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IN THE COMMONWEALTH COURT OF PENNSYLVANIA
NO. 661 MD 2020

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA AND THE PENNSYLVANIA OFFICE OF OPEN RECORDS,

Respondents

THE OFFICE OF OPEN RECORDS' BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS

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ARGUMENT

I. COUNT I SHOULD BE DISMISSED FOR FAILURE TO EXHAUST AVAILABLE RELIEF AND BECAUSE IT FAILS TO STATE A CLAIM FOR RELIEF

The case before this Honorable Court is an improper interlocutory appeal styled as an original jurisdiction action.

The PIAA denied a RTKL request. The Requester appealed to the OOR. The PIAA was ordered to submit evidence and argument to the OOR, which it did. During that time and before the OOR had issued a final determination, however, the PIAA commenced this original jurisdiction action, arguing that the OOR's briefing schedule was a "case or controversy" creating eligibility for this Court's original jurisdiction. *See* Original Petition for Review at ¶ 32. The OOR's order was, in fact, an invitation for the PIAA to submit its challenges to the administrative appeal—including, but not limited to, any jurisdictional challenges. The PIAA responded to the OOR appeal despite the fact that this action was pending for injunctive relief, and the OOR issued its Final Determination.

On February 11, 2021, the PIAA filed a Petition for Review of the OOR's Final Determination (docketed at 107 CD 2021). On February 24, 2021, this Honorable Court issued an Order in that docket number, striking the notice to plead against the OOR, noting that the PIAA "preserved its challenge to the validity of the Law, where it raised the issue before the Office of Open Records," and further

observing that Pennsylvania Rule of Appellate Procedure 1551, Pa. R.A.P. 1551, "authorizes this Honorable Court to review questions involving the validity of a statute that were not raised below." *See* Order of February 24, 2021 in *PIAA v. Campbell*, 107 CD 2021 (pending review before this Court).

Failure to Exhaust Administrative Remedies

The General Assembly expressly delegated the first tier of RTKL interpretation to the OOR, with a full opportunity for appeal in the event of dissatisfaction following the OOR's determination. *See* 65 P.S. § 67.1310; *see also Bowen v. Dep't of Corr*., 2021 Pa. Commw. Unpub. LEXIS 225, *11 (affirming the OOR's determination as to whether it possessed jurisdiction over a party).

Before it filed this original jurisdiction action, the PIAA appeared in at least ten recent cases before the OOR, participating fully in those appeals.[1] In those prior appeals, the PIAA did not present the OOR with the argument that it is not subject to the RTKL, arguing that the OOR was not the proper venue for such a challenge. *Cf. Phila. DA's Office v. Stover*, 176 A.3d 1024, 1027 (Pa. Commw. Ct. 2017)

[1] *Fife v. PIAA*, OOR Dkt. AP 2018-0264, 2018 PA O.O.R.D. LEXIS 464, *1; *Palattella v. PIAA*, OOR Dkt. AP 2018-0910, 2018 PA O.O.R.D. LEXIS 712; *Palattella v. PIAA*, OOR Dkt. AP 2018-0743, 2018 PA O.O.R.D. LEXIS 747; *Scicchitano v. PIAA*, OOR Dkt. AP 2019-1504, 2019 PA O.O.R.D. LEXIS 1521; *Scarcella v. PIAA*, OOR Dkt. AP 2020-1371, 2020 PA O.O.R.D. LEXIS 2997; *Macnamee v. PIAA*, OOR Dkt. AP 2019-1481, 2019 PA O.O.R.D. LEXIS 1190; *Scarcella v. PIAA*, OOR Dkt. AP 2020-1174, 2020 PA O.O.R.D. LEXIS 2984; *Schoeppner v. PIAA*, OOR Dkt. AP 2017-1817, 2017 PA O.O.R.D. LEXIS 1715; *Macnamee v. PIAA*, OOR Dkt. AP 2019-1742, 2019 PA O.O.R.D. LEXIS 1382; *Office & Professional Employees International Union, AFL-CIO v. PIAA*, OOR Dkt. AP 2017-1975, 2018 PA O.O.R.D. LEXIS 187.

(holding that the OOR has vested authority to determine issues of jurisdiction). Instead of simply appealing the OOR's Final Determination that it is subject to the RTKL, the PIAA has filed multiple actions, bringing procedurally deficient and/or duplicative litigation before this Honorable Court.

"The legislature has made it clear that statutorily-prescribed remedies are to be strictly pursued," and "[t]he law is well settled that a party may not challenge administrative decision-making through the vehicle of judicial review without first exhausting all administrative remedies." *Shenango Valley Osteopathic Hosp. v. Dep't of Health*, 451 A.2d 434, 437 (Pa. 1982); *Nat. Home Life Assurance Co. v. Commonwealth, Ins. Dep't*, 483 A.2d 1036, 1038 (Pa. Commw. Ct. 1984) (citing *Canonsburg General Hospital v. Dep't of Health*, 422 A.2d 141 (Pa. 1980)). Although failure to exhaust administrative remedies does not necessarily divest this court of the jurisdiction provided by 42 Pa.C.S. § 761(a) *(see Shenango Valley Osteopathic Hosp., supra* at 437 n.7), it is "clearly appropriate to defer judicial review when the question presented is one within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the desired result." *Shenango Valley Osteopathic Hosp., supra* at 438 (citing *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1978); *Borough of Green Tree v. Bd. of Property Assessments*, 328 A.2d 819 (Pa. 1974) (plurality opinion); *Philadelphia Life Ins. Co. v. Commonwealth*, 190 A.2d 111 (Pa. 1963)).

The PIAA maintains that "[t]he RTKL provides no procedure nor remedy for the PIAA to challenge its inclusion within the scope of the RTKL." *See* Amended Petition at p. 42. Respectfully, the OOR strongly disagrees with this statement.

While the OOR does not have the authority to grant equitable or injunctive relief on a challenge to the constitutionality of the RTKL, "the OOR, like all other tribunals and courts, is *per se* vested with jurisdiction to initially determine whether it has jurisdiction." *Stover*, *supra* at 1027.[2] The PIAA inexplicably claims that a remedy does not exist when one clearly does. It is simply to appeal to this Honorable Court following the OOR's determination—a statutorily defined process that grants the PIAA both a full and adequate administrative remedy and a right to a *de novo* appeal. *See Shenango Valley Osteopathic Hosp.*, *supra*; *see also* 65 P.S. § 67.1301 (establishing a right to appeal from a determination of the OOR); *Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Commw. Ct. 2010), *aff'd*, 75 A.3d 453, 477 (Pa. 2013) (establishing that, on appeal from OOR in RTKL cases, this Honorable Court's standard of review is *de novo*, and the scope of review is plenary). Instead,

[2] The OOR's decisions in regard to jurisdiction are typically related to requests made under Act 22 of 2017, requests concerning criminal investigative records in the hands of local agencies, requests for judicial records, *etc*. *See, e.g., Bradley v. Lehighton Area School District,* OOR Dkt. AP 2019-2068, 2020 PA O.O.R.D. LEXIS 1334, *1 (holding that the OOR has no jurisdiction over requests for recordings in the possession of law enforcement agencies); *Petry v. West Vincent Township*, OOR Dkt. AP 2021-0823, 2021 PA O.O.R.D. LEXIS 634 (holding that the OOR has no jurisdiction over records related to a criminal investigation held by a local agency). Most recently, the OOR held that it does not have jurisdiction over prothonotaries because they are judicial agencies. *See, e.g., Scolforo v. York County,* OOR Dkt. AP 2020-1606, 2020 PA O.O.R.D. LEXIS 2759.

the PIAA opted to initiate this original jurisdiction action, threatening "premature interruption of the administrative process." *Nat. Home Life Assurance Co.*, *supra* at 1038 (citing *Shenango Valley Osteopathic Hosp.*, *supra* at 438).

Of course, at various times, original jurisdiction actions for declaratory relief against the OOR have prevailed, in instances where no other relief has been available. *See, e.g.*, *Commonwealth v. Donahue*, 98 A.3d 1223, 1225 (Pa. 2014).

However, in *Cty. of Berks v. Pa. Office of Open Records*, 204 A.3d 534, 543 (Pa. Commw. Ct. 2019), this Honorable Court provided guidance as to when these sorts of actions are and are not appropriate. The analysis bears repeating in full:

> Furthermore, none of the cases that the County relies upon support its contention that declaratory judgment is permissible here. In each of the cited cases, *Donahue*, *Pennsylvania State Education Association ex rel. Wilson v. Department of Community and Economic Development*, 616 Pa. 491, 50 A.3d 1263 (2012), *Grine*, and *Court of Common Pleas of Lackawanna County v. Pennsylvania Office of Open Records*, 2 A.3d 810 (Pa. Cmwlth. 2010), while an appeal of an OOR final determination may have been available to some party to the records request, special circumstances existed that prevented the petitioner in the declaratory judgment action from being able to avail itself of the traditional RTKL administrative and statutory appeal process.
>
> In *Wilson*, *Grine* and *Lackawanna County*, the party bringing the declaratory judgment action was not a party to the OOR determination that was at issue and thus could not press its arguments through the normal RTKL appeal process. *Wilson*, 50 A.3d at 1265-66, 1276-77 (action seeking declaratory and injunctive relief by individual school employees and educators' union in case regarding access to home addresses of public school employees; records requests were made to individual school districts and union and school employees brought original jurisdiction action in this Court after discovering that many school districts would not challenge the release of information); *Grine*, 138 A.3d at 91 (action for declaratory and injunctive relief by two court of common pleas judges to prohibit county in which the

> judges sat from releasing records of the judges' telephone calls in response to RTKL requests; judges were not party to request and county voluntarily released records); *Lackawanna County*, 2 A.3d at 811-12 (action for declaratory judgment and injunctive relief by Administrative Office of Pennsylvania Courts (AOPC) to prevent an OOR order from going into effect that would have required a county to provide records of an AOPC employee paid by the county; records request was directed to the county rather than AOPC, and the county did not appeal an adverse ruling by the OOR hearing officer). In *Donahue*, the Office of the Governor filed a declaratory judgment action after it had received an adverse OOR ruling that it sought to contest, but had won before the OOR on unrelated grounds and its appeal to this Court was accordingly quashed because the Office was not aggrieved; therefore, the Office's only recourse under the RTKL was to wait for a future request in which the same adverse ruling was made by OOR and then appeal that determination to the courts. 98 A.3d at 1225-26, 1234-35. In this case, the County had the option of filing an appeal of the OOR's February 9, 2018 Final Determination in which it could argue that The County Code preempted the RTKL, which the County has in fact done in Count III of the petition for review, and therefore no special situation exists to warrant a declaratory judgment action that would short circuit the RTKL appeal process.

Id. at 543, 2019 Pa. Commw. LEXIS 214, *15-17. As in *County of Berks*, not only was the PIAA a party to the underlying action, but the PIAA has a fully valid, pending appeal before this Court addressing the exact same issues raised in this action. *See id.* There is no situation warranting a duplicative action potentially granting the same, or effectively the same, relief. *See id.*

"Declaratory judgments are not obtainable as a matter of right. Rather, whether a court should exercise jurisdiction over a declaratory judgment proceeding is a matter of sound judicial discretion. Thus, the granting of a petition for a declaratory judgment is a matter lying within the sound discretion of a court of

original jurisdiction." *Pennsylvania State Lodge, FOP v. Commonwealth*, 692 A.2d 609, 613 (Pa. Commw. Ct. 1997) (internal citations and quotations omitted).

Additionally, the "immediate and irreparable harm" that the PIAA alleges it will suffer was hinged on an event that has already occurred. The OOR has issued its Final Determination. The PIAA has not pled additional facts that demonstrate that it has suffered actual harm as a result of this determination. *Pa. State Lodge v. Commonwealth*, 692 A.2d 609 (Pa. Commw. Ct. 1997) (affirming the dismissal of a declaratory judgment action against the Pennsylvania Department of Labor and Industry where the plaintiff failed to allege any facts demonstrating that it suffered actual and immediate harm as a result of the department's actions).

The PIAA has now availed itself of the adequate remedy by filing an appeal with this Court, as discussed in more detail below. The OOR asks this Court to decline jurisdiction in this matter, as these actions are cumulative.

Failure to State A Claim for Relief

The PIAA argues that it should not be subject to the RTKL because it differs in certain aspects from other agencies, even though the General Assembly expressly named it an agency in the statute. The Pennsylvania General Assembly, however, determined that the citizens of the Commonwealth have a right to transparency in their children's high school athletic competitions, and so the General Assembly

expressly named the organization that governs these activities as a State-affiliated entity, and thus a Commonwealth agency.

The PIAA is not challenging the OOR's interpretation of the RTKL. Rather, the PIAA is challenging the fact that the General Assembly named them specifically. The PIAA's inclusion in the RTKL is clear, plain language, which the Pennsylvania Supreme Court has consistently described as "the best indication of legislative intent." *See Malt Beverages Distributors Ass'n v. Pa. Liquor Control Bd.*, 974 A.2d 1144, 1149 (Pa. 2009). The PIAA's argument that the statute is inherently contradictory is absurd. The RTKL statute provides a broad, general definition of an agency, and then goes on to expressly name other entities, which are designated as agencies *in addition to* the general definition. 65 P.S.§ 67.102. The fact that the General Assembly defined agencies, and then named additional entities that might not otherwise squarely meet that definition, simply reflects that the General Assembly saw the PIAA as being similarly situated and wished to remove any ambiguity by expressly naming the PIAA.

The General Assembly's decision to name the PIAA specifically should serve to remove any doubt as to the drafter's intention. "The answer to these arguments, of course, is that [an agency] is an agency if the General Assembly says it is." *Harristown Dev. Corp. v. Commonwealth, Dep't of General Servs.*, 614 A.2d 1128, 1131 (Pa. 1992). "[W]here there is a conflict between two provisions of a statute,

one of which is specific and the other merely general, the specific provisions thereof will control unless it is clear that the legislature intended otherwise, or some other canon of statutory construction compels a contrary conclusion." *In re Waits' Estate*, 7 A.2d 329, 330 (Pa. 1939); *see also Phila. v. Commonwealth*, 113 A. 661 (Pa. 1921) ("It is well established that, where a conflict exists between a specific constitutional provision, which is unquestionably applicable to a particular case, and certain general provisions, which, were it not for such conflict, might apply, the specific provision will prevail."); *Buckley v. Holmes*, 102 A. 497 (Pa. 1917); *Commonwealth v. Kline*, 144 A. 750 (Pa. 1929); *Commonwealth ex rel. Specter v. Martin*, 232 A.2d 729, 741 (Pa. 1967).

The General Assembly obviously intended the PIAA to be an agency, and the fact that there is more than one definition of "agency" does not invalidate the express inclusion of the PIAA in the RTKL. The General Assembly is empowered "to pass legislation, define the terms of its legislation, and amend its definitions as it sees fit…." *Harristown Dev. Corp., supra* at 1131.

II. FAILURE TO STATE A CLAIM (DEMURRER) AS TO THE PIAA'S ARGUMENT THAT THE RTKL IS "SPECIAL LEGISLATION"

Count II asks this Court to find that it was "singled out" by the General Assembly for disparate treatment by its inclusion in the RTKL, in violation of the

special legislation proscription of Article III, Section 32 of the Pennsylvania Constitution.

First, all duly enacted legislation "enjoys a strong presumption of validity, and 'will only be declared void if it violates the Constitution clearly, palpably and plainly.'" *Commonwealth v. Bullock*, 913 A.2d 207, 211 (Pa. 2006) (quoting *City of Phila. v. Commonwealth*, 838 A.2d 566, 585 (Pa. 2003)). The PIAA carries a "heavy burden" to prove that the RTKL is unconstitutional. *See id*. at 487, 913 A.2d at 212 (quoting *Payne v. Dep't of Corr*., 871 A.2d 795, 800 (Pa. 2005)).

"The 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." *See Pa. Tpk. Comm'n v. Commonwealth*, 899 A.2d 1085, 1094-95 (Pa. 2006); *DeFazio v. Civil Serv. Comm'n of Allegheny Cty*., 756 A.2d 1103, 1105 (Pa. 2000). Nonetheless, the General Assembly may regulate based on classifications, so long as (1) the challenged statute promotes a legitimate state interest, (2) the disparate treatment is reasonable and based on some difference that justifies the dissimilar treatment, and (3) there is a "fair and substantial relationship" between the requirements imposed and the overall objective of the underlying legislation. *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 581 (Pa. 2016).

The goal of the RTKL is to provide Pennsylvania citizens with greater transparency—a legitimate state interest. Pursuant to that interest, school districts are subject to the RTKL. *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 724 (Pa. 2020). The membership of the PIAA consists of 1,431 schools.[3] Of these, only 197 of these schools (roughly 14% of PIAA's membership) are private—the remaining 1,234 schools (roughly 86% of PIAA's membership) are public or charter schools, which are subject to the RTKL. *See id*. Not only are the vast majority of the PIAA's membership schools subject to the RTKL, but many of its board members are also subject to the RTKL in some respect. PIAA's board members are made up, in part, of representatives from these schools (whose respective districts are subject to the RTKL), the Pennsylvania School Board Association (whose members are subject to the RTKL), and the Pennsylvania Department of Education (also subject to the RTKL).

PIAA was formed by a group of high school Principals to "eliminate abuses, establish uniform rules, and place interscholastic athletics in the overall context of secondary education." *See id*. The PIAA establishes and enforces rules governing the eligibility of high school athletes to participate in interscholastic athletics, including rules for academic performance and attendance; adopts rules for each sport under its jurisdiction; provides training opportunities for public high school

[33] *See* "Our Story," available at: Our Story - PIAA (last visited May 4, 2021).

educators to officiate at Contests in which public high schools participate; and organizes and operates Inter-District Championship Contests, in which public high schools compete. *See id*.

The PIAA is the *de facto* state-wide regulator of Commonwealth high school athletics. The fact that taxpayer-funded schools voluntarily submit to such governance is irrelevant. Even assuming for the sake of argument that the PIAA differs from other agencies in some respects, the General Assembly's determination that such an entity falls within the same classification is certainly rational. *See e.g.*, *Robinson Twp.*, *supra* at 581.

The question of whether PIAA is a state actor is not one of first impression in the Commonwealth. [4] The Pennsylvania Supreme Court previously determined that the PIAA is, in fact, a state actor, holding as follows:

> The question whether the affairs of a state-wide athletic association constitute state action in the constitutional sense has not been previously considered by this Court. We agree with appellant's position that **affairs of the PIAA constitute state action.** The appellee association is composed of all the public high schools in this Commonwealth except those in Philadelphia. The PIAA is funded by the payment of membership fees from public school moneys, and so ultimately by the Commonwealth's taxpayers, and from the gate receipts of athletic events between public high schools. Judge Godbold, writing for the Fifth Circuit Court of Appeals, spoke to the issue of whether state-wide athletic associations' activities constitute state action in *Louisiana High School Athletic Association v. St. Augustine*

[4] Remarkably, the PIAA argues that this Pennsylvania Supreme Court decision should not control because of the PIAA's "significant growth" since it was handed down. *See Response of Petitioner to Preliminary Objections of Pennsylvania Office of Open Records*, ¶ 40. However, the fact that the PIAA now has a *larger* statewide impact instead supports the General Assembly's determination that the PIAA should be classified as an agency for purposes of the RTKL.

> *High School*, 396 F. 2d 224, 227 (5th Cir. 1968): "*There can be no substantial doubt that conduct of the affairs of* [*a state-wide athletic association*] *is state action in the constitutional sense*. The evidence is more than adequate to support the conclusion … that the Association amounts to an agency and instrumentality of the State of Louisiana. Membership of the Association is relevant -- 85 per cent of the members are state public schools. The public school principals, who nominally are members, are state officers…. Funds for support of the Association come partly from membership dues, largely from gate receipts from games between members, the great majority of which are held in state-owned and state-supplied facilities.

School Dist. v. Pa. Interscholastic Athletic Ass'n, 309 A.2d 353, 356-357 (Pa. 1973) (internal quotations omitted) (emphasis added). Therefore, as a state actor, the General Assembly's classification of the PIAA as an agency under the RTKL was both rational and furthers a legitimate state interest.

III. FAILURE TO STATE A CLAIM (DEMURRER) AS TO THE ALLEGED FOURTEENTH AMENDMENT VIOLATION (COUNT III), AND THE ALLEGED EQUAL PROTECTION CLAUSE VIOLATION (COUNT IV)

The PIAA has not pled appropriate facts to establish a Fourteenth Amendment or Equal Protection Clause violation. Given the fact that the PIAA regulates and operates public high school athletic competitions across the state and given that 86% of its membership are schools that are subject to the RTKL through their districts, the General Assembly's action to include it with other statewide educational/academic entities was clearly rational. The PIAA has not pled sufficient facts to overcome the presumption of the statute's validity. The fact that PIAA is a nonprofit corporation is not sufficient to mitigate the potent fact it is the *de facto*

regulator of high school athletics.[5] *See Harristown Dev. Corp., supra* at 1131; *see also Pysher v. Clinton Twp. Vol. Fire Co.*, 2019 A.3d 1116 (Pa. Commw. Ct. 2019); *Bohman v. Clinton Twp. Vol. Fire Co.*, 212 A.3d 145, *1 (Pa. Commw. Ct. 2019) (holding that other nonprofit entities may be "similar governmental entities" under the RTKL's definition of "local agency").

While the heading of Count III states a claim against Elizabeth Wagenseller in her official capacity for an alleged Fourteenth Amendment violation, the meat of the pleading does not address any action taken by her, or any OOR "policy." Instead, paragraphs 96-101 under that same Count argue that "the inclusion of PIAA" in the RTKL is a constitutional violation. *See* Amended Petition at ¶¶ 96-101. Likewise, paragraphs 110 and 111 of the Equal Protection Clause Count also limit the harm complained of to "the inclusion of PIAA *in the RTKL*." *See* Amended Petition at ¶¶ 110-111 (emphasis added). The substance of these Counts simply does not state a claim for redress against Ms. Wagenseller or the OOR, as they identify no action taken by them. The PIAA's quarrel is with the General Assembly, not with the quasi-judicial tribunal that follows the clear instruction of a statute.

[5] Although the PIAA boasts that its mission "is accomplished without any federal or state funds," and this same comment is repeated throughout its pleadings, the PIAA nevertheless acknowledges that a portion of its operating costs come from the dues of the member schools, which are funded by the taxpayers. *See* "Our Story," available at: Our Story - PIAA (last visited May 4, 2021).

Additionally, the PIAA's Section 1983 claim mischaracterizes the role of the OOR. In the facts that gave rise to this action, neither the OOR nor Ms. Wagenseller was acting as a policymaker for purposes of Section 1983. Rather, the OOR was acting in its quasi-judicial capacity, by and through the determination of its appeals officer.

In paragraph 80 of its Amended Petition, PIAA references "improper execution [of law] by government officials" as the basis for its Section 1983 claim. Likewise, paragraph 85 of that same pleading references "actions of policy making and/or execution." However, PIAA's complaint does not point to any OOR policy or execution thereof by Ms. Wagenseller as the cause of its harm. The alleged "harm" that forms the gravamen of PIAA's complaint is the OOR's Final Determination, rendered by a quasi-judicial appeals officer.

Paragraph 40 of the Amended Petition states that the "OOR took official action to declare PIAA subject to the RTKL…." *See* Amended Petition at ¶ 40.

The plain language of Section 1983 conditionally prohibits the granting of relief against "a judicial officer for an act or omission taken in such officer's judicial capacity." 42 U.S.C. § 1983. Under Section 13 of the RTKL, entitled "Judicial Review," the General Assembly established the OOR. *See* 65 P.S. § 67.1310. This Honorable Court has held that the OOR's determinations are "judicial in nature" because the OOR is "a quasi-judicial tribunal." *Office of Open Records v.*

Center Twp., 95 A.3d 354, 363 (Pa. Commw. Ct. 2014) (en banc); *see also Gera v. Borough of Frackville*, 2021 Pa. Commw. Unpub. LEXIS 217, *5, 2021 WL 1573834 (explaining that the Appeals Officer's role is "quasi-judicial").

In regard to Section 1983 claims, the United States Supreme Court has held that even private actors may be afforded the immunity ordinarily accorded judges acting within the scope of their jurisdictions if their role is "'functionally comparable' to that of a judge." *Butz v. Economou*, 438 U.S. 478, 513 (1978). In deciding whether an actor is entitled to immunity on the basis that his or her role is analogous to that of a judge, a court should evaluate the challenged proceedings in light of the "characteristics of the judicial process" set forth in *Butz v. Economou*. *See DiBlasio v. Novello*, 344 F.3d 292, 297-98 (2d Cir. 2003), cert. denied, 124 S. Ct. 2018 (2004).

> In *Butz*, the Supreme Court mentioned the following factors, among others, as characteristic of the judicial process and to be considered in determining immunity: [1] the need to assure that the individual can perform his functions without harassment or intimidation; [2] the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; [3] insulation from political influence; [4] the importance of precedent; [5] the adversary nature of the process; and [6] the correctability of error on appeal.

Cleavinger v. Saxner, 474 U.S. 193, 201-02 (1985) (citing *Butz*, 438 U.S. at 512); *see also Sheffer v. Centre Cty.*, No. 19-2726, 2020 U.S. App. LEXIS 20366, 2020 WL 3496804, at *2 (3d Cir. June 29, 2020) ("To the extent that Sheffer seeks to overcome the immunity bar by asserting that the Judicial Defendants acted in an

'administrative or enforcement capacity'… the Magistrate Judge correctly concluded that the … decisions of which Sheffer complained were judicial — not legislative or administrative — actions.")

Under the RTKL, appeals officers may hold a hearing. Appeals officers may "admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute." 65 P.S. § 67.1102(a)(2). The appeals officer may also withhold evidence by "limit[ing] the nature and extent of evidence found to be cumulative." *Id.* After review of evidence and arguments, the appeals officer may "issue a final determination…." 65 P.S. § 67.1102(a)(4). Appeals officers are given the discretion to "rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute." 65 P.S. § 67.1102(b)(3). "The determination by the appeals officer shall be a final order. The appeals officer shall provide a written explanation of the reason for the decision to the requester and the agency." 65 P.S. § 67.1101 (b)(3). Moreover, all of these quasi-judicial actions are subject to *de novo* review by this Court, or a Court of Common Pleas. *See* 65 P.S. §§ 67.1301-1302. As for the third *Butz* factor regarding insulation from political influence, the Pennsylvania Supreme Court has expressly held that the OOR is "a unique, independent agency charged with the delicate task of applying the RTKL," and that there is a "need to insulate

the OOR and its Executive Director from the potential for coercive influence…." *Arneson v. Wolf*, 124 A.3d 1225, 1228 (Pa. 2015).

There can be no question that at all times in regard to the OOR's declaration that the PIAA is subject to the law, the OOR was functioning as a quasi-judicial entity in need of insulation from the threat of litigation.

In order to be entitled to immunity, the official must be engaged in acts that are integrally related, not simply to the judicial process in general, but to a concrete judicial case or controversy. *See generally Supreme Court of Virginia v. Consumers Union of the United States, Inc.,* 446 U.S. 719, 731 (U.S. 1980). The "harm" of which the PIAA complains is the OOR's legal determination that it is subject to the RTKL, rendered by a quasi-judicial officer—a concrete case or controversy. *See id*. Again, the PIAA cannot articulate an OOR policy or ministerial action by its Executive Director that might form the basis of a proper Section 1983 claim. No action will lie under Section 1983 against Respondent Wagenseller or the OOR for a quasi-judicial determination made by a quasi-judicial officer.

However, assuming *arguendo* that there is a proper Section 1983 claim against Ms. Wagenseller or the OOR for issuing its Final Determination, the PIAA *still* has not pled sufficient facts to support it. Indeed, the OOR applies the RTKL fairly and evenly to all entities expressly named by the General Assembly as subject to the RTKL. The PIAA cannot point to another expressly named entity in the RTKL

that the OOR does not equally and fairly hold subject to the law. Again, the PIAA's inability to plead supportive facts demonstrates that its true complaint is with the General Assembly, not the OOR.

IV. FAILURE TO STATE A CLAIM (DEMURRER) AS TO THE PIAA'S ARGUMENT THAT A NONPROFIT ORGANIZATION CANNOT BE SUBJECT TO THE RTKL

There is no provision in the Nonprofit Corporation Law that conflicts with the RTKL.

Assuming, however, there *was* a conflict between the Nonprofit Corporation Law and the RTKL with respect to the PIAA's status as a Commonwealth agency, the RTKL would apply under general statutory construction principles. It is a general principle of statutory construction that particular terms in conflicting statutes control general terms:

> Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.

1 Pa.C.S. 1933. The terms of the RTKL are particular in that only some nonprofit entities are affected. *See, e.g., Harristown Dev. Corp., supra*. The terms of the Nonprofit Corporation Law, on the other hand, are general in that they are intended

to apply to all nonprofit corporations. *See id*. The RTKL is also the more recently enacted statute. *See id*.

The PIAA's argument as to this issue is a perfect illustration of confusion of the inverse, also known as the conditional probability fallacy or the inverse fallacy. There are two portions of the Nonprofit Corporation Law that permit members to access records. Relying upon these sections permitting access, the PIAA then argues the inverse, which is that it must be the case that the General Assembly intended *all* corporate records to be private.

However, the fact that the General Assembly included Section 5508(b) (which grants members a right to inspect corporate records) and Section 5512 (which grants directors a right to inspect corporate records) does not automatically mean that the Nonprofit Corporation Law prohibits disclosure to third parties in other instances. *See* 15 Pa.C.S. §§ 5508(b) and 5512.

In fact, neither sections of the Nonprofit Corporation Law cited by the PIAA has a proscription on access by third parties—in other words, there is no confidentiality clause in that law.

This exact approach of using the inverse fallacy to argue against records disclosure was just before this Court last year in *Pa. Liquor Control Board v. Burns*. In that case, the Liquor Control Board argued that the General Assembly's repeal of certain disclosure requirements from the Liquor Code meant that the inverse was

true; in other words, that such a repeal was evidence of the General Assembly's intent to hold the same information confidential. *Pa. Liquor Control Bd. v. Burns*, 229 A.3d 51 (Pa. Commw. Ct. 2020), appeal denied, 2021 Pa. LEXIS 68 (Pa., Jan. 6, 2021). This Court rightfully rejected that argument, and the Pennsylvania Supreme Court denied the appeal. *See id*.

This Honorable Court noted that "[i]n order to constitute an exemption under Section 305(a)(3) of the RTKL, the . . . statute must *expressly* provide that the record sought is confidential, private, and/or not subject to public disclosure." *See id*. (citing *Ali v. Phila. City Planning Comm'n*, 125 A.3d 92, 99-100 (Pa. Commw. Ct. 2015) (emphasis added) (holding that the "Copyright Act is not a federal law that exempts materials from disclosure under the RTKL" as "[i]t neither expressly makes copyrighted material private or confidential, nor does it expressly preclude a government agency, lawfully in possession of the copyrighted material, from disclosing that material to the public").

Similarly, there is no provision in the Nonprofit Corporation Law that expressly provides that nonprofit corporate records are confidential. As such, Count V fails to state a claim for relief.

CONCLUSION

The PIAA is an "agency" by virtue of clear statutory law. More pertinently, this case is procedurally unsound. Whether PIAA is an "agency" under the RTKL is a question for this Honorable Court to hear *de novo* on appeal from a determination of the Office of Open Records. The General Assembly prescribed the RTKL appeal process, and the PIAA has followed it by filing an appeal, rendering this action duplicative and unnecessary. The OOR asks this Court to dismiss this action.

Respectfully submitted:

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I certify that this filing complies with the word count limitations set forth within Pennsylvania Rules of Appellate Procedure 2135(d) based upon the word count of the word processing system used to prepare this brief.

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CERTIFICATE OF COMPLIANCE: Pa. R.A.P. 127

Pursuant to Pennsylvania Rule of Appellate Procedure 127, 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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CERTIFICATE OF SERVICE

I, Faith Henry, hereby certify that on this the 14th day of May, 2021, I served the foregoing upon the persons indicated below via the Court's electronic filing system and United States Mail, satisfying the service requirements of Pennsylvania Rule of Appellate Procedure 121(c).

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