

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA INTERSCHOLASTIC
ATHLETIC ASSOCIATION, INC.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
and PENNSYLVANIA OFFICE OF OPEN
RECORDS,

Respondents

:
: Original Jurisdiction

:
: No. 661 MD 2020

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APR 14 2021

OFFICE OF OPEN RECORDS

**RESPONSE OF PETITIONER TO PRELIMINARY
OBJECTIONS OF PENNSYLVANIA OFFICE OF OPEN RECORDS**

Petitioner Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA"), by and through its attorneys McNees Wallace & Nurick LLC and the Law Office of Tucker Hull, LLC, submits the following response to the Preliminary Objections of the Pennsylvania Office of Open Records to PIAA's Amended Petition for Review:

1. Admitted.
2. Admitted in part and denied in part. The Amended Petition for Review speaks for itself and any characterizations inconsistent therewith are denied. By way of further response, PIAA does, in part, seek declaratory and injunctive relief regarding its inclusion by the General Assembly as a "State-affiliated entity" within 65 P.S. § 67.102 of the Pennsylvania Right to Know Law ("RTKL").

3. Admitted in part and denied in part. The Amended Petition for Review speaks for itself and any characterizations inconsistent therewith are denied. By way of further response, PIAA does, in part, seek a declaration that the RTKL is unconstitutional as it is applied to PIAA and an injunction enjoining the Commonwealth of Pennsylvania ("Commonwealth") and the Office of Open Records ("OOR") from enforcing the RTKL against PIAA.

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

4. PIAA incorporates its responses to Paragraphs 1 through 3 of the OOR's Preliminary Objections as if set forth in full.

5. Denied as stated. The OOR cites a paragraph of the Amended Petition for Review (Paragraph 27) that does not support its averment. By way of further response, the Amended Petition for Review does reference a January 31, 2021, official action by the OOR that declared PIAA subject to the RTKL as a State-affiliated entity and directing PIAA to produce certain corporate records to a requesting individual. *Campbell v. Pennsylvania Interscholastic Athletic Ass'n*, No. AP 2020-2639 (Jan. 31, 2021), at 7, *appeal pending*, 25 C.D. 2021 (Pa. Commw.) ("under the RTKL, the PIAA is defined as a State-affiliated entity and is considered a Commonwealth agency."). This instant dispute is independent of that matter and arises because PIAA's inclusion in the RTKL is unenforceable and/or unconstitutional as a matter of law, irrespective of that proceeding.

6. Denied as stated. The OOR cites a paragraph of the Amended Petition for Review (Paragraph 28) that does not support its averment. By way of further response, PIAA has objected to RTKL requests because it is not a Commonwealth agency and is not subject to the RTKL.

7. Denied as stated. The OOR cites a paragraph of the Amended Petition for Review (Paragraph 29) that does not support its averment. By way of further response, on January 31, 2021, the OOR took official action to declare PIAA subject to the RTKL as a State-affiliated entity and directed PIAA to produce certain corporate records to a requesting individual. *Campbell v. Pennsylvania Interscholastic Athletic Ass'n*, No. AP 2020-2639 (Jan. 31, 2021), at 7, *appeal pending*, 25 C.D. 2021 (Pa. Commw.) ("under the RTKL, the PIAA is defined as a State-affiliated entity and is considered a Commonwealth agency.").

8. Admitted.

9. Admitted in part and denied in part. The Amended Petition for Review speaks for itself and any characterizations inconsistent therewith are denied. By way of further response, PIAA does, in part, challenge its inclusion by the General Assembly as a "State-affiliated entity" within the RTKL because PIAA is not a Commonwealth agency.

10. Admitted in part and denied in part. The Amended Petition for Review speaks for itself and any characterizations inconsistent therewith are

denied. By way of further response, PIAA seeks to preliminarily and permanently enjoin application of Section 102's definition of State-affiliated entity to PIAA and to enjoin the OOR from having jurisdiction over any matters relating to PIAA based on Section 102's inclusion of PIAA as a State-affiliated entity.

11. Admitted in part and denied in part. The RTKL speaks for itself and any characterizations inconsistent therewith are denied. By way of further response, PIAA is specifically identified and unconstitutionally singled out within the scope of the RTKL as a "state-affiliated entity." However, under the definition set forth in the RTKL, PIAA does not meet the definition of a "state-affiliated entity" and is not a Commonwealth agency. Accordingly, PIAA is not subject to the RTKL.

12. Admitted.

13. Admitted.

14. Denied as a legal conclusion to which no response is required. To the extent that a response is deemed required, PIAA is not a Commonwealth agency.

15. Denied. PIAA has filed an appeal to OOR's final determination at *Campbell v. Pennsylvania Interscholastic Athletic Ass'n*, No. AP 2020-2639 (Jan. 31, 2021), *appeal pending*, 25 C.D. 2021 (Pa. Commw.).

16. Denied as a legal conclusion to which no response is required.

17. Denied. The RTKL provides no procedure nor remedy for PIAA to challenge its inclusion within the scope of the RTKL.

PRELIMINARY OBJECTION FOR FAILURE TO STATE A CLAIM
(DEMURRER)

18. PIAA incorporates its responses to Paragraphs 1 through 17 of the OOR's Preliminary Objections as if set forth in full.

19. Admitted in part and denied in part. The Amended Petition for Review speaks for itself and any characterizations inconsistent therewith are denied. By way of further response, the inclusion of PIAA in the RTKL is wholly inconsistent with, and contrary to, the actual definition of "state-affiliated entity," as that term is defined in the RTKL. In Count I, PIAA seeks a declaration that it does not meet the definition of a State-affiliated entity and is not subject to the RTKL as a Commonwealth agency, among other things.

20. Admitted in part and denied in part. The Amended Petition for Review speaks for itself and any characterizations inconsistent therewith are denied. By way of further response, Section 3101.1 of the RTKL provides that the RTKL shall not apply where that law conflicts with any other state or federal law. To the extent that a nonprofit corporation registered to do business under the Nonprofit Corporation Law is somehow included within the scope of the RTKL, the record access provisions of the RTKL conflict with those found within the Pennsylvania Nonprofit Corporation Law. In Count V, PIAA seeks, among other

things, a declaration that a conflict exists between the record access provisions of the RTKL and the Nonprofit Corporation Law, and that PIAA's records are only accessible through the Nonprofit Corporation Law.

21. Denied as a legal conclusion to which no response is required. To the extent that a response is required, the RTKL applies to Commonwealth agencies.

22. Denied as a legal conclusion to which no response is required. To the extent that a response is required, it is admitted that a "State-affiliated entity" is considered a Commonwealth agency. By way of further response, the definition of a "State-affiliated entity" is a "Commonwealth authority or Commonwealth entity." By any measure and under any applicable standard, PIAA is neither a Commonwealth authority nor a Commonwealth entity. By then stating that the definition "includes [PIAA]," the definition is inherently inconsistent and contrary to its purpose.

23. Denied as a legal conclusion to which no response is required.

24. Denied as a legal conclusion to which no response is required. To the extent that a response is required, the OOR's reliance on *Harristown Dev. Corp. v. Commonwealth Dep't. of General Services*, 532 Pa. 45, 614 A.2d 1128 (1990), is misplaced. While the court in that case held that Harristown Development Corporation, a nonprofit corporation, was indeed subject to the RTKL, it was so subject not because of the RTKL itself but because of entirely unrelated legislation,

specifically 71 P.S. § 632(d) (which is within the Administrative Code of 1929 and which specifically addresses "Grounds, buildings and monuments in general"), which provides that nonprofit corporations that receive over \$1.5 million in rents from the Commonwealth each year are subject to the RTKL and Sunshine Act. Only through legislation independent of the RTKL was that nonprofit corporation subject to the RTKL.

25. Denied. The General Assembly included PIAA as an example of an entity for which it does not meet the definition. To the extent that the legislature **"specifically and expressly** included PIAA" as an entity subject to legislation even though it does not otherwise meet the definition, POs, ¶ 17 (emphasis original), such specific and express inclusion constitutes *per se* unconstitutional special legislation.

26. Denied as a legal conclusion to which no response is required. To the extent that a response is required, the specific inclusion of PIAA despite its not meeting the definition set forth therein does not supersede the provision of the RTKL providing that the RTKL is not enforceable where in conflict with another state law.

27. Denied. The RTKL does not apply to PIAA as it is not a Commonwealth agency, which is the section under which it is included within the RTKL, because it receives no state funds of any kind, was not created by the

General Assembly, is not administered by the Commonwealth, and possesses no state-granted powers or authority of any kind. Moreover, while Harristown was subject to the RTKL because it was part of a classification established by a statute other than the RTKL, here, no such classification was created, other than illegally singling out PIAA as an entity subject to a law for which it does not otherwise meet the definition being applied to it.

PRELIMINARY OBJECTION FOR FAILURE TO STATE A CLAIM
(DEMURRER)

28. PIAA incorporates its responses to Paragraphs 1 through 27 of the OOR's Preliminary Objections as if set forth in full.

29. Denied as stated. The Amended Petition for Review speaks for itself and any characterizations inconsistent therewith are denied.

30. Denied as a legal conclusion to which no response is required. To the extent that a response is required, it is admitted that the standard of review for claims under the equal protection clauses of the United States Constitution and the Pennsylvania Constitution are essentially the same.

31. Denied as a legal conclusion to which no response is required.

32. Denied as a legal conclusion to which no response is required.

33. Denied as a legal conclusion to which no response is required. To the extent that a response is required, "[t]he common constitutional principle at the heart of the special legislation proscription and the equal protection clause is that

like persons in like circumstances should be treated similarly by the sovereign."

Pennsylvania Tpk. Comm'n v. Commonwealth, 587 Pa. 347, 363, 899 A.2d 1085 (Pa. 2006).

34. Denied as a legal conclusion to which no response is required.

35. Denied. PIAA has pled a plethora of facts which overcome any presumption of validity as to the RTKL's inclusion of PIAA. All factual averments of the Amended Petition for Review must be accepted as true for purposes of consideration of preliminary objections. *See, e.g.*, Amended Petition for Review at ¶¶ 74-113. As set forth therein, PIAA is the only entity identified in Section 102's definition of State-affiliated entities that receives no Commonwealth funds, was not created by enabling legislation of the General Assembly, is not administered by the Commonwealth and is not granted governmental powers and/or authority by the General Assembly. The RTKL is limited and intended to provide access by people only to "information concerning the activities *of their government*." *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012) (emphasis added). In particular, it is intended "to promote access to *official government* information." *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 component of the RTKL that even suggests that it was intended to apply to private entities. PIAA's inclusion in the RTKL's inclusion of PIAA through Section 102's definition of

State-affiliated entities is wholly inconsistent with this purpose and violates PIAA's equal protection rights because it treats PIAA differently than any comparable entity. Indeed, it is abundantly clear that PIAA's express singling out was for the "purpose of evading the constitutional prohibition" on discriminatory treatment. *See Harrisburg Sch. Dist. v. Hickok*, 563 Pa. 391, 761 A.2d 1132, 1136 (2000). Because inclusion within the RTKL of a nonprofit corporation that receives no funds from the Commonwealth, was not created by or administered by the Commonwealth and which has no state-granted powers bears no rational relationship to the law's intended application to governmental entities and unfairly and arbitrarily discriminates against PIAA, it is unconstitutional.

36. Denied as stated. As discussed above, Harristown is included under the RTKL not because of the RTKL but because of entirely independent legislation (the Administrative Code) applicable to entities which receive large sums of rents from the Commonwealth. Moreover, unlike PIAA herein, Harristown is not singled out by name under that legislation but is part of the defined class set forth in that law. By contrast, PIAA does not meet any classification definition under the RTKL and is included only because it is singled out for such inclusion. By way of further answer, the *Harristown* decision was decided when the former RTKL was in effect, and that statute was repealed and replaced by the current RTKL. *See* 65 P.S. § 67.3102(2)(ii). Notably, the OOR does appear to view the

Harristown Development Corporation as an "agency" subject to the RTKL, as it does not list an Open Records Officer for that entity. *See* Find Agency Open Records Officers,

<https://www.openrecords.pa.gov/RTKL/AOROSearch.cfm?action=search&agency=harristown&county=&type=> (last visited April 9, 2021).

37. Denied as stated. PIAA is not obligated to identify an organization that is substantially the same as itself. PIAA appropriately pled that 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. Other than PIAA, no interscholastic competition organization, or any other nonprofit corporation that does not receive Commonwealth funds, was not created by the legislature, is not administered by the Commonwealth and has no state-granted powers, is identified in the RTKL as a State-affiliated entity. Moreover, the Commonwealth's reliance on the fact that public schools join PIAA and pay it dues highlights a fundamental flaw in the OOR's position, which is that PIAA is expressly included in the RTKL not as a Local agency (which includes local public schools), but as a Commonwealth agency. The OOR offers no support for the proposition that an entity's receipt of funds from public schools (but not a dime from the

Commonwealth) or having public schools as members qualifies PIAA to be a Commonwealth agency.

38. Denied as a legal conclusion to which no response is required. By way of further response, the OOR offers no legal or other support for the proposition that the legislature has a governmental interest in how voluntary interscholastic sporting events, which are not governmentally required, are conducted and; more to the point, how the Commonwealth has a legitimate interest in the records of a nonprofit corporation that was voluntarily joined by public and private schools when that corporation is not a governmental one and has no governmental authority over its members. *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...."); *Indiana High School Athletic Ass'n, Inc. v. Carlberg*, 694 N.E.2d 222, 234 (Ind. 1997) ("IHSAA does not derive its authority directly from the legislature but instead from a delegation of authority from member schools.").

39. Denied. Whether an entity is a state actor under Section 1983 is entirely irrelevant to whether a person or entity is a Commonwealth agency. Any entity or person can be considered a state actor under Section 1983. The RTKL is expressly limited to governmental entities and, in particular, the part of the RTKL applicable to Commonwealth agencies is limited to such entities, not to "state

actors" generally. By way of further response, express inclusion of PIAA, a non-governmental entity receiving no state tax revenues, not created by the General Assembly, having no state-granted powers, and not administered by the Commonwealth, as a Commonwealth agency under the RTKL does not have a rational basis, does not serve any legitimate state interest, is intentionally discriminatory, arbitrary and capricious and is wholly unrelated to any legitimate purpose of the legislation.

40. Denied. The inclusion of PIAA, a non-governmental entity receiving no state tax revenues, not created by the General Assembly, having no state-granted powers, and not administered by the Commonwealth, as a State-affiliated entity in the RTKL does not have a rational basis, does not serve any legitimate state interest, and is arbitrary and capricious in nature. As the OOR itself has determined, "neither the receipt of government funding nor a tax exempt status converts a non-profit organization into an agency under the RTKL." *Taranto v. Cambria County Child Development Corp.* No. 2017-1426 (OOR Oct. 13, 2017), citing *Appeal of Hadley*, 83 A.3d 1101, 1109 (Pa. Commw. 2014); *Showman v. Meyersdale Renaissance, Inc.*, No. 2011-0279 (OOR May 9, 2011) ("[g]overnment funded recipients do not become public or governmental entities based upon receipt of funds alone."), citing *Mooney v. Temple University Board of Trustees*, 488 Pa. 424, 292 A.2d 395 (1972); *PIDC v. Ali*, No. 528 C.D. 2010 (Pa. Commw.

April 18, 2011); *Roy v. PSU*, 568 A.2d 751 (Pa. Commw. 1990); *see also In re Right to Know Law Request Served on Venango County's Tourism Promotion Agency, Lead Economic Development Agency*, 83 A.3d 1101, 1109 (Pa. Commw. 2014).

Indeed, in this matter, the revenues referenced by the OOR are not from the Commonwealth in any respect. Indeed, the identified revenues are not even from the member schools but are from ticket sales to private citizens generated by events organized and hosted by PIAA, not by the schools. Thus, the OOR does not identify a single dollar from the Commonwealth that would justify PIAA being considered a Commonwealth agency. Whether the legislature thought that PIAA should be included within the RTKL is immaterial where the legislation enacted was wholly irrational in doing so. Moreover, the OOR's position, even if somehow otherwise cognizable, mandates denial of this preliminary objection as it is fact-dependent. There is no evidence of record that PIAA "generates most of its revenues from the sale of tickets to sporting events involving public schools." The OOR offers no factual basis for this assertion. To the extent that it is based upon the *Harrisburg School Dist.*, case, that decision was issued almost fifty years ago, and was prior to both admission of private schools to PIAA and PIAA's significant growth in other revenue sources, including souvenir/apparel sales, sponsorships, and game rights.

Finally, the OOR's position is directly inconsistent with its own prior decision holding that "receipt of funds from government entities is not sufficient to transform a private non-profit corporation into a 'similar governmental entity.'" *Finder v. Mt. Lebanon High School Hockey Ass'n*, No. AP 2010-0763 (Sept. 13, 2010). Also applicable in that case, the OOR found that it is "**control by** government, not cooperation with government," that is relevant. *Id.*, at 5 (emphasis original). The OOR does not now argue that the Commonwealth controls PIAA such that it should be considered a Commonwealth agency. Moreover, the OOR in that matter recognized that the athletic association did not perform "an 'essential governmental function' as required to be a Commonwealth agency." *Id.*, at 6.

41. Denied. The General Assembly's inclusion of PIAA within the definition of "state-affiliated entity" was wholly irrational and constitutes a violation of PIAA's rights to equal protection under the United States Constitution and the Pennsylvania Constitution.

42. Denied. Every action taken by the General Assembly is subject to the provisions set forth in the United States Constitution and the Pennsylvania Constitution. The General Assembly's inclusion of PIAA intentionally and illegally discriminates against PIAA and violates its rights to equal protection and substantive due process under the United States and Pennsylvania Constitutions

43. Denied. The General Assembly's inclusion of PIAA within the definition of "state-affiliated entity" constitutes a violation of PIAA's rights to equal protection under the United States Constitution and the Pennsylvania Constitution.

WHEREFORE, Petitioner respectfully requests that this Honorable Court deny the preliminary objections of the OOR.

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Dated: April 14, 2021

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CERTIFICATE OF COMPLIANCE

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

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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below via PAC File, email, and first class mail, which service satisfies the requirements of Pa. R.A.P. 121:

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PROOF OF SERVICE

I hereby certify that this 14th day of April, 2021, I have served the attached document(s) to the persons on the date(s)
and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ Logan Hetherington

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