IN THE COMMONWEALTH COURT OF PENNSYLVANIA
No. 661 MD 2020

PENNSYLVANIA INTERSCHOLASTIC
ATHLETIC ASSOCIATION, INC.
Petitioner

vs.

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

BRIEF OF PETITIONER PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC., IN OPPOSITION TO RESPONDENT PENNSYLVANIA OFFICE OF OPEN RECORDS' PRELIMINARY OBJECTIONS

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BRIEF OF PETITIONER IN OPPOSITION TO RESPONDENT PENNSYLVANIA OFFICE OF OPEN RECORDS' PRELIMINARY OBJECTIONS

Petitioner Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA"), by and through its attorneys, submits the following brief in opposition to the Preliminary Objections of Respondent Pennsylvania Office of Open Records ("OOR") to the Amended Petition for Review ("Amended Petition").

I. SUMMARY OF ARGUMENT

At issue before the Court is a provision of the Pennsylvania Right-To-Know Law ("RTKL") that purports to subject PIAA to that law but does so improperly and in an unconstitutional manner. The OOR argues that PIAA is subject to the RTKL because it is specifically identified in the legislation as a "State-affiliated entity." However, "State-affiliated entity" is defined in the RTKL as a "Commonwealth authority or Commonwealth entity." As discussed herein, and as

averred in the Amended Petition for Review ("Amended Petition"), under no plausible application of that definition does PIAA qualify as either a Commonwealth authority or Commonwealth entity. Rather, as averred in the Amended Petition, PIAA is a private voluntary nonprofit membership corporation that does not receive a single dollar from the Commonwealth, has not been granted any governmental power by the General Assembly, is not administered in any way by Commonwealth personnel or appointees, and was not created by any enabling legislation adopted by the General Assembly. It has no governmental powers of any kind, let alone those of a Commonwealth agency, authority, or entity.

Despite the inapplicability of the definition to PIAA, the "State-affiliated entity" provision then proceeds to list a number of entities as examples of State-affiliated entities, and that list includes PIAA. Singling out PIAA for inclusion, when it clearly does not meet the definition (a Commonwealth authority or Commonwealth entity), constitutes *per se* special legislation and is a violation of PIAA's equal protection rights.

Here, the OOR asserts that PIAA cannot argue what the General Assembly could, or should, have done. Yet, it is the OOR, in attempting to find some way to rationalize PIAA's inclusion within the RTKL, that does exactly that. In particular, the OOR argues that the General Assembly could have properly included PIAA within the scope of the RTKL because it receives membership dues

from public schools and revenues from games hosted at those public schools. The argument is a red herring. The OOR conveniently neglects to note that the source of those revenues (public schools) are local entities, not the Commonwealth. The OOR points to no authority supporting the proposition that receipt of funds from schools is a factor of any kind in determining whether an entity is a Commonwealth Agency.

Compounding its flawed argument, the OOR asserts that PIAA could be subject to the RTKL because it has been recognized as a "state actor" by courts. This argument conflates federal civil rights law with whether an organization is a Commonwealth authority or entity. Any individual or private party could be deemed a state actor under civil rights law based on particular circumstances and conduct and regardless of whether they are a governmental agency or entity. By contrast, a Commonwealth Agency is, by definition, a governmental entity.

Moreover, to even support its argument, the OOR relies on facts not set forth in the Amended Petition but discussed in a case decided almost fifty years ago, before PIAA admitted private schools to its membership, and which addressed very different funding circumstances than are present today. There are no facts of record setting forth the sources of PIAA's financial resources (other than the averment that no such funds come from the Commonwealth). To the extent that

any other sources of income are relevant to this case, discovery and trial on the merits of that issue are necessary.

Further, the primary case relied upon by the OOR for the "state actor" argument, *School Dist. of Harrisburg v. Pennsylvania Interscholastic Athletic Ass'n*, 453 Pa. 495, 309 A.2d 353 (1973), does not, the OOR's representation notwithstanding, hold that PIAA is a state actor. Indeed, that term is not even found in the decision. Rather, the court determined that PIAA's conduct constituted "state action in the constitutional sense." *See id.,* at 357. Going further, and despite that determination, the court reaffirmed PIAA's status as a private association and specified that judicial interference into the affairs of such a private organization should not generally occur, emphasizing "the general rule of judicial non-interference in the affairs of **private associations**." *Id.,* at 358 (emphasis added). Under no circumstance did the Supreme Court even remotely consider PIAA a governmental body.

The OOR's preliminary objections should be denied and, following the OOR's filing of its answer to the Amended Petition, this matter should proceed to disposition on the merits.

II. PROCEDURAL HISTORY

This action was initiated by PIAA's filing of a Petition for Review on December 17, 2020. An Amended Petition for Review ("Amended Petition") was

filed on February 11, 2021. On March 18, 2021, the OOR filed Preliminary Objections. On April 14, 2021, PIAA answered the Preliminary Objections. On May 14, 2021, the OOR filed a brief in support of its Preliminary Objections. This brief is submitted in opposition to the OOR's Preliminary Objections.

III. FACTUAL HISTORY

As set forth in the Amended Petition, the factual averments of which must be accepted as true for consideration of the preliminary objections, PIAA is a nonprofit voluntary membership corporation. Amended Petition, ¶ 4. It consists of public and private schools that choose to join the organization. *Id.*, ¶ 10.

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. *Id.*, ¶ 17. It was not established by the Constitution of Pennsylvania, a statute or executive order. *Id.*, ¶ 18. It is not an office, department, authority, board, multistate agency or commission of the executive branch. *Id.*, ¶ 19. 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. *Id.*, ¶ 21.

PIAA receives no state tax money nor any funding of any kind from the Commonwealth. *Id.*, ¶ 27. It was not created by enabling legislation adopted by the General Assembly. *Id.*, ¶ 29. It has not been granted any powers or authority

by the General Assembly other than that possessed by all nonprofit corporations pursuant to the Nonprofit Corporation Law of 1988. *Id.*, ¶ 30. PIAA's powers are derived from its members and it can increase, remove or modify those powers at any time without the consent of, or even notice to, the Commonwealth. *Id.*, ¶ 32. Its staff and Board of Directors do not consist of any employees or members appointed by the Governor or the General Assembly. *Id.*, ¶ 33.

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 and PIAA's member schools are free to join any of them. *Id.*, ¶¶ 34-35.

IV. QUESTIONS PRESENTED

A. Whether the OOR's preliminary objection to Count I based on the alleged failure to exhaust remedies should be overruled?

RESPONSE: This preliminary objection should be overruled.

B. Whether the OOR's demurrer to Count I ("failure to state a claim" argument) should be overruled?

RESPONSE: This preliminary objection should be overruled.

C. Whether the OOR's demurrer to Counts III and IV (denial of equal protection under the United States and Pennsylvania Constitutions) should be overruled?

RESPONSE: This preliminary objection should be overruled.

D. Whether the OOR's demurrer to Count V (relating to the Nonprofit Corporations Law) should be overruled?

RESPONSE: This preliminary objection should be overruled.

V. ARGUMENT

A. Standard of Review

"When reviewing preliminary objections to a petition for review in our original jurisdiction, this Court must treat as true all well-pleaded, material, and relevant facts together with any reasonable inference that can be drawn from those facts." *Cty. of Berks v. Pa. Office of Open Records*, 2019 Pa. Comm. LEXIS 214, *7, 204 A.3d 534, 539 n. 7 (2019). Preliminary objections in the nature of a demurrer asserting that the complaint is legally insufficient may be sustained only when "the law says with certainty that no recovery is possible; if doubt exists, then it should be resolved in favor of overruling the objection," *id.*, and "only in cases which are so free from doubt that a trial would certainly be a fruitless exercise." *Clark v. Beard*, 2007 Pa. Commw. LEXIS 61, 918 A.2d 155, 158 n. 4 (2007). Indeed, "'preliminary objections should be sustained only if, assuming the averments of the complaint to be true, the plaintiff has failed to assert a legally cognizable cause of action.'" *Weaver v. Herman*, 2015 Pa. Commw. Unpubl. LEXIS 393, 116 A.3d 1189 n. 4 (2015) (quoting *Langella v. Cercone*, 2011 Pa. Super. 196, 34 A.3d 835, 838 (Pa. Super. 2011)).

The OOR's brief, presenting four arguments (and two sub-arguments within the first one, does not track the OOR's three preliminary objections exactly, but nonetheless seems to address each of them. PIAA will, therefore, respond to the arguments as set forth in the OOR brief.

B. The OOR's "failure to exhaust remedies" argument regarding Count I should be overruled.

In its first preliminary objection, the OOR argues that Count I is deficient because PIAA has not yet exhausted available remedies. Contrary to the OOR's argument, however, the Amended Petition is properly before this Court and PIAA need not pursue the approach preferred by the OOR.

As an initial matter, PIAA seeks declaratory and injunctive relief challenging the constitutionality of the provision of the RTKL purportedly applicable to PIAA. *See* Amended Petition, ¶¶ 1, 2. This Court has jurisdiction over such an action. *Commonwealth v. Donahue*, 626 Pa. 437, 454, 98 A.3d 1223, 1234 (2014). Indeed, the court in *Donahue* further noted that an action against the OOR to challenge its interpretation of a RTKL provision "places this matter squarely within the scope of the Commonwealth Court's original jurisdiction," 626 Pa. at 455, and held that the "declaratory judgment action addressed to the Commonwealth Court's original jurisdiction was a proper vehicle for challenging OOR's interpretation of the RTKL." *Id.*, at 457.

Indeed, the Supreme Court made clear in *Donahue* that this Court "has original jurisdiction over any action brought against the 'Commonwealth government.'" 98 A.3d at 1234. As noted by the court therein: "The Judicial Code defines the 'Commonwealth government' as including '… the departments, boards, commissions, authorities and officers and agencies of the Commonwealth,'" including the OOR. *Id.* That is important since the administrative process which the OOR seeks to compel PIAA to follow does not permit either the Commonwealth or the OOR to be named as parties to any appellate action before this Court. *Padgett v. Pennsylvania State Police,* 73 A.3d 644, 648 n. 5 (Pa. Commw. Ct. 2013). Thus, PIAA cannot obtain proper relief through the administrative process since the very Respondents in this case are not parties to that process.

Moreover, the OOR's objection completely overlooks the well-established exception to the exhaustion requirement for instances "where the administrative process is inadequate to address the claim and where a substantial constitutional issue is raised." *See Pa. State Educ. Ass'n v. Dep't of Cmty. & Econ. Dev.*, 616 Pa. 491, 50 A.3d 1263, 1276 (2012) (collecting pertinent authority). The OOR lacks the authority to rule on the constitutionality of provisions of the RTKL. Indeed, the OOR simply ignores this point in its briefing, maintaining that the OOR has jurisdiction over the proceedings involving PIAA, but disregarding the fact that

three counts of the Amended Petition clearly challenge the constitutionality of PIAA's inclusion in the RTKL. *See* OOR Brief in Support of Preliminary Objections, at 2-7.

The OOR's reliance on *Cty. of Berks v. Pa. Office of Open Records*, 2019 Pa. Comm. LEXIS 214, *7, 204 A.3d 534, 539 n. 7 (2019), does not assist its argument. In that case, there was a specific OOR decision at issue, which, because it addressed a Local Agency, should have been addressed on appeal by a County Court of Common Pleas. The County, however, sought declaratory relief with this Court. The Court dismissed two counts and remanded the other to the Court of Common Pleas. Only was one dismissed for failure to exhaust remedies and that was because there seemed to be no issue of prospective harm since the General Assembly had recently amended the provision at issue and because there was an existing OOR decision which could be pursued, and which could address the County's concerns. Moreover, and critically, that case did not involve a constitutional challenge to any provision of the RTKL. By contrast, here, there is no underlying OOR decision at issue and this case expressly involves federal and state constitutional challenges to a specific provision of the RTKL. There is no provision requiring exhaustion of administrative remedies before these claims can be pursued. In addition, the OOR disregards the fact that in *County of Berks*, this Court was not presented with a challenge to a provision of the RTKL itself; rather,

in that case, "[a]ll parties recognized that the RTKL requires that the County file any appeal that it had from the Final Determination in the Court of Common Pleas of Berks County[,]" and the Court noted that the "county is a 'local agency' under the RTKL, and the appropriate venue for a local agency to challenge an OOR final determination is through an appeal to the court of common pleas where the agency is located." *See Cty. of Berks*, 204 A.3d at 540 (collecting authority). That situation simply is not present here, where PIAA has explicitly raised the issue of unconstitutional special legislation and denials of equal protection rights.

Finally, the OOR's assertion that PIAA has not, in prior OOR proceedings, "present the OOR with the argument that it is not subject to the RTKL…." (OOR Brief, at 2) is not supported by the record and is simply false. Indeed, in each appeal submitted to the OOR, PIAA has expressly taken the position that it is not subject to the RTKL but recognized that the OOR did not have the authority to resolve that issue. For illustration purpose, in *Palattella v. PIAA*, OOR Dkt. AP 2018-0910, 2018 Pa. O.O.R.D. LEXIS 712, which is cited by the OOR, PIAA expressly included the following in its response to the appeal:

> PIAA recognizes that Section 102 of the Pennsylvania Right To Know Law ("RTKL") identifies PIAA as a "State-affiliated entity" subject to the RTKL. However, PIAA does not meet the definition thereof, which is "a Commonwealth authority or Commonwealth entity." *Id.* 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 or contest this issue here as the Office of Open Records ("OOR") is not the appropriate venue to address the validity and constitutionality of the legislative enactment.

See Appendix A hereto. Comparable objections have been raised in each prior proceeding cited by the OOR. In any event, even if those matters had been appealed to this Court (none cited by the OOR were), they would have been limited to the record before the OOR, which is wholly inadequate to present the challenges presented in this action. This preliminary objection should be overruled.

C. The OOR's demurrer to Count I ("failure to state a claim" argument) should be overruled.

In addressing Count I of the Amended Petition, the OOR asserts that PIAA is arguing that it should not have been included in the RTKL, while the discretion to include it rests with the General Assembly, which has chosen to include PIAA. The argument, though, fails because what the definition is internally inconsistent and irrational. It is as if the General Assembly adopted legislation that defined birds as winged mammals and then included as examples, hawks, eagles, robins, sparrows, bluebirds and PIAA.

At the outset, it must be recognized that the RTKL was intended to be, and is, a law of limited scope applicable only to governmental entities. As noted by the Supreme Court, the RTKL is intended to provide access by people to "information concerning the activities *of their government*." *SWB Yankees LLC v.*

Wintermantel, 615 Pa. 1029, 45 A.3d 1029, 1041 (2012) (emphasis added). The law was designed "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*, 2010 Pa. Commw. LEXIS 57, 990 A.2d 813, 824 (2010) (emphasis added), *aff'd*, 621 Pa. 133, 75 A.3d 453 (2013); *see also Chester Water Auth. v. Pa. Dep't of Cmty. & Econ. Dev.*, 2021 Pa. LEXIS 1872, 2021 WL 1740596, at *9 (Pa. Apr. 29, 2021) (Dougherty, J., concurring) (noting "that the overriding objective of the RTKL is to empower citizens by affording them access to information concerning *the activities of their government*" (internal quotation marks omitted) (emphasis added)); *Levy v. Senate of Pa.*, 619 Pa. 586, 618-19, 65 A.3d 361 (2013) (describing the RTKL's purpose as "promoting 'access *to official government information* in order to prohibit secrets, scrutinize actions of *public officials*, and make *public officials* accountable for their actions'" (emphasis added) (quoting *Allegheny Cty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 2011 Pa. Commw. LEXIS 67, 13 A.3d 1025 (2011). "To qualify as governmental, the function must be a substantial facet of a government activity." *Appeal of Headley*, 2014 Pa. Commw. LEXIS 11, 83 A.3d 1101, 1109 (2012).

The RTKL covers several categories of entities, specifically Commonwealth Agencies, Local Agencies, Legislative Agencies and Judicial Agencies. The part

of the RTKL applicable to Commonwealth Agencies (which is the part where PIAA is identified), contains no suggestion that it was intended to compel disclosure of records of private corporations. Thus, singling out for inclusion in this definition a private nonprofit corporation that does not meet the definition creates, at a minimum, an inherent inconsistency within the definition.

In support of its preliminary objection, the OOR argues that nonprofit corporations can indeed be subject to the RTKL even if not governmental entities, citing *Harristown Development Corp. v. Commonwealth Dept. of General Services*, 532 Pa. 45, 614 A.2d 1128 (1990), in support of its position. *Harristown*, however, actually undermines the OOR's position.

In *Harristown*, the court considered legislation wholly independent of the RTKL that created a classification in the Administrative Code for entities receiving substantial rents from the Commonwealth and requiring such entities to be subject to the RTKL.[1] The classification did not name Harristown Development

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[1] The specific language of the provision is as follows:

> Any nonprofit corporation which leases lands, offices or accommodations to the Commonwealth for any department, board, commission or agency with a rental amount in excess of one million five hundred thousand dollars ($1,500,000) per year shall be deemed an agency as defined by the act of July 3, 1986 (P.L. 388, No. 84), known as the "Sunshine Act," and the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know-Law, and any such nonprofit corporation shall be subject to and governed by the provisions of the "Sunshine Law" and the Right-to-Know-Law.

Corporation ("HDC"), but HDC did fit the definition, so the definition applied to it. Here, by contrast, PIAA does not fit the definition but is specifically named.

Harristown is therefore inconsistent with the OOR's position that the RTKL does include nonprofit corporations since HDC was subject to the RTKL not because of the RTKL itself, but because of entirely unrelated and independent legislation. The OOR fails to support its assertion that the RTKL, by itself and without application of wholly independent legislation, applies to private nonprofit corporations.

A review of the actual definition of Commonwealth Agency in the RTKL is particularly telling. Section 301(a) of the RTKL provides that "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.

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71 Pa. C.S. § 632(d).

65 Pa. C.S. § 67.102.

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, nor was it established by the Constitution of Pennsylvania, a statute or executive order. Amended Petition, ¶¶ 17, 18. It is also not an office, department, authority, board, multistate agency, or commission of the executive branch. *Id.*, ¶ 19. The OOR does not argue that PIAA is an independent agency.[2]

The only remaining provision under which PIAA could be included under the RTKL is that of 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

[2] If made, such an argument should be rejected as PIAA does not meet the criteria established for being an independent agency. *See Goppelt v. Pa. Auto. Theft Prevention Auth.*, No. AP 2016-0018 (OOR 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*, 2012 Pa. Commw. LEXIS 283, 56 A.3d 40, 45-57 (2012); *S.A.V.E. v. Delaware Valley Regional Planning Comm'n*, 2003 Pa. Commw. LEXIS 175, 819 A.2d 1235, 1238 (2003). 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.

> 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.

65 P.S. § 67.102.

At the outset, it should be recognized that PIAA is not, nor has it ever been, a Commonwealth authority or Commonwealth entity. By including the term "Commonwealth" before both "authority" and "entity," the General Assembly made clear that the entity in question must have state governmental affiliation. Indeed, in *Goppelt*, *supra*, the OOR determined that the ATPA was a Commonwealth authority because it "was created by statute as 'a body corporate and politic.' 40 P.S. § 326.4(a)." *Id.* at 5. In particular, the ATPA 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." *Id.* By contrast, PIAA does not meet any of the criteria discussed in *Goppelt*. It was not created by any statute, funded by the Commonwealth, is not vested by the Commonwealth with powers and is not administered by the Governor or General Assembly.

Moreover, this 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). On that issue, PIAA receives no funding of any kind from the Commonwealth. Amended Petition, ¶ 27.

As for the exercise of governmental powers, PIAA has none. *Id.*, ¶ 23. Its authority over its member schools is contractual only. *See Rottmann v. Pa. Interscholastic Athletic Ass'n, Inc.*, 349 F. Supp. 2d 922 (W.D. Pa. 2004) ("The PIAA exercises no sovereign power over North Catholic or plaintiff…."). Finally, unlike any other entity listed in the definition of State-affiliated entity, PIAA's Board has no members appointed by the Governor or the General Assembly and it was not created by enabling legislation.

Recognizing that PIAA does not fit within the classification adopted for a State-affiliated entity, the OOR instead falls back on the argument that the definition itself is ultimately meaningless because PIAA is specifically identified as an example of a State-affiliated entity and the specific controls over the general. If, however, it is on this sole basis that the RTKL is deemed to apply to PIAA, the victory is ultimately fatal to the OOR since it then mandates the conclusion that the provision is, on its face, unconstitutional special legislation and a denial of rights to equal protection *since it singles out and targets PIAA by name* without it meeting

the definition of the defined classification. *See, e.g., Harrisburg Sch. Dist. v. Zogby*, 574 Pa. 121, 137, 828 A.2d 1079 (2003) (acknowledging that "a classification will be struck down if it is based upon an artificial or irrelevant distinctions used for the purpose of evading the constitutional prohibition"). PIAA submits that acceptance of this argument of the OOR compels entry of judgment in favor of PIAA on Counts II, III and IV.

D. The OOR's demurrer to Count II (special legislation) should be overruled.

Count II of the Amended Petition challenges the singling out of PIAA for inclusion within the definition of a State-affiliated entity as special legislation. Article III, Section 32, of the Pennsylvania Constitution 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., Art. III, § 32.

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." *Pa. Tpk. Comm'n*, 587 Pa. 347, 363-64, 899 A.2d 1085 (2006) (citing *Kramer v. Workers' Compensation Appeal Bd. (Rite Aid Corp.)*, 584 Pa. 309, 883 A.2d 518, 532 (2005); *Probst v. Commonwealth, Dept. of Transp., Bureau of Driver Licensing*, 578 Pa. 42, 849 A.2d 1135, 1143 (2004); *Commonwealth v. Albert*, 563 Pa. 133, 758 A.2d 1149, 1151 (2000)). Further, as the court in *Robinson Twp.* noted, "a

court may deem a statute or provision *per se* unconstitutional 'if, under the classification, the class consists of one member and is closed or substantially closed to future membership.'" *See Robinson Twp.*, 623 Pa. at 988, quoting *Zogby*, 828 A.2d at 1098; *see also West Mifflin Area Sch. Dist. v. Zahorchak*, 607 Pa. 153, 164, 4 A.3d 1042 (2010) (finding legislation at issue to be, "at a minimum, 'substantially closed' to new members, in violation of the dictates of *Hickock* and *Pennsylvania Turnpike Commission*").

The OOR first argues that the bar on special legislation does not apply to anything other than counties, cities, townships, wards, boroughs, and school districts. POs, at ¶ 30. Yet, it fails to mention that the bar on special legislation applies to regulations of trade and has specifically been applied to nonprofit corporations. Indeed, in *Pittsburgh v. Blue Cross of Western Pennsylvania*, 4 Pa. Commw. 262, 286 A.2d 475, 477-78 (1971), *rev'd on other grounds sub nom Pittsburgh v. Insurance Dep't of Pennsylvania*, 448 Pa. 466, 294 A.2d 892 (1972), this Court applied Section 32 to a private nonprofit corporation (Blue Cross of Western Pennsylvania) and 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.

Id. at 267.

The OOR also argues that the General Assembly's creation of a class of "only one member does not necessarily violate Article III, Section 32." POs, at ¶ 31. While this is superficially true, it misses both the issue and the appropriate standard for reviewing when a classification of one can be constitutional. In analyzing whether legislation violates the bar on special legislation, the Supreme Court has expressly recognized that:

> The judicial function, then, with respect to classifications, is to see that the classification at issue is founded on real distinctions in the subjects classified and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition.

Harrisburg School Dist. v. Hickock, 563 Pa. 391, 397-98, 761 A.2d 1132 (2000) (internal quotation marks omitted). Moreover, "[a] classification is *per se* unconstitutional when a class consists of one member and it is impossible or highly unlikely that another can join the class." *Id.*, at 398; *see also Pa. Tpk. Comm'n v Commonwealth*, 899 A.2d at 1098 (holding that if "it is clear 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"). A classification 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.”); *see also Hickock* (affirming order enjoining enforcement of legislative enactment targeting Harrisburg School District for special treatment with no rational basis for the special treatment); *W. Mifflin Area Sch. Dist.*, 4 A.3d at1048 (“[L]egislation creating a class of one member that is closed or substantially closed to future membership is *per se* unconstitutional.”). Thus, if it is highly unlikely that an entity comparable to PIAA could join the RTKL class to which PIAA is included, the classification is unconstitutional.

The OOR again relies on *Harristown* in support of its position and, again, such reliance is misplaced. As discussed above, in *Harristown*, the General Assembly adopted a classification that, at that time, did include only one entity. However, the court concluded that, as drafted, it was foreseeable that the classification could have additional members in the future (others could receive over $1.5 million a year in rents from the Commonwealth) and, therefore, withstood the special legislation challenge.

By contrast, here, the class created by the General Assembly for State-affiliated entities, as defined to include Commonwealth authorities and Commonwealth entities, is certainly enforceable since many entities could be part of that class. The issue arises, however, where PIAA, an entity not meeting that definition, is expressly singled out for inclusion within the definition. The General Assembly effectively created a separate classification not covered by the definition

itself and which can include only one entity, given that: (1) PIAA's inclusion occurs **only** because it is singled out and not because it otherwise meets the definition provided; and (2) it is not like any other entity identified as examples (the others were all created by the General Assembly, were given governmental powers, receive Commonwealth funds, and are administered by Commonwealth-appointed personnel). PIAA is in a classification of one and there is no possibility of that class being expanded.

Indeed, as averred in the Amended Petition, there are numerous organizations which are organized, funded and administered similarly to PIAA, many of which, like PIAA, relate to interscholastic athletic competition in Pennsylvania. Amended Petition, ¶ 63. These include 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. Further, there are also numerous non-athletic organizations joined by schools that govern interscholastic academic competitions, such as the Pennsylvania High School Speech League, local chapters of the National Forensics League, the Pennsylvania Bar Association (as to the Statewide Mock Trial Competition), the

Pennsylvania Math League, and the Pennsylvania Interscholastic Marching Band Association. None of the above interscholastic competition organizations are identified in the RTKL as State-affiliated entities and the OOR does not suggest that any of such entities are subject to the RTKL, although they do not differ from PIAA in their relationship to the Commonwealth.

Beyond the interscholastic competition context, and as averred in the Amended Petition, 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. None meet the definition of a State-affiliated entity and are not listed under that definition. Yet, all are analogous to PIAA in that they were not created by the General Assembly, funded by the Commonwealth, administered by the Commonwealth or given governmental powers by the Commonwealth. In short, no other organization in Pennsylvania analogous to PIAA is, or can be, a State-affiliated entity under the RTKL.

Finally, inclusion of PIAA within the definition is not rationally related to any legitimate purpose, as PIAA is not affiliated in any way 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, as discussed above, the RTKL was expressly intended to apply to government, not private parties. Inclusion of a private corporation not expressly created by the General Assembly, funded by the Commonwealth, administered by Commonwealth-appointed officials, or possessing governmental powers, is wholly inconsistent with the purpose of the RTKL and denies PIAA the privileges enjoyed by every other Pennsylvania interscholastic athletic association and nonprofit corporation.

Similar misguided efforts by state legislatures to classify athletic associations as state related entities are not unprecedented. Directly analogous to the current case is the Louisiana Supreme Court decision 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 permit the state to audit the LHSAA's books, which were obligations not imposed on other corporations. *Id.*, at 590-91. As with Pennsylvania's Constitution, Louisiana's counterpart 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.

Id. 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. 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:

> [I]t 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.[3]

As in *LSHAA*, PIAA's inclusion 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 PIAA in this definition is an unconstitutional special law because no other private corporations not expressly created by the General Assembly, having

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[3] 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.

LHSAA, 107 So.3d at 588.

governmentally granted powers, funded by the Commonwealth and administered by Commonwealth-appointed officials, can be State-affiliated entities.

E. The OOR's demurrer to Counts III and IV (denial of equal protection under the United States and Pennsylvania Constitutions) should be overruled.

Counts III (violation of PIAA's equal protection rights under the 14th Amendment to the United States Constitution) and IV (violation of PIAA's equal protection rights under Article I, Sections 1 and 26, 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. *See Love v. Borough of Stroudsburg*, 528 Pa. 320, 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. *See Village of Willowbrook v. Olech*, 582 U.S. 562, 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:(1) the state treated the claimant differently than others similarly situated; (2) the state did so intentionally; and (3) any differential treatment was without a 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, by subjecting PIAA to obligations and duties not shared by similarly situated entities, the RTKL 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. Also, the discriminatory treatment was intentional as PIAA is specifically named in the definition, one in which every other identified entity meets the State-affiliated entity definition.

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 corporations operating in the Commonwealth of Pennsylvania. The RTKL was intended to apply to the government, and, but for PIAA, the law does not otherwise

require private corporations to comply with the RTKL. Moreover, while PIAA is not the only athletic association of high schools operating in Pennsylvania, it is the only one that is included within the scope of the RTKL.

PIAA's inclusion in the RTKL 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 corporation in Pennsylvania made subject to the RTKL through this provision and because the Commonwealth treats PIAA differently than all other similarly situated corporations and interscholastic athletic associations.

In arguing that the definition has a rational basis, the OOR asserts that PIAA has been considered a "state actor" by the Pennsylvania Supreme Court in *School Dist. of Harrisburg v. Pennsylvania Interscholastic Athletic Ass'n*, 453 Pa. 495, 309 A.2d 353 (1973). That assertion is both misleading and irrelevant. At the outset, the term "state actor" does not appear in that decision. Rather, the question presented, under civil rights law, was whether "the affairs of a state-wide athletic association constitute state action *in the constitutional sense*." *Id.*, 309 A.2d at 356-57 (emphasis added). The concept of state action can apply to any private individual or entity, including for-profit businesses, in certain circumstances.

Application of the principle does not mean that the entity is a governmental body.[4] The court did not conclude that PIAA was a governmental entity but, rather, expressly noted that it was a private association and that, therefore, interference in its affairs is limited to very limited circumstances.[5]

Moreover, state action under civil rights law is simply not relevant to the RTKL. The RTKL covers Commonwealth agencies, not "state actors" as that term is defined by federal constitutional law. The issue before the Court is whether PIAA is a "Commonwealth agency." A party can easily engage in state action and not be a Commonwealth (or any governmental) agency. Any individual or entity, regardless of how private it is, can engage in state action. Much more, though, is needed for that entity to be considered a Commonwealth agency.

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[4] There is an entire body of case law applying the state action doctrine, which is meant to determine "whether, in a given case, a state's involvement *in private activity* is sufficient to justify the application of a federal constitutional prohibition of state action to that conduct." *See Dillon v. Homeowner's Select*, 2008 Pa. Super. 229, 957 A.2d 776 (2008) (quoting *Hartford Accident & Indem. Co. v. Ins. Comm'r*, 505 Pa. 571, 586 482 A.2d 542 (1984)).

[5] Further highlighting the distinction between private and governmental bodies, the Supreme Court has held that governmental entities may not be run by persons appointed by private parties. *Hetherington v. McHale*, 458 Pa. 479, 484-485, 329 A.2d 250 (1974). In that case, the court ruled unconstitutional legislation that permitted private parties to select members of a governmental entity. Here, a substantial number of PIAA's Board of Directors are appointed by private parties, and virtually all of the remainder are elected by PIAA's own committees. This is consistent with the reality that organizing high school sports is simply not a governmental function.

Indeed, while the OOR relies on the *Harrisburg School Dist.* court's reliance on PIAA's receipt of local school dues and gate receipts to find state action in a constitutional sense, the Pennsylvania Supreme Court has expressly ruled that a private entity's receipt of funds "no more transforms [that entity] into a 'state agency' than the receipt of federal funds can make [the entity] an agency of the federal government." *Mooney v. Board of Trustees of Temple Univ.*, 448 Pa. 424, 430, 292 A.2d 395, 399 (1972). Applying this principle to the RTKL, this Court has recognized that receipt of public funds does not convert the entity into a governmental body subject to the RTKL. *Appeal of Headley*, 2014 Pa. Commw. LEXIS 11, 83 A.3d 1101 (2014).[6]

This very approach has even been recognized by the OOR itself. In *Finder v. Mt. Lebanon High School Hockey Ass'n*, Docket No. AP 2010-0763 (attached hereto as Appendix B), the OOR "Receipt of funds from government entities is not sufficient to transform a private non-profit corporation into a 'similar governmental entity.'" *Id.,* at 6, citing *Walsh*. The OOR noted that the Requester

[6] In *Headley*, the Court considered a different section of the RTKL, that applicable to Local Agencies. Nevertheless, the critical question, which was whether the private nonprofit corporation was even a governmental agency, is applicable here. The Court considered "the degree of government control, through Board representation, the nature of the Alliance's functions, and financial control." *Id.*, at 1108. The Court noted that "to qualify as a governmental, the function must be a substantial facet of government activity." *Id.*, at 1109. The Court concluded that the entity was "not an agency under the RTKL." *Id.*

did not show that the hockey league "qualifies as an 'essential government function' as required to be a Commonwealth agency" and concluded that the association, despite receiving school funds, was "not subject to the RTKL." *Id.* The OOR itself has, therefore, recognized that entities analogous to PIAA are not Commonwealth Agencies subject to the RTKL. Because the OOR has already made clear that receipt of funds from a government does not make a private nonprofit corporation a Commonwealth Agency, its efforts at misdirection to a wholly irrelevant standard should be rejected.

The *LHSAA* case is again instructive as that court determined that 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.

LHSAA, 107 So. 3d at 608.

Indeed, 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 even more limited, specifying that it applies only to Commonwealth authorities and Commonwealth entities. Here, the OOR has not asserted any interest in requiring private nonprofit corporations that have no governmental powers, receive no funds from the Commonwealth, and are not administered by the government, to be converted into a "Commonwealth agency" and to thereupon be required to disclose their records to any member of the public who asks for them, regardless of their relationship to the corporation. The definition specifically singles out PIAA in an arbitrary and capricious manner, does not have a rational basis, does not serve any legitimate state interest, and is a clear unconstitutional violation of PIAA's equal protection rights. This preliminary objection should be overruled.

F. The OOR's demurrer to Count V (relating to the Nonprofit Corporations Law) should be overruled.

The OOR's final argument challenges Count V of the Amended Petition. Count V asserts that the RTKL is in conflict with the Pennsylvania Nonprofit Corporation Law ("NCL"). The RTKL provides that "[n]othing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree." *See* 65 P.S. § 67.306.

Prior to the 2008 enactment of the RTKL, documents held by PIAA, like every other nonprofit corporation, could be accessed only by PIAA's members or board members, not by the general public. *See* 15 Pa. C.S.A. § 5508, Corporate Records; Inspection by Members (permitting inspection of corporate records by members and only if "for a proper purpose"); § 5512 (permitting inspection by members of the board of directors). Because the RTKL does not "supersede or modify the public or nonpublic nature of a record or document established in . . . law," it maintained the *status quo* as to who could access records of nonprofit corporations by neither superseding nor modifying the NCL's record access provisions. For this reason, Section 306 of the RTKL commands that access to PIAA's records remains limited to its board members and members, just as it was prior to the RTKL's enactment.

PIAA's inclusion within the definition of a State-affiliated entity under Section 102 of the RTKL does not mean, as argued by the OOR, that all contrary statutory provisions should be ignored. This Court has, on multiple occasions, held that the disclosure provisions of the RTKL can be superseded by other statutory and constitutional provisions. *See, e.g., Pennsylvanians for Union Reform v. Pa. Dep't of State,* 2016 Pa. Commw. LEXIS 232, 138 A.3d 727 (2016) (holding that the access provisions and restrictions under the Voter Registration Act conflict and supersede the access provisions within the RTKL); *Dep't of Transp. v.*

Walsh/Granite JV, 2016 Pa. Commw. LEXIS 462, 149 A.3d 425 (2016) (holding same, but with respect to the Public-Private Transportation Partnership Law); *Ali v. Phila. City Planning Comm'n*, 2015 Pa. Commw. LEXIS 423, 125 A.3d 92, 105 (2015) (holding that the provisions of the RTKL conflict with those of the Copyright Act); *see also Office of Open Records v. Pa. State Police*, 2016 Pa. Commw. LEXIS 422, 146 A.3d 814 (2016) (holding that the access provisions and restrictions within the Criminal History Record Information Act prevented OOR from conducting an *in camera* review of records).

Here, a record that is "exempt from being disclosed under any other … law" is not considered a "public record" under the RTKL. *See* 65 P.S. § 67.102 (defining "public record"). *See also* 65 P.S. § 67.305 (providing that the presumption that records constitute public records does not apply to a record that "is exempt from disclosure under any other . . . law."). Limiting nonprofit corporate records to only their members and board members under the NCL would be wholly eviscerated if the general public could access PIAA's records simply by bypassing the NCL and making requests under the RTKL. While the identity of a requester is largely immaterial under the RTKL, it is absolutely critical under the NCL. As the NCL is targeted to nonprofit corporations and to whom (and why) records of nonprofit corporations may be disclosed, it controls and supersedes

potentially inconsistent provisions of the RTKL. For these reasons, this preliminary objection to Count V of the Amended Petition should be overruled.

VI. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court overrule the OOR's Preliminary Objections to the Amended Petition for Review.

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CERTIFICATE OF COMPLIANCE: Pa. R.A.P. 2135(d)

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

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APPENDIX A

PENNSYLVANIA OFFICE OF OPEN RECORDS

IN THE MATTER OF:	:	
	:	
Ed Palattella,	:	
Requester	:	
	:	Docket Number: AP 2018-0743
v.	:	
	:	
Pennsylvania Interscholastic	:	
Athletic Association, Inc.,	:	
Respondent	:	

SUBMISSION OF RESPONDENT PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC., IN OPPOSITION TO APPEAL OF REQUESTER ED PALATTELLA

Respondent Pennsylvania Interscholastic Athletic Association, Inc. ("PIAA"), responds to the appeal ("the Appeal") of Ed Palattella ("Requester") relating to PIAA's response to requester's request for documents, as follows.

I. BACKGROUND

PIAA is a Pennsylvania nonprofit corporation and a voluntary membership organization comprised of most public and private high schools in Pennsylvania. *See* Affidavit of PIAA Executive Director Dr. Robert A. Lombardi, attached hereto ("Lombardi Affid.,"), ¶ 5.[1] Its membership consists of approximately 1,435 public and private high

[1] Requester states in his appeal that "PIAA is a public agency." This is not correct. PIAA is not an agency of the Commonwealth or any subdivision thereof. Rather, it is a 501(c)(3) not-for-profit membership corporation consisting of public and private schools that choose to join the organization. It receives no tax money. It is no more a public agency than is the Pennsylvania School Boards Association, Rugby Pennsylvania (which governs a sport which PIAA does not); the Pennsylvania Interscholastic Hockey League (also governing a sport which PIAA does not); and the myriad of other organizations that Pennsylvania high schools choose to join.

PIAA recognizes that Section 102 of the Pennsylvania Right To Know Law ("RTKL") identifies PIAA as a "State-affiliated entity" subject to the RTKL. However, PIAA does not meet the definition thereof, which is "a Commonwealth authority or

schools and junior high/middle schools located within the Commonwealth that apply for, and are accepted for, membership. *Id.*, ¶ 8.

PIAA is governed by a Constitution adopted by its member schools and By-Laws adopted by its Board of Directors. *Id.*, ¶ 10, and Exhibit A thereto. Per the PIAA Constitution, the member schools have authorized PIAA, initially through its District Committees, to investigate and resolve athletic eligibility issues and violations of PIAA rules. PIAA Constitution, ARTICLE VI, Section 1.

PIAA is divided into twelve geographic Districts, each of which has a District Committee whose members are volunteers elected by PIAA member schools within the District. *Id.*, ARTICLE IX, Sections 1 and 2; Lombardi Affid., ¶¶ 11, 13. This matter arose in PIAA District X, which includes the counties of Crawford, Erie, Forest, Mercer, Venango and Warren. Lombardi Affid., ¶ 12. Its District Committee is chaired by a volunteer, Dr. Peter Iacino. *Id.*, ¶ 14.

In January 2018, four minor students transferred from two PIAA member public high schools to a private PIAA member high school, Cathedral Preparatory School, located in Erie ("Erie Prep"). Affidavit of PIAA District X Chairman Dr. Peter Iacino ("Iacino Affid."), ¶ 6. Pursuant to the PIAA By-Laws, hearings were conducted by the PIAA District X Committee to determine whether those students would be eligible to

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Commonwealth entity." *Id.* 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 or contest this issue here as the Office of Open Records ("OOR") is not the appropriate venue to address the validity and constitutionality of the legislative enactment.

participate in interscholastic athletics at Erie Prep. *Id.* PIAA By-Laws, ARTICLE VI.[2] At the hearings, the students and their families, who were represented by counsel, asked that the hearings be closed because they were presenting personal and confidential testimony and evidence as to the reasons why they were transferring. Id., ¶ 9. Following the hearings, the District Committee deliberated and, in open session, then voted in favor of eligibility for each student. Id., ¶ 10.

There is no requirement that PIAA District Committee meetings and hearings be recorded, and that rarely occurs. Lombardi Affid., ¶ 17. On occasion, a District Committee may have a stenographer take notes. *Id.* The notes are not used in the decision-making process. *Id.* A transcript is never requested by a District Committee unless one of the parties appeal the District Committee decision to the Board of Directors. *Id.* In such instance, the District Committee may request that a transcript be prepared and forwarded to the Board of Directors for its review. *Id.*

Here, the District X Committee engaged a stenographer to attend the hearing and take notes. Iacino Affid., ¶ 7. Had an appeal of the District Committee's decision been taken, the court reporter would have been asked to prepare a transcript in anticipation of that appeal. Id., ¶¶ 5, 12. As no appeal of the District Committee's decision was taken, the stenographer was never asked by PIAA or the District Committee to prepare a transcript, nor paid to do so, and no transcript of any of the

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[2] Pursuant to ARTICLE VI, if a student's transfer is materially motivated by athletics, rather than family, academic, religious or other non-athletic reasons, the student loses eligibility for one year in the sports he played the previous year. *See also* Lombardi Affid., ¶ 20.

hearings was prepared. Lombardi Affid., ¶ 18; Iacino Affid., ¶ 13; Affidavit of Sarah A. Sargent ("Sargent Affid."), ¶ 6.

On February 7, 2018, Bryan Fife, an individual not a party to the current proceeding, sent a request under the RTKL for "the official transcripts of eligibility hearings" for the four students at issue in the current matter. PIAA responded by stating that no transcripts existed and that, if they did, they would include information barred from disclosure under the RTKL and the Pennsylvania Constitution. Mr. Fife appealed the decision to the Office of Open Records ("OOR").

Subsequent to the deadline for submissions to the OOR, Mr. Fife submitted an affidavit reciting a hearsay telephone conversation he purportedly had with the stenographer and the status of the alleged transcript. Because the deadline for submissions had passed and Mr. Fife had not sought permission to submit the affidavit, PIAA believed it inadmissible and, because the OOR rules did not provide for PIAA to submit its own post-deadline rebuttal, PIAA did not respond to it.

On March 30, 2018, the OOR issued a final determination rejecting Mr. Fife's appeal because "the transcripts are not subject to disclosure under the RTKL as they contain the type of personal information that is protected by the constitutional right of privacy." *In the matter of Fife v. Pennsylvania Interscholastic Athletic Association*, No. AP 2018-0265 (Mar. 30, 2018), at 13. A true and correct copy of the decision is attached hereto as Appendix A. As discussed below, PIAA believes that this determination, and the reasons underlying it, are dispositive of the current appeal.

As part of its March 30 decision, the OOR rejected PIAA's contention that a transcript did not exist, finding that "[t]he PIAA has not submitted any evidence to refute

the Requester's affidavit." PIAA believes this approach flawed since PIAA had no right to respond to Mr. Fife's affidavit and the affidavit itself was submitted after the deadline for doing so. Because the issue of the existence of the transcript is presented again in this appeal, PIAA submits herewith an affidavit from the court reporting service (Sargent's Court Reporting Service, Inc.) refuting the erroneous statements that had been relied upon by the OOR and confirming that no transcripts exist. PIAA submits that this appeal should be rejected on this ground as well.

On April 16, 2018, Requester submitted a request to PIAA for the "Official transcripts of eligibility hearings that the PIAA District 10 Committee held on Feb. 6, 2018, for [the four students at issue]." The following day, Dr. Robert Lombardi responded to the request.[3]

The current Appeal was filed on or April 26, 2018. Thereafter, and consistent with its statutory obligations under the RTKL, PIAA notified counsel for the four students that the privacy interests of the students and their families could be implicated in this matter and informed them of their right to intervene.

On May 4, 2018, PIAA submitted a request to defer submissions until Requester filed copies of his RTKL request and the response thereto. Later that day, Requester submitted the missing documents. PIAA then withdrew its motion. This memorandum is submitted in opposition to the appeal.

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[3] As discussed at more length below, Dr. Lombardi also responded to an informal, non-RTKL request for the decision letters from the hearings. He voluntarily produced redacted copies of those letters.

II. RESPONSE TO ARGUMENT OF REQUESTER

A. THE APPEAL RELATING TO THE REDACTED DOCUMENTS RELATES TO DOCUMENTS NOT REQUESTED BY REQUESTER UNDER THE RTKL.

As noted above, on April 17, 2018, PIAA provided Requester with copies of three redacted decision letters, copies of which are attached to Requester's appeal. These letters were provided not in response to a RTKL request but pursuant to an informal request from Requester where he stated:

> Also, without filing a RTKL request, and separate from the attached request, I am asking for the three letters, dated Feb. 7, 2017, that the PIAA District 10 Committee sent to the schools that participated in the eligibility hearings on Feb. 6. 2017, for students Joseph Scarabino, C. Regan Schleicher and Treviahn L. Thrower.

Request, filed by Requester on May 4, 2018. In his response to Requester's RTKL and other request, PIAA's Dr. Lombardi stated:

> As per your request, I have attached the decision letters from PIAA District 10 redacted as appropriate. I have also attached my response to your Right To Know Law request as the Officer of Open Records for PIAA.

Response, filed by Requester on May 4, 2018.

Requester acknowledges in his appeal that the letters were "provided to me without a RTKL request" but "I am appealing the redaction of those letters as well."

PIAA submits that because the letters were neither sought under the RTKL, nor provided pursuant thereto, they are not properly the subject of this appeal. To the extent that they are deemed properly before the OOR, PIAA addresses below the rationale for the redactions thereof.

B. PIAA IS NOT IN POSSESSION OR CONTROL OF ANY OFFICIAL TRANSCRIPT RESPONSIVE TO THE REQUEST.

An agency is required to produce only those records within its possession and which are "created, received or retained" by it. *See* RTKL Section 102. It is not required to create records which do not already exist or to modify the format of an existing record. *Id.*, Section 706. Section 506(d) of the RTKL does require an agency to produce public records which are in the possession of a third party hired by the agency to perform a governmental function that is directly related to that function.

Here, the interplay of these statutory provisions is applicable. At the outset, Requester seeks the "official transcripts" of the hearings. PIAA has not requested, created, received or retained any transcript of the hearings and there is no certified official transcript of them. PIAA did enter into an agreement for a stenographer to attend the subject hearings. The stenographer was paid for her attendance but was not contracted to prepare transcripts, was not paid to do so, did not prepare or submit any transcripts and did not certify to an accurate record of the proceedings, which would be needed for an official transcript. All that exist are the raw electronic notes files of the stenographer.

Stenographer notes are not transcripts. Transcripts have long been defined as "[a]n official copy of the record of proceedings in a trial or hearing. Word-for-word typing of everything that was said 'on the record' during the trial." *Black's Law Dictionary*, 5th ed. Consistent with this definition, to qualify as court-accepted transcripts, documents must be certified to by stenographers as accurately reciting the verbal statements made at a hearing. *See e.g.,* 201 Pa. Code § 4002, defining transcripts for court purposes as "a certified, written and verbatim record of a proceeding." *See also* Affidavit of Sarah

Sargent ("Sargent Affid."), ¶ 5 ("Transcripts of a proceeding are documents certified by a stenographer as accurately reciting the verbal communications from the hearing.").

By contrast, a stenographer's raw unedited notes are "not an accurate recitation of what was said at the hearings" and they have not been certified as a complete and accurate record of the applicable hearings. Sargent Affid., ¶ 9. Rather, the unedited text contained in the notes "would be in large measure illegible and certainly not an accurate recitation of what was stated at the hearings." *Id.*, ¶ 8. Under any reasonable interpretation of the term "transcript," stenographer raw notes do not meet the definition.

This case is analogous to *In the Matter of Adrianne Somaru v. Nether Providence Twp.*, 2015 PA O.O.R.D. LEXIS 298, No. AP 2015-0163 (OOR Mar. 19, 2015). There, a municipal zoning hearing board conducted a hearing at which a stenographer prepared notes. However, neither the township nor any party to the proceedings requested a transcript, so none was prepared. In considering a third party's request for the hearing transcript, the OOR determined that because the township demonstrated that it did not possess or order the transcript (even though it – as here - had arranged for the stenographer's attendance at the hearing), it met its burden of proving that "it does not possess a transcript of the Zoning Hearing Board proceedings, including the unedited transcript sought in the Request." *Id.*, at 5.

Even if Requester's request could be read so broadly so as to define a transcript to include the raw, unfinalized, unedited and uncertified notes of a stenographer, PIAA is not required to provide records in a format other than that in which they are kept. Here, the stenographer service has stated that the applicable electronic files "would be useless to someone without application of our proprietary software." Sargent Affid., ¶ 7.

This is problematic both in the fact that Requester would likely not be able to review whatever was produced but, even more importantly, PIAA (which also does not have the applicable software) is not able to review the notes to identify and redact private and confidential information of minors and their families. Consequently, should Requester receive the files and somehow be able to decrypt some or all of them, confidential information that is barred from production by the RTKL and the Pennsylvania Constitution (as discussed below) would be disclosed.

Finally, there is the inability to obtain and provide the requested records even if otherwise subject to disclosure. The stenographer's office has refused to provide the notes to PIAA. *See* Sargent Affid., ¶ 10, and letter of March 21, 2018 attached thereto. PIAA, as a nonprofit corporation, has no subpoena power and no ability to compel production of the notes. Indeed, since PIAA did not contract for the creation of such notes, it would have no right to obtain them and any order to obtain them would require PIAA to enter into a contract that does not currently exist and under which Sargent's is not obligated to enter.

PIAA submits that no transcripts, and certainly no "official transcripts" exist of the applicable hearings and that, if they somehow do exist, PIAA does not have possession or access to them. Therefore, the appeal should be denied.

C. The sought records contain private information that is not subject to disclosure.

1. The sought records contain personal and private information not subject to disclosure.

As discussed above and by the OOR in *Fife*, the hearings at issue here were held to determine whether the students' transfers between schools were athletically

motivated. Lombardi Affid. ¶ 21. In addressing such issues, students and their families are necessarily required to provide evidence as to the motivations for the transfers. *Id.*, ¶ 22. The reasons for any students changing schools, particularly without a change of residence, often relate to highly private and sensitive family and personal issues, such family finances, health issues, domestic relations, grades, emotional and social development of students, and disciplinary issues. *Id.*, ¶¶ 22, 23. Because of the sensitive nature of the information, PIAA has adopted policies governing the confidentiality of such information. *Id.*, ¶ 24. *See* PIAA Policy Regarding Confidentiality of Information Relating to Student-Athletes, Member Schools, Sports Officials, and other Adults, found in the PIAA Policies and Procedures. Generally, Personal Private Information of students may not be disclosed to third parties.[4] The reason for the restriction is obvious: juveniles and their families should not be required to share with the public at large information that is private, sensitive and potentially embarrassing simply to be able to play high school sports.

PIAA's approach to this information is consistent with the RTKL and Article 1, Section 1 of the Pennsylvania Constitution. The RTKL, which precludes the release of records containing even the names of juveniles, cannot reasonably be read to permit disclosure of those same juveniles' academic, medical and social information.[5] *See*

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[4] "Personal Private Information" is defined in the PIAA By-Laws as: "Information about an individual, or an individual's family, not generally known to the community, including but not limited to information relating to a person's academic, health, disciplinary and delinquency history, financial condition, domestic circumstance, family and personal relationships, substance abuse, and/or potentially illegal conduct."

[5] Requester's suggestion that the names of the students at issue "are already a matter of public record, as they were listed in a newspaper article on the hearings," does not provide an exception to, or waiver of, Section 708(b)(30) of the RTKL, which

C.N. v. Whitehall-Coplay School Dist., No. AP 2015-2466 (Jan. 19, 2016) (holding that student school athletic eligibility information is exempt from disclosure as information relating to "academic matters or status as a student"); *Pa. State Educ. Ass'n v. Commonwealth, Dept. of Cmty. & Econ. Dev.*, 148 A.3d 142, 156-58 (Pa. Cmwlth. 2016) (recognizing that exemptions within the RTKL itself reflect the legislature's own performance of the balancing test, revealing a determination that certain privacy interests outweigh the public's need to know.)

Even if the RTKL could somehow be read to permit disclosure of the requested records, the personal privacy provision of Article 1, Section 1 of the Pennsylvania Constitution would bar it. This provision protects all individuals from disclosure of the type of private information sought herein. *See Reese v. Pennsylvanians for Union Reform*, 2017 Pa. LEXIS 3160 *32 (Pa. 2017). Here, each of the hearings involved the presentation of personal and private information concerning the applicable juveniles and their families. Iacino Affid. ¶ 10.

Since personal private information is clearly sought, PIAA, and now the OOR, is compelled by *Reese* to weigh the privacy interests of the students and their families against the interest of Requester in disclosure. This case does not involve matters of government funds (PIAA receives none), nor does it involve important governmental functions. Indeed, courts have held that high school students do not even have a right to participate in sports. *Pennsylvania Interscholastic Athletic Ass'n, Inc. v. Greater*

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bars the disclosure of any record identifying the name "of a child 17 years of age or younger." That exemption does not include an exception for information that a reporter might have published. Therefore, to the extent that any requested record contains the name of a minor, it is subject to exemption.

Johnstown School Dist., 76 Pa. Cmwlth. 65, 72, 463 A.2d 1198, 1201 (1983) ("The trial judge properly concluded that there is no property right to participate in athletics."); Angstadt v. Midd-West School Dist., 377 F.3d 338, 344 (3d Cir. 2004) ("There is no constitutionally protected right to play sports."). At issue are students' participation in voluntary extra-curricular activities.

While there are certainly many people who enjoy watching high school sports, and while they might be curious as to why some athletes choose to transfer to another school, their legal interest in how PIAA applies its PIAA By-Laws is not significant. *See Poole v. Pennsylvania Interscholastic Athletic Ass'n,* No. 353 of 1986 (C.C.P. Westmoreland Aug. 13, 1986), attached hereto as Appendix "B," at 12 ("This Court does not believe that the matter before the Court, i.e., the application of the by-laws of the PIAA to high school athletes, is one that rises to the level of a matter of important public interest....").

PIAA has concluded that the right of informational privacy of the juveniles and their families in this instance outweighs any public interest in dissemination of those families' reasons for changing high schools. This is consistent with the OOR's prior conclusion in *Fife* that Mr. Fife did not articulate "any public benefit associated with releasing the transcripts from closed hearings regarding the athletic eligibility of 17 year-old students," particularly where:

> [e]ach of the hearings involved the presentation of personal and private information concerning the applicable students and their families" and at such hearings "students and their families routinely testify as to sensitive private and personal information ... often includ[ing] evidence as to family finances, health issues, domestic relations, grades, emotional and social development of students and disciplinary issues." Therefore, the transcripts are not subject to disclosure under the RTKL as they contain

the type of personal information that is protected by the constitutional right to privacy.

Fife, at 13. PIAA submits that the appeal should be rejected on this basis as well.

2. PIAA'S redaction of records was appropriate.

As discussed above, PIAA voluntarily responded to an informal request by Requester for the February 7, 2018 letters from the District X Committee informing the schools of the results of the hearings. The letters were produced, albeit with identifying information redacted. As discussed above, the names of juveniles may not be disclosed. PIAA further determined that those names could be determined if the names of their parents and schools were disclosed, so those names were also redacted. Finally, the reasons for transfer were also redacted as this private information is personal and private. With those exceptions, the remainder of each letter was produced. PIAA submits that its redactions were appropriate in this matter and should be sustained (if the matter is properly before the OOR).

3. The requested records are also exempt from disclosure pursuant to Section 708(b)(17) of the RTKL.

Finally, the sought records document PIAA's noncriminal investigations into the athletic eligibility and status of minors and are, therefore, exempt from disclosure pursuant to Section 708(b)(17) of the RTKL. The OOR and the Commonwealth Court have recognized that this exemption applies where "a systematic or searching inquiry, a detailed examination, or an official probe" has been conducted regarding a non-criminal matter. See *Pa. Dep't of Health v. OOR*, 4 A.3d 803, 810-11 (Pa. Cmwlth. 2010). The sought records from the investigatory hearing on the matter fall within this exemption.

III. CONCLUSION

Because no transcripts of the identified hearings exist, because the requested records are exempt from disclosure, and because production of the requested records would be in violation of the Constitutional privacy rights of the students and their families, Requestor's appeal should be denied, and this matter dismissed with no further action required of PIAA.

Respectfully submitted,

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Dated: May 8, 2018

Attorneys for Pennsylvania Interscholastic Athletic Association, Inc.

APPENDIX B

pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
CYNTHIA FINDER	:	
Complainant	:	
v.	:	**Docket No.: AP 2010-0763**
MT. LEBANON HIGH SCHOOL	:	
HOCKEY ASSOCIATION, Respondent	:	

INTRODUCTION

Cynthia Finder (the "Requester") submitted a request to the Mount Lebanon High School Hockey Association, ("Association"), pursuant to the Right-to-Know Law, 65 P.S. §§67.101, *et seq.*, ("RTKL"). The Association advised it is not an agency subject to the RTKL. The Requester timely appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **denied**.

FACTUAL BACKGROUND

On August 4, 2010, the Requester submitted a right-to-know request to the Association seeking "records pertaining to [its] operation and financial transactions …including:

- Lists of all [Association] officers/board members in the last five years (2005-10);
- All tax returns and/or 990s prepared and filed… in the last five years (2005-10);
- All records of financial transactions, including revenues received, contributions made and received, and expenditures in the last five years (2005-10);
- Organization enrollment totals for the last five years (2005-10) including roster totals for all [Association] teams [only totals not minor names are requested];
- All varsity coaching contracts in which the [Association] has negotiated and entered, including those in effect in the last five years (2005-10);
- All criteria used to seek, advertise for candidates for varsity coaching candidates in the last five years (2005-10);
- All lists of applicants for coaching vacancies in the last five years (2005-10),

> the criteria used to select candidates, and all minutes and related documents from meetings in which those candidates were discussed;
> - All minutes and related documents from meetings in which board members discussed or took votes on hiring, addressing complaints or disciplining [Association] coaches;
> - All minutes and related documents from meetings in which board members discussed or took votes on issues specifically regarding our son, []. This would include any documents pertaining to the regular board meeting held Jan. 20, 2010 and our meeting Jan. 31, 2010 with past President Betti Smee, former Director of Coaching Dave Patrick, Tom Songer and the coaching staff.

(the "Request").

Matthew O'Brokta, President of the Association timely responded that it would conduct a legal review regarding whether the Association is obligated to provide the records, and then advised that the Association is neither a local nor a Commonwealth agency ("Response"). The Association advised that it is a non-profit organization operated on a volunteer basis by parents with only a sponsorship relationship with the Mt. Lebanon School District, which is insufficient to transform it into an agency under the RTKL.

The Requester timely appealed challenging the non-agency status of the Association because it is a club sport played by exclusively Mt. Lebanon High School students in the colors and logo of the District and players represent the School and are subject to discipline and benefits of other student athletes (the "Appeal"). The Requester argues the Association performs a governmental function for the Mt. Lebanon School District ("District") as per Section 506. Among other connections between the Association and the District, the Requester lists: District provides taxpayer-funded financial contribution to the hockey team's ice time; District publicly honors and awards varsity letters to varsity hockey players at same event in the high school auditorium in which it honors other players from school athletic teams, though it is not a school athletic team; District cooperates with Association in sharing academic information about players and permitting early dismissals from class on game days.

The OOR asked both parties to address the agency status of the Association. The Association explained it is an independent, voluntary non-profit association run by parents of players who comprise its Board of Governors, and none of the officers or Board members have any authority or control over the Association or its finances. The Association analyzes a number of OOR determinations regarding agency status and notes that the District does not exercise control over its governance or finances. The President explains that the fees for playing in the Association defray the costs for running the organization, including ice rental fees, and the contribution made by the District toward ice time is less than $5,000 in any year. He argues the Association does not perform a governmental function and that its inability to participate in certain Pennsylvania Interscholastic Athletic leagues shows that it is not a governmental agency.

President O'Brokta attested to the facts contained in his letter by notarized affidavit, including to the fact that the logo was chosen independent of the District and that all cooperation with the District as far as academic standards does not translate into control by the District. The Association also submitted a copy of its Bylaws. The Bylaws reflect that upon dissolution, any assets shall be distributed to non-profits with similar purposes. The primary purpose of the Association is to benefit the District by providing a competitive hockey program and support hockey in Mt. Lebanon. Eligibility of players is defined in part by the District and the PIHL, Pennsylvania Interscholastic Hockey League, a non-profit organization.

The Requester submitted a letter asserting that ice hockey is not a sanctioned school sport and that the Association does not fulfill a function previously performed by the District, but acts with the District's approval and performs functions delegated by the District. She argues that because the Association plays under the logos and colors of the District and cooperates with the District, it performs in lieu of the District's governmental function. Through funding, it performs a contract for the District and functions under "its own framework, rules and privacy."

She compares the Association to SWB Yankees and asserts that Section 506(d) applies to reach the records at issue. While acknowledging that funding of the ice rink use alone does not suffice to convert the Association into a governmental entity, she argues that the funds show a sphere of influence. She argues the assistant rink manager is an employee of Mt. Lebanon Municipality Recreation Department, and that the District's donation to that Department to pay for ice time is a sufficient connection because that rink manager/municipal employee is also the Director of Hockey Operations/Coach who oversees many of the Association teams. Both the Requester and her spouse attested to the accuracy of the factual contents of her letter under 18 Pa. C.S. §4904.

LEGAL ANALYSIS

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). 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 or not 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 and the OOR has the necessary, requisite information and evidence before it, presented through sworn, written testimony, to properly adjudicate the matter. Since the Association contends it is not subject to the RTKL, as a threshold inquiry, the OOR must determine whether the Association is an "agency."

The Requester argues that the Association is an agency subject to the RTKL because of the Association's affiliation and cooperation with the District, and its performance of a function

of providing a competitive hockey league that is not performed by any other agency, and is an agency by virtue of that "sports relationship" based upon *SWB Yankees LLC v. Wintermantel*, *SWB Yankees v. Wintermantel*, 2010 Pa. Commw. LEXIS 396 (Pa. Commw. July 22, 2010). The Requester does not specify whether the Association is a local or Commonwealth agency, and contends that the records are accessible through Section 506(d).

"Local Agency" is defined in Section 102 of the RTKL in pertinent part as:

> Any local, intergovernmental, ***regional*** or municipal agency, authority, council, board, commission or ***similar governmental entity***."

65 P.S. §67.102 (emphasis supplied). A "Commonwealth agency" is defined in part as "an organization established by [law] which performs or is intended to perform an ***essential governmental function***." *Id.* (emphasis supplied). In assessing the agency status of non-profits, OOR Final Determinations have analyzed a number of factors, including the level of governmental control, through Board representation, and financial control. *See, e.g., Ali v. PIDC, supra*, *Bari v. City of Phila. & IVCC*, OOR Dkt. AP 2009-0676, 2009 Pa. O.O.R. D. LEXIS 779. The discussion of these factors from *Walsh v. Carnegie Library*, OOR Dkt. AP 2009-1150, 2010 Pa. O.O.R.D. LEXIS 111, is incorporated by reference as though fully set forth herein.

Based upon its level of cooperation with the government entities and oversight through funding, the Requester asserts that the Association is subject to the RTKL. Evidence of federal, state and local government cooperation with an entity is not sufficient to establish control by a government agency. *See Bari, supra.* As the OOR held in *Styborski v. Oil Region Alliance*, OOR Dkt. AP 2010-0272, 2010 Pa. O.O.R.D. LEXIS 255, the relevant considerations are ***control by*** government, not cooperation with government. The Requester asserts that its connection to the District, and the cooperation between the District and Association for players to participate in the Association is a sufficient governmental connection. The OOR disagrees.

There is no evidence of governmental or financial control by the District over the Association. The Requester acknowledges that the Association does not perform a function previously performed by a local agency- either the District or Municipality Recreation Department- to perform a government function previously performed by that local agency. The Requester submitted nothing to demonstrate that the Association is governmental in nature, conducting business or transactions generally performed by government, and did not show how a hockey league qualifies as an "essential governmental function" as required to be a Commonwealth agency. The Requester did not identify a specific governmental function allegedly performed by the Association or submit any support for its conclusion that operating a hockey league constitutes a governmental function.

The Requester also argues that receipt of funds from the District for the ice rink is sufficient to convert the Association into a government agency. Receipt of funds from government entities is not sufficient to transform a private non-profit corporation into a "similar governmental entity." *See Walsh, supra*. As there are not sufficient indicia of government control or function, the Association is not subject to the RTKL and had no duty to respond to the Requester.

The Requester also argues that the Association's records should be accessible through Section 506(d) as in *SWB Yankees*; however, that provision does not operate to convert a non-agency into an agency and applies to the records of an agency that are in possession of a third-party contractor. To reach records of a non-profit organization through Section 506(d), a requester must make the request to the agency that has the contractual relationship with the non-profit, and show that the records sought in the request directly relate to the governmental function performed by contract. Here, the Requester sought the records directly from the Association, and thus did not trigger Section 506(d).

CONCLUSION

For the foregoing reasons, the Requester's Appeal is **denied.** The Association does not qualify as an "agency" under the RTKL, and therefore is not subject to its duties of disclosure.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Allegheny 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 according to court rules as per Section 1303. This Final Determination shall be posted at http://openrecords.state.pa.us.

FINAL DETERMINATION ISSUED AND MAILED: September 13, 2010

Lucinda Glinn

LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Cynthia Finder; Matthew O'Brokta for Association

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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