, local chapters of the National Forensics League, the Pennsylvania Bar Association (for the Statewide Mock Trial Competition), the Pennsylvania Math League, and the Pennsylvania Interscholastic Marching Band Association. *Id.*, ¶ 27. None of the above interscholastic competition

organizations are identified in the RTKL as State-affiliated entities although they do not differ from PIAA in their relationship to the Commonwealth.

Beyond the interscholastic competition context, there are also multiple incorporated and unincorporated associations in the Commonwealth which provide services to and for schools and school districts yet are not identified as State-affiliated entities. The Pennsylvania School Board Association, the Pennsylvania State Athletic Directors Association, the Pennsylvania Association of School Administrators, the Pennsylvania Association of Secondary School Principals, and the Pennsylvania Coaches Association, are but a few such entities. Lombardi Affid., ¶ 28. None meet the definition of a State-affiliated entity and are not listed under that definition. Yet, all of them are analogous to PIAA in that they were not created by the General Assembly and are not funded by the Commonwealth. In short, no other interscholastic athletic or academic organization in Pennsylvania is identified in the RTKL as a State-affiliated entity.

Finally, the inclusion of PIAA within the definition is not rationally related to any legitimate purpose as PIAA is not affiliated with the Commonwealth and because inclusion of a private corporation within the scope of the RTKL is directly contrary to the express purposes of that enactment. Indeed, by including PIAA within the scope of the RTKL through the definition of State-affiliated entity, the Commonwealth has created a class of one and imposed duties and obligations on PIAA that do not apply to any other interscholastic athletic or academic association nor to any other corporation not expressly created by the General Assembly, funded by the Commonwealth and administered by Commonwealth-appointed officials. This definition singles out PIAA

and denies it privileges enjoyed by every other interscholastic athletic association and every other corporation not expressly created by, funded by, or managed/operated by, the Commonwealth.

This case is analogous to that considered by the Louisiana Supreme Court in *Louisiana High School Athletics Ass'n. v. State of Louisiana*, 107 So. 3d 583 (La. 2013) ("*LHSAA*"). There, the court considered state legislation that, like here, singled out the state interscholastic athletic association. Among the actions challenged by the LHSAA was legislation requiring the LHSAA to provide its annual audits to the state and to audit the LHSAA's books, obligations not imposed on other corporations in the state. *Id.*, at 590-591. As with Pennsylvania's Constitution, the Louisiana one bars adoption of special legislation. In discussing what constitutes special legislation, the court noted that

The ultimate distinction between general laws and local or special laws is that the former affect the community as a whole, whether throughout the State or one of its subdivisions; and the latter affect private persons, private property, private or local interests.

107 So. 3d at 599. The court went on to point out that "a law is special if it "affects only a certain number of persons within a class and not all persons possessing the characteristics of the class." *Id.*, at 601. Addressing the legislation at issue, it became apparent that:

these statutes do not "operate equally and uniformly upon all persons brought within the relations and circumstances for which they provide" because they do not apply uniformly to all athletic associations or student-athletes in Louisiana. *Arshad*, 11-1579 at 6, 95 So.3d at 482. The statutes do not apply to other athletic associations operating in Louisiana, such as the MAIS, the LHSRA, or the LCSAA. While these other organizations are smaller than the LHSAA, they perform the same function of regulating interscholastic athletic competitions involving Louisiana high schools. By making these statutes applicable only to the LHSAA, the

Legislature has effectively denied the LHSAA, a Louisiana corporation, the privilege of creating its own internal rules and regulations while preserving the rights of other athletic associations to do so.

Id., at 601. Because application of Louisiana's open meetings law to the LHSAA was also at issue, and that issue was controlled by whether the LHSAA is a quasi-public agency or body, the court held that:

Applying the *Smith* factors to this case, it is clear the LHSAA is a private entity. The LHSAA was not created by the Legislature, but by a group of high school principals who wanted to better regulate and develop the high school interscholastic athletic program in Louisiana. The association was composed of Louisiana high schools who applied and were approved for membership, thereby agreeing to be bound by the rules and regulations promulgated by the LHSAA. The LHSAA's powers derive exclusively from the constitution and internal rules approved by its initial member schools.

Id., at 602. The court concluded that "the LHSAA cannot be considered a 'quasi public agency or body.'" *Id.*, at 607.⁷

As in *LSHAA*, the Commonwealth's inclusion of PIAA in the definition of "State-affiliated entity" is special legislation creating a class of one member which cannot change because PIAA is the only entity expressly included within that definition that does not meet the definition but is nevertheless covered by it. The specific inclusion of

⁷ The LHSAA is very analogous to PIAA in both its history and function. As recited by the court in *LHSAA*:

On September 28, 1988, the LHSAA was formed as a Louisiana nonprofit corporation. Prior to its 1988 incorporation, the LHSAA was an unincorporated association, operating under the same name since 1920. The LHSAA was organized by a group of principals to promote and regulate interscholastic athletic competition. The LHSAA's membership consists of high schools within Louisiana, which apply and are approved for membership in accordance with its articles of incorporation, constitution, and bylaws. The member schools of the LHSAA include private and public schools, and the private schools include religious and nonreligious schools. Each school that joins the LHSAA does so voluntarily and is not compelled to join by any state law.

PIAA in this definition is an unconstitutional special law because no other private corporations not expressly created by the General Assembly, funded by the Commonwealth and administered by Commonwealth-appointed officials, can be State-affiliated entities.

C. APPLICATION OF THE RIGHT TO KNOW LAW TO PIAA BUT NOT TO ANY OTHER PENNSYLVANIA CORPORATION NOT CREATED BY ACT OF THE GENERAL ASSEMBLY, FUNDED BY THE COMMONWEALTH OR MANAGED/ADMINISTERED BY COMMONWEALTH-APPOINTED OFFICIALS VIOLATES PIAA'S EQUAL PROTECTION RIGHTS UNDER THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS

As with the prior argument, PIAA recognizes that the OOR does not have the authority to determine the constitutionality of the RTKL's inclusion of PIAA. *See Pa. Indep. Oil & Gas Ass'n v. Dep't of Env'tl. Prot.*, 135 A.3d 1118, 1129 (Pa. Cmwlth. 2015). This issue is presented herein to preserve it for appeal.

Both the 14th Amendment to the Constitution of the United States and Article I, Sections I and 26, of the Constitution of the Commonwealth of Pennsylvania entitle PIAA to equal protection of the law. Claims of violation of the equal protection provisions of the Pennsylvania Constitution are analyzed under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment. *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (1991) (holding that the "equal protection provisions of the Pennsylvania Constitution are analyzed by this Court under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment...."). The equal protection clause "assures that all similarly situated persons are treated alike." *Small v. Horn*, 554 Pa. 600, 722 A.2d 664, 672 (1998). Under that standard, an equal protection violation occurs when a party has been

intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.

An equal protection claim can be brought as a class of one: *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."). Under this approach, the act of the state is unconstitutional if it is demonstrated that (1) the state treated the claimant differently than others similarly situated; (2) the state did so intentionally; and (3) any differential treatment was without rational basis. *Cornell Narberth, LLC v. Borough of Narberth*, 2017 Pa. Commw. LEXIS 488, 167 A.3d 228 (2017); *Hill v. Borough of Kutztown*, 455 F.3d 225 (3d Cir. 2006).

In this case, the definition of a State-affiliated entity clearly treats PIAA different than any other nonprofit corporation not created by the Commonwealth, not funded by the Commonwealth and not administered by Commonwealth appointees by subjecting PIAA to obligations and duties not shared by similarly situated entities. Also, the discriminatory treatment was intentional as PIAA is specifically named in the definition, one in which every other identified entity meets the definition set forth since they are all created by the General Assembly, funded through such legislation and administered by Commonwealth-appointed officials.

Third, the differential treatment afforded PIAA is without any rational basis. PIAA is a private membership corporation registered to do business with the Department of State Corporations Bureau. There are thousands of such private membership

corporations operating in the Commonwealth of Pennsylvania. The RTKL was intended to apply to the government and Commonwealth does not otherwise require private membership corporations to comply with the terms of the RTKL. PIAA is the only private membership corporation included within the scope of the RTKL. Moreover, while PIAA is not the only athletic association of high schools operating in the Commonwealth of Pennsylvania, it is the only such athletic association of high schools in Pennsylvania that is included within the scope of the RTKL.

The RTKL's inclusion of PIAA through Section 102's definition of State-affiliated entities violates PIAA's equal protection rights because it places PIAA into a class of one whereby PIAA is the only interscholastic athletic association and only private membership corporation in Pennsylvania made subject to the RTKL through this provision. Section 102 of the RTKL also violates PIAA's equal protection rights because the Commonwealth treats PIAA differently than similarly situated corporations and interscholastic athletic associations. In particular, the RTKL specifically and irrationally identifies and singles out PIAA as it is the only private membership corporation and only interscholastic athletic association that is named therein.

PIAA is the only entity identified in Section 102's definition of State-affiliated entities that was not created by enabling legislation of the General Assembly. PIAA is the only entity identified in Section 102's definition of State-affiliated entities that is not granted governmental powers and/or authority by the General Assembly. The RTKL's inclusion of PIAA through Section 102's definition of State-affiliated entities violates PIAA's equal protection rights because it places PIAA into a class of one whereby PIAA

is the only entity included therein not created by enabling legislation nor having state-granted powers and funding made subject to the RTKL through this provision.

The *LHSAA* case is again instructive. There, the court determined that state legislation requiring the LHSAA to disclose its financial audits to the state was a violation of the LHSAA's equal protection rights. The court discussed the issue as follows:

We find the LHSAA has shown the statute does not further a legitimate state interest. Appellants contend the statute furthers the important state interest of ensuring state law is followed and funds are properly used. The problem with this argument, as the LHSAA points out, is that the State has no real, legitimate interest in looking at and publishing the LHSAA's financial information because it has no power to control the LHSAA's revenue collection or spending. The LHSAA has the sole power to raise money as it will and spend it as its governing authority, its Executive Committee, deems proper. Although the statute arguably concerns a legitimate state interest regarding how the LHSAA spends its revenue, since a portion of it comes from public high schools, we find this statute does not further that interest. If the LLA discovers discrepancies in the LHSAA's audit, it has no authority to regulate the revenue collection or spending of the LHSAA, a private, nonprofit corporation.

107 So. 3d at 608.

Here, similarly, the Commonwealth has not asserted any interest in requiring private nonprofit corporations to disclose their records to any member of the public who asks for them. The RTKL is limited to governmental entities and PIAA is not one. Moreover, unlike the issue in *LHSAA*, which related to whether that entity was even receiving funds from any governmental bodies, Section 102's definition of State-affiliated entity is limited to Commonwealth authorities and Commonwealth entities. Consequently, the definition specifically singles out PIAA in an arbitrary and capricious manner as it is the only entity identified therein that was not created by the General Assembly, funded by Commonwealth managed and managed by Commonwealth-

appointed officials. The inclusion of PIAA in the RTKL through Section 102's definition of State-affiliated entity does not have a rational basis, does not serve any legitimate state interest, and is an unconstitutional violation of PIAA's equal protection rights.

C. RESPONSES TO SPECIFIC REQUESTS.

As a good faith effort to respond to Requester's request should the RTKL law be determined to be applicable to PIAA, responses were provided to him. Requester states as follows as the ground for his appeal:

See attached request. The agency's final answer reflects a denial or deemed denial of all seven (7) request items. The agency's refusal to provide records responsive to all seven (7) requests is challenged on appeal. The agency acted in bad faith/wanton disregard of law by refusing to conduct a timely good faith search for, and timely release of, responsive records that do, in fact, exist.

As there were actually eight requests, PIAA is uncertain as to what one was deemed responsive. However, as Requester states that he challenges the response to all of the responses, PIAA addresses each as follows (albeit not in the order of requests):

Request 7: The request and response are as follows:

All electronic copies of written communications that already exist in electronic form and that were exchanged between PIAA officials (and between PIAA officials and legal counsel) between the dates of January 1, 2020 and the present that discuss the topic of PIAA being improperly included in the RTKL.

Response: There are no documents responsive to this request.

As set forth in the attached affidavit of Dr. Lombardi, PIAA's Executive Director and specified open records officer, a search for the requested records was undertaken and no responsive records were found. Lombardi Affid., ¶¶ 30-33. All communications relating to this request were oral in nature. *Id.*, ¶ 33.

Request 6: The request and response are as follows:

PIAA's most recent Form 990 filing with the IRS that already exist in electronic form.

Response: The IRS 990 Form is available for public view on the IRS site. This may be accessed at www.irs.gov

Section 704 of the RTKL permits an agency to respond to a request by notifying the requester that the requested record is available through publicly accessible electronic means. PIAA notified Requester here that the 990 filing is available for public view on the IRS website. Lombardi Affid., ¶ 34. PIAA's response was correct and appropriate.

Request 8: The request and response are as follows:

Please send me a screenshot image showing the name of the software program in PIAA's possession, custody or control that can perform electronic redactions on PDF files and/or other electronic type files.

Response: PIAA is not aware of any record responsive to this request.

As set forth in the attached affidavit of Dr. Lombardi, a search for the requested records was undertaken and no responsive records were found. Lombardi Affid., ¶ 36. PIAA would need to create the record to produce it. *Id.* PIAA is also not required to create a record that does not otherwise exist.

Request 5: The request and response are as follows:

PIAA's most recent three (3) years of independent audited financial statements that already exist in electronic form.

Response: PIAA has requested these records from its auditors but has not yet received them. They will be produced upon receipt.

As set forth in the response, PIAA has agreed to produce the records. However, as set forth in the Affidavit of Dr. Lombardi, PIAA's copies of these records are in hard copy format only. Lombardi Affid., ¶ 38. As Requester sought electronic records, PIAA

requested them in electronic format from PIAA's auditors. *Id.* It has not yet received them but will provide them to Requester once received. *Id.*

Additionally, requiring production of a specific private corporation's audited financial statements, when other analogous corporations are not so required to produce them, was one of the issues addressed in *LHSAA*. There, the court found that the requirement that the *LHSAA* provide its audited financial statements to the state, when other private corporations were not required to do so, was a violation of the *LHSAA*'s equal protection rights and was unconstitutional. That determination is applicable here as well to the extent that PIAA is required to produce its audited financial statements to anyone asking for them when other nonprofit corporations are not required to also do so.

Request 1: The request and response are as follows:

All legal invoices that already exist in electronic form that were paid by PIAA to any and all attorneys/law firms between the dates of January 1, 2012 and the present.

Response: PIAA has no documents responsive to this request. Law firms paid by PIAA since 2012 are believed to have thousands of pages of invoices but PIAA is not aware of how many of those are in an electronic format. All such records, if they exist, must be redacted prior to productions.

As discussed above, requiring production of a specific private corporation's financial records, when other analogous corporations are not so required to produce them, was one of the issues addressed in *LHSAA*. There, the court found that the requirement that the *LHSAA* provide its audited financial statements to the state, when other private corporations were not required to do so, was a violation of the *LHSAA*'s equal protection rights and was unconstitutional. That determination is applicable here as well to the

extent that PIAA is required to produce its financial records to anyone asking for them when other nonprofit corporations are not required to also do so.

Additionally, as set forth in the Lombardi Affidavit, PIAA does not have any such records in an electronic format. Lombardi Affid., ¶ 40. PIAA receives its legal invoices in paper format. *Id.*, ¶ 41. PIAA has requested electronic copies of the records from its law firms. *Id.*, ¶ 42. To the extent that records do exist in the possession of third parties (PIAA's law firms), there exist thousands of pages of such records which must be individually redacted prior to production. *Id.*, ¶¶ 43-44. It will take weeks to do so since none of those documents are in currently in a redacted format and must be created by PIAA. *Id.*, ¶ 45. PIAA's standard redaction process is to go through each paper invoice that it has and redact it. *Id.*, ¶ 46. PIAA had recently undertaken this very task with the same requested records pursuant to an earlier request by another individual for the same documents. *Id.*, ¶ 47. However, those redacted records were destroyed once the requester informed PIAA that he would not pay for the costs of reproduction. *Id.* That destruction occurred prior to receiving Mr. Campbell's request. *Id.* Consequently, I would need to replicate the process here. *Id.*

There is nothing in the RTKL that requires PIAA to create redacted records on a computer and it may print the existing records to proceed with the redaction process. See *OOR Fee Schedule* ("... an agency may charge (in accordance with the OOR's Official Fee Structure) for any copies it must make in order to securely redact the material before allowing the requester to view the records."); *Fennick v. Pocono Mt. School Dist.*, OOR Dkt. AP 2020-0575 (July 29, 2020), at 10 ("The RTKL permits an agency to charge copying fees for any printing necessary to securely redact records,

even when inspection is sought."). If Requester desires that to occur, PIAA will do so upon receipt of the anticipated reproduction costs of the records.

Requests 2 through 4: The requests and responses are as follows:

The fronts of all electronic cleared check images that already exist in electronic form for all financial accounts owned/operated by PIAA between the dates of June 1, 2019 and the present.

Response: PIAA has no documents that exist which are responsive to this request. The security features of our banking institution do not allow for modification of electronic images to remove confidential information. PIAA also has no current means of obtaining, preserving and producing the requested records in an electronic format.

Electronic copies of all monthly bank (or other financial institution) statements that already exist in electronic form for all financial records owned or operated by PIAA between the dates of December 1, 2013 and the present.

Response: There are no documents that exist which are responsive to this request nor any current means to obtain, preserve and produce electronic files from such institutions in an electronic format.

All posted line item transactions in all bank (or other financial institution) accounts that already exist in electronic form for all financial records owned or operated by PIAA between the dates of June 1, 2019 and the present.

Response: There are no documents that exist which are responsive to this request nor any current means to obtain, preserve and produce electronic files from such institutions in an electronic format.

As discussed above, requiring production of a specific private corporation's financial records, when other analogous corporations are not so required to produce them, was one of the issues addressed in *LHSAA*. There, the court found that the requirement that the *LHSAA* provide its audited financial statements to the state, when other private corporations were not required to do so, was a violation of the *LHSAA*'s equal protection rights and was unconstitutional. That determination is applicable here as well to the

extent that PIAA is required to produce its financial records to anyone asking for them when other nonprofit corporations are not required to also do so.

Additionally, it must be recognized that the requests seek disclosure of banking information which could place PIAA at risk. While the OOR determined in 2013 in *Sharpe v. Chambersburg School Dist.*, No. AP 2013-1628 (Oct. 23, 2013), that a local agency had not demonstrated a reasonable likelihood of danger under Section 708(b)(3) from the release of such information, that decision predated the Pennsylvania Supreme Court decision in *Reese v. Pennsylvanians for Union Reform*, 2017 Pa. LEXIS 3160 *32 (Pa. 2017), holding that the privacy protections afforded under Article I, Section 1, of the Pennsylvania Constitution supersede any obligations to produce records under the RTKL.

Since 2013, the risk of data breaches and hacking of bank accounts have grown exponentially. As noted by the court in *Storm v. Paytime, Inc.*, 90 F.Supp. 3d 359, 360 (M.D. Pa. 2015), "There are only two types of companies left in the United States, according to data security experts: "those that have been hacked and those that don't know they've been hacked. According to a 2014 report conducted by the Ponemon Institute, 43% of companies have experienced a data breach in the past year. Even worse, the absolute size of the breaches is increasing exponentially." The court recognized that this increasing risk leads to justifiable concern over disclosure of the "most personal information, such as their Social Security numbers and bank account information." *Id.*, at 361. That concern and risk is not limited to individuals.

The United States District Court for the Eastern District of Pennsylvania has further recognized that information on a check, including the account number, must be

redacted to protect privacy interests. *Pichler v. UNITE*, 238 F.R.D. 405, 409 (E.D. Pa. 2006). Under the analogous federal Freedom of Information Act, courts have recognized that disclosure of bank account numbers would violate privacy rights since "the information could be used for nefarious purposes." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19 (D.D.C. 2000). PIAA submits that it, as a private corporation receiving no state tax money, is entitled to maintain the confidential nature of its banking records from widespread public disclosure.

Additionally, assembly and redaction of the requested records is not realistically feasible. There are many thousands of individual checks which must be reviewed and redacted. *Lombardi Affid.*, ¶ 51. PIAA consists of twelve separate districts, each using separate banks, almost all using volunteer treasurers working with physical, not electronic records. *Id.*, ¶ 52. As set forth in Dr. Lombardi's affidavit, assembling, redaction and production of the requested records would be extremely difficult. *Id.*, ¶ 53. Even at the headquarters level alone, PIAA pays thousands of workers (officials, referees, ticket takers, security, maintenance staff, health officials, etc.) for each season. *Id.*, ¶ 54. As an example, the printout of just the records for a single season of PIAA's basketball tournament is over 600 pages. *Id.*, ¶ 55. Multiply that by 22 sports and a number of years, and then multiply that by 12 separate districts, and it quickly becomes apparent that tens of thousands of records must be reviewed, potentially redacted, and then produced. *Id.*, ¶ 56. Just on these requests, PIAA estimates that it would take a full-time employee three to four months to properly comply with the request. *Id.*, ¶ 57. It is overbearing and would significantly impact on the operations of the Association. *Id.*, ¶ 58. The appeal seeking these records should be rejected.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

Alan R. Boynton, Jr.

I.D. No. 39850

100 Pine Street

P.O. Box 1166

Harrisburg, PA 17108-1166

(717) 232-8000

Dated: December 30, 2020

*Attorneys for Pennsylvania Interscholastic
Athletic Association, Inc*

IN THE MATTER OF:

**Simon Campbell,
Requester**

 γ_1

**Pennsylvania Interscholastic
Athletic Association, Inc.,
Respondent**

Figure 1

Docket Number: AP 2020-2639

AFFIDAVIT OF DR. ROBERT A. LOMBARDI

I, Robert A. Lombardi, state and affirm, subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities, that the following statements are true and correct.

1. I am an adult individual currently residing in Dauphin County, Pennsylvania.
2. Since 2012, I have been employed by the Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA"), as Executive Director.
3. Prior to being appointed Executive Director, I worked as Assistant Executive Director of PIAA between 1988 and 1993 and Associate Executive Director from 1993 to 2012.
4. In my capacity as Executive Director, I serve as the Open Records Officer for PIAA.
5. PIAA is a Pennsylvania nonprofit corporation and a voluntary membership organization comprised of public and private schools that choose to join PIAA.
6. PIAA was formed as an unincorporated association by a group of high school principals in 1913 and was later incorporated by several individuals in 1978.

7. PIAA's membership currently consists of approximately 1,435 public and private high schools and junior highs/middle schools that apply for, and are accepted for, membership.
8. PIAA is not, and has never been, a Commonwealth agency, authority or entity.
9. PIAA receives no state tax money or state revenues of any kind nor was it created by the General Assembly or granted any governmental powers or authority.
10. No member of the PIAA Board of Directors is appointed by the General Assembly or the Governor's office.
11. PIAA is a nonprofit corporation analogous to the thousands of private corporations registered with the Corporations Bureau of the Department of State and the dozens of other local, state and national entities which public and private schools, in their discretion, choose to join and which receive no statutory or other Commonwealth funding. PIAA member schools are free to be members of any other organizations and most do belong to entities which are organized, funded and administered similarly to PIAA.
12. PIAA consists of twelve geographic districts, each of which is administered by a volunteer district committee elected by member schools located in that district.
13. Each PIAA district committee is responsible for athletic competitions between member schools within its boundaries.
14. Each PIAA district pays the officials/referees and other game personnel for district games.

15. The PIAA headquarters also organizes and pays for an inter-district championship tournament in each sport.

16. PIAA has assumed jurisdiction over 22 sports, most with separate boys' and girls' tournaments.

17. PIAA similarly pays for all officials and game personnel for each competition.

18. In any given year, there are many thousands of checks issued and hundreds of pages of check registers.

19. Because each district has separate administrative structures, treasuries and financial records, obtaining extensive records from each is time-consuming and burdensome.

20. PIAA has received Right To Know Law (RTKL) requests in the past. Although PIAA does not believe that it is subject to that law, we have voluntarily complied with it. However, in each matter that has been appealed to the Office of Open Records (OOR), we have noted our position. That has been done to preserve our argument should a matter reach a court capable of determining the constitutionality and legality of PIAA's inclusion under the RTKL.

21. To date, no OOR decision relating to PIAA has been addressed by any court.

22. PIAA is not part of the Governor's Office, the Office of the Attorney General, the Department of the Auditor General or the Treasury Department. It is also not an organization established by the Constitution of Pennsylvania, a statute or

executive order. It is also not an office, department, authority, board, multistate agency or commission of the executive branch.

23. PIAA has not been given any powers or authority by the General Assembly other than those applicable under the Nonprofit Corporation Law to every nonprofit corporation in Pennsylvania.

24. PIAA does not oversee any fund created by state law and does not receive any tax money or other funding from the Commonwealth.

25. PIAA member schools are not limited to joining only PIAA, even for interscholastic athletic competition and most of our member schools do belong to other organizations governing sports over which PIAA has no jurisdiction and/or interscholastic academic and other competitions.

26. Among other organizations which regulate non-PIAA interscholastic athletic competition in Pennsylvania are Rugby PA, the Inter-Academic Association of Philadelphia and Vicinity (Inter-Act League), Central Pennsylvania Interscholastic Hockey League (ice hockey), the Mid-Atlantic Prep League (MAPL), Pennsylvania Independent Schools Athletic Association (PISAA), the Interstate Preparatory League, the Pennsylvania Interscholastic Cycling League, and the Pennsylvania Interscholastic Esports Association.

27. Non-athletic organizations joined by schools include ones regulating interscholastic academic competitions, such as the Pennsylvania High School Speech League, local chapters of the National Forensics League, the Pennsylvania Bar Association (for the Statewide Mock Trial Competition), the Pennsylvania Math League, and the Pennsylvania Interscholastic Marching Band Association.

28. PIAA is aware of the existence of multiple incorporated and unincorporated associations in the Commonwealth which provide services to and for schools and school districts yet are not identified as State-affiliated entities. The Pennsylvania School Board Association, the Pennsylvania State Athletic Directors Association, the Pennsylvania Association of School Administrators, the Pennsylvania Association of Secondary School Principals, and the Pennsylvania Coaches Association, are but a few such entities. We are familiar with those entities because each has a representative on the PIAA Board of Directors.

29. Pursuant to Mr. Campbell's request, I attempted to assemble provide to him the requested records.

30. Request 7 of Mr. Campbell sought copies of all written communications between PIAA officials, including legal counsel between January 1, 2020 and the date of his submission "that discuss the topic of PIAA being improperly included in the RTKL.

31. I conducted a thorough search of all PIAA records relating to that topic and found no responsive records.

32. I am also aware that any communications on that subject would be limited to me and legal counsel as no other PIAA official was involved in 2020 in discussion of that issue as of the date of the request.

33. I am also aware that all communications between me and legal counsel on that topic in 2020 were oral. There were no 2020 written communications on that subject prior to submission of the request.

34. Mr. Campbell also requested copies of PIAA's 990 filings with the IRS. As those records already exist in electronic format on the IRS website, I referred him to those documents.

35. Mr. Campbell also requested a screen shot showing the name of the software program in PIAA's possession, custody or control that can perform electronic redactions on PDF files and/or other electronic type files.

36. I conducted a search of the PIAA records and did not locate any existing screen shot responsive to the request. We would need to create such a screen shot.

37. Mr. Campbell also requested electronic copies of PIAA most recent three years of independent audited financial statements.

38. PIAA receives its audited financial statements in hard copy format from its auditors. Upon receipt of the request, I asked our auditors for electronic copies if they exist. Once they are obtained, I will provide them to Mr. Campbell.

39. Mr. Campbell also requested copies of all legal invoices that exist in electronic form that were paid by PIAA between January 1, 2012 and the present.

40. PIAA has no responsive records in an electronic format.

41. PIAA receives its legal invoices in a paper format.

42. I have requested electronic records from law firms which we have used but have not received them.

43. There are several thousand pages of such invoices.

44. Once the records arrive, they will need to be redacted.

45. It will take weeks to do so since none of those documents are in currently in a redacted format and must be created by PIAA.

46. Our standard redaction process involves going through entries on each printed invoice.

47. I had recently undertaken this task with the same requested records pursuant to an earlier request by another individual for the same documents, so I know how long the effort will take. However, those redacted records were destroyed once the requester informed PIAA that he would not pay for the costs of reproduction. That destruction occurred prior to receiving Mr. Campbell's request. Consequently, I would need to replicate the process here.

48. Mr. Campbell's requests 2 through 4, which focus on banking records, are of particular concern to PIAA.

49. PIAA is a nonprofit corporation that receives no state funding.

50. Recent years have shown the risk to corporations from hacks of their banking and other records. Disclosure of banking account information has been determined to considerably increase those risks.

51. Additionally, assembly and redaction of the requested records is not realistically feasible. There are many thousands of individual checks which must be reviewed and redacted.

52. PIAA is divided into twelve administrative districts, each each using separate banks, almost all using volunteer treasurers working with physical, not electronic records.

53. Assembling, redaction and production of the requested records would be extremely difficult.

54. Even at the headquarters level alone, PIAA pays thousands of workers (officials, referees, ticket takers, security, maintenance staff, health officials, etc.) for each season.

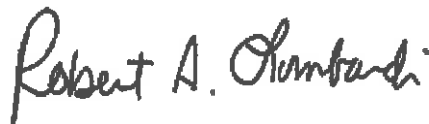
55. As an example, the printout of just the records for a single season of PIAA's basketball tournament is over 600 pages.

56. Multiply that by 22 sports and a number of years, and then multiply that by 12 separate districts, and it quickly becomes apparent that tens of thousands of records must be reviewed, potentially redacted, and then produced.

57. Just on these requests, I estimate that it would take a full-time employee three to four months to properly comply with the request.

58. This would significantly impact on the operations of PIAA.

Dated this 30th day of December 2020.

A handwritten signature in black ink that reads "Robert A. Lombardi". The signature is written in a cursive, flowing style.

Dr. Robert A. Lombardi

OOB Exhibit 11

Zeppos-Brown, Magdalene

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Thursday, December 31, 2020 12:31 AM
To: Zeppos-Brown, Magdalene
Cc: Boynton, Alan; Caley, Danielle
Subject: [External] Re: Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc.
Docket Number: AP 2020-2639

Follow Up Flag: Follow up
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Dear Appeals Officer Zeppos-Brown,

Our courts have held that a responding agency to a RTKL request is permitted to make new denial argument for the first time on appeal. However, our Commonwealth Court has also ruled that the OOR must consider, per due process requirements, a Requester's response to any such new denial argument in accordance with the Section 1101(a) tenet that a Requester "shall address any grounds stated by the agency for delaying or denying the request".

PIAA just made numerous new denial arguments five minutes before the current record closing deadline. I am therefore requesting that you use your Section 1102(b)(3) authority to keep the record open to both parties for a modest additional three (2) business days, in order to afford me the right of addressing this new denial argument. I will of course extend the deadline for OOR Final Determination by an additional two (2) business days to avoid any time pressure on OOR.

Thank you for your consideration.

Sincerely
Simon Campbell

On Wed, Dec 30, 2020 at 11:55 PM Caley, Danielle <DCaley@mcneeslaw.com> wrote:

Good Evening,

Attached please find the Pennsylvania Interscholastic Athletic Association, Inc., ("P.I.A.A.") Submission of Opposition to the Appeal of the Requestor and accompanying Affidavit of Robert A. Lombardi for the above-referenced proceeding.

Should you have any questions regarding this matter, please do not hesitate to contact Attorney Boynton.

Thank you,

Danielle Caley

Secretary to:

Alan R. Boynton, Jr., Esq.

Thomas Markey, Esq.

Rachael R. Hadrick, Esq.

Christian Wolgemuth, Esq.



McNees Wallace & Nurick, LLC

100 Pine Street, | Harrisburg, PA 17108-1166

Tel: 717.237.5333

[Email](#) | [Website](#)

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OOR Exhibit 12

Zeppos-Brown, Magdalene

From: Boynton, Alan <ABoynton@mcneeslaw.com>
Sent: Thursday, December 31, 2020 8:36 AM
To: Zeppos-Brown, Magdalene
Cc: Simon Campbell
Subject: [External] RE: Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc. Docket Number: AP 2020-2639

Follow Up Flag: Follow up
Flag Status: Flagged

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Ms. Zeppos-Brown,

We do not believe that there are arguments in our submission other than those identified in the denial letter, particularly since the opening paragraph of that letter provided that PIAA intended to challenge its inclusion within the scope of the RTKL and since Requester has already acknowledged the substance of that position in his response to the request for a stay. Nevertheless, PIAA has no objection to Mr. Campbell's request that he be allowed additional days to respond to those issues he believes are new and not raised in the denial letter, provided that PIAA is permitted an equivalent amount of time to reply to his submission. Finally, because Requester submitted no timely response of any kind addressing any of the issues identified in the denial letter, argument on those issues in a submission addressing assertedly newly raised issues would be untimely and should not be permitted.

Alan Boynton



Alan R. Boynton, Jr.
McNees Wallace & Nurick LLC
100 Pine Street | Harrisburg, PA 17101
Tel: 717.237.5352 | Fax: 717.260.1665
Cel: 717.418.2354
[LinkedIn](#) | [Website](#)

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From: Simon Campbell <parighttoknow@gmail.com>
Sent: Thursday, December 31, 2020 12:31 AM
To: mazepposbr@pa.gov
Cc: Boynton, Alan <ABoynton@mcneeslaw.com>; Caley, Danielle <DCaley@mcneeslaw.com>
Subject: Re: Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc. Docket Number: AP 2020-2639

[EXTERNAL]

Dear Appeals Officer Zeppos-Brown,

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PIAA just made numerous new denial arguments five minutes before the current record closing deadline. I am therefore requesting that you use your Section 1102(b)(3) authority to keep the record open to both parties for a modest additional three (2) business days, in order to afford me the right of addressing this new denial argument. I will of course extend the deadline for OOR Final Determination by an additional two (2) business days to avoid any time pressure on OOR.

Thank you for your consideration,

Sincerely
Simon Campbell

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Should you have any questions regarding this matter, please do not hesitate to contact Attorney Boynton.

Thank you,

Danielle Caley

Secretary to:

Alan R. Boynton, Jr., Esq.

Thomas Markey, Esq.

Rachael R. Hadrick, Esq.

Christian Wolgemuth, Esq.



McNees Wallace & Nurick, LLC

100 Pine Street, | Harrisburg, PA 17108-1166

Tel: 717.237.5333

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OOOR Exhibit 13

Zeppos-Brown, Magdalene

From: Zeppos-Brown, Magdalene
Sent: Thursday, December 31, 2020 9:06 AM
To: Boynton, Alan
Cc: Simon Campbell
Subject: RE: [External] RE: Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc. Docket Number: AP 2020-2639

Follow Up Flag: Follow up
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Dear Parties:

I have reviewed the below emails. As an initial matter, both parties will be afforded through January 4, 2021 to make additional submissions, and this will confirm that Mr. Campbell has agreed to extend the due date for the Final Determination to be issued, such that it will be issued on or before January 13, 2021.

The OOR is experiencing a high volume of appeals at this time. In order to ensure that the OOR has sufficient time to review the submissions and deliberate and discuss the appeal, and to afford both parties sufficient time to make the requested supplemental submissions, we request an extension to issue the Final Determination, such that the Final Determination in the above matter would be issued on or before January 27, 2021.

In light of the above, I ask Mr. Campbell to kindly advise by 1 pm today, December 31, 2020, if you agree to the extension. If you do agree, then I will submit a schedule that allows more time for additional evidence to be submitted.

Thank you for your cooperation in this process.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
(717) 346-9903 | mazepposbr@pa.gov
<https://openrecords.pa.gov> | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

From: Boynton, Alan <ABoynton@mcneeslaw.com>
Sent: Thursday, December 31, 2020 8:36 AM
To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>
Cc: Simon Campbell <parighttoknow@gmail.com>
Subject: [External] RE: Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc. Docket Number: AP 2020-2639

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Alan Boynton



Alan R. Boynton, Jr.
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100 Pine Street | Harrisburg, PA 17101
Tel: 717.237.5352 | Fax: 717.260.1665
Cel: 717.418.2354
[LinkedIn](#) | [Website](#)

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Sent: Thursday, December 31, 2020 12:31 AM
To: mazepposbr@pa.gov
Cc: Boynton, Alan <ABoynton@mcneeslaw.com>; Caley, Danielle <DCaley@mcneeslaw.com>
Subject: Re: Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc. Docket Number: AP 2020-2639

[EXTERNAL]

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Sincerely
Simon Campbell

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Should you have any questions regarding this matter, please do not hesitate to contact Attorney Boynton.

Thank you,

Danielle Caley

Secretary to:

Alan R. Boynton, Jr., Esq.

Thomas Markey, Esq.

Rachael R. Hadrick, Esq.

Christian Wolgemuth, Esq.



McNees Wallace & Nurick, LLC

100 Pine Street, | Harrisburg, PA 17108-1166

Tel: 717.237.5333

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00R Exhibit 14

Zeppos-Brown, Magdalene

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Thursday, December 31, 2020 9:49 AM
To: Zeppos-Brown, Magdalene
Cc: Boynton, Alan
Subject: [External] Re: Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc.
Docket Number: AP 2020-2639
Attachments: image001.jpg

Follow Up Flag: Follow up
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Dear Ms. Zeppos-Brown,

Under the RTKL the agency has the burden of proof to show why the records are exempt (while the requester has the right/obligation to address the denial grounds). I have never seen or heard of a situation where an agency has a separate record closing deadline to the Requester to address the Requester's argument. No such right in law exists. It would merely give potential for the agency to make even more new denial argument thus generating a never-ending cycle of argument and counter-argument and opening/reopening of the record. In my experience OOR maintains the same record-closing deadline on both parties to ensure neither side has 'the last word'.

PIAA doesn't oppose the modest extension of time that I seek. And I approve extending the deadline for Final Determination by an additional two or three business days in your discretion if you could please establish a new record closing deadline (the same for both parties) of that amount.

Thank you.

Simon Campbell

On Thu, Dec 31, 2020, 8:36 AM Boynton, Alan <ABoynton@mcneeslaw.com> wrote:

Ms. Zeppos-Brown,

We do not believe that there are arguments in our submission other than those identified in the denial letter, particularly since the opening paragraph of that letter provided that PIAA intended to challenge its inclusion within the scope of the RTKL and since Requester has already acknowledged the substance of that position in his response to the request for a stay. Nevertheless, PIAA has no objection to Mr. Campbell's request that he be allowed additional days to respond to those issues he believes are new and not raised in the denial letter, provided that PIAA is permitted an equivalent amount of time to reply to his submission. Finally, because Requester submitted no timely response of any kind addressing any of the issues identified in the denial letter, argument on those issues in a submission addressing assertedly newly raised issues would be untimely and should not be permitted.

Alan Boynton



Alan R. Boynton, Jr.

McNees Wallace & Nurick LLC
100 Pine Street | Harrisburg, PA 17101
Tel: 717.237.5352 | Fax: 717.260.1665

Cel: 717.418.2354

[LinkedIn](#) | [Website](#)

The foregoing message may be protected by the attorney-client privilege. If you believe it has been sent to you in error, do not read it. Please reply to the sender that you have received the message in error, then delete it. Thank you.

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Thursday, December 31, 2020 12:31 AM
To: mazepposbr@pa.gov
Cc: Boynton, Alan <ABoynton@mcneeslaw.com>; Caley, Danielle <DCaley@mcneeslaw.com>
Subject: Re: Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc. Docket Number: AP 2020-2639

[EXTERNAL]

Dear Appeals Officer Zeppos-Brown,

Our courts have held that a responding agency to a RTKL request is permitted to make new denial argument for the first time on appeal. However, our Commonwealth Court has also ruled that the OOR must consider, per due process requirements, a Requester's response to any such new denial argument in accordance with the Section 1101(a) tenet that a Requester "shall address any grounds stated by the agency for delaying or denying the request".

PIAA just made numerous new denial arguments five minutes before the current record closing deadline. I am therefore requesting that you use your Section 1102(b)(3) authority to keep the record open to both parties for a modest additional three (2) business days, in order to afford me the right of addressing this new denial argument. I will of course extend the deadline for OOR Final Determination by an additional two (2) business days to avoid any time pressure on OOR.

Thank you for your consideration.

Sincerely

Simon Campbell

On Wed, Dec 30, 2020 at 11:55 PM Caley, Danielle <DCaley@mcneeslaw.com> wrote:

Good Evening,

Attached please find the Pennsylvania Interscholastic Athletic Association, Inc., ("P.I.A.A.") Submission of Opposition to the Appeal of the Requestor and accompanying Affidavit of Robert A. Lombardi for the above-referenced proceeding.

Should you have any questions' regarding this matter, please do not hesitate to contact Attorney Boynton.

Thank you,

Danielle Caley

Secretary to:

Alan R. Boynton, Jr., Esq.

Thomas Markey, Esq.

Rachael R. Hadrack, Esq.

Christian Wolgemuth, Esq.



McNees Wallace & Nurick, LLC

100 Pine Street, | Harrisburg, PA 17108-1166

Tel: 717.237.5333

[Email](#) | [Website](#)

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OOR Exhibit 15

Zeppos-Brown, Magdalene

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Thursday, December 31, 2020 12:04 PM
To: Zeppos-Brown, Magdalene
Cc: Boynton, Alan
Subject: [External] Re: Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc.
Docket Number: AP 2020-2639

Follow Up Flag: Follow up
Flag Status: Flagged

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Dear Appeals Officer Zeppos-Brown,

I would also like to point out that Attorney Boynton is factually incorrect when stating that I "submitted no timely response of any kind addressing any of the issues identified in the denial letter". I clearly did so, when submitting my initiating appeal to OOR. Had I not done so then OOR would have been required by law to dismiss my initiating appeal as Insufficient under Section 1101(a)(1). That my initiating appeal submission was sufficient but short and sweet reflects the reality that PIAA's denial responses were short and sweet. PIAA is acting in bad faith. PIAA was required by law, Section 903(2), to issue a "citation of supporting legal authority" for each and every denial. This, they did not do. It is not my job as Requester to help PIAA do a better job at making denials by telling PIAA all the things wrong in their final answer. That PIAA made new denial argument ...i.e. additional Section 903(2) "specific reasons" (albeit without supporting legal authority in many instances) ...for the first time on appeal to OOR, is reflected by the far more detailed information that was given to OOR in this appeal than was given to me in the final answer.

The process due in this statutory scheme is notice and an opportunity to present evidence to the fact-finder. *Wishnefsky v. Dep't of Corr.*, 144 A.3d 290 (Pa. Cmwlth. 2016) ("This case illustrates how the addition of a new reason for denying a request after the appeal, can result in prejudice to the requester, where the OOR does not consider the requester's response"). There is no harm in granting my modest request for an additional 2-3 business days before permanently closing the record to both sides. It would give PIAA a third bite at the apple (i.e. final answer, appeal submission 1 and appeal submission 2) to put it's best, & most complete, denial evidence and argument into the record of this OOR appeal, while at the same time affording me my *Wishnefsky* rights.

OOR should resist PIAA's unusual request that it be afforded the right (where none exists in law) to make new denial argument for the first time on appeal only after a Requester further shows how the agency position is lacking. Any new record-closing deadline extension (that PIAA does not oppose) should extend equally to both parties.

Separately, I caution Attorney Boynton that his publicity stunt inside his brief (how I am described in the 'Parties' section) is not appreciated and I will address this matter with the Commonwealth Court* who have ruled multiple times that Requester motivation and identity is Irrelevant as a matter of law. On a minor point of clarification re: my initiating appeal submission to OOR. In that submission I referred to "all seven (7) of my request items". That was an inadvertent factual error. The record shows there were eight (8) request items. Me describing something the wrong way isn't me changing anything. That I used the word "all" inside my initiating appeal submission to OOR appeal was sufficient to put PIAA on notice that I was challenging the denial/deemed denial of all request items.

Thank you for your consideration.

Sincerely,
Simon Campbell.

*I will also address it on my YouTube channel in line with my constitutional right to reputation and my constitutional right to comment on public matters. Attorney Boynton is required to follow Rule 3.4(c) of the Rules for his profession, which prohibit a "lawyer's personal opinion as to the justness of a cause" when appearing before a tribunal. If the statements about me in the Parties section of the PIAA brief were not Mr. Boynton's personal opinion, rather the position of his client, then Mr. Boynton's tactics risk facilitating my ability to seek bad fad sanctions against PIAA for a publicity stunt that had no link to the judiciable controversy.

On Thu, Dec 31, 2020 at 9:48 AM Simon Campbell <parighttoknow@gmail.com> wrote:

Dear Ms. Zeppos-Brown,

Under the RTKL the agency has the burden of proof to show why the records are exempt (while the requester has the right/obligation to address the denial grounds). I have never seen or heard of a situation where an agency has a separate record closing deadline to the Requester to address the Requester's argument. No such right in law exists. It would merely give potential for the agency to make even more new denial argument thus generating a never-ending cycle of argument and counter-argument and opening/reopening of the record. In my experience OOR maintains the same record-closing deadline on both parties to ensure neither side has 'the last word'.

PIAA doesn't oppose the modest extension of time that I seek. And I approve extending the deadline for Final Determination by an additional two or three business days in your discretion if you could please establish a new record closing deadline (the same for both parties) of that amount.

Thank you.

Simon Campbell

On Thu, Dec 31, 2020, 8:36 AM Boynton, Alan <ABoynton@mcneeslaw.com> wrote:

Ms. Zeppos-Brown,

We do not believe that there are arguments in our submission other than those identified in the denial letter, particularly since the opening paragraph of that letter provided that PIAA intended to challenge its inclusion within the scope of the RTKL and since Requester has already acknowledged the substance of that position in his response to the request for a stay. Nevertheless, PIAA has no objection to Mr. Campbell's request that he be allowed additional days to respond to those issues he believes are new and not raised in the denial letter, provided that PIAA is permitted an equivalent amount of time to reply to his submission. Finally, because Requester submitted no timely response of any kind addressing any of the issues identified in the denial letter, argument on those issues in a submission addressing assertedly newly raised issues would be untimely and should not be permitted.

Alan Boynton

OOR Exhibit 16

Zeppos-Brown, Magdalene

From: Zeppos-Brown, Magdalene
Sent: Thursday, December 31, 2020 12:14 PM
To: Simon Campbell
Cc: Boynton, Alan
Subject: RE: [External] Re: Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc. Docket Number: AP 2020-2639

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Parties:

Both parties will have through January 5, 2021 to make submissions, and the Final Determination will be issued on or before January 14, 2021. No additional extensions will be considered. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
(717) 346-9903 | mazepposbr@pa.gov
<https://openrecords.pa.gov> | [@OpenRecordsPA](#)

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Thursday, December 31, 2020 12:04 PM
To: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>
Cc: Boynton, Alan <ABoynton@mcneeslaw.com>
Subject: [External] Re: Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc. Docket Number: AP 2020-2639

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Dear Appeals Officer Zeppos-Brown,

I would also like to point out that Attorney Boynton is factually incorrect when stating that I "submitted no timely response of any kind addressing any of the issues identified in the denial letter". I clearly did so, when submitting my initiating appeal to OOR. Had I not done so then OOR would have been required by law to dismiss my initiating appeal as

OOR Exhibit 17

Zeppos-Brown, Magdalene

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Monday, January 4, 2021 11:09 AM
To: Zeppos-Brown, Magdalene
Cc: Boynton, Alan; jdelone@attorneygeneral.gov; kneary@attorneygeneral.gov; kromano@attorneygeneral.gov; Schwab, Gregory (GC)
Subject: [External] For entry into the record of Campbell v. PIAA OOR Dkt. No. 2020-2639
Attachments: 1-3-21 Campbell Letter to OAG.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

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Re: Campbell v. PIAA, OOR Dkt. No. 2020-2639

Dear Appeals Officer Zeppos-Brown,

On December 11, 2020, OOR issued its docketing instructions to me and PIAA. Included in those docketing instructions was an initial record closing deadline of December 22, 20 (since extended to January 5, 2021) and an initial Final Determination deadline of January 11, 2021 (since extended with my Section 1101(b)(1) approval to January 14, 2021). OOR has made clear to both me and PIAA that the record will not re-open again after tomorrow. I am making it clear that I will not agree to extend the deadline for OOR Final Determination beyond January 14, 2021.

On December 30, 2020, PIAA entered denial argument into the record of this appeal to preserve it. Most of that argument was centered on PIAA's belief that the PA General Assembly violated the Constitution when placing PIAA under the RTKL twelve (12) years ago. As a Requester I have a modest Section 1101(a) duty to "address" PIAA's denial grounds which I have already done in terms of PIAA's constitutional denial basis.

Included in OOR's docketing instructions of December 11, 2020 was the instruction "Agency Must Notify Third Parties" which read:

If records affect a legal or security interest of a third party ...the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.

Such notice must be made by: (1) Providing a copy of all documents included with this letter; and (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer assigned to this case (see 65 P.S. § 67.1101(c)).

The Commonwealth of Pennsylvania is an indispensable party to PIAA's argument that the RTKL is unconstitutional as to the inclusion of PIAA. Yet the Commonwealth has thus far remained silent about asserting its direct interest into this appeal in opposition to PIAA's constitutional theories..

Obviously it is not the Commonwealth's job to express an interest in any RTKL records interest of mine, but it is the Commonwealth's job to defend the constitutionality of a duly enacted statute. Therefore, I am copying Attorneys Delone, Neary and Romano in the AG's office to ask them to make sure the appropriate attorney from the AG's office asserts the Commonwealth's direct interest into this appeal via Section 1101(c)(1) of the RTKL.

I do not want to see a situation where PIAA files a Petition for Review in Commonwealth Court of a potentially adverse decision in this appeal that excludes naming the Commonwealth as a respondent, and then argue that the Commonwealth waived its interest by not participating in this appeal as a third party.

I am a private citizen who is not an attorney. As explained in the attached letter, it is not my job to defend the constitutionality of the RTKL. It is AG Shapiro's job, indeed his duty, to do that. I am aware that this communication, entered into the record of this OOR appeal, would transfer to the Commonwealth Court as part of the Petition for Review process and I want the Commonwealth Court to see that I tried my best to have the OAG perform its duties in the proper dispute vehicle.

PIAA engaged in a flawed legal strategy when naming the OOR as a Defendant in No. 661 MD 2020 and seeking to enjoin OOR from adjudicating this appeal. Such a move was obviously seeking to infringe upon my legal rights to a timely OOR Final Determination per the PA Supreme Court's *Bowling* decision. Unless OOR is actually prevented from issuing a Final Determination in this appeal then I have zero interest in No. 661 MD 2020. It is about to become little more than an abstract debating society between PIAA and the Commonwealth.

What should have happened is that PIAA await for the outcome of the OOR's Final Determination in this appeal, then if PIAA didn't like the outcome it could (by right) file a Petition for Review of the records dispute (naming me as a respondent) and simultaneously name the Commonwealth in an action seeking Declaratory Judgment at that time. In this manner, I would focus on the records dispute while the OAG would focus on addressing PIAA's constitutional theories.

I refuse to do the job of the Attorney General (or Office of General Counsel) in defending the constitutionality of the RTKL. In addition to what I have advocated for OAG and OOR to do in the attached communication, I am asking for two things today.

1. I am asking the copied attorneys from OAG to make sure that the Commonwealth makes a Section 1101(c)(1) statement of interest in this dispute to protect the interests of the Commonwealth (i.e. all duly enacted laws are presumed to be constitutionally sound). If OAG doesn't want to do it then the copied Office of General Counsel should do it.

2. I am asking PIAA by copy to PIAA counsel, Attorney Boynton, to discontinue the PIAA litigation at 661 MD 2020 and instead channel PIAA energies into this dispute where PIAA's voice can still be heard but so can mine. I am further asking PIAA counsel to put forward PIAA's best and most complete denial evidence and argument by tomorrow's record closing deadline. This will be the third "bite at the apple" that PIAA has had to do that. See *Levy v. Senate of Pennsylvania*, 94 A.3d 436, 441 (Pa. Cmwlth. 2014) ("[A]n agency must raise all its challenges before the fact-finder closes the record"). Although there is RTKL precedent that says a Chapter 13 reviewing Court can conduct a *de novo* review of an OOR Final Determination, there is subsequent precedent from the Commonwealth Court that states a Chapter 13 reviewing Court has the discretionary authority defer to the findings of the OOR when the record shows that the agency had ample opportunity to put its fullest, best, and most complete denial argument and evidence into the OOR record. Attorney Boynton, I will oppose *de novo* review if you lose any argument on the records dispute because PIAA has been given three opportunities for you to do the best denial job you can do. You've already preserved PIAA's constitutional arguments. I suggest that you now "focus" on the records dispute, because complaining about me is neither a strategy or a focus.

Sincerely,
Simon Campbell

----- Forwarded message -----

From: Simon Campbell <parighttoknow@gmail.com>

Date: Mon, Jan 4, 2021 at 12:04 AM

Subject: Fwd: PIAA v. Commonwealth of Pennsylvania, No. 661 MD 2020 (Pa. Commw. Ct.)

To: <grschwab@pa.gov>

Corrected typo in the email address. Please encourage the Governor to encourage Mr. Shapiro to do his job in the proper forum. Thank you.

----- Forwarded message -----

From: Simon Campbell <parighttoknow@gmail.com>

Date: Sun, Jan 3, 2021 at 11:59 PM

Subject: PIAA v. Commonwealth of Pennsylvania, No. 661 MD 2020 (Pa. Commw. Ct.)

To: <jdelone@attorneygeneral.gov>, <kneary@attorneygeneral.gov>, <kromano@attorneygeneral.gov>

Cc: Brown, Charles (OOR) <charlebrow@pa.gov>, <grschwab@pal.gov>, Boynton, Alan <ABoynton@mcneeslaw.com>

Kindly find attached re: the subject matter litigation.

Sincerely,
Simon Campbell
Bucks County, PA



Simon Campbell
668 Stony Hill Rd #298
Yardley, PA 19067
Tel: 267-229-3165
parighttoknow@gmail.com

**RE: RIGHT-TO-KNOW LAW “(RTKL)” CIVIL LITIGATION
PENDING IN THE COMMONWEALTH COURT**

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION

v.

**COMMONWEALTH OF PENNSYLVANIA
& OFFICE OF OPEN RECORDS
NO. 661 MD 2020**

January 3, 2021, via e-mail to:

J. Bart DeLone, Esq.
Chief Deputy Attorney General
Pennsylvania Office of Attorney General
Appellate Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
jdalone@attorneygeneral.gov

Keli Marie Neary, Esq.
Executive Deputy Attorney General
PA Attorney Civil Law Division
Pennsylvania Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
kneary@attorneygeneral.gov

Karen Masico Romano, Esq.
Chief Deputy Attorney General
Pennsylvania Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
kromano@attorneygeneral.gov

**PETITIONING OF RTKL REQUESTER SIMON CAMPBELL
(THE “LIVE CONTROVERSY CREATOR” RE: NO. 661 MD 220)**

Dear Pennsylvania Office of Attorney General,

Twelve (12) years after the Pennsylvania General Assembly added PIAA to the RTKL, and with scores of RTKL controversies involving PIAA being adjudicated in that time, PIAA decided that now is the time to sue the Commonwealth to allege that it is unconstitutional to have PIAA be included in the RTKL. It is astonishing.

I generated the live controversy underpinning No. 661 MD 220 because I exercised my constitutionally-protected petitioning right to file a RTKL request of PIAA on November 2, 2020¹. I filed a constitutionally-protected petition appeal at OOR of a denial of that request on December 10, 2020. That appeal, *Campbell v. PIAA*, has been docketed by OOR at 2020-2639. The exercise of my constitutionally-protected rights caused the Commonwealth to be sued by PIAA.

With just one e-mail from me to the OOR Appeals Officer withdrawing my appeal/request I could pull the rug out on all currently positioned legal arguments in No. 661 MD 220. If I did this, PIAA would need to decide if it wants to argue for exceptions to the mootness doctrine. That I hold this kind of power to change events in No. 661 MD 2020 yet I was not named by PIAA as a party in that dispute is curious².

First, a threshold matter. I am not a lawyer. I am representing myself *pro se* in this communication and also in my pending RTKL appeal against PIAA at OOR Dkt 2020-2639. Any attorney is welcome to contact me directly at my address, email, or phone number at any time for any reason. Furthermore, anyone is welcome to use this communication however they see fit. I will be posting a copy of it on the internet, on my YouTube channel, and sharing it with the media.

On December 21, 2020 PIAA filed a Motion to Stay the proceedings at OOR Dkt. No. 2020-2639 until the matter at No. 661 MD 220 was resolved. I objected and PIAA's Motion to Stay was **DENIED** by the OOR Appeals Officer, after I refused to agree to extend the Final Determination deadline³. The Appeals Officer has now set a final record-closing deadline of January 5, 2021 for both parties to put their respective final arguments into the OOR appeal. OOR is scheduled to issue its Final Determination on *Campbell v. PIAA*, Dkt. 2020-2639 on or before January 14, 2021. Should it be adverse to PIAA then PIAA would have thirty (30) days to challenge that OOR Final Determination in Commonwealth Court in the form of a Petition for Review. These procedure and deadlines are specified in the RTKL.

In eleven (11) days there will be nothing left to "enjoin" in terms of Defendant OOR in 661 MD 2020. OOR would have relinquished jurisdiction already. The *Campbell v. PIAA* train

¹ I don't think I've ever filed a RTKL request of PIAA before. At least none that I remember. I decided to do it here after I saw that PIAA was saying and doing some interesting things in RTKL disputes with other Requesters.

² I am not saying I have an interest in intervening in that dispute even though I am clearly indispensable to PIAA's position given that my ability to get the records I seek would be affected. Right now, I view No. 661 MD 220 as a waste of taxpayer money and court time. So long as my records dispute at OOR is proceeding on time I see no need to waste my time or money getting involved in an abstract debating society that No. 661 MD 220 is barely eleven days away from becoming.

³ Only a Requester has standing to agree to extend an OOR Final Determination deadline. Without agreement from me (which PIAA's attorney did not seek), OOR's hands were tied by the 30 day mandate of Section 1101(b)(1) of the RTKL. I did, later, agree a few days extension of time for OOR to issue its Final Determination.

would have left the OOR station having bought a one-way, nonstop, ticket to the next station: the Pennsylvania Commonwealth Court. It is my educated guess that OOR will seek to have itself removed from the case at 661 MD 2020 shortly after January 14, 2021⁴. This could leave the Office of Attorney General alone in a dispute that no longer involves a live controversy at OOR.

I see little to no chance of PIAA winning an emergency restraining Order to stop the OOR from issuing its Final Determination on January 14, 2021. First, is the very obvious legal problem that PIAA created for itself in 661 MD 2020 (i.e. not naming me as a Respondent when I am clearly an indispensable party to PIAA's position of wanting to stop OOR from doing its job in a records dispute with me). Second, PIAA cannot show irreparable harm if OOR Dkt. No. 2020-2639 continues to its conclusion. Third, PIAA already has an adequate remedy at law. If PIAA is confident in its legal position then PIAA can continue denying me access to the records I seek and PIAA has the right to file a Petition for Review in Commonwealth Court of any adverse OOR Final Determination. PIAA's desire to restrain the quasi-judicial authority of OOR is akin to PIAA saying "we don't even want to have to *argue* before OOR⁵". It is akin to PIAA suggesting to the Commonwealth Court that I shouldn't be afforded any due process even though I am an indispensable party to my own records request. I am timely seeking public records, as is my right under the RTKL.

A Requester – *any* Requester – sits in the seat of the public when making Right-to-Know-Law requests for public records. See *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014) ("the status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be accessible)". Public records are "open to the entire public at large." See, e.g., *Coulter v. Pa. Bd. of Prob. & Parole*, 48 A.3d 516, 519 (Pa. Cmwlth. 2012) ("home plans" of parolee requester are not accessible to her under RTKL though she is subject of records; to be accessible under the RTKL, identity of the requester is irrelevant).

I am the Public. PIAA wants the Public ignored.

PIAA, in filing its suit at No. 661 MD 2020, took the position that the public and the public's legal rights were irrelevant. PIAA wants to litigate its position from the strange idea that PA's RTKL must be presumed unconstitutional as opposed to the reality that all laws are presumed constitutional. PIAA wasn't thinking through the Simon Campbell factor. I am not the type of person to think "sure, PIAA, I can wait three years from Sunday to have my records dispute adjudicated in accordance with law while you pursue your speculative theories."

Today I am advocating for both the Office of Attorney General ("OAG") and, by copy, the Office of Open Records ("OOR") to file the necessary paperwork in the Commonwealth Court –

⁴ Although Section 204(c) of the Commonwealth Attorneys Act states that the OAG is required to represent the "Commonwealth and all Commonwealth Agencies" and OOR is technically a Commonwealth Agency, I posit that OOR must represent itself separately. Under Section 204(c) OAG has ability to outsource some of its representation to the Office of General Counsel – an arm of the Governor's office. It would be paradoxical to think that OAG/OGC could force representation onto OOR given that the PA Supreme Court has ruled that OOR operates independently of the Governor's office.

⁵ Where is the harm in arguing? Moreover, the argument deadline expires on January 5, 2021. OOR has told both me and PIAA that it will not take any further argument after this date.

as soon as possible after January 14, 2021 – to bring a swift end to 661 MD 2020 because there will not be any live controversy pending at OOR after January 14, 2021. From January 15, 2021 onwards, OAG and OOR should not waste precious taxpayer resources arguing *in the abstract* about possible RTKL requests involving PIAA that might or might not come to OOR in the future. Also, neither OAG nor OOR should pursue litigation in which the indispensable party Requester is missing⁶. PIAA is already on a destination to Commonwealth Court via the train ticket I created at OOR Dkt. No. 2020-2639. PIAA already has a remedy pertaining to its constitutional theories. This is the only train that PIAA should be on, because it is the only train that includes the voice of the indispensable party Requester.

The litigation at 661 MD 2020 is essentially dead as of January 15, 2021 and the only question, if PIAA don't discontinue that action, is whether the OOR or OAG kills it first. But the end of 661 MD 2020 will likely not stop PIAA from pursuing its constitutional claims via the route I have set up in OOR Dkt. 2020-2639. If any aspect of the OOR Final Determination is adverse to PIAA I expect PIAA will appeal that decision (as would be PIAA's right) to the Commonwealth Court via a Petition to Review. I contend that the correct Respondents on such Petition should be myself and the Commonwealth, because (a) I am indispensable to the records dispute, and b) the Commonwealth is indispensable as to the constitutionality of the RTKL. OOR would be irrelevant to the controversy. OOR has no interest in whether records get released and OOR has no duty to defend the constitutionality of PA's RTKL

Section 204(c) of the Commonwealth Attorneys Act makes clear that the Office of Attorney General must represent the Commonwealth against the constitutional attack that PIAA has launched on the RTKL ("The Attorney General shall represent the Commonwealth and all Commonwealth agencies ...in any action brought ...against the Commonwealth"). Section 204(c) of the Commonwealth Attorneys Act also states "The Attorney General may, upon determining that it is more efficient or otherwise is in the best interest of the Commonwealth, authorize the General Counsel or the counsel for an independent agency to initiate, conduct or defend any particular litigation or category of litigation in his stead." Hence the courtesy copy to the Governor's Office of General Counsel ("OGC"). I am asking that OAG and OGC speak to each other to decide who wants to defend the Commonwealth against PIAA's constitutional attack on the RTKL when my records dispute lands in Commonwealth Court.⁷ I also encourage both OAG and OGC to review Section 1101(c) of RTKL to see if either would like to file a third party direct interest submission before the OOR issues its Final Determination.

I refuse to do the job of the Attorney General or the Governor.

OOR doesn't have jurisdiction to declare a statute to be unconstitutional. Therefore, OOR has to rule against PIAA on that issue in *Campbell v. PIAA*, OOR Dkt. No. 2020-2639. Absent an emergency Court Order in No. 661 MD 2020 that prevents OOR from issuing a Final Determination on or before January 14, 2020; it appears *PIAA v. Campbell* will be at the

⁶ The solution to that problem is not that I join 661 MD 2020 because that litigation affords me no path to obtaining the public records that I seek. Rather, the solution is that PIAA follows the path I created in OOR Dkt. No. 2020-2639. It is a path where both my voice and PIAA's voice can be heard.

⁷ To be clear, I am not asking for any legal representation from OAG or OGC for myself and my records interest, but I am saying that it is not my job to defend the constitutionality of PA's RTKL.

Commonwealth Court in a Petition for Review filed by PIAA sometime around the middle of February. I posit that PIAA would need to name the Commonwealth as a Respondent in addition to me⁸. But what if PIAA doesn't do that? What if PIAA only names Simon Campbell? Would OAG or OGC petition to intervene? I posit that this is exactly what OAG or OGC should do.

I am *pro se* right now. On a Petition for Review that PIAA might file in Commonwealth Court to challenge an adverse OOR Final Determination, I might decide to stay *pro se*. Or I might hire counsel. Or I might send the Commonwealth Court a Notice of Non-Participation (something I have done before because nothing in the RTKL requires Requester participation in a court appeal of an OOR Final Determination). If I do the latter and PIAA only names me not the Commonwealth as Respondents then who is going to defend the Constitutionality of PA's RTKL?

In sum, OAG and OOR need to kill No. 661 MD 2020 as soon as possible after January 14, 2021 because no live controversy will exist at OOR after that date; and because OAG and OOR need to recognize that the indispensable public⁹ is on another docket and the indispensable public has a right to have its voice heard in that other docket. I will not do the job of defending the constitutionality of the RTKL. If I hire counsel to deal with this matter in Commonwealth Court I will instruct my counsel not to do it. Attorney General Shapiro and Governor Wolf need to have their lawyers step up to the plate. Please kill 661 MD 2020 as soon as possible then stand by to return to the case, once OOR Dkt. No. 2020-2639 is in Commonwealth Court with PIAA arguing inside a Petition for Review that the RTKL is unconstitutional.¹⁰

If anyone has any questions please don't hesitate to reach out to me.

Sincerely,



Simon Campbell
Citizen Requester

Cc: Via e-mail to:

Charles Brown, Esq.
Chief Counsel
Pennsylvania Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
charlebrow@pa.gov

⁸ I could charge PIAA with additional bad faith conduct if PIAA did not name the Commonwealth i.e. PIAA's counsel surely knows it is not Simon Campbell's job to defend the constitutionality of the RTKL.

⁹ A requester – any Requester – sits in the seat of the public when making RTKL requests.

¹⁰ Whether PIAA needed to file something supplemental with a Petition for Review is a decision for PIAA's counsel. But if that something supplemental does not relate to the records dispute then I will likely have no interest in it. A courtesy copy is all I would ask for.

Gregory George Schwab, Esq.
Pennsylvania Office of General Counsel
Governor's Office of General Counsel
333 Market St 17th Fl.
Harrisburg, PA 17126-0333
grschwab@pal.gov

Alan Boynton, Esq.¹¹
Counsel for PIAA
McNees Wallace & Nurick LLC.
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
ABoynton@mcneeslaw.com

¹¹ Attorney Boynton, I can only presume that you are not familiar with how I use the First Amendment. The stunt that you/your client attempted to pull inside your Brief to OOR on December 30, 2020, when describing me in the context of PSBA's SLAPP suit (ruled "objectively baseless" in its entirety by the Third Circuit), is going to be publicly profiled on my YouTube channel. If you don't like what I will have to say about your garbage tactics in the public record of a judicable controversy then don't engage in garbage tactics. Who I am and why I want records under the RTKL is irrelevant to the judicable controversy. Were you asserting your Rule 3.4(c) "personal opinion as to the justness of a cause"? Or merely going along with client wishes to pen irrelevant garbage? I pity your poor client; now facing the prospect of having to pay you twice to argue the same things in front of the same Court at the same time on two different dockets. What a waste of judicial resources that your client would even think to do that to the Commonwealth Court. I propose that PIAA discontinue the litigation at No. 661 MD 2020 without delay.

OOOR Exhibit 18

Zeppos-Brown, Magdalene

From: Caley, Danielle <DCaley@mcneeslaw.com>
Sent: Tuesday, January 5, 2021 11:56 PM
To: Zeppos-Brown, Magdalene; parighttoknow@gmail.com
Cc: Boynton, Alan; Chwastyk, Devin
Subject: [External] Simon Campbell v. Pennsylvania Interscholastic Athletic Association, Inc.nc.
Docket Number: AP 2020-2639
Attachments: Respondents Supplemental Submission in Opposition to Appeal (A7863849).pdf
Follow Up Flag: Follow up
Flag Status: Flagged

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Good Evening,

Attached please find the Pennsylvania Interscholastic Athletic Association, Inc., ("P.I.A.A.") Supplemental Submission of Opposition to the Appeal of the Requestor for the above-referenced proceeding.

Should you have any questions regarding this matter, please do not hesitate to contact Attorney Boynton.

Thank you,

Danielle Caley
Secretary to:
Alan R. Boynton, Jr., Esq.
Thomas Markey, Esq.
Rachael R. Hadrack, Esq.
Christian Wolgemuth, Esq.



McNees

McNees Wallace & Nurick, LLC
100 Pine Street, | Harrisburg, PA 17108-1166
Tel: 717.237.5333
[Email](#) | [Website](#)

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PENNSYLVANIA OFFICE OF OPEN RECORDS

IN THE MATTER OF:

Simon Campbell,
Requester

v.

Pennsylvania Interscholastic
Athletic Association, Inc.,
Respondent

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Docket Number: AP 2020-2639

**SUPPLEMENTAL SUBMISSION OF RESPONDENT PENNSYLVANIA
INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC., IN
OPPOSITION TO APPEAL OF REQUESTER SIMON CAMPBELL**

This appeal arises out of a November 2, 2020 request for records submitted by Simon Campbell ("Requester") to Respondent Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA"). The request purported to be submitted under the Pennsylvania Right-To-Know Law ("RTKL").¹

By direction of the Pennsylvania Office of Open Records ("OOR"), on December 30, 2020, PIAA submitted a submission in support of its position. Although having a deadline of December 30 as well, Requester did not submit ANY argument in support of his appeal. The following day, however, he did request the opportunity to leave open the record to permit him to address "new denial arguments" submitted by PIAA. The OOR agreed to keep the record open until January 5, 2021. This submission is intended to address two issues, as discussed below.

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

A. ANY SUBMISSION BY REQUESTER RELATING TO RESPONSES PRESENTED IN PIAA'S LETTER OF DECEMBER 7, 2020 SHOULD BE REJECTED AS UNTIMELY.

The OOR directed the parties to submit their positions on or before December 30, 2020 as to issues raised by Requester in his appeal. PIAA did so; Requester did not. Requester was well aware of the issues raised as to his specific requests since PIAA set forth responses to each of his requests in the PIAA letter of December 7, 2020. Yet, Requester presented no submission in support of his position that PIAA's position on each response was improper. Moreover, it is abundantly clear that Requester had no intention of complying with the OOR deadline or submitting any response on these issues since, as he acknowledges, he did not receive PIAA's submission until close to midnight that day.

The OOR process is not designed as a "submission, response" process where one party has the opportunity to first digest the other party's submission, then respond to it. Giving one party the opportunity to review and respond to arguments while not permitting the other an equal opportunity after receipt of new arguments is fundamentally unfair and inconsistent with the process established by the OOR. While Requester can perhaps credibly argue that new issues were raised in PIAA's submission of December 30 (primarily the constitutional challenges), his failure to address in any way the issues raised in the December 7 letter was inexcusable and his failure to comply with the deadline should not be condoned or waived. Requester knowingly waived his right to submit arguments on these issues and the OOR should consider only his submission to "new" issues raised in PIAA's initial submission.

Section 1102(a)(1) of the RTKL authorizes the OOR to set "a schedule for the requester and the open-records officer to submit documents in support of their position." The hearing officer did so. The Requester failed to comply with this schedule. The Commonwealth Court has recognized that parties may obtain extensions from administrative deadlines set by certain agencies upon good cause shown. See *Eathorne v. State Ethics Comm'n*, 2008 Pa. Commw. LEXIS 532, 960 A.2d 206 (2008) (applying such standard to late filing under the Ethics Act); *Pa. Uninsured Emplr Guar. Fund v. Workers' Comp. Appeal Bd.*, 2014 Pa. Commw. LEXIS 204, *12, 89 A.3d 330 (2014) (recognizing that workers compensation judges can "waive or modify the deadline for good cause shown"). This is consistent with the approach taken by courts. See *Carl v. Noonan*, 2015 Pa. Super. Unpubl. LEXIS 617, *26, 120 A.3d 1061 (Pa. Super. 2015) ("The law requires that the rules for case-management deadlines be strictly followed except where there is good cause for, and an absence of prejudice in, construing them more leniently.").

Here, the only good cause shown relates to purportedly new issues raised by PIAA. PIAA has no objection to the OOR considering a post-deadline submission by Requester on these new topics. On the issues of which he was already aware, though, PIAA does object to the OOR consideration as Requester has not offered any good cause for his delay in submitting such submission.

Even if good cause is shown, prejudice to the opposing party can mandate rejection of the request. See *Carl, supra*. Here, the prejudice comes with Requester being permitted to circumvent the rules to permit him to respond to positions with new facts and arguments and the opposing party not being given the right to respond

accordingly. Here, PIAA does not know what arguments Requester intends to present and cannot address them. For these reasons, the OOR should consider only Requester's submission to the extent that it addresses issues not raised in PIAA's letter of December 7, 2020.

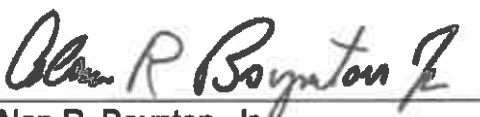
B. REQUESTER'S SUBMISSION RELATING TO CONSTITUTIONAL CHALLENGE TO PIAA'S INCLUSION UNDER THE RTKL MAY BE CONSIDERED BUT IS ULTIMATELY IRRELEVANT TO THE MATTER TO BE CONSIDERED BY THE OOR.

As discussed in PIAA's December 30 submission, PIAA challenges its inclusion within the scope of the RTKL as such inclusion constitutes special legislation and violates PIAA's equal protection rights. As further set forth therein, PIAA does not expect the OOR to address these issues, because administrative agencies like OOR are not tasked with determining the constitutionality of statutes, including the RTKL. *Spencer v. City of Reading Charter Bd.*, 2014 Pa. Comm. LEXIS 403, *11, 97 A.3d 834 (Pa. Commw. 2014) ("Constitutional challenges do not need to be raised at the administrative level, as agencies do not decide constitutional questions."). *See also Borough of Greentree v. Bd. of Prop. Assessments, Appeals & Review*, 459 Pa. 268, 281, 328 A.2d 819 (1974) ("the determination of the constitutionality of enabling legislation is not a function of the administrative agencies thus enabled."). With that in mind, PIAA has no objection to Requester submitting arguments on the issue but his position is ultimately irrelevant since (as Requester has pointed out in his various communications with the OOR and Office of Attorney General) it is the obligation of the OOR and Commonwealth, and not him, to defend the statute before a court of appropriate jurisdiction.

With respect to the appropriate venue and process for challenging an aspect of the RTKL, the Pennsylvania Supreme Court has held that the OOR "does not provide public school employees with a reliable administrative or judicial method by which to seek redress for action that they believe violates the statutory scheme and/or their constitutional rights." *Pa. State Educ. Ass'n ex rel. Wilson v. Pa. Office of Open Records*, 616 Pa. 491, 510-512, 50 A.3d 1263, 1276 (2012). In that case, the court authorized the bringing of a separate suit against the OOR challenging the constitutionality of application of the RTKL with respect to certain private information on the basis that "the administrative process is inadequate to address the claim and where a substantial constitutional issue is raised." *Id.* An analogous action is currently pending before the Commonwealth Court challenging PIAA's inclusion within the RTKL. Thus, while the issues are identified, they are not relevant for this proceeding.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

Alan R. Boynton, Jr.
I.D. No. 39850
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000

Dated: January 5, 2021

*Attorneys for Pennsylvania Interscholastic
Athletic Association, Inc*

OOR Exhibit 19

Zeppos-Brown, Magdalene

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Tuesday, January 5, 2021 11:57 PM
To: Zeppos-Brown, Magdalene
Cc: Boynton, Alan
Subject: [External] Simon Campbell Appeal Submission to OOR; Dkt. No. AP 2020-2639
Attachments: 1-5-21 Campbell Brief to OOR Dkt 2020-2639.pdf

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Dear Appeals Officer Zeppos-Brown,

Please find attached.

Thank you,
Simon Campbell

PENNSYLVANIA OFFICE OF OPEN RECORDS

SIMON CAMPBELL,

Requester

v.

Pennsylvania Interscholastic
Athletic Association, Inc.,

Respondent

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Dkt. No. AP 2020-2639

**OOOR APPEAL SUBMISSION OF
REQUESTER SIMON CAMPBELL**

AND NOW, comes Simon Campbell, *pro se*, as follows:

I. INTRODUCTION

In 1822, the “Father of the Constitution” wrote that a “popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both.... A people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”¹ Nearly two centuries later, the Supreme Court echoed Madison’s sentiments in explaining the importance and value of the Freedom of Information Act, the federal counterpart to Pennsylvania’s Right to Know Law:

¹ Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON, 103 (Gaillard Hunt, ed. 1910).

FOIA is often explained as a means for citizens to know “what the Government is up to.” This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy. The statement confirms that, as a general rule, when documents are within FOIA’s disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose.

NARA v. Favish, 541 U.S. 157, 171-72 (2004) (citation omitted).

Here in Pennsylvania our own Commonwealth Court echoed Madison’s sentiments in explaining the Right to Know Law (“RTKL”) this way:

A RTKL request stands in stark contrast to a discovery request; the power is not judicial and is not constrained by relevancy. Instead, the power granted requesters by the RTKL is inquisitorial and investigative. Under the RTKL, the requester is empowered by the legislature—within explicit, enacted constraints—to go fishing.[...]

[U]nlike a grand jury or the commission, a RTKL requester is not constrained by a need for suspicion that the law is being violated or for assurance that it is not, nor is a RTKL requester subject to the same constitutional restraints as a government actor. Instead, a requester has a legislatively granted and judicially enforceable right to secure information from the hands of government. The rights afforded a requester under the RTKL are constrained by the presumption and exemptions contained in the law itself. *See* Section 305 and 708 of the RTKL, 65 P.S. § 67.305, 67.708.

Office of the DA of Phila. v. Bagwell, 155 A.3d at 1138-39 (Pa. Cmwlth. 2017)

I want to know if the Pennsylvania Interscholastic Athletic Association uses any of the taxpayer-sourced money that it receives to write checks to strip clubs, dive bars, and IndyCar racing circuits. I want to know if any checks were written for Victoria Secret lingerie, or for a new armani suit for the PIAA’s Executive Director.

I want to see how many times, and in what amounts, PIAA officials have used ATM machines to withdraw cash, and I want to know what they do with the cash. I want to know what kind of legal work the law firm of McNees Wallace & Nurick LLC did for PIAA in 2017-2018 that cost \$305,335. I want to know all this, and so much more.

Of course, what I *want* to know is irrelevant. What is relevant is my *right* to know. Were the PIAA Executive Director to indignantly reply, “No, you limey *&^*%!, we do not spend money on strip clubs, dive bars or IndyCar racing circuits!” ...do We the People wish to live in a society where we say “OK, Bob, if you say so”? Or do We the People wish to live in a society where we say “**prove it!**”? That choice will soon enough be back in front of our esteemed Commonwealth Court.

Let us begin.

My appeal to the Office of Open Records (“OOR”) resulted from a bad faith denial of access to public records by the Pennsylvania Interscholastic Athletic Association, Inc. (“PIAA”) for eight (8) Right to Know Law (“RTKL”) request items that I made of PIAA on November 2, 2020. PIAA denied (or deemed denied i.e. did not actually provide) access to all eight (8) requested items. All eight (8) denials/deemed denials are therefore being challenged on appeal.

I. REQUESTER DUE PROCESS

At the time of penning this brief both myself and PIAA have a deadline of 11:59pm tonight to put our final submissions into the OOR appeal record before the record closes. As such, I am only able to address those arguments and evidence that PIAA has already put into the record before today. I have no way of knowing what new denial argument and/or evidence might be entered in to the record by PIAA at the last minute, and the OOR has ruled that there will be no more extensions of time to enter argument/information into the record. I understand that OOR must, like our Courts, run a tight ship and that deadlines matter. Indeed, I support efficient deadlines. The problem is that case law allows an agency to enter new denial argument for the first time on appeal. A Requester per the tenets of Section 1101(a)(1) has a right, indeed a duty, to "address" denial arguments put forth. 65 P.S. §67.1101(a)(1). *See Wishnefsky v. Dep't of Corr.*, 144 A.3d 290 (Pa. Cmwlth. 2016)("This case illustrates how the addition of a new reason for denying a request after the appeal, can result in prejudice to the requester, where the OOR does not consider the requester's response"). As such, I posit (respectfully) that OOR errs when setting a briefing schedule and/or makes record-closing decisions that could deprive the Requester of his/her *Wishnefsky* rights. I posit that as a general rule OOR should set a record-closing deadline on the agency and a *later* record-closing deadline on the Requester.

II. THE PARTIES

A. PIAA

- ❖ PIAA is a Section 501(c)(3), tax-exempt, taxpayer-funded, entity that generates millions of dollars of revenue for itself via the funding it receives from public school entities (and other sources) across the Commonwealth of Pennsylvania. Attached, Campbell Exhibit A².
- ❖ PIAA is a pervasively entwined state actor for constitutional purposes for the same reasons the U.S. Supreme Court held the Tennessee Secondary School Athletic Association to be engaged in **state action**. See *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001) (“The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.”).
- ❖ In recognition of its pervasively entwined taxpayer-funded status and the enormous decision-making authority and influence that PIAA wields over the lives of Pennsylvania’s public school children, the Pennsylvania General

² The pages in Campbell Exhibit A are from PIAA’s Form 990 for the period beginning 7-1-17 ending 6-30-18, not from PIAA’s Form 990 for the period 7-1-18 to 6-30-19 or 7-1-19 to 6-30-20 (which would constitute the Form 990 being sought in Request Item 6 (i.e. the most recent Form 990 that PIAA has filed with the IRS).

Assembly enacted Act 91 in 2000 (omnibus amendments to the Public School Code of 1949); 24 P.S. § 16-1601-A (“Interscholastic Athletics Accountability”). Attached, Campbell Exhibit B. Act 91 explicitly regulates PIAA in numerous ways, including, but not limited to, the requirement in Section 1604-A(b)(1) that PIAA “adopt and adhere” to policies that conform with the requirements of the Pennsylvania Sunshine Act (relating to open meetings)³. In Section 1603-A, a Pennsylvania Athletic Oversight Counsel comprised of many state officials is established to oversee the operations of PIAA. In Section 1604-A(b)(5) of Act 91 the state literally regulates also regulates who must be seated as a member of PIAA’s board of directors.

- ❖ Four years later, the Pennsylvania Athletic Oversight Committee was created by Act 70 of 2004 by the General Assembly as a legislative oversight committee to meet at least once a year for the purposes of reviewing the Pennsylvania Interscholastic Athletic Association's continued compliance with Act 91 of 2000, responding to issues related to the activities of the Association and to issue an annual report of its findings to the presiding officers in both Chambers.
- ❖ That PIAA is a “State-affiliated entity” is self-evident from a reading of Act

³ Interestingly, PIAA has not sued the Commonwealth for its inclusion in the Sunshine Act.

91 and Act 70. No other “association” that PIAA wishes to compare itself to, in the RTKL context, is subject to anywhere near the same entanglement (and oversight) with the state, and with local public school entities, as is PIAA.

B. SIMON CAMPBELL

- ❖ I am a resident of Bucks County, PA, and a naturalized U.S. Citizen (2009)⁴ having been born and raised in the United Kingdom⁵.
- ❖ I am an individual, not a lawyer, who engages in civic and political discourse as an unpaid pastime. ‘Government watchdog’ is a phrase some people have used. Sometimes I see other citizens (or media outlets) struggling to get records under the RTKL so I decide to ‘jump into’ the situation. I do this in order to seek pro-transparency precedents at the OOR and court levels that other citizens can hopefully benefit from. I subscribe to the OOR’s e-newsletter and I review the OOR’s Final Determinations. I recently came across OOR Dkt. No. 2020-1174 (*Daily Item Newspaper v PIAA*) and couldn’t believe what I read. It seemed as if PIAA has a serious attitude problem about the RTKL. I was intrigued enough to file a RTKL request on my own initiative.⁶

⁴ It is a requirement of the RTKL that a Requester be a legal resident of the United States. 65 P.S. §67.102.

⁵ I retain my British citizenship i.e. I am a dual citizen.

⁶ Assuming *arguendo* I might sometimes associate with fellow citizens, or talk to reporters off-the-record, such association cannot be probed or questioned by a State Actor such as PIAA. The right to privately associate behind shared ideals is a constitutionally protected right. *NAACP v. Alabama*, 357 U.S. 449 (1958).

- ❖ Using cheeky humor and sometimes naughty words I recently started a new YouTube channel to discuss RTKL (& First Amendment) matters of interest at: <https://www.youtube.com/channel/UCDRUTVUSt-3qxR0OEJJdI8A>.
- ❖ Allegedly, I am a Pain-in-the-Arse.⁷
- ❖ If true, then I am an Irrelevant-Pain-in-the-Arse. *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014) ("the status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be accessible)". Public records are "open to the entire public at large." *See, e.g., Coulter v. Pa. Bd. of Prob. & Parole*, 48 A.3d 516, 519 (Pa. Cmwlth. 2012) ("home plans" of parolee requester are not accessible to her under RTKL though she is subject of records; to be accessible under the RTKL, identity of the requester is irrelevant).
- ❖ It is my Constitutional right to be a Pain-in-the-Arse (i.e. to make RTKL requests that certain State Actors don't like). In 2017, another taxpayer-funded pervasively entwined State Actor, the Pennsylvania School Boards Association (PSBA), filed a frivolous SLAPP suit⁸ against me in the Cumberland County Court of Common Pleas⁹. PSBA tried to intimidate me

⁷ At least I think that's what PIAA Attorney Boynton was trying to say about me in PIAA's description of me in the PIAA brief of December 30, 2020.

⁸ SLAPP = Strategic Lawsuit Against Public Participation.

⁹ Where it today languishes a lingering death.

into not making RTKL requests of public school entities. PSBA made the absurd claim that making RTKL requests of public school entities (i.e. merely *asking* for information) was “abuse of process”. In response, and with counsel from the American Civil Liberties Union (“ACLU”), I sued PSBA for First Amendment retaliation in federal court. In its Summary Judgment appeal decision, the Third Circuit Court of Appeals agreed with the District Court that, “[b]ecause [Campbell's] underlying activity was constitutionally protected, we also accept the District Court's conclusion that PSBA's State Suit is objectively baseless, as the First Amendment protected all of Campbell's alleged activities. Campbell's activities here could not reasonably be construed as defamatory given his allegations and the plausible state actor status of PSBA.” *Campbell v. Pennsylvania School Boards Association*, 972 F. 3d 213 - Court of Appeals, 3rd Circuit 2020.¹⁰

- ❖ During his video-taped deposition in the federal lawsuit, PSBA CEO Nathan Mains¹¹, issued a fake apology to me for PSBA having made false allegations of criminality against me inside its SLAPP suit. I posted highlights of the Mains’ fake apology/deposition on YouTube so the legislature and the public

¹⁰ The Third Circuit’s ultimate decision is odd but this is not the forum to debate how or why it is odd. Suffice it to say that PSBA didn’t “win” anything despite PIAA’s inference to the contrary. PSBA merely avoided being punished for filing a SLAPP suit. It explains why today I am a champion of House Bill 95, PA’s proposed anti-SLAPP law.

¹¹ A member of PIAA’s governing board.

can see what SLAPP looks like in the real world. See <https://www.youtube.com/watch?v=TOFiREicmjg>.

III. PIAA's CONSTITUTIONAL DENIAL BASIS

- ❖ It is not the job of a private citizen to defend the Constitutionality of the RTKL. That is the job of the Attorney General.¹² That said, I would be remiss if I didn't point out the very obvious issues pertaining to the doctrines of *laches* and *collateral estoppel*. The pervasive entanglement between PIAA and state officials (Act 91 of 2000 and Act 70 of 2004) and between local public school entities (who fund PIAA with taxpayer money) speaks for itself. I know of no other private entity or other similar "association" that PIAA wishes to compare itself to (e.g. the Pennsylvania School Boards Association) that is required by law to adhere to the provisions of the Pennsylvania Sunshine Act. PIAA has failed to meet its very heavy burden to find that the legislature acted outside the scope of its policy-making authority when putting PIAA under the provisions of the Sunshine Act and the RTKL.

IV. ARGUMENT – ADDRESSING PIAA'S DENIALS (ITEM BY ITEM)

As a threshold matter, only valid affidavits – presented under penalty of perjury - constitute testimonial evidence in a RTKL dispute. Unsworn statements

¹² I have separately written to the Office of Attorney General, by letter dated 1-3-21, and asked that the Office intervene in this dispute in order to defend the Commonwealth against PIAA's constitutional claims.

may not be relied upon as competent evidence to withhold records under the RTKL. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012)(holding that unsworn statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) (“Because the letter written by City's counsel is a legal brief, it cannot be ... evidence at all”).

ITEM 1 (Legal Invoices in Electronic Form)

- ❖ In its final answer of December 7, 2020, PIAA said it “has no documents responsive to this request” then stated “such records, if they exist, must be redacted prior to productions. This is a contradiction. It tells OOR that PIAA never bothered inquiring with its lawyers, past or present, at the time of final answer, whether they had the requested electronic records in their own possession (i.e. PIAA’s constructive possession). In his affidavit, Mr. Lombardi (#42) stated “I have requested electronic records from law firms which we have used but have not received them”. The implication is that Mr. Lombardi did not make any inquiry with the lawyers until after issuing a final answer. There is no evidence of record as to when he contacted the lawyers (under PIAA’s Section 901 “control”), by what means, and on what dates. Nor any evidence as to what he said to the lawyers (e.g. “I need the records by

[date]”). Nor any evidence as what their responses were. Are we to seriously believe that licensed professional attorneys simply ignored the wishes of their own client? Moreover, PIAA’s counsel in this dispute, McNees Wallace & Nurick LLC, is one of those law firms whose invoices are sought¹³ - making the firm an accessory to the act of bad faith of its client. McNees Wallace & Nurick LLC is not merely counsel to PIAA in this dispute they are a contracted vendor whose records are being sought. Are we seriously to believe that this large law firm does not possess any of its generated invoices in electronic form? PIAA Attorney Alan Boynton is under a Rule 3.3 “Candor Toward the Tribunal” obligation¹⁴. In terms of whether or not his law firm’s electronic invoices are accessible under the language of Section 901, he has made himself a third party witness to his client’s position. Assuming *arguendo* there *might* be information that could be fairly redacted from the requested invoices under attorney-client privilege, we don’t even reach to that issue because, thus far, PIAA has not asserted that privilege¹⁵; i.e. OOR cannot even begin to think about things like whether *in camera* review on redactions is necessary, because the record shows that, two months after receiving my Request Item

¹³ See attached, Campbell Exhibit A, McNees Wallace & Nurick LLC paid \$305,335 for “Legal Services” during PIAA’s tax year 7-1-17 to 6-30-18.

¹⁴ Rules of Professional Conduct for licensed attorneys.

¹⁵ I will address the issue of waiver later in this brief. Moreover, it is possible that the invoices only contains factual descriptors not legal advice or strategy.

1, PIAA has not even begun to process it. There is no excuse for any of this bad faith conduct¹⁶. An OOR finding of fact that PIAA and its counsel¹⁷ acted in wanton disregard of law is appropriate. As a matter of law, no records were released and PIAA failed to meet its burden. I respectfully ask OOR to GRANT my appeal as to Item 1.

ITEM 2 (Check Images in Electronic Form)

- ❖ In its final answer of December 7, 2020, PIAA said “PIAA has no documents that exist which are responsive to this request”. That is a materially false statement. They exist in online banking records (as I described in my request) and PIAA has a duty to retrieve them. The security features of the banks are irrelevant. PIAA can simply take screenshot copies of the check images, electronically redact those screenshots to the extent allowed by the RTKL¹⁸, and then send the electronic redacted copies to me. Section 706 requires this outcome. If PIAA can see information on a computer screen then PIAA must

¹⁶ The mere fact of PIAA holding a wildly speculative position as to the constitutionality of the RTKL does not and cannot mean it is entitled to shirk all its duties under the RTKL. Were this not so, then deep-pocketed special interest groups would be empowered to essentially suspend the application of law on the presumption that a duly enacted law is unconstitutional. Attorney Boynton in his fiduciary duty of care to his client should have hedged his client's bets by fully complying with the RTKL even if still pursuing PIAA's other claims. In my opinion, Attorney Boynton has breached his duty of care to his client but neither OOR nor our Courts should let PIAA off the hook for this, otherwise it would set terrible precedent.

¹⁷ Although OOR does not have authority to sanction lawyers it does have fact-finding authority to issue a non-binding opinion that a party and/or its counsel acted in bad faith when presenting evidence to OOR.

¹⁸ The Lambardi affidavit #48 onwards (fretting about the release of financial records) is irrelevant since I don't dispute that *some* redactions like account numbers might normally have been necessary but we don't even get to what redactions might be necessary here because PIAA has refused to process my request.

take a snapshot copy of that information. Taking a screenshot (electronic copy) of an image on a computer does not constitute creating or compiling a record. See OOR Final Determination, *Davis v. City of Butler Police Department*, OOR Dkt. No. 2016-0409. Per the Section 102 definition of a Record, “Information, regardless of physical form or characteristics” is considered a record and therefore subject to disclosure. See *Commonwealth v. Cole*, 52 A.3d 541, 549 (Pa. Commw. Ct. 2012)(holding that “drawing information from a database does not constitute creating a record under the Right-to-Know Law”). This denial of Request Item 2 was in bad faith because no actual search even took place. PIAA failed to meet its burden. I respectfully ask OOR to GRANT my appeal as to Item 2.

ITEM 3 (Monthly Bank Statements in Electronic Form)

- ❖ In its final answer of December 7, 2020, PIAA said “There are no documents that exist which are responsive to this request nor any current means to obtain, preserve and produce electronic files from such institutions in an electronic format.” That is a materially false statement in wanton disregard of law. Everybody knows, as I showed in my request, that monthly bank statements in electronic form are available in online banking. In Mr. Lombardi’s 58 paragraph affidavit of 12-30-20 not one paragraph explains the type of search

that was undertaken to obtain these records and why these documents do not exist. There might be some redactions (like account numbers) that are needed from the bank statements, but OOR cannot begin to reach to that issue when PIAA refuses to even recognize the existence of the bank statements. A finding of bad faith is warranted. PIAA failed to meet its burden. My appeal as to Item 3 should be GRANTED.

ITEM 4 (Line Item Financial Transactions in Electronic Form)

- ❖ Same as #3 above. It is a materially false statement for PIAA to suggest that it's online banking records do not include line item transactions. The line item transactions are required to be extracted from the online banking database. PIAA refused to even look for the records online. A finding of bad faith is warranted. PIAA failed to meet its burden. I respectfully ask OOR to GRANT my appeal as to Item 4.

ITEM 5 (Audited Financial Statements in Electronic Form)

- ❖ The fact that these records exist is shown in Campbell Exhibit A.
- ❖ In its final answer of December 7, 2020, PIAA said "PIAA has requested these records from its auditors but has not yet received them. They will be produced upon receipt." This statement was repeated in #38 of Mr. Lombardi's affidavit of 12-30-20. What an attitude! Does PIAA – represented by counsel –

seriously expect that Requesters can only obtain records under the RTKL in the timeframe of PIAA's choice or the timeframe of PIAA's auditors' choice? Are we to believe that licensed professionals like auditors have thumbed their nose at their own client for the last eight (8) weeks by refusing to give their client records that their client needs in order to comply with the law? Does PIAA and its auditors tell the IRS "we'll send you our tax returns whenever we get around to doing it"? Judging by the attitude of Mr. Lombardi and PIAA counsel I doubt PIAA's auditors have been contacted. Where is the written evidence they were contacted? On what date? What was said to them? PIAA proffers no evidence that it conducted a good faith search. Indeed, there is no evidence that any type of search was conducted, good faith or bad faith. A finding of bad faith is warranted. PIAA failed to meet its burden. I respectfully ask OOR to GRANT my appeal as to Item 5.

ITEM 6 (Most Recently Filed Form 990 in Eletronic Form)

- ❖ In its final answer of December 7, 2020, PIAA said "The IRS 990 Form is available for public view on the IRS site. This may be accessed at www.irs.gov." This is a bad faith denial. I did not ask for where I could find a blank copy of a tax form if I searched around the IRS' website long enough. I asked for "PIAA's most recent Form 990 filing" which most assuredly is not

being posted on the web domain www.irs.gov. Form 990s are required to be filed by tax-exempt entities like PIAA under section 501(c) of the Internal Revenue Code and associated treasury regulations; and they are required to be made public under those regulations. In #34 of his 12-30-20 affidavit Mr. Lombardi stated that the “records already exist in electronic format on the IRS website”. As the OOR can see from visiting www.irs.gov there are no Form 990 submissions from PIAA on that web domain. Mr. Lombardi committed perjury. A finding of bad faith is warranted. PIAA failed to meet its burden. I respectfully ask OOR to GRANT my appeal as to Item 6.

ITEM 7 (Written Communications in Electronic Form)

- ❖ In its final answer of December 7, 2020, PIAA said “there are no documents responsive to this request”. As a threshold matter, OOR should consider that Mr. Lombardi is not a credible witness. As argued, statements in his affidavit and in PIAA’s final answer constitute willful defiance of law. Also, my request was for communications “between PIAA officials” not merely between PIAA officials and counsel. PIAA’s website lists its executive and support staff at <https://www.piaa.org/about/organization/staff/default.aspx> (last visited 1-5-21) and its board members at <https://www.piaa.org/about/organization/board/default.aspx> (last visited 1-5-21). In total, PIAA lists thirty-two (32) members of its governing board of

directors. There is no evidence that Mr. Lombardi asked all of them to search for responsive records in their personal possessions. All we see in paragraph #31 of his 12-30-20 affidavit is the assertion that *Mr. Lombardi* searched for “PIAA records”. That is ambiguous as to the nature and extent of the search he conducted. There is no evidence that he asked anyone on the governing board or in the executive ranks to search for responsive records in their possessions (i.e. sent among themselves and that may not include Mr. Lombardi) in the form of personal emails and text messages. In paragraph #32 Mr. Lombardi attests he is “also aware” that communications only took place between himself and counsel. Yet he proffers no evidence as to what this awareness is, or where it came from. How could he be aware whether or not two or more other officials communicated between themselves if he never asked them to review their personal communication records¹⁹? Burden of proof not met. I respectfully ask OOR to GRANT my appeal as to Item 7.

ITEM 8 (Screenshot Image Showing the Name of a Software Program)

- ❖ In its final answer of December 7, 2020, PIAA stated “PIAA is not aware of any record responsive to this request”. This statement is not evidence. I

¹⁹ Communications exchanged on personal communication devices that discuss agency business are public records under the RTKL. See e.g. OOR Final Determination, *Bradley v. Lehigh Area School District*, Dkt. No. AP 2020-1220 (itself citing to several Commonwealth Court decisions on this issue).

sought information that exists on a computer screen²⁰. *Information* is a record under the Section 102 definition of a Record. The information I sought was "the name of the software program/s in PIAA's possession, custody or control that can perform electronic redactions on PDF files and/or other electronic file types". PIAA does not dispute or deny that it possesses, or has custody or control of, such a software program. Nor does it dispute that it uses such a program for agency business. PIAA is confusing my request for a copy (here, a screenshot copy) with the information that is being sought. For the same reasons that I addressed in response to PIAA's denial of Item 2, PIAA is obliged by law to release a screenshot copy image. Burden of proof not met. I respectfully ask OOR to GRANT my appeal as to Item 8.

V. ARGUMENT - THE ALLEGED BURDEN OF PROCESSING MY REQUEST ITEMS IS INSUFFICIENT AS A DENIAL BASIS

Littered throughout PIAA's argument is the reality that PIAA has a mental block when it comes to the RTKL. PIAA doesn't like having to comply with this important public transparency law. To PIAA, someone like me is a tiresome sod and my request is allegedly "frivolous"²¹ and unduly burdensome. Only it isn't just me that PIAA seems to have a problem with. PIAA has been battling the Daily Item

²⁰ Whatever can be seen on a computer screen that is used for agency business is a presumptively public record.

²¹ Source: Fox32 TV interview with Mr. Lombardi ("PIAA files suit over Right to Know Law"), <https://www.fox43.com/article/sports/piaa-right-to-know-lawsuit/521-6a6399d3-5933-4ee3-9646-602e17206733>

newspaper for years, and, reportedly, has even thumbed its nose at state lawmakers who have sought financial records from PIAA²².

Before I discuss the law it is worth unpacking from a practical perspective the alleged burden of my request items. The financial images shown in my request were from my own bank account. I did that to show how easy it is to get the records I seek and how easy it is to securely redact them using a software program. Extracting and downloading records like monthly bank statements or itemized transactions can be done in minutes. Not days, hours, weeks, or months. If nobody at PIAA has set up a username and password to access online banking records because everyone at PIAA prefers to lie in the 1950s using paperwork, this does not excuse PIAA from the Section 901 requirement to search in good faith for records in its custody or "control" (e.g. online banking records). There is not a bank in America that today does not offer internet access to online banking records.

If it might take a longer amount of time to screenshot capture the check images that I seek (and redact them using software with e-redaction capabilities), well, PIAA is a large organization. It could spread the work out. Each District could

²² Source: Daily Item news story, "Legislators want to discuss District IV concerns with PIAA Oversight Committee" https://www.dailyitem.com/news/legislators-want-to-discuss-district-iv-concerns-with-piaa-oversight-committee/article_dfe4c2f2-c6be-11ea-956f-f76d6997bd3a.html ("My office asked three times" said State Rep. David Rowe, "When we first asked for the information they asked us why we wanted it. The financial information initially provided to me was very general. I have since made multiple requests for more financials, specifically in regards to expenditures, but I have yet to receive them.")

access its own local banking records then send its RTKL-responding work to headquarters for final review and release to me. But, even if I am wrong about all this, and even if my request *is* burdensome, it matters not²³. Yes, there is a cost and a price to pay for having a RTKL. But what would be the cost to society of not having a RTKL?

As a matter of law, the only statutory exemptions that touch upon the issue of alleged burden are Sections 506(a) and 703. Section 506(a) fails on its face because PIAA offers no evidence that I have made “repeated requests for that same record”. Section 703 (insufficiently specific) fails because my request items were all tightly worded. There is nothing vague or unclear about any of them.

See, “[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...” and, ...”an agency’s failure to maintain the files in a way necessary to meet its obligations under the RTKL should not be held against the requestor. To so hold would permit an agency to avoid its obligations under the RTKL simply by failing to orderly maintain its records.” *Commonwealth v. Legere*, 50 A.3d 260 (Pa. Commw. Ct. 2012)(holding that the alleged burden on an agency

²³ Although I am known in agency circles for being a reasonable requester. Many a Superintendent of a small rural school district who gets a RTKL request from me knows they can pick up the phone to call me. On many an occasion I have pared down my initial request to help the Superintendent out. I do this when I see an agency acting in good faith i.e. wanting to give me information. PIAA’s attitude, by contrast, leaves me cold. They have caught an attitude too long with too many people.

does not render a request insufficiently specific)(emphasis added).

The Commonwealth Court has recognized that there are situations wherein an agency may not have enough time under the RTKL's deadlines to effectively review the records at issue. In *Pa. State System of Higher Education v. Ass'n of State College and University Facilities* ("APSCUF"), nonetheless the Court held as follows:

...just because an agency claims it neither has the time nor resources to conduct a document-by-document review within the time-period required by the RTKL does not make it so. The agency making such a claim has to provide the OOR with a valid estimate of the number of documents being requested, the length of time that people charged with reviewing the request require to conduct this review, and if the request involves documents in electronic format the agency must explain any difficulties it faces when attempting to deliver the documents in that format.

142 A.3d 1023, 1031-32 (Pa. Commw. Ct. 2016).

Here, PIAA provided neither OOR nor me with any such information. When making its Motion to Stay these proceedings on December 21, 2020, PIAA did not cite a single one of these issues as a basis for why OOR should stay the appeal. See, *Dep't of Env'tl. Prot. v. Legere*, 50 A.3d 260, 267 (Pa.Cmwlt.2012) ("It should be noted that had DEP undertaken the search that it was required to perform to meet its obligations under the RTKL, it would have located the required records and would have been able to discern any applicable exemptions related to the specific records located at that time. We will not reward DEP's failure to timely adhere to the RTKL

by granting it yet another opportunity to impede access to the records. Accordingly, the OOR properly concluded that DEP failed to offer evidence supporting its claims of exemption.”). OOR has given PIAA not one, but two, bites of the apple in this appeal to put PIAA’s full and final denial position into the record. OOR must now follow the *Legere* Court’s direction to “properly conclude” that PIAA “failed to offer evidence supporting its claims of exemption.”

VI. ARGUMENT – WAIVER

PIAA has the burden of proof in this dispute not me. The record shows that PIAA took a 30-day extension on my request and wasted the entire 30 days. No processing of any request items took place during place during that time period. PIAA’s final answer was threadbare. The record further shows OOR giving PIAA the chance to its full and final position into the record by a deadline of December 30, 2020, and then again, a re-opened new deadline of January 5, 2021. The record further shows me reminded PIAA counsel of the waiver issue before the record closed; something I did not need to do. At this point, neither OOR nor our Courts should give PIAA anymore chances to supplement the record in this case. PIAA’s problems in this case are entirely of PIAA’s making.

Our Commonwealth Court consistently requires agencies to raise and defend all applicable exemptions before the initial fact-finder. *See In Mission Pennsylvania,*

LLC v. McKelvey, et al., (Cmwlth. Ct. June 4, 2019)(“Lack of evidence, when the parties and participants had a full opportunity to submit evidence to the fact-finder, is not a valid reason for supplementing the record”), citing *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Cmwlth. 2017)(“it is not incumbent upon OOR to request additional evidence when developing the record. Rather, it is the parties’ burden to submit sufficient evidence to establish material facts”); see also *Levy v. Senate of Pennsylvania*, 94 A.3d 436, 441 (Pa. Cmwlth. 2014) (“Challenges not previously raised before the fact-finder are waived”).

To any extent PIAA might have wanted to assert attorney-client privilege re: *possibly*²⁴ viable redactions that privilege has been waived because PIAA did not timely raise it. PIAA – and its counsel whose invoices are being sought – only have themselves to blame for their bad faith conduct in not timely gathering and reviewing the requested documents, as Section 901 requires. Any and all redaction arguments not raised thus far have similarly now been waived. That this may present a dilemma re: issues such as bank account numbers, is not my fault. PIAA has not provided OOR with a single citation of law, as required by Section 903(2), to justify any redactions. Therefore all redaction arguments that could have been raised, but were not, have been waived. OOR must hold firm and order the release of everything.

²⁴ And it is not admitted that any of the invoices contain privileged information.

PIAA would then have thirty (30) to comply with the OOR's Final Determination Order. PIAA could use those thirty (30) days to establish new bank accounts and transfer money out of the old accounts, then shut them down, before the old account information is released without redactions; if PIAA is concerned about financial account security. This is 'doable' because there is no such thing as a forward-looking RTKL request. PIAA only need provide records that existed prior to the filing of my request on November 2, 2020. This might be a pain in the bottom for PIAA, but it is a pain of PIAA's own making. Case law is clear. Our Courts do not excuse, or condone, wanton disregard of the RTKL and bad faith conduct. Waiver is waiver. Period. Our Commonwealth Court would send a strong message to agencies if agreeing with my position on this important issue.

VII. ARGUMENT - NO PAPER COPY FEES ARE OWED

As a threshold matter, again, *waiver* applies. If an agency believes that fees are due then "an agency should provide a fee estimate by the last day of the extension period" because the agency must determine the public or nonpublic status of the requested records by that time. *Pennsylvania Dep't of Educ. v. Bagwell*, 131 A.3d 638 (Pa. Commw. Ct. 2015). This, PIAA did not do. Although the RTKL permits an agency to demand prepayment before providing access to records, per *Bagwell*, an agency may only demand prepayment after the agency has reviewed the records, determined

what information is exempt, and identified how many pages must be redacted. Where an agency makes an improper prepayment demand, the agency waives the ability to assert exemptions.

Even assuming *arguendo* that waiver did not apply to the issue of fees and redactions, PIAA still cannot charge paper copy fees to redact electronic records, because Section 1307(g) of the RTKL attaches to redaction costs not Section 1307(b)(ii). OOR has no statutory authority to set a fee schedule for redaction costs under Section 1307(g). OOR only has statutory authority to set “fees for duplication” under Section 1307(b)(ii).

In the context of paper records if an agency takes out a black sharpie pen or ‘white-out’ in order to redact some information²⁵ on the paper, that act is an act of redaction not an act of duplication. No duplication occurs by the act of putting some liquid or a pen on a piece of paper. Similarly, if an agency uses a software program to electronically redact information from an electronic document it is redaction act not a duplication act. OOR’s fee-setting authority in Section 1307(b)(ii) is not triggered by a redaction act. In 2020 this issue was squarely before the OOR. In OOR Final Determination, *Mezzacappa v. Colonial Intermediate Unit 20*, Dkt. No. AP 2019-1922 (July 31, 2020), attached as Campbell Exhibit C. OOR Appeals Officer Jordan

²⁵ Black sharpie pens are the least secure way to redact information on paper. All you have to do is hold the paper up to a bright light to see through the redaction. Electronic software tools provide far more secure redaction.

Davis was presented with a dispute where video records needed to be redacted and the agency proved it did not have the technical capability (i.e. it did not possess any software program) to do it. In his well-reasoned analysis, Appeals Officer Davis correctly held that the “Unit’s redactions are governed by Section 1307(g) of the RTKL” not Section 1307(b)(ii)²⁶, then concluded that the agency must obtain the necessary software to do the redactions and that the software should be as inexpensive as possible to ensure the costs are “reasonable.” It may be true that the Requester owes fees for redaction but how much fees, and for what, is a case-by-case assessment under Section 1307(g).²⁷

The only thing missing from Appeals Officer Davis’ otherwise excellent analysis in *Mezzacappa* was an analysis of Section 706. The issue is not whether an agency is able to do the redaction, rather whether the information itself is able to be redacted. It is a subtle yet important distinction. See, “The agency may not deny access to the record if the information which is not subject to access is able to be redacted.” 65

²⁶ It would constitute an absurd result for OOR to find that redaction costs for some (video) records are to be assessed under Section 1307(g) whereas redaction costs for other (non-video) records are assessed under 1307(b)(ii). Appeals Officer Davis’ finding that redaction costs fall under 1307(g) assessment correlates neatly *dicta* found in the PA Supreme Court case, *Easton Area Sch. Dist. V. Miller*, 13 MAP 2019, 2020 Pa. LEXIS 3378. In *Miller* the court focused its Section 706 attention on whether “the students’ images can be redacted” not whether the school district had the software to do it. In footnote 15 the Supreme Court stated “We do not suggest the District is obligated to finance such redaction, which responsibility may fall either to the District or to the Requester depending upon other laws, policies, or legal directives that are not before the Court in the present appeal.” Nothing in the Supreme Court’s *Miller* decision suggest that redaction costs fall under OOR fee-setting authority in 1307(b)(ii).

²⁷ To the extent there is any contradictory language in OOR’s Section 1307(b)(ii) fee schedule, I contend that such language is not permitted as a matter of law. OOR has no statutory authority to pre-determine fees for redaction costs not any authority to pre-determine any particular method of redaction. Redaction fees are a case-by-case assessment under 1307(g).

P.S. § 67.706.

In this dispute no paper records are sought and all the electronic records that I seek are “able” to be redacted. Therefore, even assuming PIAA had not waived a fee demand, and even assuming PIAA had not waved a right to redactions, and even assuming PIAA possessed no software tools to do the redactions electronically, PIAA must still obtain such tools at the cheapest price and do the redactions electronically. 65 P.S. § 67.1307(g).

This analysis finds additional logic from *Commonwealth v. Legere*, 50 A.3d 260 (Pa. Commw. Ct. 2012)(“an agency’s failure to maintain the files in a way necessary to meet its obligations under the RTKL should not be held against the requestor. To so hold would permit an agency to avoid its obligations under the RTKL simply by failing to orderly maintain its records.”). Microsoft Excel can easily redact downloaded banking information. Adobe Acrobat Pro can easily redact PDF files and numerous inexpensive programs like SnagIt can redact image files. That PIAA officials may not wish to use such tools and may prefer to live in the 1950s not 2021, is a mindset that should not be held against the Requester. If PIAA officials have no idea how to use these types of everyday software tools perhaps they can ask one the high school students that they come into contact with, to show them how to use them.

VIII. ARGUMENT - PIAA ACTED IN BAD FAITH

PIAA with the assistance of counsel (whose invoices are subject to Request Item 1) acted in wanton disregard of law. Bad faith conduct is everywhere. Other than writing *something* to me in a timely manner I cannot find any aspect of the RTKL that has been complied with. Holding a wildly speculative theory about the constitutionality of the RTKL does not excuse PIAA's refusal to search in good faith for responsive records.

Although OOR does not possess authority to sanction an agency for acting in bad faith under the RTKL it does possess fact-finding authority to issue an advisory opinion in this regard. See OOR Final Determination, *Columbia Care v. Pennsylvania Department of Health*, Dkt. No. AP 2017-1613 ("The Department did not conduct a good faith effort to determine if the redacted material is subject to access"). Such a finding is appropriate here.

The 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..." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Cmwlth. 2010) (*en banc*), *aff'd*, 621 Pa. 133, 75 A.3d 453 (2013).

Section 901 of the RTKL requires an agency to not only search in “good faith” for responsive records in an agency’s actual possession but also conduct a good faith search for records in the agency’s “control”. 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort” as used in Section 901 of the RTKL, in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control²⁸, including third-party contractors... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted).

To ensure the public access provided for under the RTKL, the statute provides for an award of court costs, attorney fees and/or statutory penalties to enforce its provisions. See, 65 P.S. §67.1304 and 1305. More specifically, the RTKL provides for the awarding of reasonable attorney fees and costs of litigation if an agency “willfully or with wanton disregard deprives the requester of access to a public record subject to access or otherwise acted in bad faith under the provisions of this act.” 65 P.S. §67.1304(a)(1).

²⁸ Licensed professional service providers are within the “control” of their clients to whom they owe a fiduciary duty of care.

The “bad faith” referred to in §1304(a)(1) “does not require a showing of fraud or corruption. The lack of good faith compliance with the RTKL and an abnegation of mandatory duties under its provisions rise to the level of bad faith.” *Uniontown Newspapers*, 185 A.3d at 1170, *Office of Dist. Att’y of Phila. v. Bagwell*, 155 A.3d 1119 (Pa. Cmwlth. 2017), *Chambersburg Area School District v. Dorsey*, 97 A.3d 1281 (Pa. Cmwlth. 2014) (agency failure to review responsive records was grounds from which fact-finder could discern bad faith), *Staub v. City of Wilkes Barre & LAG Towing, Inc.* (Pa. Cmwlth. No. 2140 C.D. 2012, filed October 3, 2013), 2013 WL 5520705 (affirming an award of attorney fees for agency failure to confer with third parties prior to responding to an open records request.)

Chapter 13 Courts are empowered to render bad faith determinations for determining awards of attorney fees and costs as provided for under §1304 and of the statutory penalties under §1305. *See, Uniontown Newspapers*, 185 A.3d at 1175. *Bowling*, 75 A.3d at 470. One of the fundamental requirements of an agency under the RTKL is to make a good faith effort to find and obtain responsive records before denying access. *Uniontown Newspapers*, 185 A.3d at 1170. An agency is not permitted to circumvent the requirements of the RTKL and avoid disclosing existing public records by asserting, especially in the absence of a detailed search, that it does not know where the documents are. *See Pa. State Police v. McGill*, 83 A.3d 476, 481

(Pa. Cmwlth. 2014).

The failure to make the good faith search required by §901, particularly until the matter is in litigation, is a willful disregard of the public's right to public records. *Uniontown Newspapers*, 185 A.3d at 1171. *Parsons v. Pa. Higher Education Assist. Agency (PHEAA)*, 910 A.2d 177 (Pa. Cmwlth) (*en banc*), appeal denied, 591 Pa. 686, 917 A.2d 316 (2006) (agency's failure to review records before a hearing on denial showed willful violation of the prior version of Right-To-Know law). Although the requester bears the burden of proving an agency committed bad faith, "after discovered-records are a type of evidence from which a court may discern bad faith." *Uniontown Newspapers, supra., Dorsey, supra.* In addition, an agency's failure to perform the mandatory duties under the act such as performing a good faith search under §901 prior to the denial of access, may also support a finding of bad faith. *Id.*"

Part of the mandatory duty of conducting a good faith search under §901 includes the duty by the Open Records Officer to advise all custodians who may possess potentially responsive records about the pending request. *Uniontown Newspapers, supra.* This includes the duty, when the records are not in the agency's physical possession, to contact agents within its control including third party contractors to search and provide responsive records. *Uniontown Newspapers*, 185

A.3d at 1172, *Breslin v. Dickinson Twp.*, 68 A.3d 49 (Pa. Cmwlth. 2013), *Staub, supra*.

The duty under §901 also requires that, once the agency has obtained all potentially responsive records, it has a duty to review them and assess their public nature under §§ 901 and 903. *Uniontown Newspapers*, 185 A.3d at 1172, *Breslin, PHEAA*. The failure to conduct a good faith search as required by §901 for responsive records during the request stage constitutes bad faith. *Uniontown Newspapers*, 185 A.3d at 1172, *Dorsey, supra*. An agency's failure to locate responsive records until forced to do so by litigation is evidence of bad faith which may be taken into consideration by the trial court assessing a claim under §1304. *Uniontown Newspapers, Id*. The failure of an agency to obtain or to review responsive records prior to issuing a denial under §903 can also provide a basis for a finding of bad faith. *Uniontown Newspapers, Id, PHEAA*.

Continuing to contest access during an appeal to OOR or a Chapter 13 Court without obtaining all the records and assessing their public nature constitutes bad faith. *Uniontown Newspapers*, 185 A.3d at 1173. Furthermore, an agency which waits until after an OOR determination requiring disclosure to conduct a proper good faith search or to supply responsive public records provides a further basis for a finding of bad faith and the imposition of fees and costs under §1304(a)(1).

Uniontown Newspapers, 185 A.3d at 1173-1174.

As to the imposition of civil penalties under 65 P.S. §67.1305(a), the RTKL vests a Chapter 13 Court with jurisdiction to assess whether an agency's actions in withholding public records was willful, wanton or unreasonable. *Bowling*, 75 A.3d at 469-70. *Uniontown Newspapers*, 185 A.3d at 1174-1176. Imposition of the maximum statutory penalty is warranted when the conduct of the agency indicates that it did not conduct a thorough search for responsive records until after the appeals process occurred and the duration of the failure to conduct a good faith search and/or withhold relevant public records are factors which may also be considered by the court at imposing the maximum statutory penalty under §1305. *Uniontown Newspapers, Id.*

As to the award of attorney fees, §1304(a) permits the court to award "reasonable attorney fees and costs of litigation, or an appropriate portion thereof" to a requester when the agency acts in bad faith and/or deprives the requester of public records with willful or wanton disregard. Under the provisions of the RTKL, a Chapter 13 Court has jurisdiction to award attorney fees for bad faith. *Uniontown Newspapers*, 197 A.3d 825, 823 (Pa. Cmwlth. 2018), *IBEW v. City of Reading*, 1716-78 slip op. August 16, 2018, Lillis, J. C.C.P. Berks.

Although the language of §1304(a) speaks of a court awarding fees and costs

when it “reverses the final determination of the appeals officer”, the Commonwealth Court has held that, due to an ambiguity between the language of §1304(a) and §1304(a)(2) which speaks to “the agency and its final determination,” this language should not be construed as requiring the reversal of only an OOR appeals officer determination by a court but permits the award of such fees and costs when the court assesses that the agency has acted in bad faith and/or willful and wanton disregard in its course of conduct during an RTKL request and appeal process. *Uniontown Newspapers*, 197 A.3d at 832-835. The Commonwealth Court has held that such an interpretation is consistent with the statutory purposes of the RTKL and to do otherwise would yield “an absurd result.” 197 A.2d at 834. The court went on to hold that to interpret §1304 otherwise would penalize the requester for prevailing in a Chapter 11 appeal and would allow the most egregious of agency conduct to go unchecked. It would also provide no remedy for a requester who had obtained a successful disclosure order (final determination) from the OOR with no interest in nor basis for appealing to reverse a favorable finding. The court also held that a contrary interpretation would improperly constrain a Chapter 13 Court’s ability to award attorney fees to a requester when it makes a finding of bad faith.

Thus, having a Chapter 13 Court to assess attorney fees and costs under §1304 when it reverses an agency’s final determination is appropriate. *Uniontown*

Newspapers, 197 A.3d at 834-835, citing two cases under the former Right-To-Know Act, Act of June 21, 1957, P.L. 390, as amended, 65 P.S. §§66.1-66.9, repealed by, §3102(2)(ii) of the RTKL, 65 P.S. §67.3102(2)(ii), see, *Parsons v. Pa. High Education Assist. Agency (PHEAA)*, 910 A.2d 177 (Pa. Cmwlth.) (*en banc*), appeal denied, 917 A.2d 316 (Pa. 2006).

IX. CONCLUSION

I respectfully ask the OOR to GRANT my appeal as t all eight (8) items sought, without any redactions being permitted and without any costs being assessed. I further ask that OOR issue an advisory opinion finding that PIAA and its counsel acted in bad faith and in wanton disregard of law.

Respectfully submitted,

By: _____

Simon Campbell, Requester
668 Stony Hill Rd #298
Yardley, PA 19067
parighttoknow@gmail.com

Date: January 5, 2021

CAMPBELL EXHIBIT A

Four Pages from PIAA's 2017-2018 Form 990

**(not obtained from any
IRS web domain)**

Form **990**
 Department of the Treasury
 Internal Revenue Service

Return of Organization Exempt From Income Tax
 Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except private foundations)
 Do not enter social security numbers on this form as it may be made public
 Information about Form 990 and its instructions is at www.irs.gov/form990

OMB No 1545-0047

2017

Open to Public Inspection

A For the 2017 calendar year, or tax year beginning 07-01-2017, and ending 06-30-2018

- B Check if applicable:
☐ Address change
☐ Name change
☐ Initial return
☐ Final return/terminated
☐ Amended return
☐ Application pending

C Name of organization
 PENNSYLVANIA INTERSCHOLASTIC
 ATHLETIC ASSOCIATION INC

Doing business as

Number and street (or P.O. box if mail is not delivered to street address) Room/suite
 550 GETTYSBURG ROAD PO BOX 2008

City or town, state or province, country, and ZIP or foreign postal code
 MECHANICSBURG, PA 170550708

F Name and address of principal officer
 ROBERT A LOMBARDI
 550 GETTYSBURG ROAD PO BOX 2008
 MECHANICSBURG, PA 170550708

D Employer identification number
 23-1362410

E Telephone number
 (717) 697-0374

G Gross receipts \$ 13,961,661

I Tax-exempt status ☒ 501(c)(3) ☐ 501(c) () (insert no) ☐ 4947(a)(1) or ☐ 527

J Website: WWW PIAA ORG

H(a) Is this a group return for subordinates? ☐ Yes ☒ No

H(b) Are all subordinates included? ☐ Yes ☐ No

If "No," attach a list (see instructions)

H(c) Group exemption number

K Form of organization ☒ Corporation ☐ Trust ☐ Association ☐ Other

L Year of formation 1978

M State of legal domicile PA

Part I Summary

1 Briefly describe the organization's mission or most significant activities
 THE CHARITABLE PURPOSES OF PIAA ARE SET FORTH IN ITS CONSTITUTION WHICH INDICATE PIAA PROMOTES AND SUPPORTS THE EDUCATIONAL VALUES OF INTERSCHOLASTIC ATHLETICS AND THE HIGH IDEALS OF GOOD SPORTSMANSHIP. FURTHER, IT PROMOTES, ESTABLISHES AND ENFORCES UNIFORM STANDARDS IN ATHLETIC COMPETITION AMONG ITS SCHOOLS AND PROMOTES AND SUPPORTS SAFE AND HEALTHY ATHLETIC COMPETITION

2 Check this box <input type="checkbox"/> if the organization discontinued its operations or disposed of more than 25% of its net assets	
3 Number of voting members of the governing body (Part VI, line 1a)	3 32
4 Number of independent voting members of the governing body (Part VI, line 1b)	4 32
5 Total number of individuals employed in calendar year 2017 (Part V, line 2a)	5 25
6 Total number of volunteers (estimate if necessary)	6 200
7a Total unrelated business revenue from Part VIII, column (C), line 12	7a 661,809
7b Net unrelated business taxable income from Form 990-T, line 34	7b 285,795

	Prior Year	Current Year
8 Contributions and grants (Part VIII, line 1h)	1,301,332	1,495,421
9 Program service revenue (Part VIII, line 2g)	11,639,893	10,459,673
10 Investment income (Part VIII, column (A), lines 3, 4, and 7d)	34,040	71,860
11 Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)	656,751	679,703
12 Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)	13,632,016	12,706,657
13 Grants and similar amounts paid (Part IX, column (A), lines 1-3)	25,000	25,000
14 Benefits paid to or for members (Part IX, column (A), line 4)	0	0
15 Salaries, other compensation, employee benefits (Part IX, column (A), lines 5-10)	2,122,273	2,165,057
16a Professional fundraising fees (Part IX, column (A), line 11a)	320,096	382,391
b Total fundraising expenses (Part IX, column (D), line 25) \rightarrow 454,911		
17 Other expenses (Part IX, column (A), lines 11a-11d, 11f-24e)	10,478,553	10,790,712
18 Total expenses Add lines 13-17 (must equal Part IX, column (A), line 25)	12,945,924	13,363,160
19 Revenue less expenses Subtract line 18 from line 12	686,092	-656,503
	Beginning of Current Year	End of Year
20 Total assets (Part X, line 16)	8,119,560	7,584,521
21 Total liabilities (Part X, line 26)	1,560,148	1,636,056
22 Net assets or fund balances Subtract line 21 from line 20	6,559,412	5,948,465

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.

Sign Here

Signature of officer

2017-01-28
 Date

ROBERT A LOMBARDI EXECUTIVE DIRECTOR
 Type or print name and title

Paid Preparer Use Only

Print/Type preparer's name
 MATTHEW S WILDASIN CPA

Preparer's signature
 MATTHEW S WILDASIN CPA

Date

Check ☐ if self-employed PTIN P00795734

Firm's name \rightarrow BOYER & RITTER LLC

Firm's address \rightarrow 211 HOUSE AVENUE

CAMP HILL, PA 17011

Firm's EIN \rightarrow 23-1311005

Phone no (717) 761-7210

May the IRS discuss this return with the preparer shown above? (see instructions)

QCR Exhibit 19 Page 040

☒ Yes ☐ No

For Paperwork Reduction Act Notice, see the separate instructions.

Cat No 11282Y

Form 990 (2017)

Part IV Checklist of Required Schedules

	Yes	No
1 Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? If "Yes," complete Schedule A	1 Yes	
2 Is the organization required to complete Schedule B, Schedule of Contributors (see instructions)?	2 Yes	
3 Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? If "Yes," complete Schedule C, Part I	3	No
4 Section 501(c)(3) organizations. Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? If "Yes," complete Schedule C, Part II	4 Yes	
5 Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Revenue Procedure 98-19? If "Yes," complete Schedule C, Part III	5	No
6 Did the organization maintain any donor advised funds or any similar funds or accounts for which donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? If "Yes," complete Schedule D, Part I	6	No
7 Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? If "Yes," complete Schedule D, Part II	7	No
8 Did the organization maintain collections of works of art, historical treasures, or other similar assets? If "Yes," complete Schedule D, Part III	8	No
9 Did the organization report an amount in Part X, line 21 for escrow or custodial account liability, serve as a custodian for amounts not listed in Part X, or provide credit counseling, debt management, credit repair, or debt negotiation services? If "Yes," complete Schedule D, Part IV	9	No
10 Did the organization, directly or through a related organization, hold assets in temporarily restricted endowments, permanent endowments, or quasi-endowments? If "Yes," complete Schedule D, Part V	10	No
11 If the organization's answer to any of the following questions is "Yes," then complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable		
a Did the organization report an amount for land, buildings, and equipment in Part X, line 10? If "Yes," complete Schedule D, Part VI	11a Yes	
b Did the organization report an amount for investments—other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? If "Yes," complete Schedule D, Part VII	11b	No
c Did the organization report an amount for investments—program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? If "Yes," complete Schedule D, Part VIII	11c	No
d Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? If "Yes," complete Schedule D, Part IX	11d	No
e Did the organization report an amount for other liabilities in Part X, line 25? If "Yes," complete Schedule D, Part X	11e Yes	
f Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? If "Yes," complete Schedule D, Part X	11f Yes	
12a Did the organization obtain separate, independent audited financial statements for the tax year? If "Yes," complete Schedule D, Parts XI and XII	12a Yes	
b Was the organization included in consolidated, independent audited financial statements for the tax year? If "Yes," and if the organization answered "No" to line 12a, then completing Schedule D, Parts XI and XII is optional	12b	No
13 Is the organization a school described in section 170(b)(1)(A)(ii)? If "Yes," complete Schedule E	13	No
14a Did the organization maintain an office, employees, or agents outside of the United States?	14a	No
b Did the organization have aggregate revenues or expenses of more than \$10,000 from grantmaking, fundraising, business, investment, and program service activities outside the United States, or aggregate foreign investments valued at \$100,000 or more? If "Yes," complete Schedule F, Parts I and IV	14b	No
15 Did the organization report on Part IX, column (A), line 3, more than \$5,000 of grants or other assistance to or for any foreign organization? If "Yes," complete Schedule F, Parts II and IV	15	No
16 Did the organization report on Part IX, column (A), line 3, more than \$5,000 of aggregate grants or other assistance to or for foreign individuals? If "Yes," complete Schedule F, Parts III and IV	16	No
17 Did the organization report a total of more than \$15,000 of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? If "Yes," complete Schedule G, Part I (see instructions)	17 Yes	
18 Did the organization report more than \$15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? If "Yes," complete Schedule G, Part II	18	No
19 Did the organization report more than \$15,000 of gross income from gaming activities on Part VIII, line 9a? If "Yes," complete Schedule G, Part III	19	No

Part VI Governance, Management, and Disclosure For each "Yes" response to lines 2 through 7b below, and for a "No" response to lines 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O. See instructions.

Check if Schedule O contains a response or note to any line in this Part VI

**Section A. Governing Body and Management**

	Yes	No
1a Enter the number of voting members of the governing body at the end of the tax year	32	
If there are material differences in voting rights among members of the governing body, or if the governing body delegated broad authority to an executive committee or similar committee, explain in Schedule O		
b Enter the number of voting members included in line 1a, above, who are independent	32	
2 Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?		No
3 Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors or trustees, or key employees to a management company or other person?		No
4 Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?		No
5 Did the organization become aware during the year of a significant diversion of the organization's assets?		No
6 Did the organization have members or stockholders?	Yes	
7a Did the organization have members, stockholders, or other persons who had the power to elect or appoint one or more members of the governing body?	Yes	
b Are any governance decisions of the organization reserved to (or subject to approval by) members, stockholders, or persons other than the governing body?	Yes	
8 Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:		
a The governing body?	Yes	
b Each committee with authority to act on behalf of the governing body?	Yes	
9 Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? If "Yes," provide the names and addresses in Schedule O		No

Section B. Policies (This Section B requests information about policies not required by the Internal Revenue Code.)

	Yes	No
10a Did the organization have local chapters, branches, or affiliates?		No
b If "Yes," did the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with the organization's exempt purposes?		
11a Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?	Yes	
b Describe in Schedule O the process, if any, used by the organization to review this Form 990		
12a Did the organization have a written conflict of interest policy? If "No," go to line 13	Yes	
b Were officers, directors, or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	Yes	
c Did the organization regularly and consistently monitor and enforce compliance with the policy? If "Yes," describe in Schedule O how this was done	Yes	
13 Did the organization have a written whistleblower policy?	Yes	
14 Did the organization have a written document retention and destruction policy?	Yes	
15 Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?		
a The organization's CEO, Executive Director, or top management official	Yes	
b Other officers or key employees of the organization	Yes	
If "Yes" to line 15a or 15b, describe the process in Schedule O (see instructions)		
16a Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?		No
b If "Yes," did the organization follow a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and take steps to safeguard the organization's exempt status with respect to such arrangements?		

Section C. Disclosure

17 List the States with which a copy of this Form 990 is required to be filed: PA

18 Section 6104 requires an organization to make its Form 1023 (or 1024 if applicable), 990, and 990-T (501(c)(3)s only) available for public inspection. Indicate how you made these available. Check all that apply.

☐ Own website ☒ Another's website ☒ Upon request ☐ Other (explain in Schedule O)

19 Describe in Schedule O whether (and if so, how) the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.

20 State the name, address, and telephone number of the person who possesses the organization's books and records.

ROBERT A LOMBARDI EXECUTIVE DIRECTOR 550 GETTYSBURG ROAD PO BOX 2008 MECHANICSBURG, PA 170550708 (717) 697-0374

Part VII Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees (continued)

(A) Name and Title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional Trustee	Officer	Key employee	Highest compensated employee	Former			
See Additional Data Table										
1b Sub-Total										
c Total from continuation sheets to Part VII, Section A										
d Total (add lines 1b and 1c)								502,917	0	144,549

2 Total number of individuals (including but not limited to those listed above) who received more than \$100,000 of reportable compensation from the organization **▶ 3**

3 Did the organization list any former officer, director or trustee, key employee, or highest compensated employee on line 1a? If "Yes," complete Schedule J for such individual

	Yes	No
3		No

4 For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than \$150,000? If "Yes," complete Schedule J for such individual

4	Yes	
----------	-----	--

5 Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization? If "Yes," complete Schedule J for such person

5		No
----------	--	----

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than \$100,000 of compensation from the organization. Report compensation for the calendar year ending with or within the organization's tax year.

(A) Name and business address	(B) Description of services	(C) Compensation
MCKEES WALLACE & NURICK LLC 100 PINE STREET HARRISBURG PA 17108	LEGAL SERVICES	305,335

2 Total number of independent contractors (including but not limited to those listed above) who received more than \$100,000 of compensation from the organization **▶ 1**

PUBLIC SCHOOL CODE OF 1949 - OMNIBUS AMENDMENTS**Act of Nov. 22, 2000, P.L. 672, No. 91****Cl. 24**

Session of 2000

No. 2000-91

SB 1403

CAMPBELL EXHIBIT B**AN ACT**

Amending the act of March 10, 1949 (P.L.30, No.14), entitled "An act relating to the public school system, including certain provisions applicable as well to private and parochial schools; amending, revising, consolidating and changing the laws relating thereto," providing for CPR instruction; further providing for attendance in district to which territory of residence formerly attached; providing for safe schools advocates and for safe schools standing to sue and enforcement; further providing for agricultural education; establishing the Pennsylvania Athletic Oversight Council; providing for interscholastic athletics accountability; further providing for transportation, for education empowerment definitions and for lists and districts; and providing for an education empowerment pilot program.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The act of March 10, 1949 (P.L.30, No.14), known as the Public School Code of 1949, is amended by adding a section to read:

Section 1205.4. CPR Instruction.--(a) School entities shall be required to offer a cardiopulmonary resuscitation training (CPR) Class on school premises at least once every three years. The course shall be offered as an option to all employees of the school entity.

(b) Completion of training, including testing of skills and knowledge, shall be documented by the signature and title of a representative of the training entity and shall include the date training was completed. Documentation shall be retained in the facility in that employee's file. Training shall be conducted by:

- (1) the American Red Cross;**
- (2) the American Heart Association;**
- (3) an individual certified to conduct CPR training by the American Red Cross, American Heart Association or other certifying agency approved by the Department of Health; or**
- (4) other certifying agency approved by the Department of Health.**

(c) School districts may include this training in the continuing education plan submitted by the district to the Department of Education under section 1205.1.

(d) For purposes of this section, a school entity shall be defined as a local school district, intermediate unit or area vocational-technical school.

Section 2. Section 1314 of the act is amended to read:

Section 1314. Attendance in District to Which Territory of Residence Formerly Attached.--(a) All pupils residing in any territory belonging to any school district established by the act, approved the eighteenth day of May, one thousand nine hundred eleven (Pamphlet Laws 309), which territory at the time of the approval of said act was attached to another school district for school purposes, may, if they so desire, attend during the entire school term of each year the public schools in the district to which the territory in which they reside was formerly attached. The district in which they reside shall pay to the district in which they attend the tuition charge provided for by this act: Provided, That if the school districts in which such pupils now reside has or shall hereafter, by the establishment of new schools

or otherwise, provide within reasonable distance proper school facilities of like grades to those in the district to which they were formerly attached, then in any such case, such pupils shall attend the schools in the district in which they reside. In case of dispute, the decision of the Superintendent of Public Instruction as to sufficiency and reasonableness of the school facilities provided by the school district in which such pupils reside shall be final.

(b) Pupils and their younger siblings under the age of twenty-one (21) years, born or yet unborn of a family that resides in the territory, that is located in a county of the second class, that has been transferred from a township of the first class which has adopted a home rule charter under the former act of April 13, 1972 (P.L.184, No.62), known as the "Home Rule Charter and Optional Plans Law," or under 53 Pa.C.S. Pt. III Subpt. E (relating to home rule and optional plan government) located in a school district of the second class, to a township of the first class located in a school district of the second class, for school purposes may, if they so desire, continue to attend the public schools in the district to which the territory in which they reside was formerly attached for the duration of their attendance in public schools. The district in which they reside shall pay to the district in which they attend the lesser of the State subsidy of the district of residence or the district of attendance in accordance with provisions regarding basic education funding.

Section 3. The act is amended by adding sections to read;

Section 1310-A. Safe Schools Advocate in School Districts of the First Class.--(a) The Secretary of Education shall establish, within the office, a safe schools advocate for each school district of the first class. The advocate shall not be subject to the act of August 5, 1941 (P.L.752, No.286), known as the "Civil Service Act." The advocate shall establish and maintain an office within the school district.

(b) The safe schools advocate shall have the power and its duties shall be:

(1) To monitor the school district's compliance with this article, including:

(i) the school district's reporting to the office of incidents involving acts of violence, possession of a weapon or possession, use or sale of controlled substances as defined in the act of April 14, 1972 (P.L.233, No.64), known as "The Controlled Substance, Drug, Device and Cosmetic Act," or possession, use or sale of alcohol or tobacco by any person on school property;

(ii) obtaining copies of the school district's reports to the office and reviewing and analyzing them;

(iii) the school district's compliance with the procedures set forth in the memorandum of understanding with the appropriate police department regarding incidents involving acts of violence and possession of weapons; and

(iv) obtaining documentation, on a weekly basis during those times when school is in session, of all written or verbal contacts by school district personnel with the appropriate police department consistent with the requirements of the memorandum of understanding.

(2) To monitor the school district's compliance with the mandatory expulsion requirements of section 1317.2.

(3) To receive inquiries from school staff and parents or guardians of students who are victims of acts of violence on school property.

(4) To establish a protocol, in consultation with the Juvenile Court Judges' Commission, to assure timely receipt by the school district of information regarding students who have been adjudicated delinquent pursuant to 42 Pa.C.S. § 6341(b.1) (relating to adjudication) and to monitor the school district's use of that information to ensure that victims of acts of violence by a student are protected.

(5) To establish a program to assure extensive and continuing public awareness of information regarding the role of the advocate on behalf of victims of acts of violence on school property, which may include the mailing of information to the parents or guardians

of students in the school district or other forms of communication.

(6) To review and analyze Federal and State statutes which may be an impediment to school safety and the imposition of discipline for the commission of acts of violence on school property and to prepare, by April 30, 2001, and as necessary from time to time thereafter, reports making recommendations for changes to the statutes which would promote school safety and facilitate effective and expedient disciplinary action. The reports shall be submitted to the secretary.

(7) To review and analyze court decisions applicable to the school district's disciplinary process and procedures, to make recommendations to the school district regarding any negative impact these decisions have upon the effective maintenance of school safety and to make recommendations relating to the existing provisions of consent decrees.

(8) To prepare an annual report regarding the activities of the advocate during the prior fiscal year and any recommendations for remedial legislation, regulations or school district administrative reforms, which shall be submitted to the school district superintendent, the secretary, the chairperson of the Education Committee of the Senate and the chairperson of the Education Committee of the House of Representatives by August 15 of each year.

(9) To monitor infractions of the school district's code of conduct to identify students whose conduct would constitute an offense under 18 Pa.C.S. § 2701 (relating to simple assault).

(c) The safe schools advocate shall, on behalf of victims of acts of violence on school property, victims of conduct that would constitute an act of violence and victims of students who have committed two or more infractions as set forth in subsection (b) (9):

(1) provide assistance and advice, including information on support services provided by victim assistance offices of the appropriate district attorney and through local community-based victim service agencies;

(2) provide information to the parent or guardian of the student victim regarding the disciplinary process and any action ultimately taken against the student accused of committing the act of violence;

(3) in cases involving the possession or use of a weapon, advise the parent or guardian of the victim whether the school district properly exercised its duty under section 1317.2;

(4) in cases where the advocate has received a request by the parent or guardian of the victim, to attend formal disciplinary proceedings;

(5) with the consent of the parent or guardian of the victim, present information in the disciplinary proceeding, which may include oral or written presentations, including testimony by the victim or the parent or guardian of the victim, regarding the impact on the victim and the victim's family and the appropriate disciplinary action and which may include direct or cross-examination of witnesses;

(6) where the perpetrator of an act of violence is returning to school after placement under a consent decree, adjudication of delinquency or conviction of a criminal offense, assist the parent or guardian of the victim in providing input to the school district and the appropriate juvenile or criminal justice authority to ensure the victim's safety on school property;

(7) in cases where the district has failed to report the act of violence to the appropriate police department as required by the memorandum of understanding, to report such act of violence directly; and

(8) provide information and make recommendations to the office of the district attorney regarding the impact of the act of violence on the victim and the victim's family.

(d) Upon discovery of the commission of an act of violence upon a student, the school district of the first class shall immediately notify the victim's parent or guardian of the safe schools advocate. The form of this notice shall be developed by the advocate and provided to the school district. This form shall

include the address and telephone number of the advocate and a brief description of the purposes and functions of the safe schools advocate. The principal of each school within the school district shall post a notice not less than 8 1/2 by 11 inches entitled "Safe Schools Advocate" at a prominent location within each school building, where such notices are usually posted. The form of this notice shall also be developed by the advocate and provided to the school district.

(e) It shall be the duty of each school administrator in a school district of the first class to cooperate with the safe schools advocate to implement this section and to provide the advocate, upon request, with all available information authorized by State law. In regard to individual cases of acts of violence, only information permitted to be shared under subsection (f) shall be disclosed.

(f) The advocate and all employees and agents of the safe schools advocate shall be subject to and bound by section 444 of the General Education Provisions Act (Public Law 90-247, 20 U.S.C. § 1232g) and 34 CFR Pt. 99 (relating to family educational rights and privacy).

(g) This section shall not apply to the extent that it would conflict with the requirements of the Individuals with Disabilities Education Act (Public Law 91-230, 20 U.S.C. § 1400 et seq.) or other applicable Federal statute or regulation.

(h) As used in this section:

"Act of violence" shall mean the possession of a weapon on school property or an offense, including the attempt, solicitation or conspiracy to commit the offense, under any of the following provisions of 18 Pa.C.S. (relating to crimes and offenses):

- (1) section 2501 (relating to criminal homicide).
- (2) section 2702 (relating to aggravated assault).
- (3) section 3121 (relating to rape).
- (4) section 3122.1 (relating to statutory sexual assault).
- (5) section 3123 (relating to involuntary deviate sexual intercourse).
- (6) section 3124.1 (relating to sexual assault).
- (7) section 3125 (relating to aggravated indecent assault).
- (8) section 3126 (relating to indecent assault).
- (9) section 3301 (relating to arson and related offenses).
- (10) section 3701 (relating to robbery).
- (11) section 3702 (relating to robbery of motor vehicle).

"School district" shall mean school district of the first class.

Section 1311-A. Standing.--(a) If a student in a school district of the first class is a victim of an act of violence involving a weapon on school property and the student who possessed the weapon was not expelled under section 1317.2, the parent or guardian of the victim shall have standing to institute a legal proceeding to obtain expulsion of the student.

(b) The Office of General Counsel shall have standing to bring an action on behalf of a victim or the parent or guardian of a victim of an act of violence in a school in a school district of the first class to modify, clarify or eliminate a consent decree that is related to discipline in the district if, in consultation with the advocate, the Office of General Counsel believes that the action is in the best interests of the students of the school district.

(c) The Secretary of the Budget may designate a portion of the funds provided for the safe schools advocate for contracts for legal services to assist low-income parents or guardians of victims to obtain legal services for proceedings under subsection (a). The Secretary of the Budget may designate a portion of the funds provided for the advocate to challenge a consent decree under subsection (b) or to bring an action under sections 1310-A(c)(5) and 1312-A(a). The designation of attorneys to receive funds under this subsection shall be within the discretion of the Office of General Counsel after consultation with the safe schools advocate. Designated funds which are not expended under this subsection shall lapse to the General Fund.

(d) Legal proceedings under this section shall be conducted by an attorney designated by the Office of General Counsel in

consultation with the safe schools advocate. The attorney must be a member of the bar in good standing.

(e) The appropriation for the Office of School Victim Advocate in section 202 of the act of May 24, 2000 (P.L.1068, No.21A), known as the "General Appropriation Act of 2000," shall be used to implement this section and sections 1310-A and 1312-A.

(f) As used in this section, "low-income parent or guardian" shall mean a parent whose family income is no greater than two hundred fifty per centum (250%) of the Federal poverty level.

Section 1312-A. Enforcement.--(a) If the school district of the first class fails to comply with requirements to provide information to the safe schools advocate under section 1310-A, the advocate shall provide documentation of the failure to the Department of Education. If the department determines that there is noncompliance, the department shall notify the advocate and the Office of General Counsel. The Office of General Counsel, in consultation with the safe schools advocate, shall designate an attorney to bring an action in a court of competent jurisdiction to enforce section 1310-A.

(b) Legal proceedings under subsection (a) shall be conducted by an attorney designated by the Office of General Counsel in consultation with the safe schools advocate. The attorney must be a member of the bar in good standing.

Section 1313-A. Construction of Article and Other Laws.--Nothing in this article or any other provision of law shall be construed as granting a right of status for or participation by the safe schools advocate in a grievance or arbitration proceeding arising out of a collective bargaining agreement.

Section 4. Section 1549(b) and (c) of the act, added June 30, 1995 (P.L.220, No.26), are amended to read:

Section 1549. Agricultural Education.--* * *

(b) The department shall have the power and its duty shall be to:

(1) Provide, in conjunction with the Department of Agriculture, resource information to educators and public and private schools and organizations on agricultural education.

(2) Provide [for], in conjunction with the Department of Agriculture, for the development and distribution to school entities or private or nonpublic kindergartens, elementary or secondary schools in this Commonwealth materials on agricultural education. Such materials may include instruction on issues related to agriculture, including, but not limited to, food safety, pesticides, farmland preservation, waste management, wetlands, nutrient management, food production and food processing, animal health and statutory and regulatory protections of the right to farm.

(3) Identify, recognize and establish, in conjunction with the Department of Agriculture, awards for exemplary agricultural education curricula developed in Commonwealth schools.

(4) Use local school district occupational advisory committees, as well as the facilities and equipment of the Department of Agriculture, to serve as the conduit to bring youth and adult education programs into communities and schools, focusing on agricultural industry issues of importance to this Commonwealth.

(5) Maintain, in conjunction with the Department of Agriculture, an inventory of agricultural education materials, programs and resources available in Commonwealth agencies.

(c) The secretary shall prepare and submit, in conjunction with the Department of Agriculture, an annual report to the Governor and the General Assembly [outlining] on the status of agricultural education in this Commonwealth. The report shall outline agricultural education programs and achievements, [highlighting] highlight new initiatives and [recommending] recommend future program needs.

* * *

Section 5. The act is amended by adding an article to read:

ARTICLE XVI-A.

INTERSCHOLASTIC ATHLETICS ACCOUNTABILITY.

Section 1601-A. Scope.--This article deals with interscholastic athletics accountability.

Section 1602-A. Definitions.--The following words and phrases when used in this article shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Association." The Pennsylvania Interscholastic Athletic Association.

"Committee." The Legislative Budget and Finance Committee.

"Council." The Pennsylvania Athletic Oversight Council as established in section 1603-A.

"Interscholastic athletics." All athletic contests or competitions conducted between or among school entities situated in counties of the second class, second class A, third class, fourth class, fifth class, sixth class, seventh class and eighth class.

"Nonpublic school." A school, other than a public school within this Commonwealth, wherein a resident of this Commonwealth may legally fulfill the compulsory school attendance requirements of this act and Title VI of the Civil Rights Act of 1964 (Public Law 88-352, 78 Stat. 241).

"School entity." A public school, school district, nonpublic school or private school in this Commonwealth other than a private or nonpublic school which elects not to become a member of the association.

Section 1603-A. Pennsylvania Athletic Oversight Council.--(a) The Pennsylvania Athletic Oversight Council is established.

(b) The council shall have seventeen voting members, appointed as follows:

(1) Two members of the Senate, of which one shall be appointed by the President pro tempore of the Senate and one shall be appointed by the Minority Leader of the Senate. To the greatest extent possible, appointees should have some experience in interscholastic athletics or shall be parents of students involved in interscholastic athletics.

(2) Two members of the House of Representatives, of which one shall be appointed by the Speaker of the House of Representatives and one shall be appointed by the Minority Leader of the House of Representatives. To the greatest extent possible, appointees should have some experience in interscholastic athletics or shall be parents of students involved in interscholastic athletics.

(3) The Secretary of Education or a designee.

(4) Twelve members shall be appointed as follows:

(i) The following organizations shall each submit three nominations to the Governor, who shall then select two of the names submitted from each of the organizations to serve on the council. To the greatest extent possible, these appointments shall be representative of all of the Pennsylvania Interscholastic Athletic Association's athletic districts:

(A) The Pennsylvania Association of Secondary School Principals.

(B) The Pennsylvania Association of School Administrators.

(C) The Pennsylvania School Boards Association.

(D) The Pennsylvania State Athletic Directors Association.

(ii) The following organizations shall each submit two nominations to the Governor, who shall then select one of the names submitted from each of the organizations to serve on the council. To the greatest extent possible, these appointments shall be representative of all of the Pennsylvania Interscholastic Athletic Association's athletic districts:

(A) The Pennsylvania Congress of Parents and Teachers.

(B) The Pennsylvania Coaches Association.

(C) The Officials Council.

(iii) One member, as selected by the Governor, representing those nonpublic schools that are members of the association.

(5) At least one member appointed under paragraph (4) must be associated with women's athletics, including a coach of a women's athletics team or the parent of a participant in women's athletics.

(c) Terms are as follows:

(1) Members appointed by the Governor shall serve for the duration of the existence of the council.

(2) Legislative members appointed by the Senate and the House of Representatives shall serve at the pleasure of the appointing

authority.

(d) Vacancies occurring on the council by death, resignation, removal or any other reason shall be filled within thirty (30) days of the creation of the vacancy in the manner in which that position was originally filled. An individual appointed to fill a vacancy shall be appointed for the unexpired term of the member he succeeds.

(e) The members of the council shall receive no actual compensation for their services. However, all expenses reasonably necessary for the members of the council to perform their duties shall be paid by the Department of Education.

(f) The duties and responsibilities of the council shall be as follows:

(1) To meet no less than four times a year at the call of the chair. All such meetings shall be conducted in accordance with the requirements of 65 Pa.C.S. Ch. 7 (relating to open meetings).

(2) To make recommendations concerning changes to the administration of interscholastic athletics to the association. The council shall make recommendations on issues, including, but not limited to:

(i) Appeals.

(ii) Athletic eligibility.

(iii) Transfers of students.

(3) To review and monitor the efforts of the association to meet the criteria listed in section 1604-A(a) and (b).

(4) To hold public hearings, subject to the requirements of 65 Pa.C.S. Ch. 7, on any issue concerning interscholastic athletics. These issues shall include, but not be limited to:

(i) Appeals.

(ii) Athletic eligibility.

(iii) Transfers of students.

(5) To have access to all books, papers, documents and records of the association in order to complete the annual report required under clause (6).

(6) To issue an annual report to the chairman and minority chairman of the Education Committee of the Senate, the chairman and minority chairman of the Education Committee of the House of Representatives and the president of the association summarizing:

(i) The council's meetings, public hearings and other action taken by the council.

(ii) The recommendations of the council made during the year and the association's response to each recommendation.

(iii) The efforts of the association to meet the criteria listed in section 1604-A(a) and (b).

(7) To issue a final report two (2) years after the Governor has made the final appointments to the council to the chairman and minority chairman of the Education Committee of the Senate and the chairman and minority chairman of the Education Committee of the House of Representatives and the president of the association summarizing all of the council's actions and recommendations over the previous two (2) years and the association's response to each.

(8) To elect a chairman and a vice chairman.

(9) To, at the council's discretion, request the committee to perform an audit on any phase of the association's compliance with the criteria listed in section 1604-A(a) or (b), as necessary for the purposes of completing its annual or final report.

(g) Expiration of council is as follows:

(1) If, by a majority vote, the council finds that the association has met the criteria listed in section 1604-A(a) and (b) to its satisfaction, the association shall continue to oversee the operation of interscholastic athletics in this Commonwealth, and the council shall expire. The council shall publish a notice of its expiration in the Pennsylvania Bulletin.

(2) If, by a majority vote, the council finds that the association has failed to meet the criteria listed in section 1604-A(a) and (b) to its satisfaction, the council shall, within one (1) year of its finding, submit a proposal for the selection of a new entity to oversee the operation of interscholastic athletics in this Commonwealth to the chairman and minority chairman of the Education Committee of the Senate and the chairman and the minority chairman of the Education Committee of the House

of Representatives. Upon submission of the proposal, the council shall expire, and the council shall publish a notice of its expiration in the Pennsylvania Bulletin. The association shall be allowed to continue to oversee the operation of interscholastic athletics in this Commonwealth only until such time as a new entity is authorized to do so.

(h) Staff.--The Pennsylvania Department of Education shall provide support staff as needed to the council.

Section 1604-A. Council Recommendations and Standards.--(a) The association shall take all steps necessary to comply with the recommendations of the council, including recommendations concerning appeals, athletic eligibility and transfers of students.

(b) The association shall take all steps necessary to comply with the following standards:

(1) Adopt and adhere to policies governing the conduct of open meetings that conform with the requirements of 65 Pa.C.S. Ch. 7 (relating to open meetings).

(2) Adopt and adhere to a policy establishing a competitive bidding process for the purchase of nonincidental merchandise and services that conforms with the requirements of this act.

(3) Adopt and adhere to a policy establishing a competitive process for the selection of sites for championship competitions.

(4) Agree to an annual financial and management review conducted by the committee.

(i) Such reviews shall indicate whether the association has:

(A) conformed with accepted accounting practices;

(B) conformed with all Federal and State statutes governing the administration of nonprofit organizations;

(C) conformed with accepted administrative and management practices; and

(D) contracted with employees who have fulfilled the duties for which they were contracted and act in the best interests of interscholastic athletics.

(ii) The committee shall report its findings from this review to the council, which shall make any appropriate recommendations to the association.

(5) Ensure that the membership of its board of directors includes the following who shall be full, voting members:

(i) One member representing school boards of directors who is an elected member of a school board of directors at the time of appointment.

(ii) One member representing athletic directors who is employed as an athletic director at the time of appointment.

(iii) One member representing coaches who is employed as a coach at the time of appointment.

(iv) One member representing officials who is an active official at the time of appointment.

(v) One member representing the Department of Education.

(vi) One member representing school administrators who is employed as a school administrator at the time of appointment.

(vii) One member representing women's athletics.

(viii) One member representing nonpublic schools.

(ix) Two members representing parents.

(6) Not require any member school entity to reimburse the association for legal fees and expenses incurred by the association or any of its personnel in defending a legal action authorized by a member school entity and brought against the association or any of its personnel and take action to repeal any present rule or policy authorizing such reimbursement prior to the final report of the council.

(7) Adopt an evaluation system for game officials at district, interdistrict and championship competitions and utilize that evaluation system in the selection of individuals to officiate those contests.

(8) Adopt and adhere to a policy prohibiting conflicts of interest and setting forth rules of ethics to be followed by association board members and employees.

(9) Employ in-house counsel.

(10) Evaluate the performance of its contracted employees to determine whether they have complied with the provisions of their

contracts and to determine whether termination is appropriate for any association employees who have violated the provisions of their contracts.

(11) Adopt no rules restricting media access to interscholastic athletic competitions or restricting the substance of any commentary offered by media reporting of interscholastic athletic competitions.

(12) Adopt rules intended to discourage its member school entities from recruiting student athletes, provided that:

(i) Such rules and any penalties levied for their breach shall be directed at the association's member schools and not at individual student athletes who may have been the subject of recruiting.

(ii) Any and all procedures established to gather evidence related to the enforcement of such rules shall place the burden of proof of the breach of such rules on the association and shall afford any member school entity due process rights in defending itself against the allegations, including a right to a hearing on the charges before the imposition of penalties.

(iii) The association is specifically prohibited from identifying individual student athletes as subjects or targets of such procedures.

(13) Establish a policy, including a mechanism for enforcement, requiring that persons involved in interscholastic athletics be provided equality of opportunity and treatment without regard to race, sex, religion, national origin or ethnic background.

Section 6. Section 1726-A of the act, amended June 26, 1999 (P.L. 394, No. 36), is amended to read:

Section 1726-A. Transportation.--(a) Students who reside in the school district in which the charter school is located or who are residents of a school district which is part of a regional charter school shall be provided transportation to the charter school on the same terms and conditions as transportation is provided to students attending the schools of the district. School districts of the first class shall also provide transportation to the students if they are the same age or are enrolled in the same grade, grades or their grade equivalents as any students of the district for whom transportation is provided under any program or policy to the schools of the district. Such transportation shall be provided to charter school students each school day whether or not transportation is provided during the same school day to students attending schools of the district. Nonresident students shall be provided transportation under section 1361. Districts providing transportation to a charter school outside the district shall be eligible for payments under section 2509.3 for each public school student transported.

(b) In the event that the Secretary of Education determines that a school district of the first class is not providing the required transportation to students to the charter school, the Department of Education shall pay directly to the charter school funds for costs incurred in the transportation of its students. Payments to a charter school shall be determined in the following manner: for each eligible student transported, the charter school shall receive a payment equal to the total expenditures for transportation of the school district divided by the total number of school students transported by the school district under any program or policy.

(c) The department shall deduct the amount paid to the charter school under subsection (b) from any and all payments made to the district.

(d) A school district of the first class shall submit a copy of its current transportation policy to the department no later than August 1 of each year.

Section 7. Section 1702-B of the act is amended by adding a definition to read:

Section 1702-B. Definitions.--For purposes of this article, the following terms shall have the following meanings:

* * *

"History of extraordinarily low test performance." A combined average of sixty per centum (60%) or more of students scoring in

the bottom measured group of twenty-five per centum (25%) or below basic level of performance on the Pennsylvania System of School Assessment tests under 22 Pa. Code Ch. 4 (relating to academic standards and assessment) in math and reading in the most recent two school years for which scores are available.

* * *

Section 8. Sections 1703-B(a), 1705-B and 1706-B(a) of the act, added May 10, 2000 (P.L.44, No.16), are amended to read:

Section 1703-B. Education Empowerment List.--(a) The department shall place a school district that has a history of low test performance on an education empowerment list. The department shall immediately notify the school district of its placement on the education empowerment list and shall publish the list in the Pennsylvania Bulletin. A school district may petition the department to exclude from its calculation under this subsection or section 1707-B(a.1) the PSSA test score of any student who was enrolled in the district for less than ninety (90) instructional days of the school year in which the test was administered.

* * *

Section 1705-B. Education Empowerment Districts.--(a) Except as provided in subsection (h), a school district on the education empowerment list that does not meet the goals for improving educational performance set forth in the school district improvement plan and maintains a history of low test performance at the end of the third school year following the date of its placement on the list shall be certified by the department as an education empowerment district, and a board of control shall be established. The department may allow the school district to remain on the education empowerment list for an additional school year prior to certifying the school district as an education empowerment district if the department determines that the additional year will enable the school district to improve test performance and meet other goals set forth in the school district improvement plan.

(b) The board of control shall be comprised of three members as follows:

(1) the secretary, who shall serve as chairman, or a designee; and

(2) two members who are residents of a county in which the school district is located and who shall be appointed by the secretary within fourteen (14) days of the school district's certification as an education empowerment district.

(c) No person who is an officer, board member or employee of the school district shall be appointed to the board of control.

(d) Members of the board of control who are not employees of the Commonwealth or a political subdivision shall receive compensation under section 692.2.

(e) Vacancies on the board of control shall be filled in the same manner as the original appointment.

(f) Members of the board of control shall serve at the pleasure of the secretary.

(g) Actions of the board of control shall be by a majority vote. A majority of the members appointed shall constitute a quorum.

(h). (1) A board of control established under section 692 shall be abolished upon certification of the school district as an education empowerment district. The school district shall be operated by a board of control established under subsection (a). The secretary may appoint the same individuals serving on the board of control under section 692 to the board of control under subsection (b).

(2) Sections 691 and 692 shall not apply to a school district certified as an education empowerment district.

(3) For a school district with a history of low test performance that is certified as distressed for a minimum period of two (2) years under sections 691 and 692 [on the effective date of this article], the department shall waive the inclusion of the school district on the education empowerment list under section 1703-B(a) and immediately certify the school district as an education empowerment district.

Section 1706-B. Powers and Duties of Board of Control.--(a) Except for the power to levy taxes, the board of control may exercise all other powers and duties conferred by law on the board of school directors and the powers and duties conferred by law on a special board of control under sections 693, 694 and 695. In addition to the powers set forth in section 1704-B(a), the board of control shall have the power to close a district school.

* * *

Section 9. Sections 1707-B and 1708-B(b) of the act, added May 10, 2000 (P.L.44, No.16), are amended to read:

Section 1707-B. Boards of Control for Certain School Districts.--(a) The General Assembly finds and declares as follows:

(1) In addition to the operation of failing school districts by a state, other jurisdictions across the nation are utilizing other models to reform failing urban school districts in which the chief executive of the city government is empowered to control the governance of the public schools serving the city. For example, Chicago has implemented a reform model operated by the mayor.

(2) In this Commonwealth, the Mayor of the City of Philadelphia, a city of the first class coterminous with a school district of the first class, recently was empowered by amendments to the home rule charter immediately to appoint all members of the Board of Education of the School District of Philadelphia to serve at his pleasure. In no other school district of the Commonwealth is the mayor or chief executive of a municipality empowered to control or affect the governance of school districts. Under the home rule charter amendments, the Mayor of Philadelphia will have significant input into the development and implementation of any school district improvement plan adopted under section 1703-B and the school district generally.

(3) In order to assess the effectiveness of a mayor-led system of school governance in other large city school districts in this Commonwealth which have a history of extraordinarily low test performance, a pilot program under this section shall be established for certain school districts of the second class coterminous with cities that have opted under the act of July 15, 1957 (P.L.901, No.399), known as the "Optional Third Class City Charter Law," or 53 Pa.C.S. Pt. III Subpt. E (relating to home rule and optional plan government) to be governed by a mayor-council form of government.

(a.1) For a school district of the second class [with] which has a history of extraordinarily low test performance, which is coterminous with [the] a city of the third class [which contains the permanent seat of government of this Commonwealth] that has opted under the "Optional Third Class City Charter Law" or 53 Pa.C.S. Pt. III Subpt. E to be governed by a mayor-council form of government and which has a population in excess of forty-five thousand (45,000), the secretary shall waive the inclusion of the school district on the education empowerment list under section 1703-B(a) and immediately certify the school district as an education empowerment district. No school district shall be certified under this section later than December 31, 2005.

(b) A board of control in an education empowerment district certified under [subsection (a)] this section shall consist of five (5) residents of the school district who shall be appointed by the mayor of the coterminous city within fourteen (14) days of the certification of the school district as an education empowerment district. Members of the board of control shall serve at the pleasure of the mayor.

(c) The authority granted to a board of school directors under section 1704-B(a) shall be exercised by the board of control of an education empowerment district certified under [subsection (a)] this section. The provisions of sections 1705-B(c), (d), (e) and (g), 1706-B and 1708-B(a) shall be applicable to a board of control appointed under subsection (b). The provisions of sections 693, 694 and 695 relating to special boards of control shall apply to a board of control under this section.

(d) Within thirty (30) days of the certification of an education empowerment district under [subsection (a)] this section, the mayor shall appoint a school district empowerment

team under section 1703-B(d)(2) to develop a school district improvement plan under section 1703-B(e). The mayor or [his] a designee shall serve as chairman of the school district empowerment team.

(e) The school district improvement plan under subsection (d) shall be transmitted by the board of control to the department within one hundred twenty (120) days of the appointment of the school district empowerment team. The department shall return the school district improvement plan to the board of control with its approval or any request for modifications within thirty (30) days following its submission. Any further modifications made by the school district empowerment team shall be transmitted to the department by the board of control.

(f) When a school district certified as an education empowerment district under [subsection (a)] **this section** no longer has a history of low test performance and has reached the goals set forth in the school district improvement plan, the department shall remove the certification as an education empowerment district as provided under section 1710-B, except that no certification removal **of a school district initially certified under subsection (a.1)** shall be made for a period of at least five (5) years.

(g) **A school district certified as an empowerment district under this section shall not have its certification removed as a result of the reports of the Bureau of the Census or any change in classification of municipalities or school districts.**

Section 1708-B. Charter Schools.--* * *

(b) Charter schools approved pursuant to this section shall not be subject to sections 1717-A(b), (c), (d), (e), (f) [and], (g), (h) and (i) and 1722-A(c).

* * *

Section 10. This act shall take effect as follows:

(1) The amendment or addition of sections 1205.4 and 1549 of the act shall take effect in 60 days.

(2) The addition of section 1604-A of the act shall take effect in 90 days.

(3) The remainder of this act shall take effect immediately.

APPROVED--The 22nd day of November, A. D. 2000.

THOMAS J. RIDGE

CAMPBELL EXHIBIT C



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**TRICIA MEZZACAPPA,
Requester**

v.

**COLONIAL INTERMEDIATE
UNIT 20,
Respondent**

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Docket No: AP 2019-1922

INTRODUCTION

Tricia Mezzacappa ("Requester") submitted a request ("Request") to the Colonial Intermediate Unit 20 ("Unit") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking video from an identified bus route. The Unit denied the Request in part, arguing that the request for video sought confidential information related to students. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part and denied in part**, and the Unit is required to take further action as directed.

FACTUAL BACKGROUND

On September 4, 2019, the Request was filed, seeking, in relevant part:¹

¹ The Request included three other items, two of which were partially granted and one of which was denied because the responsive records do not exist. On appeal, the Requester affirmatively does not challenge these items of the response.

“Bus video AM route only for the first day of school 2019-2020.”²

On October 11, 2019, after taking a thirty-day extension, 65 P.S. § 67.902(b), the Unit denied the Request in part, arguing that the video is exempt under the Family Educational Rights and Privacy Act (“FERPA”), because it would reveal the home address of minors, 65 P.S. § 67.708(b)(30), because it would endanger personal safety, 65 P.S. § 67.708(b)(1),³ contains personal identification information, 65 P.S. § 67.708(b)(6)(i), and because the Unit had weighed the interest in privacy against the public interest in disclosure and determined that the video should be withheld under the state constitutional right to privacy.

On October 17, 2019, the Requester appealed to the OOR, arguing only that the videos must be provided. The OOR invited both parties to supplement the record and directed the Unit to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On October 29, 2019, the Unit submitted a position statement, reiterating the Unit’s arguments. In support of this position, the Unit submitted the verified attestations of Dr. Frank DeFelice, the Unit’s Agency Open Records Officer, Dr. Christopher Wolfel, the Unit’s Executive Director, and Thomas Kalinoski, the Unit’s Director of Technology, who attested that the responsive videos contained personal details of minor students, that the Unit lacks the technology to redact the videos, and that the Unit had performed a balancing test and determined that the records could not be released.

The same day, the Requester submitted a position statement, stating that identical issues had been considered and disposed of by the OOR in a prior appeal, and that the Unit’s definition

² The Requester subsequently clarified to the Unit that the record sought relates to one bus driver, Matt Dees, and that no other bus videos needed to be examined.

³ The Unit occasionally refers to this as “708(b)(2)”, but this appears to be an error.

of an 'education record' under FERPA contravened the definition developed by the Commonwealth Court.

The same day, with the agreement of all parties, the OOR stayed the case pending the outcome of the Pennsylvania Supreme Court's decision in *Easton Area School District v. Miller*, 13 MAP 2019, 2020 Pa. LEXIS 3378.

On June 22, 2020, the OOR notified the parties that the Pennsylvania Supreme Court had issued an opinion and reopened the record so that the parties could address the effect of the ruling on the instant appeal.

On July 3, 2020, the Unit submitted a position statement reiterating that it lacked the ability to redact the records at issue. In support of this statement, the Unit submitted the supplemental attestations of Dr. DeFelice and Mr. Kalinoski, who attest that the Unit does not possess the software it would require to securely redact the videos, that the videos contain various details which would allow viewers to easily discern the home addresses of students, and that disclosing the video would necessarily risk providing those addresses to the public.

The same day, the Requester submitted a position statement, arguing that the Unit had failed to demonstrate that there was any expectation of privacy in the locations that a bus stops on public roads, and that the redaction of the faces of the students would be acceptable.⁴

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets,

⁴ The Requester also submitted various exhibits and a verification regarding the bus driver and various past allegations. Because the verification and exhibits are not relevant to the issue on appeal, they were not considered.

scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Unit is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the

Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The responsive records must be provided with redactions

The Unit argues that the videos responsive to the Request are exempt because they would reveal the home address of minors, 65 P.S. § 67.708(b)(30), because they would endanger personal safety, 65 P.S. § 67.708(b)(1), and because they contain personal identification information, 65 P.S. § 67.708(b)(6)(i). The Unit further argues that the responsive video is exempt under FERPA⁵ and the constitutional right to privacy because it consists of footage of enrolled students

In support of these arguments, the Unit provided the verified attestations of Dr. DeFelice, Dr. Wolfel, and Mr. Kalinoski, who attest that the videos display details of the bus route such as landmarks, signs, the addresses of houses and the full bus route, which would permit a viewer to determine where children are picked up or deposited and therefore provide their home addresses. Specifically, Mr. Kalinoski attests that:

4. I personally reviewed the bus video, which depicts special education students traveling between home and school.
5. Anyone viewing the video will see the faces of the children on the bus.
6. Many of the bus stops are in front of the students' homes.
7. Anyone viewing the video can see the addresses of some of the homes at which the bus stops.

⁵ FERPA protects “personally identifiable information” contained in “education records” from disclosure, and financially penalizes school districts that have “a policy or practice of permitting the release of education records ... of students without the written consent of their parents.” 20 U.S.C. § 1232g(b)(1).

8. The video includes audio.

The OOR has previously considered an identical argument, supported by similar evidence. *Mezzacappa v. Colonial Intermediate Unit 20*, 2019-0838, 2019 PA O.O.R.D. LEXIS 656 (on appeal to the Northampton County Court of Common Pleas). In *Mezzacappa*, the requester sought all video filmed by the cameras of Bus #52 for a month, and the agency denied, arguing that the ability to discern the addresses and features of minors rendered the video exempt under Sections 708(b)(2), (6)(i) and (30). The OOR considered and rejected each of these reasons for denial, noting that the Unit's attestations failed to establish any reasonable threat to the safety of the students, that no part of Section 708(b)(6)(i) encompasses a school bus video, and that while houses, street names and address numbers are all occasionally visible on the responsive videos, there is no evidence that a watcher would be able to determine whether a minor dwells at any given house.

Since then, in *Easton Area Sch. Dist. v. Miller*, the Pennsylvania Supreme Court examined a similar situation, where a reporter sought school bus video which would show an instructor disciplining a student. 13 MAP 2019, 2020 Pa. LEXIS 3378. In *Miller*, the Court found that an "education record" under FERPA cannot be provided in unredacted form and explained that a video qualifies as an "education record" if it relates directly to a student, including by capturing a student's image at any event which would later become part of an inquiry by the school. *Id.* at 37. *Miller* relied on guidance promulgated by the United States Department of Education to find that the meaning of "education record" under FERPA is broader than lower courts previously held, explaining that even students who are innocently or incidentally involved in incidents which merit later official scrutiny are directly related. *Id.* at 31; *see Cent. Dauphin Sch. Dist. v. Hawkins*, 199

A.3d 1005, 1013-14 (Pa. Commw. Ct. 2018) (prior case holding that school bus video did not ‘directly relate’ to a student caught on film because it existed for the purpose of staff discipline).

The Court in *Miller* ultimately found that the images of the students should be redacted from the responsive video recording(s), either under FERPA or under the constitutional right to informational privacy. 2020 Pa. LEXIS 3378 *37. The Court previously held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass’n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the responding agency and the OOR must balance the individual’s interest in informational privacy with the public’s interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; see also *Pennsylvania State Univ. v. State Employees’ Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act). In *Miller*, the Court explained that each student had a potential privacy interest in their identification in a school video, but that the right to privacy may be satisfied by the redaction of the faces of “reasonably identifiable” students. 2020 Pa. LEXIS 3378 *37.

Furthermore, although neither Section 708(b)(1) or (b)(30) of the RTKL were directly at issue in *Miller*, the Court addressed the potential for safety concerns in the release of the footage, stating that, “[i]n the case of a school bus surveillance video, such a disclosure could reveal the identity of minor students; their clothing, behaviors, or disabilities; the specific bus they take; and the geographical location where they exit the bus. In addition to obvious safety concerns, such a disclosure also necessarily implicates the students’ right to informational privacy [.]” *Id.* at 34.

As in the previous *Mezzacappa* case, the attestations submitted by the Unit are conclusory on the topic of safety. Section 708(b)(1)(ii) of the RTKL exempts from disclosure a record that “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). Under the RTKL, “reasonable likelihood” of “substantial and demonstrable risk” is necessary to trigger the personal security exception. *Del. County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012). Meanwhile, Section 708(b)(30) allows an agency to prohibit the release of a “record identifying the name, home address or date of birth of a child 17 years of age or younger.” 65 P.S. § 67.708(b)(30). Here, the Unit has established only that some addresses may be visible and has not elaborated on any substantial and demonstrable risk to the children. However, the Requester has disclaimed any interest in the personal information of the students, such as addresses or identities. As a result, the OOR will address the purported security risks and possibility of home addresses just as the court did in *Miller*, through redaction.⁶

On appeal, the Unit explains that it has already conducted the *PSEA* balancing test and determined that “the right of each student and the students’ families to privacy far outweighs the public interest in having access to the requested videos.” This determination comports with the Pennsylvania Supreme Court’s rationale in *Miller*, and therefore the OOR finds that the Unit correctly determined that a privacy right in the identity of these students exists.

However, as the Supreme Court explained in *Miller*, both this right of privacy and the requirements of FERPA are satisfied if the identities of the students can be reasonably protected

⁶ The Unit also raises Section 708(b)(6) of the RTKL, which exempts from disclosure certain personal identification information, including “Social Security number; driver’s license number; personal financial information; home, cellular or personal telephone numbers; personal e-mail addresses; employee number or other confidential personal identification number...[; a] spouse’s name; marital status, beneficiary or dependent information...[; t]he home address of a law enforcement officer or judge.” 65 P.S. §§ 67.708(b)(6)(i)(A)-(C). However, the Unit does not identify any information from the video which would be encompassed by this exemption, and it appears to be irrelevant to this analysis.

by redaction of the video without destroying the underlying record. *See Id.* Similarly, the RTKL requires that information subject to exemption under Section 708 be redacted from otherwise-public records to the greatest extent possible. 65 P.S. § 67.706 (requiring that nonpublic information be removed by redaction if possible). Therefore, both *Miller* and the statutory language favor redaction of the videos.

The Unit argues that redaction is impossible for two reasons; it lacks the essential software to do so,⁷ and because the video contains voluminous details which would require redaction. The Unit argues that in addition to the faces of students, the Unit would be required to redact street signs and addresses, and that it would also need to disguise the actual route being taken by the bus.

The right to privacy articulated in *PSEA* and applied by *Miller* is a personal right to privacy and is entirely satisfied if redaction can reasonably obscure the identity of the students; the fact that some number of unknown students take a particular bus route is not secret and requires no redaction. *See, e.g., Mission Pa., LLC, v. McKelvey*, 212 A.3d 119, 132 (PA. Commw. Ct. 2019) (emphasizing the fact that the constitutional right to privacy is in personal information alone). Furthermore, as the Requester notes, there is no expectation of privacy in the bus route itself, which is driven on public roads and at well-known times during every school day. *PSEA*, 148 A.3d at 150 (“[T]his Court has routinely required a factual examination of whether (1) the person has exhibited an actual (subjective) expectation of privacy in the items to be searched or disclosed, and (2) whether society is prepared to recognize this expectation as reasonable and protectable.”) Therefore, the right to privacy is satisfied by the redaction of details which shield the identities of the students and does not justify additional redaction to hide the bus route.

⁷ This argument is addressed more fully in the section below.

However, in light of the fact that the Requester has disclaimed any interest in the addresses of the students, the Unit may redact any specific addresses which are visible on the video.

2. The Unit's redactions are governed by Section 1307(g) of the RTKL

The Unit argues that it does not possess the capability to redact video footage. In support of this argument, the Unit submitted the supplemental affidavit of Mr. Kalinoski, who attests that:

4. I personally reviewed the bus video, which depicts special education students traveling between home and school.

5. The video includes audio.

6. In my capacity as the Director Technology, I am familiar with the software owned by and available to the Intermediate Unit.

7. The Intermediate Unit does not own or have access to software that would allow object tracking redaction of the video. This limits us to not being able to effectively redact student faces and home addresses.

Under the RTKL, an attestation may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Unit has acted in bad faith, "the averments in [the verification] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Therefore, the Unit has demonstrated that it does not have the ability to redact the video.

The agency in *Miller* likewise argued that it lacked the capabilities to redact student faces from video feeds, and the Pennsylvania Supreme Court still ordered that the records must be redacted and provided. *Miller*, 2020 Pa. Lexis 3378, *33. However, the Court also noted that "[w]e do not suggest the District is obligated to finance such redaction, which responsibility may

fall either to the District or to the Requester depending upon other laws, policies, or legal directives that are not before the Court in the present appeal.” *Id.* at 34, n.15.

Fees under the RTKL are governed by Section 1307, which provides guidelines for postage fees, duplication fees, certification fees, printing fees, enhanced electronic access fees, and a catchall provision. 65 P.S. §§ 67.1307(a)-(g). Because the costs for procuring software or contract services are not governed by any of the regular fee provisions, the OOR turns to 1307(g), which provides that the miscellaneous costs an agency *necessarily* incurs for complying with a request may be imposed upon a requester provided that such costs are *reasonable*. 65 P.S. § 67.1307(g); *see also SERS v. Office of Open Records*, 10 A.3d 358, 363 (Pa. Commw. Ct. 2010). To show that a cost may be imposed on a requester, the agency must show that the cost at issue is both necessary to fulfill the request and reasonable in scope. *See Iverson v. Southeastern Pa. Transp. Auth.*, OOR Dkt. AP 2011-0742, 2011 PA O.O.R.D. LEXIS 477; *Lauff v. Fort Cherry Sch. Dist.*, OOR Dkt. AP 2011-0701, 2011 PA O.O.R.D. LEXIS 470. To demonstrate that the price is reasonable, the agency must show that this fee is “reasonable in the field” or that it was an ordinary price for such services. *Iverson*, 2011 PA O.O.R.D. LEXIS 477 (stating that because “... SEPTA did not establish that it consulted with other companies regarding the fees for similar services and or address the time reportedly required to comply with the Request, SEPTA failed to prove that the estimated charges are either necessary or reasonable, and, accordingly, SEPTA cannot pass the estimated charge on to the Requester”). Where an agency lacks the ability to extract and duplicate information without using a third-party vendor, it may recoup the costs for that charge. *See Allen v. Fairview Twp.*, OOR Dkt. AP 2010-0758, 2010 PA O.O.R.D. LEXIS 747.

Here, the Unit has presented the OOR with evidence that it does not have the software necessary to redact the faces of the students in the responsive video but has not provided the OOR

with any estimate of costs to either obtain such software or obtain a contractor.⁸ Therefore, the Unit must determine what options exist to allow it to redact the responsive video as required by *Miller*, and provide the Requester with a good faith estimate of any reasonable expenses it will necessarily entail.⁹ Upon payment of such expenses, the Unit must provide the redacted video.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part and denied in part**, and the Unit is required to provide the Requester with an estimate of reasonable and necessary fees for redaction within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Northampton County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.¹⁰ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 31, 2020

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS

Sent to: Tricia Mezzacappa (via email only);

⁸ The OOR lacks the ability to determine what services the Unit could or should retain but notes that the Unit should consider the possibility of using low or zero-cost options. The popular video platform YouTube, for example, contains an onboard video editor which can automatically detect and blur faces, or permit the user to apply a custom blur to a video. See, e.g., "Edit videos & video settings; Blur your videos", YouTube Help, support.google.com/youtube/answer/9057652?hl=en (last accessed July 13, 2020).

⁹ As noted, the word "necessarily" in Section 1307(g) indicates that the Unit should seek to identify the lowest-cost solution which will permit the redactions. If the Requester believes that the Unit is not operating in good faith, she may appeal to the Court of Common Pleas of Northampton County, which has the power to assess fees and penalties against the agency. 65 P.S. § 67.1305.

¹⁰ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

OOB Exhibit 20



FINAL DETERMINATION

IN THE MATTER OF

**SIMON CAMPBELL,
Requester**

v.

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

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Docket No.: AP 2020-2639

INTRODUCTION

Simon Campbell ("Requester") submitted a request ("Request") to the Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking, among other records, various legal invoices and check copies. The PIAA partially denied the Request, asserting that certain records do not exist. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part and denied in part**, and the PIAA is required to take further action as directed.

FACTUAL BACKGROUND

On November 2, 2020, the Request was filed, seeking:

1. ... [E]lectronic copies of all legal invoices that already exist in electronic form that were paid by [the] PIAA to any and all attorneys/law firms between the dates of January 1, 2012 and the present....
2. [E]lectronic copies of the fronts of all electronic cleared check images that already exist in electronic form ... for all financial accounts owned/operated by [the] PIAA between the dates of June 1, 2019 and the present....
3. [E]lectronic copies of all monthly bank (or other financial institution) statements that already exist in electronic form for all financial accounts owned/operated by [the] PIAA between the dates of December 1, 2013 and the present.
4. [A]ll posted line item transactions in all bank (or other financial institution) accounts that already exist in electronic form for all financial accounts owned/operated by [the] PIAA between the dates of June 1, 2019 and the present....
5. [The] PIAA's most recent three (3) years of independent audited financial statements that already exist in electronic form....
6. [The] PIAA's most recent Form 990 filing with the IRS that already exists in electronic form....
7. [E]lectronic copies of all written communications that already exist in electronic form, and that were exchanged between [the] PIAA officials (and between [the] PIAA officials and counsel) between the dates of January 1, 2020 and the present that discuss the topic of [the] PIAA being improperly included in the RTKL....
8. [A] screenshot image showing [the Requester] the name of the software program/s in [the] PIAA's possession, custody or control that can perform electronic redactions on PDF files and/or other electronic file types....

On November 6, 2020, the PIAA invoked a thirty-day extension of time, 65 P.S. § 67.902(b), to respond to the Request. On December 7, 2020, the PIAA partially denied the Request, asserting that records responsive to Items 1, 2, 3, 4, 7 and 8 do not exist. With respect to Item 5, the PIAA stated that it "requested these records from its auditors but has not yet received them" and the records "will be produced upon receipt." In response to Item 6 of the Request, the PIAA directed the Requester to the IRS's publicly available website, www.irs.gov. The PIAA also noted a

“[g]eneral objection” to the Request, stating that the PIAA “is not a Commonwealth authority or entity” that is subject to the RTKL and that it intended “to litigate this issue in response to th[e] [R]equest.”

On December 10, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the PIAA to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On December 21, 2020, the PIAA filed a Motion to Stay Proceedings (“Motion”), asserting that the instant appeal should be stayed pending the Commonwealth Court’s consideration of the PIAA’s Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief, which was filed with the Commonwealth Court on December 18, 2020. On December 21, 2020, the OOR afforded the Requester the opportunity to respond to the PIAA’s Motion. On December 22, 2020, the Requester submitted his response to the PIAA’s Motion, stating that he objects to the Motion. Also, on December 22, 2020, the OOR informed the parties that the PIAA’s Motion was denied, and the OOR set forth deadlines for the parties to submit evidence in the appeal.

On December 30, 2020, the PIAA submitted a position statement reiterating its grounds for denial. The PIAA also contends that the PIAA is not subject to the RTKL and that application of the RTKL to the PIAA “constitutes unconstitutional special legislation.” The PIAA further argues that the RTKL violates the PIAA’s “equal protection rights under the United States and Pennsylvania Constitutions,” and that disclosure of certain banking information “would violate privacy rights.” The PIAA also submitted the affidavit, made under penalty of perjury, of Dr. Robert Lombardi (“Dr. Lombardi”), Executive Director and Open Records Officer of the PIAA.

On December 31, 2020, the Requester made a submission, requesting that the record in this matter remain open an additional two or three business days. On the same day, the PIAA made a submission, asserting that because the Requester “submitted no timely response ... addressing any of the issues identified in the denial letter, argument on those issues in a submission addressing assertedly newly raised issues would be untimely and should not be permitted.” Also, on December 31, 2020, the Requester submitted a reply to the PIAA’s submission, stating, in part, that the PIAA acted in bad faith. On the same day, the OOR notified the parties that the record would remain open through January 5, 2021.

On January 4, 2021, the Requester made a submission, indicating that he was “ask[ing] the Pennsylvania Office of the Attorney General (“AG’s Office”)] to make sure the appropriate attorney from the AG’s [O]ffice asserts the Commonwealth’s direct interest into this appeal via Section 1101(c)(1) of the RTKL.” The Requester’s submission also included a letter to the AG’s Office.

On January 5, 2021, the PIAA submitted a supplemental position statement, asserting, in part, that “any submission by [the] Requester relating to responses presented in [the] PIAA’s letter of December 7, 2020 should be rejected as untimely.”¹ On the same day, the Requester submitted a supplemental position statement, stating, in part, that “[a]ny and all redaction arguments not raised thus far have similarly now been waived” and requesting that the OOR “issue an advisory opinion finding that [the] PIAA and its counsel acted in bad faith and in wanton disregard of [the] law.”

¹ Of note, to develop the record in this matter, all submissions of both parties were considered. See 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”).

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “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.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The PIAA is a Commonwealth agency² subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

² This is addressed in further detail in Section 1 of this Final Determination.

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The PIAA is subject to the RTKL

As a preliminary matter, the PIAA argues that because it is not a Commonwealth authority or entity, it is not subject to the requirements of the RTKL. Specifically, the PIAA contends that “[a]s [the] PIAA does not meet the definition of State-affiliated entity, nor is it included within the scope of the RTKL based on any other provision, the RTKL is not applicable to [the] PIAA and the OOR has no jurisdiction over requests for records made to [the] PIAA.”³

Under the RTKL, the term “State-affiliated entity” is defined as “[a] Commonwealth authority or Commonwealth entity. The term includes the ... *Pennsylvania Interscholastic Athletic Association*....” 65 P.S. § 67.102 (emphasis added). Additionally, the term “Commonwealth

³ Along these lines, the PIAA also maintains that application of the RTKL to the PIAA “constitutes unconstitutional special legislation” and that the RTKL violates the PIAA’s “equal protection rights under the United States and Pennsylvania Constitutions.” However, the PIAA also states that it “recognizes that the OOR does not have the authority to grant declaratory and/or equitable relief on a challenge to the constitutionality of a statute. *See Pa. Indep. Oil & Gas Ass’n v. [Pa.] Dep’t of Envtl. Prot.*, 135 A.3d 1118, 1129 (Pa. Commw. 2015).” Accordingly, these issues will not be addressed in this Final Determination.

agency” is defined to include “[a]ny office, department, authority, board, multistate agency or commission of the executive branch, an independent agency and a *State-affiliated entity*.” *Id.* (emphasis added). As such, under the RTKL, the PIAA is defined as a State-affiliated entity and is considered a Commonwealth agency. Pursuant to the clear language of the RTKL, “[a] Commonwealth agency shall provide public records in accordance with [the RTKL].” 65 P.S. § 67.301(a).

In light of the above statutory language, the OOR has repeatedly determined that the RTKL applies to the PIAA. *See, e.g., Scicchitano v. PIAA*, OOR Dkt. AP 2019-1504, 2019 PA O.O.R.D. LEXIS 1521; *Palattella v. PIAA*, OOR Dkt. AP 2018-0743, 2018 PA O.O.R.D. LEXIS 747. To hold otherwise would disregard the legislative intent behind the RTKL to promote government transparency and would also ignore the Legislature’s unambiguous directive that the RTKL applies to the PIAA.

2. Records responsive to Item 1 of the Request are subject to disclosure

Item 1 of the Request seeks electronic copies of “all legal invoices that already exist in electronic form that were paid by [the] PIAA to any and all attorneys/law firms between the dates of January 1, 2012 and the present...” While the PIAA asserts that it “receives its legal invoices in paper format,” the PIAA further states that it “has requested electronic copies of the records from its law firms.” In support, Dr. Lombardi affirms, in part, as follows:

40. [The] PIAA has no responsive records in an electronic format.
41. [The] PIAA receives its legal invoices in a paper format.
42. I have requested electronic records from law firms which we have used but have not received them.
43. There are several thousand pages of such invoices.
44. Once the records arrive, they will need to be redacted.

45. It will take weeks to do so since none of those documents are ... currently in a redacted format and must be created by [the] PIAA.
46. Our standard redaction process involves going through entries on each printed invoice.
47. I had recently undertaken this task with the same requested records pursuant to an earlier request by another individual for the same documents, so I know how long the effort will take. However, those redacted records were destroyed once the requester informed [the] PIAA that he would not pay for the costs of reproduction. That destruction occurred prior to receiving [the R]equest. Consequently, I would need to replicate the process here.

Under the RTKL, a sworn affidavit is generally competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the PIAA acted in bad faith, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, while the PIAA states that the relevant invoices "will need to be redacted," the PIAA presents no evidence in support of any redactions. Specifically, the PIAA's submissions fail to indicate what would need to be redacted and the basis for such redactions. Notably, although the PIAA states that it is waiting to receive the responsive invoices in electronic form from its attorneys, the PIAA acknowledges that it has in its possession the invoices in paper format. As such, the PIAA has had the opportunity to review the responsive invoices and determine any necessary redactions. Moreover, the fact that a request may entail retrieving a large number of documents does not relieve the agency's duty to comply with the RTKL. *See Pa. Dep't of Env'tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012); *see also Ruggiero v. Lackawanna County*, OOR Dkt. AP 2014-0043, 2014 PA O.O.R.D. LEXIS 157 ("[A] request involving the

detailed review of voluminous documents does not relieve the agency of its requirements to presume the records are open and available and [to] respond in accordance with the RTKL”); *Falcetta v. Grove City Area Sch. Dist.*, OOR Dkt. AP 2018-0908, 2018 PA O.O.R.D. LEXIS 908. Accordingly, to the extent the legal invoices currently exist in electronic format, they are subject to disclosure.⁴ See 65 P.S. § 67.708(a)(1).

3. Portions of the records responsive to Items 2, 3 and 4 of the Request are subject to disclosure

Items 2, 3 and 4 of the Request seek various check images, bank statements and posted line-item transactions from the PIAA. The PIAA contends that “information on a check, including the account number, must be redacted to protect [the PIAA’s] privacy interests.” Section 708(b)(6) of the RTKL exempts from disclosure “personal financial information,” which the RTKL defines as “[a]n individual’s personal credit, charge or debit information; bank account information; bank, credit or financial statements; account or PIN numbers and other information relating to an individual’s personal finances.” 65 P.S. § 67.102; 65 P.S. § 67.708(b)(6). Because bank account numbers constitute “bank account information” of the PIAA, it is expressly exempt under Section 708(b)(6). See *Murray v. Pa. Dep’t of Health and GGNLC Lancaster, LLP d/b/a Golden Living Center-Lancaster*, OOR Dkt. AP 2017-0461, 2017 PA O.O.R.D. LEXIS 1361 (finding the bank account number of a nursing home the department contracts with to be exempt from disclosure pursuant to Section 708(b)(6)); *Berney v. Sch. Dist. of Phila.*, OOR Dkt. AP 2016-1390, 2016 PA O.O.R.D. LEXIS 1426 (finding the bank account number of a law firm that the district contracts with to be exempt from disclosure pursuant to Section 708(b)(6)). Therefore, the PIAA may redact its bank account numbers from the responsive records.

⁴ However, if the records only exist in hard copy, the PIAA is not required to convert those records into electronic copies. See 65 P.S. § 67.705.

With respect to the remaining portions of responsive records, Dr. Lombardi affirms, in part, as follows:

50. Recent years have shown the risk to corporations from hacks of their banking and other records. Disclosure of banking account information has been determined to considerably increase those risks.
51. Additionally, assembly and redaction of the requested records is not realistically feasible. There are many thousands of individual checks which must be reviewed and redacted.
52. [The] PIAA is divided into twelve administrative districts, each ... using separate banks, almost all using volunteer treasurers working with physical, not electronic records.
53. Assembling, redaction and production of the requested records would be extremely difficult.
54. Even at the headquarters level alone, [the] PIAA pays thousands of workers (officials, referees, ticket takers, security, maintenance staff, health officials, etc.) for each season.
55. As an example, the printout of just the records for a single season of [the] PIAA's basketball tournament is over 600 pages.
56. Multiply that by 22 sports and a number of years, and then multiply that by 12 separate districts, and it quickly becomes apparent that tens of thousands of records must be reviewed, potentially redacted, and then produced.
57. Just on these requests, I estimate that it would take a full-time employee three to four months to properly comply with the [R]equest.
58. This would significantly impact on the operations of [the] PIAA.

As previously stated, the fact that a request may entail retrieving a large number of records does not relieve the agency's duty to comply with the RTKL. *See Legere*, 50 A.3d at 265. The OOR notes that an agency which does not have sufficient time to locate and review responsive records is entitled to apply to the OOR for additional time under the Commonwealth Court's decision in *Pa. State Sys. of Higher Educ. v. Ass'n of State Coll. & Univ. Faculties* ("APSCUF"), where the Commonwealth Court determined:

The agency making such a claim has to provide the OOR with a valid estimate of the number of documents being requested, the length of time that people charged with reviewing the request require to conduct this review, and if that request involves documents in electronic format the agency must explain any difficulties it faces when attempting to deliver the documents in that format. Based on the above information, the OOR can then grant any additional time warranted so that the agency can reasonably discern whether any exemptions apply.

142 A.3d 1023, 1032 (Pa. Commw. Ct. 2016).

In this instance, the PIAA did not seek any such extension under *APSCUF*. Rather, the PIAA argues that “[t]he appeal seeking these records should be rejected.” Because the PIAA did not set forth any basis for exemptions from public access, any records responsive to Items 2, 3 and 4 of the Request that currently exist in electronic format are subject to disclosure, subject to redactions of the PIAA’s bank account numbers, as directed above.

4. Records responsive to Item 5 of the Request are subject to disclosure

Item 5 of the Request seeks the PIAA’s “most recent three (3) years of independent audited financial statements that already exist in electronic form.” In response, the PIAA states that it agrees to provide the records to the Requester, once it receives them in electronic format from the PIAA’s auditors. Specifically, Dr. Lombardi affirms that the PIAA “receives its audited financial statements in hard copy format from its auditors. Upon receipt of the [R]equest, I asked our auditors for electronic copies if they exist. Once they are obtained, I will provide them to [the Requester].”

As the PIAA agrees to provide the responsive records and has not presented any argument in support of withholding the responsive records, 65 P.S. § 67.708(a)(1), to the extent that the PIAA’s auditors have the records responsive to Item 5 of the Request in electronic format, they are subject to public access.

5. The PIAA provided electronic access to records responsive to Item 6 of the Request

In response to Item 6 of the Request, which seeks the PIAA's "most recent Form 990 filing with the IRS that already exist in electronic form," the PIAA directed the Requester to the IRS's website, www.irs.gov. The PIAA argues that its response to this portion of the Request "was correct and appropriate." Section 704(b) of the RTKL permits an agency to respond to a request for records "by notifying the requester that the record is available through publicly accessible electronic means[.]" 65 P.S. § 67.704(b)(1). If a requester is unwilling or unable to access the records electronically, the requester may "submit a written request to the agency to have the record converted...." 65 P.S. § 67.704(b)(2). If the requester does not timely do so, an agency has no further obligation under the RTKL relative to a requester's access to the particular requested record(s). An appeal to the OOR is not "a written request to the agency to have the record converted" such that it triggers an agency's responsibility to take further action pursuant to Section 704(b)(2) of the RTKL. *Borden v. Ridgebury Twp.*, OOR Dkt. AP 2011-1460, 2011 PA O.O.R.D. LEXIS 1223.

Here, Dr. Lombardi affirms that "[a]s those records already exist in electronic format on the IRS website, I referred him to those documents." Under the RTKL, a sworn affidavit may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. The OOR has previously held that directing a requester to an internet website for the responsive records satisfies an agency's obligations under Section 704 of the RTKL. *See Rowbottom v. Dauphin County*, OOR Dkt. AP 2019-0472, 2019 PA O.O.R.D. LEXIS 542; *Citizens for Pennsylvania's Future v. Pa. Turnpike Comm'n*, OOR Dkt. AP 2015-0726, 2015 PA O.O.R.D. LEXIS 856. As such, the PIAA's response regarding Item 6 of the Request satisfies the requirements under Section 704 of the RTKL.

6. The PIAA has demonstrated that records responsive to Item 7 of the Request do not exist

In response to Item 7 of the Request, the PIAA contends that there are no responsive records. In support, Dr. Lombardi affirms, in part, as follows:

30. [Item] 7 of [the Request] sought copies of all written communications between [the] PIAA officials, including legal counsel between January 1, 2020 and the date of [the Request] “that discuss the topic of [the] PIAA being improperly included in the RTKL.”
31. I conducted a thorough search of all [the] PIAA records relating to that topic and found no responsive records.
32. I am also aware that any communications on that subject would be limited to me and legal counsel as no other PIAA official was involved in 2020 in discussion of that issue as of the date of the [R]equest.
33. I am also aware that all communications between me and legal counsel on that topic in 2020 were oral. There were no 2020 written communications on that subject prior to submission of the [R]equest.

Under the RTKL, a sworn affidavit may serve as sufficient evidentiary support for the nonexistence of records. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Based on the evidence provided—the affidavit of the PIAA’s Executive Director and Open Records Officer, who would have the capacity to search for responsive records—the PIAA has demonstrated that it conducted a good faith search for responsive records. *See Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294 (finding that an agency conducted a good faith search by “contact[ing] the Bureau most likely to possess responsive records, and ... explain[ing] why that Bureau is most likely to possess those records”); *Yakim v. Municipality of Monroeville*, OOR Dkt. AP 2017-1946, 2017 PA O.O.R.D. LEXIS 1685. Accordingly, the PIAA has met its burden of proof that it does not possess records responsive to Item 7 of the Request. *See Hodges*, 29 A.3d at 1192.

7. The PIAA has failed to demonstrate that records responsive to Item 8 do not exist

The PIAA asserts that records responsive to Item 8 of the Request, which seeks a “screenshot image showing ... the name of the software program/s in [the] PIAA’s possession, custody or control that can perform electronic redactions on PDF files and/or other electronic file types,” does not exist. In support, Dr. Lombard affirms that he “conducted a search of the PIAA records and did not locate any existing screen shot responsive to the [R]equest.”

In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court concluded that:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.... After obtaining potentially responsive records, an agency has the duty to review the record and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2013) (internal citations omitted); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep’t of Homeland Sec.*, 857 F.Supp.2d 129, 138-39 (D.D.C. 2012)). Additionally, the Commonwealth Court has held that an open records officer’s inquiry of agency members may constitute a “good faith effort” to locate records, stating that open records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open-records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

In this instance, although Dr. Lombardi affirms that he conducted a search for responsive records, Dr. Lombardi does not provide any additional information regarding the search he conducted, including what steps he took in conducting his search. Notably, Dr. Lombardi’s affidavit does not indicate if he inquired of other relevant personnel, such as the PIAA’s IT Department, to determine if there were any applicable software programs. Accordingly, the evidence submitted by the PIAA fails to demonstrate that the PIAA does not possess records responsive to Item 8 of the Request. Therefore, the PIAA has not proven that it conducted a good faith search in response to Item 8 of the Request. *See Mollick v. Worcester Twp.*, OOR Dkt. AP 2018-2153, 2019 PA O.O.R.D. LEXIS 90 (finding that “[w]ithout identifying the potentially responsive emails possessed by the [t]ownship’s Supervisors and providing them to [the township’s Open Records Officer], the [t]ownship is unable to prove that it conducted a good faith search...”).

The OOR is mindful that an agency cannot produce records that do not exist within its “possession, custody or control” and, accordingly, is not ordering the creation of any records. Absent the PIAA providing a sufficient evidentiary basis that no responsive records exist, the OOR will order disclosure of responsive public records. *See Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

8. The OOR declines to make a finding of bad faith

The Requester asks that the OOR make a finding of bad faith. Specifically, the Requester maintains that “[o]ther than writing *something* to me in a timely manner I cannot find any aspect of the RTKL that has been complied with,” (emphasis in original). While the OOR may make findings of bad faith, only the courts have the authority to impose sanctions on agencies. *See generally* 65 P.S. § 67.1304(a) (noting that a court “may award reasonable attorney fees and costs of litigation ... if the court finds ... the agency receiving the ... request willfully or with wanton disregard deprived the requester of access to a public record ... or otherwise acted in bad faith....”); 65 P.S. § 67.1305(a) (“A court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith”).

In this instance, the PIAA properly extended its time to respond to the Request by thirty days, 65 P.S. § 67.902(b)(2), and, ultimately, issued its response in a timely manner. Moreover, while the OOR disagrees with the PIAA’s legal arguments regarding whether it is subject to the RTKL, the OOR declines to make a finding of bad faith on that basis. Likewise, the PIAA’s assertion that certain records do not exist, or that responding to portions of the Request “would significantly impact on the operations of [the] PIAA” does not rise to the level of bad faith.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part and denied in part**, and the PIAA is required to provide responsive records, as directed above, within thirty days. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a

proper party to any appeal and should not be named as a party.⁵ This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 13, 2021

/s/ Magdalene C. Zeppos-Brown

MAGDALENE C. ZEPPOS-BROWN, ESQ.
APPEALS OFFICER

Sent to: Simon Campbell (via email only);
Alan Boynton, Esq. (via email only); and
Dr. Robert Lombardi, AORO (via email only)

⁵ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**Rebecca Young, Esq. (via email only);
Dr. Frank DeFelice (via email only)**

Zeppos-Brown, Magdalene

From: Zeppos-Brown, Magdalene
Sent: Wednesday, January 13, 2021 8:21 AM
To: Simon Campbell; Boynton, Alan; rlombardi@piaa.org
Subject: Final Determination: Campbell v. PIAA (OOR Dkt. AP 2020-2639)
Attachments: 2020-2639_Campbell-PIAA_FD.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Parties:

Attached, please find the Final Determination issued in the above matter. Thank you.



Magdalene C. Zeppos-Brown, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
[\(717\) 346-9903](tel:7173469903) | mazepposbr@pa.gov
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OOR Exhibit 21

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JAN 25 2020

OFFICE OF OPEN RECORDS

J. Chadwick Schnee
chadwick@tucker-hull-law.com

January 25, 2021

Charles Brown, Esq.
Chief Counsel
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

RE: **PETITION FOR RECONSIDERATION –**
Campbell v. Pennsylvania Interscholastic Athletic Association, Inc.,
OOR Dkt. AP 2020-2639

Dear Chief Counsel Brown:

Please enter my appearance on behalf of the Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA").

Pursuant to Section VIII of the Office of Open Records ("OOR") Procedural Guidelines and 1 Pa.Code § 35.241, please accept this correspondence as a Petition for Reconsideration of the above-referenced appeal on behalf of the PIAA.¹ Specifically, reconsideration is sought because the OOR erred and/or abused its discretion by 1) refusing to stay the Final Determination while the PIAA's Commonwealth Court action 661 MD 2020 was pending; 2) holding that the PIAA constitutes an agency under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101-.3101.1; 3) granting access to unredacted legal invoices containing content subject to the attorney-client privilege and/or the attorney-work product doctrine; 4) ordering the production of a record that does not exist; and 5) failing to allow the PIAA additional time to produce responsive records. The PIAA specifically requests that the OOR reconsideration for the purpose of further developing the record for meaningful appellate review by 1) holding a

¹ Pursuant to 1 Pa. Code § 35.241(e)-(f), as adopted by Section VIII of the OOR Procedural Guidelines, the OOR retains jurisdiction to grant reconsideration of this matter, even while an appeal of the underlying Final Determination is pending.

hearing; 2) conducting an *in camera* review of records; and 3) accepting the attached Supplemental Affidavit from Dr. Robert A. Lombardi.

1. The OOR erred and/or abused its discretion by refusing to stay the Final Determination

Although neither the RTKL nor the OOR's Procedural Guidelines specifically permit the OOR to stay an appeal, the OOR has repeatedly exercised such power. *See, e.g., Hahn v. Lawrence County*, OOR Dkt. AP 2020-2108 ("Pursuant to the Governor's Proclamation of Disaster Emergency, the OOR stayed this appeal..."); *Brambila v. City of Pittsburgh*, OOR Dkt. AP 2020-0300 ("[T]he OOR notified the parties that it was invoking an indefinite stay in this matter due to the COVID-19 emergency"); *Messina v. Philadelphia Department of Licenses and Inspection*, OOR Dkt. AP 2020-1065 (granting a stay because an agency's offices were closed); *Florio Perruci Steinhardt & Fader LLC v. Pennsylvania Department of Health*, OOR Dkt. AP 2017-1667 ("[T]he OOR issued an Opinion and Order staying the matter..."); *Lerner v. City of Philadelphia*, OOR Dkt. AP 2017-1202 (staying an appeal before the OOR while an appeal of a different matter was pending); *Ullery v. Pennsylvania Department of Health*, OOR Dkt. AP 2017-1548 (staying an appeal to allow the OOR to meet its "responsibility to adequately develop the record for judicial review").

Neither the RTKL, the OOR Final Determinations nor the Procedural Guidelines offer any guidance as to how the OOR determines when it is appropriate to stay an appeal. The OOR's proposed regulations, however, suggest that the OOR believes stays are appropriate if an issue is the same as one pending before "the Commonwealth Court." *See* OOR Draft Regulations, proposed section 77.76, available at https://www.openrecords.pa.gov/Documents/RTKL/Draft_OOR_Regs_2020-12-30.pdf.

Here, as reflected in the Final Determination, the PIAA timely notified the OOR that it filed an action in the Commonwealth Court seeking a declaration that it is not subject to the RTKL. Before the OOR, the PIAA also raised this same issue. As the PIAA was (and continues to be) engaged in litigation before the Commonwealth Court as to whether it is subject to the RTKL, the OOR erred and/or abused its discretion by not staying this matter, in accordance with its proposed regulations. Further, to the extent that the OOR questioned the sufficiency of the PIAA's search for records or whether records exist, the OOR should grant reconsideration and hold a hearing for the purpose of further developing the evidentiary record before the OOR to ensure that meaningful appellate review may occur. For these reasons, the OOR should issue an order granting reconsideration of the Final Determination, imposing a stay pending the Commonwealth Court's resolution of the matter docketed as *Pennsylvania Interscholastic Athletic Association, Inc. v. Commonwealth of Pennsylvania*, 661 M.D. 2020 (Pa.Cmwth.) and ordering a hearing.

2. The OOR erred, abused its discretion and/or violated the PIAA's constitutional rights by holding that it is subject to the RTKL

For the reasons set forth in the arguments submitted during the appeal, the PIAA should not be considered subject to the RTKL based on its organizational structure, the Pennsylvania

constitutional bar on special legislation, and its right to equal protection guaranteed under both the Pennsylvania Constitution and the Fourteenth Amendment to the U.S. Constitution. The OOR erred as a matter of law, abused its discretion and/or violated the PIAA's constitutional rights in holding that it is subject to the RTKL. In order to further develop the evidentiary record for appellate review, the PIAA seeks reconsideration of the OOR Final Determination for the purpose of enabling it to provide live witness testimony during a hearing before the OOR as to the PIAA's organizational structure.

3. The OOR erred and/or abused its discretion in granting access to unredacted legal invoices

To the extent that the RTKL applies to the PIAA, Part 1 of the Request sought legal invoices, and PIAA's Executive Director stated in his denial and affirmed under penalty of perjury that such invoices would need to be redacted. The RTKL recognizes that information subject to the attorney-client privilege and/or attorney-work product doctrine must be redacted from public records. See 65 P.S. § 67.102 (omitting records "protected by a privilege" from the definition of "public records"). In *Levy v. Senate of Pennsylvania*, for example, the Pennsylvania Supreme Court noted that a "careful line-by-line analysis of the content of the invoices" was justified in determining the extent to which legal invoices were subject to a privilege. 65 A.3d 361, 373 (Pa. 2013). Here, by blanketly ordering the release of legal invoices – a type of document held by the OOR to almost invariably be subject to the redaction of material protected by the attorney-client privilege and/or attorney-work product doctrine in hundreds of adjudications – the OOR erred in a matter of law.²

For the purpose of further developing the evidentiary record with respect to specific portions of the legal invoices that are privileged, the PIAA asks the OOR to issue an order granting reconsideration of the Final Determination and permitting the PIAA to redact all information subject to the attorney-client privilege and/or attorney-work product doctrine. In the alternative, the PIAA asks the OOR to grant reconsideration for the purpose of conducting an *in camera* review of its legal invoices in order to comply with the OOR's statutory duty to develop the evidentiary record for meaningful appellate review.

4. The OOR erred and/or abused its discretion in ordering the PIAA to provide a record that does not exist

To the extent that the RTKL applies to the PIAA, the PIAA notes that Section 705 of the RTKL states that agencies are "not ... required to create a record which does not currently exist." 65 P.S. § 67.705. Part 8 of the Request sought a "screenshot image" showing software that can perform electronic redactions, and Dr. Lombardi, under penalty of perjury, affirmed that he searched PIAA's records and that no such record exists. Rather than accept Dr. Lombardi's factual affirmation as accurate, the Appeals Officer suggested that Dr. Lombardi should have

² The PIAA notes that Assistant Chief Counsel Applegate, in a prior appeal docketed as *Scarcella v. PIAA*, OOR Dkt. AP 2020-1371, specifically permitted the PIAA to redact legal invoices even without specifically mentioning the attorney-client privilege or attorney-work product doctrine: "Because Dr. Lombardi attests that the ... records required redaction, the PIAA was entitled to print out these records in order to ... redact them." The OOR additionally erred by not following its prior decision in *Scarcella*.

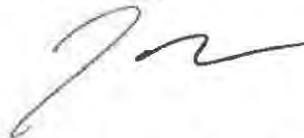
asked “PIAA’s IT Department[] to determine if there were any applicable software programs” (an inquiry that goes beyond the limited scope of the simple question of whether a screenshot exists). To the extent that the Appeals Officer had any doubt as to the veracity of Dr. Lombardi’s affidavit in terms of the existence of a screenshot, the Appeals Officer erred by not holding a hearing. The PIAA asks the OOR to grant reconsideration of the Final Determination and hold a hearing as to whether a responsive screenshot exists in order to further develop the evidentiary record before the OOR to ensure meaningful appellate review.

5. The OOR erred and/or abused its discretion by not allowing the PIAA additional time to provide responsive records

To the extent that the RTKL applies to the PIAA, the PIAA notes that nothing within the RTKL requires agencies to produce records within 30 days of when the OOR issues a Final Determination, and, as recognized in *Pa. State Sys. of Higher Educ. v. Ass’n of State Coll. & Univ. Faculties* (“*APSCUF*”), the OOR may provide agencies additional time to “locate and review responsive records.” See 142 A.3d 1023 (Pa. Commw. 2016). Before the OOR, the PIAA specifically stated, through a sworn attestation from its Executive Director, that “tens of thousands of records must be reviewed, potentially redacted, and then produced,” “it would take a full-time employee three to four months to properly comply with the [R]equest” and that it “would significantly impact ... the operations of [the] PIAA.” The PIAA complied with *APSCUF* by providing 1) a valid estimate of records at issue (“22 sports” times multiple years, times “12 separate districts,” times approximately 600 pages) and 2) the length of time needed to conduct the review (three to four months). Having provided evidence establishing the staggering volume and amount of time needed to locate and review records, the OOR erred as a matter of law and/or abused its discretion in not allowing the PIAA more than 30 days to locate and produce responsive records in light of *APSCUF*.

For the foregoing reasons, the PIAA respectfully asks the OOR to issue an order granting reconsideration of its January 13, 2021 Final Determination in the matter docketed as *Campbell v. PIAA*, OOR Dkt. AP 2020-2639.³

Sincerely,



J. Chadwick Schnee, Esq.

³ The PIAA also notes that Mr. Campbell recently filed a Petition for Review of this Final Determination alleging that the OOR erred in holding that the PIAA established that no records exist with respect to Item 7 of his RTKL request. See *Campbell v. PIAA*, No. 25 C.D. 2021. Although the PIAA agrees with the OOR’s determination in that regard, granting reconsideration of this matter for the purpose of further developing the evidentiary record by holding a hearing and/or conducting an *in camera* review would also allow the parties the opportunity to provide witness testimony with the opportunity for cross-examination.

SUPPLEMENTAL AFFIDAVIT OF DR. ROBERT A. LOMBARDI

I, Dr. Robert A. Lombardi, subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities, affirm that the following statements are true and correct:

1. I previously completed an affidavit in the matter docketed as *Campbell v. Pennsylvania Interscholastic Athletic Association, Inc.*, OOR Dkt. AP 2020-2639 that was submitted to the assigned Appeals Officer on December 30, 2020 and hereby incorporate my previous statements set forth in that affidavit into this supplemental affidavit by reference.

ITEM 1

2. In my capacity as Executive Director of the Pennsylvania Interscholastic Athletic Association ("PIAA"), I am familiar with the types of documents maintained by the PIAA and where they are maintained.
3. As the Executive Director of the PIAA, I review all legal invoices for services performed on behalf of the PIAA at the headquarters level, including all litigation. Several of PIAA's twelve districts occasionally engage their own legal counsel for local issues. I do not routinely approve these invoices but have access to them through the districts.
4. All legal invoices received by PIAA contain specific descriptions of legal services that must be redacted prior to release to third parties.
5. While the PIAA regularly receives paper versions of legal invoices, it does not receive electronic versions of legal invoices.
6. Item 1 of Mr. Simon Campbell's request ("Request") sought "electronic copies of all legal invoices" between January 1, 2012 and November 2, 2020.
7. In my timely response to Mr. Campbell, I advised that the PIAA does not possess "electronic copies" of such legal invoices and that, if it did, they would still need to be redacted.
8. I am aware that 65 P.S. § 67.705 does not require an agency to convert paper documents into an electronic format in response to a request.
9. Nevertheless, in the interest of conducting a good faith search for electronic copies records and to the extent that the PIAA must obtain such records under 65 P.S. § 67.506(d), I contacted all law firms used by PIAA and those district committees who have engaged legal counsel in order to determine whether they maintain electronic copies of legal invoices and to obtain copies.

10. As of December 30, 2020, I had still not received electronic copies of the requested invoices.
11. In my prior affidavit, I noted that such invoices would have to be redacted and that this process would entail going through entries on each printed invoice.
12. All legal invoices that PIAA has received inherently contain material protected by the attorney-client privilege and/or the attorney-work product doctrine.
13. PIAA's legal invoices are so inherently privileged that, in a prior appeal docketed as *Scarcella v. PIAA*, OOR Dkt. AP 2020-1371, an OOR Appeals Officer specifically permitted the PIAA to redact legal invoices even without specifically mentioning the attorney-client privilege or attorney-work product doctrine: "Because Dr. Lombardi attests that the ... records required redaction, the PIAA was entitled to print out these records in order to ... redact them."
14. PIAA is and has been the client of various law firms since January 1, 2012.
15. Legal invoices are sent to me in my capacity as Executive Director of the PIAA and to PIAA districts from attorneys and administrative staff at law firms and are never shared with personnel outside of the PIAA.
16. Legal invoices contain specific descriptions of legal services performed at PIAA's request for legal assistance, along with notes, mental impressions, legal advice, opinions and strategies from PIAA's retained legal counsel. Legal advice reflected in the invoices has never been obtained for the purpose of committing a crime or tort.
17. PIAA has invoked the attorney-client privilege with respect to the invoices and has not waived this privilege.
18. Similarly, for the reasons set forth above, PIAA believes that the specific descriptions of legal services within the legal invoices are confidential under the broad protection of the attorney-work product doctrine.

ITEMS 2-4

19. Items 2-4 of the Request sought check images, banking and other financial records over the course of several years.
20. Upon receiving the Request, I began the lengthy process of determining where such records would be stored based on the broad scope of the Request.
21. Based on my knowledge of the types of documents maintained by the PIAA by virtue of my tenure with the PIAA and role as Executive Director, I soon realized that this portion of the Request would involve over 100,000 pages of documents and

ascertained that many, if not all, of such records would require the redaction of bank account numbers.

22. In inquiring with the PIAA's banking institution, I learned that the bank's security features did not allow the modification of images to remove confidential information.
23. Once the OOR had jurisdiction over this matter by virtue of Mr. Campbell's appeal, I detailed in my prior affidavit that there are over 100,000 pages of responsive documents by multiplying 22 sports by the number of years listed in each item of the Request by 12 separate districts and 600 pages (determined by counting the number of pages for a single season of the PIAA's basketball tournament).
24. Based on the overwhelming volume of records at issue, I estimated that it would take a full-time employee three to four months in order to redact bank account numbers and copy responsive records.

ITEM 5

25. Item 5 of the Request sought "electronic copies" of three years' worth of independent audited financial statements.
26. As stated in my prior affidavit, the PIAA only receives its audited financial statements "in hard copy."
27. I am aware that 65 P.S. § 67.705 does not require an agency to convert paper documents into an electronic format in response to a request.
28. Nevertheless, in the interest of conducting a good faith search for electronic copies records and to the extent that the PIAA must obtain such records under 65 P.S. § 67.506(d), I contacted our auditors upon receipt of the Request in order to determine whether they maintain electronic copies of the audited financial statements and to obtain copies.
29. As of December 30, 2020, I had still not received electronic copies of the requested financial statements. However, I have since received these statements and provided them to Mr. Campbell.

ITEM 7

30. Item 7 of the Request sought communications between January 1, 2020 and the date of the Request concerning "the topic of PIAA being improperly included in the RTKL."
31. As stated in my previous affidavit, I, in my capacity as Executive Director, am aware that the only individual at PIAA who was involved in such discussions during the time period set forth in the Request is me.

32. I am also aware that all such discussions on that subject matter were limited to myself and legal counsel, were for the purpose of seeking legal advice, and were only conducted orally, without the exchange of any written documents.
33. Nevertheless, in order to fully conduct a good faith search for responsive documents, I conducted a thorough search of PIAA's records and was unable to locate any responsive documents.

ITEM 8

34. Item 8 of the Request sought a screenshot image of software programs.
35. In my capacity as Executive Director, I am aware that the PIAA does not routinely store screenshot images of software programs.
36. In fact, having worked at the PIAA for more than three decades, I have never seen a screenshot image of any software program in any of the PIAA's records.
37. Nevertheless, as stated in my prior affidavit, I searched the PIAA's records for the purpose of determining whether such an image exists.
38. I was unable to locate such an image and noted that the PIAA would have to create a screenshot in order to comply with the Request. I have since obtained additional technological support and created such a screenshot, which I have provided to Mr. Campbell.

Date: 1/25/2021


Dr. Robert A. Lombardi

OOB Exhibit 22

From: Chadwick Schnee <chadwick@tucker-hull-law.com>
Sent: Tuesday, January 26, 2021 1:47 PM
To: Simon Campbell <parighttoknow@gmail.com>; Brown, Charles (OOR) <charlebrow@pa.gov>
Cc: Zeppos-Brown, Magdalene <mazepposbr@pa.gov>; Boynton, Alan <ABoynton@mcneeslaw.com>
Subject: [External] RE: Campbell v. PIAA, OOR Dkt. AP 2020-2639 - Petition for Reconsideration

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Charles,

I would respectfully note that 1 Pa. Code § 35.241(c) (as adopted by Section VIII(B) of the Procedural Guidelines) specifically state as follows:

(c) Response. No answers to petitions for rehearing or reconsideration will be entertained by the agency. If, and to the extent, however, that rehearing or reconsideration is granted by the agency head, a response in the nature of an answer may be filed by any participant within 15 days after the issuance of the order granting rehearing or reconsideration. The response shall be confined to the issues upon which rehearing or reconsideration has been granted.

Accordingly, PIAA would object to any further response by Mr. Campbell, unless reconsideration is granted in accordance with the mandate of 1 Pa. Code § 35.241(c).

Thank you.

J. Chadwick Schnee, Esq.



[108 W Main Street](#)
[P.O. Box 330](#)
[Annville, PA 17003](#)
Phone: 717-685-7947 | Fax: 717-685-7942
[Email](#) | [Website](#)

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From: Simon Campbell <parighttoknow@gmail.com>
Sent: Tuesday, January 26, 2021 1:43 PM
To: charlebrow@pa.gov
Cc: Chadwick Schnee <chadwick@tucker-hull-law.com>; Zeppos-Brown, Magdalene <mazepposbr@pa.gov>
Subject: Re: Campbell v. PIAA, OOR Dkt. AP 2020-2639 - Petition for Reconsideration

Charles,

I will have a response to you by midnight tonight.

Simon Campbell
Transparency Activist
Yardley, Bucks County
Please hit the red **SUBSCRIBE** button at:

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On Mon, Jan 25, 2021 at 7:47 PM Chadwick Schnee <chadwick@tucker-hull-law.com> wrote:
Simon,

Thank you for the clarification. The Petition for Reconsideration is attached and was sent to Craig when it was filed.

Thank you.

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From: Chadwick Schnee <chadwick@tucker-hull-law.com>
Sent: Monday, January 25, 2021 2:41 PM
To: openrecords@pa.gov; charlebrow@pa.gov
Cc: Boynton, Alan; Craig Staudenmaier
Subject: Campbell v. PIAA, OOR Dkt. AP 2020-2639 - Petition for Reconsideration

Dear Charles,

Please find attached a Petition for Reconsideration filed on behalf of the PIAA.

Thank you.

J. Chadwick Schnee, Esq.



[P.O. Box 330](#)

[Annville, PA 17003](#)

Phone: 717-685-7947 | Fax: 717-685-7942

[Email](#) | [Website](#)

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00R Exhibit 23

From: [Brown, Charles \(OOR\)](#)
To: [Henry, Faith](#)
Subject: FW: [External] Campbell v. PIAA, OOR Dkt. No. AP 2020-2639
Date: Tuesday, January 26, 2021 8:41:46 AM

From: Simon Campbell <parighttoknow@gmail.com>
Sent: Monday, January 25, 2021 7:40 PM
To: chadwick@tucker-hull-law.com
Cc: Brown, Charles (OOR) <charlebrow@pa.gov>; Zeppos-Brown, Magdalene <mazepposbr@pa.gov>; Robert A. Lombardi <rlombardi@piaa.org>; Boynton, Alan <ABoynton@mcneeslaw.com>; Craig Staudenmaier <cjstaud@nssh.com>
Subject: [External] Campbell v. PIAA, OOR Dkt. No. AP 2020-2639

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Chad,

Good evening. I see you've left Montgomery County! I wanted to clarify the lines of representation. As you likely know I handled the OOR appeal *pro se*. Atty. Staudenmaier has been retained on a limited basis to file, and represent my interests in, the Petition for Review at Commonwealth Court Dkt. No. 25 CD 2021.

I assume you are not going to counsel PIAA to ignore a binding Order of the OOR (i.e. not *fully* complying with it or appealing it) such that a default occurs and I would have the right to seek enforcement of that Order. I assume that PIAA will not want to dig its bad faith and waiver holes deeper than they already exist. That PIAA embarked on a course of action presuming the RTKL to be unconstitutional while ignoring my statutory rights, and brazenly ignoring its evidentiary burden in front of OOR, is a problem of PIAA's own making. PIAA is obliged to follow the law as written not as it may wish it to be. Therefore, I am assuming that PIAA will be filing its own Petition for Review in Commonwealth Court of OOR Dkt. No. AP 2020-2639 in the required time-frame. If I am correct in this assumption then Craig will be handling that matter in court and service should be to him.

However, Craig is not retained to represent my interests on any Petition for Reconsideration filed by PIAA with OOR. I will continue to represent myself in front of OOR. If PIAA has filed such a Petition please can you (or OOR) forward me that communication showing when it was sent/received.

Thank you.

Simon Campbell

Transparency Activist

Yardley, Bucks County

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OOB Exhibit 24

PETITION FOR RECONSIDERATION

DATE ISSUED AND MAILED: February 5, 2021

IN RE: *Simon Campell v. Pennsylvania Interscholastic Athletic Association, Inc.*,
OOR Dkt. AP 2020-2639

Upon review of the petition for reconsideration filed with the Office of Open Records (“OOR”) to the above-referenced docket number, for the reasons set forth below, it is determined that the petition is **DENIED**.

PIAA has filed for reconsideration, arguing the OOR erred by: 1) refusing to stay the appeal pending resolution of the PIAA suit in Commonwealth Court, 2) holding that PIAA was subject to the RTKL notwithstanding PIAA’s constitutional claims, 3) granting access to unredacted legal invoices, 4) ordering PIAA to produce a record that does not exist, and 5) not allowing PIAA additional time to produce the large volume of records at issue.

With respect to PIAA’s first claim, decisions on whether to stay proceedings are subject to the discretion of the tribunal, *City of Easton v. Marra*, 862 A.2d 170 (Pa. Commw. Ct. 2004) and may be appropriate where necessary to prevent a party’s rights from being unfairly prejudiced. *Id.* Here, PIAA’s rights have not been unfairly prejudiced because the claims made in the Commonwealth Court action may be pursued in an appeal of the OOR’s final determination. With respect to PIAA’s claim that it is not subject to the RTKL on constitutional grounds, PIAA expressly acknowledged that the OOR could not grant relief based on constitutional questions. Therefore, it appears that PIAA abandoned its constitutional claim. With respect to PIAA’s claim that the OOR erred by granting access to unredacted legal invoices, the OOR expressly noted that PIAA failed to proffer any evidence to support any redactions. With respect to PIAA’s claim that the OOR erred by ordering PIAA to disclose a record PIAA claimed did not exist, the OOR specifically noted PIAA’s evidence is support of this claim and expressly noted why this evidence was insufficient to meet PIAA’s burden of proof; issues of the weight and credibility are

left to the discretion of the appeals officer, and an abuse of discretion is not present in this matter. Finally, with respect to PIAA's claim that the OOR erred by not permitting PIAA additional time to produce records, the OOR expressly noted that PIAA did not request additional time pursuant to *Pa. State System of Higher Education (PASSHE) v. Association of Pa. State College and University Faculties (APSCUF)*, 142 A.3d 1023 (Pa. Commw. Ct. 2016).

Based on the foregoing, the reconsideration is denied.

Issued by:

[/s/ Charles Rees Brown](#)

CHIEF COUNSEL

Sent to: Simon Campbell (via email)
 J. Chadwick Schee, Esquire (via email)

10. PIAA submission dated December 30, 2020.
11. Requester email dated December 31, 2020, requesting additional time to respond to PIAA submission.
12. PIAA email dated December 31, 2020, objecting to the Requester's request for additional time to make a submission.
13. OOR dated December 31, 2020 responding to the submission deadlines and asking the Requester for additional time to issue the final determination.
14. Requester email dated December 31, 2020, 9:49 a.m., approving extending the final determination issuance date.
15. Requester email dated December 31, 2020, 12:04 p.m.
16. OOR email dated December 31, 2020 establishing supplemental submission deadlines.
17. Requester submission received January 4, 2021.
18. PIAA supplemental submission dated January 5, 2021.
19. Requester supplemental submission dated January 5, 2021.
20. Final Determination issued by the OOR on January 13, 2021.
21. PIAA Petition for Reconsideration dated January 25, 2021.
22. Email chain dated January 26, 2021 regarding the Petition for Reconsideration.
23. Requester email dated January 26, 2021.
24. OOR correspondence dated February 5, 2021 denying the Petition for Reconsideration.