

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RALPH DUQUETTE,	:	NO. 84 MD 2022
	:	
Plaintiff,	:	
vs.	:	
	:	CIVIL ACTION - LAW
	:	
OFFICE OF OPEN RECORDS;	:	
PALMYRA AREA SCHOOL DISTRICT;	:	
GOLDSTEIN LAW PARTNERS, LLC;	:	JURY TRIAL DEMANDED
JOSHUA JONES; MICHAEL KOVAL;	:	
MANDY BRADEN; MARYANN CINI;	:	
KAYLA LEIBERHER; ALICIA	:	
BRENDLE HALDEMAN, Individually	:	
and in Their Roles as Members of the	:	
Palmyra Area School Board of	:	
Directors; and CHRISTINE FISHER;	:	
LARRY GEIB and SUZANN GILLIGAN	:	
in Their Roles as Members of The	:	
Palmyra Area School Board of	:	
Directors,	:	
	:	
Defendants.	:	

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**DEFENDANT GOLDSTEIN LAW PARTNERS, LLC'S BRIEF IN SUPPORT OF  
PRELIMINARY OBJECTIONS**

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## **I. FACTUAL BACKGROUND**

On March 1, 2022, Petitioner filed a Petition for Review in this Court's original jurisdiction seeking a Writ of Mandamus, Declaratory Judgment and Injunctive Relief. A true and correct copy of the Complaint is attached to Moving Defendant's Preliminary Objections to Moving Defendant's Preliminary Objections as Exhibit A.

In his Petition, the Petitioner alleges that the Palmyra Area School District (PASD) unlawfully appointed Goldstein Law Partners as solicitors of the school district prior to the December 2, 2021 reorganization meeting which swore in newly elected members. Exhibit A, ¶¶17-26. The Petitioner alleged that the appointment of GLP was conducted and concluded outside the parameters of the Sunshine Act because no public comment was allowed with respect to the appointment of GLP. Exhibit A, ¶23.

On December 6, 2021, Petitioner submitted a public records request to the OOR of PASD, pursuant to Pennsylvania's Right-to-Know Law (RTKL), 65 P.S. §§ 67.101, et seq. Exhibit A, ¶27. Petitioner's request sought the disclosure of certain categories of documents described in paragraphs 1-10 of Petitioner's Petition. At the next Reorganization meeting held on December 16, 2021, the Petitioner read a statement setting forth his objections to the process of hiring

GLP as the District's solicitor, and his belief that the process violated the Pennsylvania Sunshine Act and the Board's own policies. Exhibit A, ¶30.

On January 12, 2022, the Open Records Officer for PASD granted the request in part, and denied it in part. See Response attached to Moving Defendant's Preliminary Objections as Exhibit B. Upon receipt of the Response, Petitioner alleged that Respondent represented concurrent clients relative to its appointment as solicitor for the District and that GLP assisted in the reviewing of records to be submitted to the OOR in violation of the RTKL. Exhibit A, ¶35-40.

On January 24, 2022, Petitioner filed an appeal to the Response with the Office of Open Records (OOR) and his Appeal was docketed on January 25, 2022. Exhibit A, ¶56-58. On February 3, 2022, Defendant GLP submitted a letter in Brief in response to the appeal and entered its appearance as a direct party of interest on an Office of Open Records form. Exhibit A, ¶59.

The Petitioner alleges that the OOR's decision was due on February 2, 2022, but it prematurely issued its Final Determination in the appeal which was docketed on February 24, 2022. Exhibit A, ¶74-76. Despite a detailed appeals process outlined in RTKL, 65 P.S. § 67.1302(a), Petitioner has failed to file his Petition for review in the Lebanon Court of Common Pleas. To the Respondent's knowledge, Petitioner has not filed suit under the Pennsylvania Sunshine Act

concerning the manner by which the Board of School Directors conducted its December 2, 2021 reorganization meeting.

By way of his petition, the Petitioner seeks declaratory and injunctive relief regarding OOR's implementation of the RTKL (Exhibit A, Counts I and II), as well as seeking to reverse the OOR's February 24, 2022 Final Determination regarding the request by the Petitioner. (Exhibit A, Count III). Counts I and II, and a court order issuing a writ of Mandamus directing the District to lawfully appoint all contractors for legal services, within the confines of the Sunshine Act; and directing the Office of Open Records to disqualify GLP from representing multiple apparent clients who have alleged concurrent conflicts-of-interest. (Count II).



## **II. QUESTIONS PRESENTED**

1. Whether the preliminary objections should be sustained because the Court lacks original jurisdiction to review the Petitioner's petition?

**Suggested answer: Yes**

2. Whether the preliminary objections should be sustained because the Petitioner has failed to exhaust his statutory remedies?

**Suggested answer: Yes**

3. Whether Count I (Declaratory Relief) should be dismissed where the Petitioner has failed to state a cause of action upon which relief can be granted?

**Suggested answer: Yes**

4. Whether Count II (Mandamus) should be dismissed where the Petitioner has failed to state a claim in mandamus upon which relief may be granted?

**Suggested answer: Yes**

5. Whether Count III (Injunctive Relief) should be dismissed where the Petitioner has failed to state a claim upon which injunctive relief may be granted?

**Suggested answer: Yes**

6. Whether Petition should be dismissed for insufficient specificity and failure to conform to law pursuant to Pa.R.C.P. 1028(a)(2), and (3)?

**Suggested answer: Yes**

### **III. SUMMARY OF ARGUMENT**

Defendant GLP's Preliminary Objections identify clear legal deficiencies in Duquette's Petition. The Court lacks jurisdiction. Duquette has failed to exhaust statutory remedies, which is a prerequisite to the jurisdiction of this Court. Further, Duquette's Petition lacks sufficient specificity, and fails to state a claim upon which relief may be granted.

For the reasons set forth below, this Court should dismiss the Duquette's Petition for Review, or in the alternative, transfer jurisdiction the Petition to the Lebanon County Court of Common Pleas.

### **IV. ARGUMENT**

#### **A. Standard of Review**

A preliminary objection in the nature of a demurrer is properly granted if a plaintiff's complaint fails to state a claim upon which relief may be granted. Sevin v. Kelshaw, 611 A.2d 1232 (Pa. Super. 1992). In ruling on preliminary objections, this Court must accept as true all well-pleaded material allegations in the petition for review, as well as all inferences reasonably deduced therefrom. Meier v. Maleski, 167 Pa.Cmwlth. 458, 648 A.2d 595 (1994). The Court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. Id. "The question presented by the demurrer is whether, on the facts averred, the law says with certainty that

no recovery is possible." Mistick, Inc. v. Northwestern Nat'l Cas. Co., 806 A.2d 39, 42 (Pa. Super. 2002).

A preliminary objection in the nature of a demurrer admits every well-pleaded fact in the complaint and all inferences reasonably deducible therefrom. Clark v. Beard, 918 A.2d 155 (Pa.Cmwlth.2007). It tests the legal sufficiency of the challenged pleadings and will be sustained only in cases where the pleader has clearly failed to state a claim for which relief can be granted. Id. When ruling on a demurrer, a court must confine its analysis to the complaint. Id. A demurrer does not admit conclusions of law. Firetree, Ltd. v. Department of General Services, 920 A.2d 906, 911 (Pa. Cmwlth. 2007) citing Philmar Mid-Atlantic, Inc. v. York Street Associate, 566 A.2d 1253, 1254 (Pa. Super. 1989).

**1. Duquette's Petition Should Be Dismissed as the Court Lacks Jurisdiction to Hear the Petition for Review Pursuant To 65 P.S. § 67.1302(a) and 42 Pa.C.S.A. Section 761(c).**

Under Pa.R.C.P. No. 1028(a)(1), preliminary objections may be filed to a petition for review, asserting that the court lacks jurisdiction over the subject matter of the action. In reviewing preliminary objections, all material facts averred in the complaint, and all reasonable inferences that can be drawn from them, are admitted as true. However, a court need not accept as true conclusions of law, unwarranted inferences, argumentative allegations, or expressions of opinion. "Preliminary objections should be sustained only in cases that are clear

and free from doubt.” Seitel Data, Ltd. v. Center Township, 92 A.3d 851, 858-59 (Pa. Cmwlth. 2014), *appeal dismissed*, 111 A.3d 170 (Pa. 2015) (citations omitted).

Defendant GLP submits that this Court lacks jurisdiction to hear a Petition for Review relating to an OOR Final Determination as such petitions are statutorily required to be filed in the Courts of Common Pleas. To the extent that the Petitioner cites to ancillary matters as the basis for jurisdiction, those ancillary matters do not involve the merits of OOR's Final Determination.

By seeking review of the OOR Final Determination in this Court, the Petitioner bypasses the statutorily prescribed process in the RTKL, 65 P.S. § 67.1302(a), which states:

Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a local agency ..., a requester or local agency may file a petition for review or other document as required by rule of court with the court of common pleas for the county where the local agency is located.

Id. As his rationale for bypassing the statutorily prescribed process, the Petitioner in paragraph 15 of his Petition, cites to 42 Pa.C.S.A. Section 761(c) which states:

The Commonwealth Court shall have original jurisdiction in cases of mandamus and prohibition to courts of inferior jurisdiction and other government units where such relief is ancillary to matters within its appellate jurisdiction, and it, or any judge thereof, shall have full power and authority when and as often as there may be occasion, to issue writs of habeas corpus under like conditions returnable to the said court. To the extent

prescribed by general rule the Commonwealth Court shall have ancillary jurisdiction over any claim or other matter which is related to a claim or other matter otherwise within its exclusive original jurisdiction.

42 Pa.C.S.A. § 761(c). By his petition, Petitioner asserts that this Court has exclusive jurisdiction over ancillary matters in final orders of government agencies under 761(c), which confers “original jurisdiction in the Commonwealth Court in cases of mandamus and government units where such relief is ancillary to matters within its appellate jurisdiction.”

This argument fails for two reasons. First in citing to 42 Pa.C.S.A. § 761(c), the petitioner fails to acknowledge that the Court cannot assert ancillary jurisdiction over a matter unless it “is related to a claim or other matter otherwise within its exclusive original jurisdiction.” 42 Pa.C.S.A. § 761(c) In deciding whether to retain ancillary jurisdiction, this Court has looked to whether the issues are “obviously intertwined and will presumptively involve much of the same evidence.” Dresser Industries, Inc. v. Com., Dept., of Env't'l Resources, 146 Pa.Cmwlth. 114, 128 (1992). Here, this Court lacks ancillary jurisdiction with regard to the Petitioner's Petition for Review because the Petitioner has failed to state how the court's ancillary jurisdiction applies to his claims in general, or to GLP specifically. Ordinarily, appellate jurisdiction of a Petition for Review by the Petitioner would be vested in the Court of Common Pleas of Lebanon County

pursuant to 65 P.S. § 67.1302(a). However, the Petitioner asks this Court to exercise its ancillary jurisdiction under 42 Pa.C.S.A. § 761(c) to this Petition for Review simply because the Petitioner invokes the Court's original jurisdiction.

As an additional defect relating to GLP, Section 761(c) is limited to "Commonwealth agencies and GLP is a private law firm, not a government agency. A "Commonwealth agency" is defined as "[a]ny executive or independent agency." 42 Pa.C.S.A. § 102. "Executive agency" is defined as "[t]he Governor and the departments, boards, commissions, authorities and other officers and agencies of the Commonwealth government . . . ." Id.

Furthermore, jurisdiction is not vested in this Court. For 42 Pa.C.S.A. § 761(c) to apply, this Court must have jurisdiction. As stated above, this Court lacks jurisdiction to hear Duquette's Petition in that he incorrectly bypassed the statutory requirement to file in the Court of Common Pleas. Here, Petitioner alleges that Respondent violated the Pa. Right-to-Know Law, 65 P.S. §§ 67.101, et seq.; the Pennsylvania Sunshine Act, 65 P.S. §§ 701, et seq., and the Pennsylvania Rules of Professional Conduct 204 Pa. Code § 81.4 in the manner in which it was elected as the solicitor for the School District and in the manner in which it represented the District in the OOR's final determination of his public records request.

Here, there is a clear, unambiguous statute directing that Petitions for Review of OOR Final Determinations are to be filed in the Court of Common Pleas. Thus as stated above, if the Petitioner was aggrieved by the RTKL appeals process, his statutory remedy was to file a “Petition for Review or other document” with the Court of Common Pleas within 30 days of that Determination. 65 P.S. § 67.1302(a). However, the Plaintiff bypassed this remedy and proceeded to file his petition in this Court. Second, Count I of the Petitioner's Petition seeks declaratory action based on its assertion that Defendant GLP has allegedly violated the Pennsylvania Rules of Professional Conduct. In Count III, the Petitioner incorporates Count I (request for declaratory action) but alleges no additional claims specific to GLP. The Petitioner merely reiterates that GLP represented clients when conflicts of interest were present.

If Petitioner believed that GLP violated the Professional Rules of Conduct with respect to its representation of the district, his remedy would be to file a complaint with the Office of Disciplinary Council for alleged violations of the Pennsylvania Rules of Professional Conduct. However, the Petitioner has failed to plead any facts to support an attorney client relationship between the GLP and the Petitioner which would allow him to file a claim for professional misconduct. 204 Pa. Code § 1.7. Regardless, this Court is not the appropriate forum for such claims.

**2. Duquette's Petition Should Be Dismissed for His Failure to Exhaust Statutory Remedies.**

This Court does not have jurisdiction over a claim where the Legislature has otherwise provided an adequate statutory remedy. Ezy Parks v. Larson, 454 A.2d 928, 935-936 (Pa. 1982); Capital City Lodge No.12 v. City of Harrisburg, 588 A.2d 584, 588 (Pa. Cmwith. 1991). The procedure prescribed by statute must be strictly pursued to the exclusion of other methods of redress. 1 Pa.C.S.A. § 1504 ("In all cases where a remedy is provided or a duty is enjoined or anything is directed to be done by any statute, the directions of the statute shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the common law, in such cases, further than shall be necessary for carrying such statute into effect."). This is particularly true of special statutory appeals from the action of administrative bodies. Blank v. Board of Adjustment, 136 A. 2d 695, 696-697 (Pa. 1957).

Furthermore, a party is required to exhaust available statutory remedies before seeking review and equitable redress under this Court's original jurisdiction. See County of Berks v. Pennsylvania Office of Open Records, 204 A.3d 534, 540 (Pa. Cmwlt. 2019) (denying county's original jurisdiction petition seeking declaratory relief where county failed to exhaust its statutory right of appeal to the Court of Common Pleas). Requiring exhaustion of statutory



remedies promotes compliance with the statutory appellate scheme by restricting premature intervention by the courts to challenges to final determinations of government agencies. See Id.; East Coast Vapor, LLC v. Pennsylvania Dep't of Rev., 189 A.3d 504, 510 (Pa. Cmwlth. 2018) (courts should “refrain from exercising equity jurisdiction where there exists an adequate statutory remedy”).

The holding in County of Berks is directly on point. In that case, the county filed a petition for review under Commonwealth Court's original jurisdiction, challenging an adjudication by the Office of Open Records (OOR), which ordered the release of certain county records. The county requested a declaratory judgment ordering that the relevant county code preempted the Right To Know Law (RTKL) provisions. County of Berks, 204 A.2d at 538. OOR filed preliminary objections, arguing, among other things, that the county's original jurisdiction petition should be dismissed because the county had “an adequate statutory remedy under the RTKL” through an appeal to the court of common pleas. Id. at 539. On review, the Commonwealth Court agreed, finding that the county's remedy to challenge OOR's adjudication was properly through the statutory appeal process. Id. at 540. It noted that an appeal to the Court of Common Pleas would resolve the issues being presented by the county. Id. at 543.

Here, the Petitioner has failed to exhaust his statutory remedy of appeal, just as the county did in County of Berks. As noted above the RTKL mandates that

appellate review of an OOR Final Determination take place in the appropriate court of common pleas. 65 P.S. § 67.1302(a). Here, the Petitioner has not followed that procedure and has thus failed to exhaust a statutory remedy. Thus, Duquette's original jurisdiction petition fails because it has not exhausted its statutory appeal remedies and this Court does not have subject matter jurisdiction. Pa.R.C.P. 1028(a)(1),(7).

Accordingly, pursuant to Pa.R.C.P. 1028(a)(7), due to the Petitioner's failure to exhaust its statutory remedies concerning the Final Determination at issue, the Petitioner's Petition must be dismissed or, in the alternative, jurisdiction should be transferred to the Lebanon County Court of Common Pleas.

**3. Count I of the Petition Should Be Dismissed Because Petitioner Failed to State a Claim For Declaratory Relief Upon Which May Be Granted.**

The Pennsylvania Rules of Civil Procedure allow a party to raise a preliminary objection for lack of standing under Rule 1028(a)(4) legal insufficiency of a pleading (demurrer). The Petitioner seeks to compel the court to enforce its petition for declaratory relief against the Defendant by citing the Sunshine Act. Exhibit A (Count I.) However, the Sunshine Act is inapplicable here because the Petitioner has no standing under Rule 1028(a)(4).

For standing to exist, the underlying controversy must be real and concrete, such that the party initiating the legal action has, in fact, been "aggrieved."

Pittsburgh Palisades Park, LLC v. Commonwealth, 585 Pa. 196, 888 A.2d 655, 659 (2005). “The core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not ‘aggrieved’ thereby and has no standing to obtain a judicial resolution to his challenge.” William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 280–81 A.2d 269, 280 (1975).

A party is aggrieved for purposes of establishing standing when the party has a “substantial, direct and immediate interest” in the outcome of litigation. Fumo v. City of Philadelphia, 601 Pa. 322, 972 A.2d 487, 496 (2009). A party's interest is substantial when it surpasses the interest of all citizens in procuring obedience to the law; it is direct when the asserted violation shares a causal connection with the alleged harm; finally, a party's interest is immediate when the causal connection with the alleged harm is neither remote nor speculative. Id.

Here, Petitioner’s interest is not direct or immediate. Petitioner fails to allege sufficient facts to show he was harmed by the appointment of GLP as the School District’s new solicitor, other than claiming that he and other members of the public in attendance were not permitted public comments before the Board voted to approve the District’s new solicitor at the December 2, 2021 reorganization meeting. Exhibit A ¶79. However, the Sunshine Act allows the

board to defer public comments at the next scheduled meeting if it decides that it does not have sufficient time to hear comments. 65 Pa.C.S.A. § 710.1.

By his own pleadings, the Petitioner was granted an opportunity to read his objections concerning GLP's appointment at the next meeting held on December 16, 2021. See Exhibit A. ¶6. Thus, the Petitioner's claims that the school board violated the Sunshine Act is unfounded because no harm was caused to the Petitioner. Further, the Petitioner suffered no immediate harm as a result of the alleged actions of the Respondent. In his Petition, he alleges future harm on taxpayers including himself if declaratory judgement is not granted concerning the alleged unlawful appointment of GLP as the solicitor of the school district. Exhibit A. ¶81.

The Petitioner's allegations of harm is remote and speculative because he has failed to prove that the GLP's appointment was unlawful. Even if he had proof of any unlawful process of the appointment of GLP, he has also failed to provide any evidence that he has suffered immediate harm caused by the Respondent. Furthermore, Count I of the Plaintiff's Petition seeks declaratory relief. However, to obtain declaratory relief, there must be an "actual controversy" between the named parties. Berwick Twp., v. O'Brien, 148 A.3d 872, 881 (Pa. Cmwlth. 2016).

Petitioner must show a direct and substantial interest that is immediate and causally connected to the actions of the "Respondent," generally, and not the

individuals and agencies the Petitioner named as respondents. See William Penn, 346 A.2d at 280-87.

Here, Petitioner's status as a "former member of the Board of Directors of the School District, resident and taxpayer" who wants a declaration that GLP concurrently represented the District, the Board or individual Board members is not enough to vest him with standing and position him to seek declaratory relief, particularly a declaration that the GLP was unlawfully appointed by the School Board and School District.

Accordingly, Count I of the Petition should be dismissed with prejudice because the Petitioner failed to meet the required elements for standing in its declaratory judgment action-namely, Petitioner failed to demonstrate that his asserted interest was direct, immediate and causally connected to GLP's actions. See Fumo v. City of Philadelphia, 601 Pa. 322, 972 A.2d 487, 496 (2009).

**4. Duquette's Petition Should Be Dismissed for His Failure to State a Claim in Mandamus upon Which Relief May Be Granted.**

In Count II of his Petition, the Petitioner requests that this Court issue a Writ of Mandamus directing the District to lawfully appoint all contractors for legal services, within the confines of the Sunshine Act; to direct the Office of Open Records to disqualify Goldstein Law Partners from representing multiple apparent clients who have alleged concurrent conflicts-of-interest. See Exhibit A,

Count II. However, Petitioner cannot meet the standards necessary to attain a writ of mandamus.

Mandamus “is an extraordinary writ and is a remedy used to compel the performance of a ministerial act or a mandatory duty.” Borough of Plum v. Tresco, 606 A.2d 951, 953 (Pa. Cmwlth. 1992). The Supreme Court has stated that “The writ of mandamus exists to compel official performance of a ministerial act or mandatory duty. Mandamus cannot issue to “compel performance of a discretionary act or to govern the manner of performing [the] required act.” This Court may issue a writ of mandamus where the petitioners have a clear legal right, the responding public official has a corresponding duty, and no other adequate and appropriate remedy at law exists. Fagen v. Smith, 41 A.3d 816, 818 (Pa. 2012).

Furthermore, “the burden of proof falls upon the party seeking this extraordinary remedy to establish his legal right to such relief.” “As a high prerogative writ, mandamus is rarely issued and never to interfere with a public official's exercise of discretion.” Id. Baron v. Commonwealth Dep't of Hum. Servs., 169 A.3d 1268, 1272 (Pa. Commw. Ct. 2017), *aff'd*, 648 Pa. 574, 194 A.3d 563 (2018).

In this case, the Petitioner has failed to plead sufficient facts that, even if accepted as true, demonstrate that it is entitled to mandamus relief. Specifically, the Petitioner has failed to meet all of the standards necessary to establish a cause

of action. Petitioner alleges that GLP was appointed outside the confines of the Sunshine Act but has failed to establish that GLP's appointment as the solicitor for the school district was unlawful. Rather the Petitioner merely states that the appointment of GLP was conducted and concluded outside the parameters of the Sunshine Act because no public comment was allowed with respect to this item of agency business, the appointment of GLP. See Exhibit A ¶23.

As stated above, the Petitioner was given an opportunity to voice his concern at the December 16, 2021 reorganization meeting and as such his objections were heard by the School Board. Accordingly the Petitioner has not established that GLP's appointment was unlawful. Thus, the Petitioner has failed to define a clear mandatory duty of the district to act in regards to the alleged unlawful appointment of GLP.

The Petitioner also alleges that Defendant represented concurrent clients relative to its appointment as solicitor for the District. Here the Petitioner has failed to plead any facts in support of an existing client attorney relationship between GLP and the school board as well as individual members of the school board. Additionally, the Petitioner alleges that GLP assisted in the reviewing of records to be submitted to the Petitioner in violation of the RTKL. Exhibit A ¶35- 40. However section 901 of the RTKL mandates that an agency make a good faith effort to determine if the record requested is a public record, legislative

record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request. 65 P.S. § 67.901.

Here, in its January 22, 2022 Response, the District's Open Records Officer (hereinafter "AORO") confirmed that a good faith review of all potential records was conducted responsive to the Petitioner's request in the possession of the PASD. The AORO exercised due diligence in contacting all school board members, and directed them to provide for review all potentially responsive documents in their personal possession. This includes, but is not limited to, email communications and text messages sent and received from the directors' personal accounts and/or devices. See Exhibit D, AORO's response to Petitioner Request.

In making a good faith effort in its determination, an agency open records officer (AORO) must direct requests to other appropriate persons within the agency or to appropriate persons in another agency. 65 P.S. § 67.501(b). Accordingly the AORO did not err in its decision to direct its requests to GLP. Furthermore, even if the Petitioner is able to provide support to his allegations, Petitioners request that this Court direct OOR to disqualify GLP should be dismissed because the Petitioner has not established that the Sunshine Act creates any affirmative duty in the OOR to guide and monitor a District solicitor's representation of its clients.



Moreover, as the court noted in Baron, the purpose of mandamus is not to establish legal rights, but to enforce an established right. Baron v. Commonwealth Dep't of Human Servs., 169 A.3d 1268, 1272 (Pa. Cmwlth. 2017), aff'd, 194 A.3d 563 (Pa. 2018). Mandamus may not be used to compel a discretionary act. Cimaszewski v. Pa. Bd. of Probation and Parole, 868 A.2d 416 (Pa. 2005).

In Baron, a Records requestor petitioned for review in mandamus and related ancillary relief for enforcement of an order of the Office of Open Records (OOR) directing the Department of Human Services to disclose records sought under the Right-to-Know law. In dismissing the petition for review, this court held that the Disclosure order issued by the Office of Open Records (OOR) directing the Department of Human Services to disclose records sought under the Right-to-Know Law, rates paid to nursing homes by managed care organizations (MCO) participating in a medical assistance program, did not mandate any MCO to perform any action, as required to state a claim for mandamus relief against an MCO. In stating its decision, the court reasoned that mandamus is not appropriate against a private party. Further, it emphasized that the Disclosure Order did not mandate it to perform any action. Baron v. Commonwealth Dep't of Hum. Servs., 169 A.3d 1268, 1273 (Pa. Commw. Ct. 2017), aff'd, 648 Pa. 574, 194 A.3d 563 (2018)

As in Baron, in the instant case, GLP is a private law firm, not a government agency. As such, the Defendant submits that mandamus is not appropriate against it. Further, as Baron notes, one of the three elements required to state a claim for mandamus relief is a mandatory duty on the part of the respondent. Id. Here, the Petitioner has failed to state the source of mandatory duty owed by GLP. Specifically, the supervision and administration of a District solicitor's practices is not an established right to be enforced by the OOR. The Petitioner has simply created this duty, not because Respondents have a legal duty to do so.

Moreover, Petitioner has other appropriate and adequate remedies at law available to him. As noted, if Petitioner was dissatisfied with OOR's Final Determination, he had the opportunity to seek further redress in the Court of Common Pleas.

Accordingly, Petitioner's mandamus action must be dismissed because the Petitioner did not establish that it possesses a clear legal right to enforce the performance of the relief requested, nor that Respondents have a duty to perform these acts.

**5. Count III of Petition Should Be Dismissed for Legal Insufficiency Pursuant to Rule 1028(a)(4) of The Pennsylvania Rules Of Civil Procedure as to Failure to State a Claim For Injunctive Relief Upon Which Should Be Granted.**

Count III of the Petition seeks injunctive relief and continues to focus on GLP's alleged violations of the Rules of Professional Conduct. It is obvious that Count III merely reiterates the Plaintiff's allegations but fails to allege facts to demonstrate GLP acted to cause harm to the Plaintiff. Exhibit A, Count III. In order to prevail on a petition for a permanent injunction, the party seeking the injunction must establish that the [1] right to relief is clear, [2] that there is an urgent necessity to avoid an injury which cannot be compensated for by damages, and [3] the greater injury will result from refusing rather than granting the relief requested. P.J.S. v. Pennsylvania State Ethics Commission, 669 A.2d 1105 (Pa.Cmwlth. 1996). Injunctive relief is not available where there is an adequate remedy at law. Id.

Here, Petitioner has alleged insufficient facts to state a cause of action against the Respondent. In fact, the only sufficiently pled fact against "GLP" is that "GLP has its offices located at 11 Church Rd, Hatfield, Pennsylvania, and 610 Old York Road, Set 340, Jenkintown, Pennsylvania" Exhibit A., ¶5. Petitioner avers only generally that GLP has engaged in acts which are contrary to the Professional

Rules of Civil Procedure, but fails to plead any facts whatsoever to support a clear right of relief. Exhibit A., ¶82.

Moreover, Petitioner has bypassed the adequate remedies at law available to him by his decision not to file his Petition in the Court of Common Pleas. Therefore, the Petitioner has stated no case or controversy against GLP. See Mistich v. Commonwealth of Pennsylvania Board of Probation and Parole, 863 A.2d 116, 119 (Pa. Cmwlth. 2004).

For the reasons set forth above, the Petition fails to state a claim against the GLP for injunctive relief. See Pa. R.Civ.P. 1028(a)(4).

**6. Petition Should Be Dismissed for Insufficient Specificity and Failure to Conform to Law Pursuant to Pa.R.C.P. 1028(a)(2), and (3).**

A petition must conform to the law and rules of court, and it must be sufficiently specific to allow a respondent to defend itself. Pa.R.C.P. 1028(a)(2) and (3). As set forth above, Pennsylvania is a fact-pleading state. Gen. State Authority v. Sutter, 403 A.2d 1022 (Pa. Cmwlth. 1979); Pa.R.C.P. 1019(a). As such, Petitioner may not rely on factually unsupported claims or legal conclusions to establish his cause of action. Erie County League of Women Voters v. Department of Environmental Resources, 525 A.2d 1290 (Pa. Cmwlth. 1987)

In order to survive preliminary objections, the Petition must be both sufficiently clear to enable GLP to defend itself, and sufficiently specific and

complete to inform the Respondent what recovery is sought against it, as a whole. See Mi v. Greene, 906 A.2d 1232, 1236 (Pa. Super. 2006) See also Feldman v. Hoffman, 107 A.3d 821, 825 n.5 (Pa. Commw. Ct. 2014) (noting that to plead a cause of action, the plaintiff must allege facts to demonstrate that the defendant intentionally acted to do something).The Supreme Court has stated that “the possibility that an interest will suffice to confer standing grows less as the causal connection grows more remote.” Wm. Penn Parking Garage, Inc. v. Pittsburgh, 464 Pa. 168, 198 (1975).

Here, the Petitioner has failed to show a direct and substantial interest that is immediately and causally connected to the actions of GLP. See Exhibit A. at 191-202. The Petitioner merely states that individual named defendants; the School Board erred in its appointment of GLP and OOR- erred in its final determination of the Petitioner’s records request, but has failed to allege specific facts upon which GLP could reasonably prepare a defense. Therefore, pursuant to Pa.R.C.P. 1028(a)(3), the Petition should be dismissed because it lacks sufficient specificity. For the reasons set forth above, the Petition is not sufficiently clear, specific or complete to allow GLP to defend itself or even know what recovery Petitioners seek against it. Pa.R.C.P. 1028(a)(2) and (3).

## V. CONCLUSION

For the reasons set forth above, this Court should dismiss the Duquette's Petition for Review, or in the alternative, transfer jurisdiction the Petition to the Lebanon County Court of Common Pleas.

Respectfully Submitted,

**DICKIE, McCAMEY & CHILCOTE, P.C.**

Date: June 10, 2022

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