No. 76 & 77 MAP 2019

IN THE SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT OF CORRECTIONS,
Appellant

v.

UNIONTOWN NEWSPAPERS, INC., D/B/A THE HERALD STANDARD;
AND CHRISTINE HAINES,
Appellees

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA NO. 66 M.D. 2015, DATED MARCH 31, 2018

BRIEF OF THE COUNTY COMMISSIONERS ASSOCIATION OF PENNSYLVANIA, PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION IN SUPPORT OF THE PETITION OF APPELLANTS, PENNSYLVANIA DEPARTMENT OF CORRECTIONS

Crystal H. Clark (Atty. I.D. 91069)
Rachel R. Hadrick (Atty. I.D. 316383)
McNees Wallace & Nurick LLC
570 Lausch Lane, Suite 200
Lancaster, PA 17601-3057
(717) 581-2313
cclark@mcneeslaw.com
rhadrick@mcneeslaw.com

Attorneys for Amici Curiae The County Commissioners Association Of Pennsylvania, Pennsylvania State Association of Township Supervisors, Pennsylvania School Boards Association, and Pennsylvania Municipal Authorities Association

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*

The County Commissioners Association of Pennsylvania ("CCAP") is an organization which came into being in 1886 as a largely volunteer group. Beginning in the late 1880's, CCAP and its predecessor, the Pennsylvania State Association of County Commissioners, received recognition from the Pennsylvania General Assembly in various statutes permitting it to be designated as a "State Association," to hold annual meetings, and to cooperate with other similar state associations. In 1955, under the County Code, CCAP was officially recognized as a state association empowered to discuss and resolve questions arising in the discharge of the duties and functions of the respective officers of the Counties, and to provide uniform, efficient, and economical means of administering the affairs of Pennsylvania's Counties. 16 P.S. §441(a).

CCAP's mission and vision encompasses providing "a strong, unified voice for the Commonwealth's 67 counties," and advocating and providing leadership on those issues that will enhance and strengthen the ability of county commissioners to better serve their citizens and govern more effectively and efficiently." *CCAP Corporate Mission Statement*, available at https://www. pacounties.org/AboutUs/ Pages/default.aspx (last accessed November 19, 2019).

CCAP acts through its staff members, Board of Directors, and Committees, the latter two being comprised of representatives of CCAP member Counties, who

serve to direct the advocacy and efforts on behalf of those members. Important to this case, CCAP was directly involved in the drafting of both the original iteration and the 2008 Right to Know Law ("RTKL"), as amended. Additionally, CCAP regularly partners with the Pennsylvania Office of Open Records and other entities to educate both its members and outside groups on the rights, obligations and responsibilities of public entities under the RTKL. Finally, CCAP regularly consults with and advises its member counties on specific issues arising in the implementation and application of the law. CCAP is therefore familiar with the proscribed duties of an open records officer ("ORO") and the requirement that an agency make a good faith assessment of whether public records are responsive to a request.

The Pennsylvania State Association of Township Supervisors ("PSATS") is a non-profit association that has been providing training, educational and other member services to officials from over 1,400 townships of the second class in the Commonwealth of Pennsylvania for almost 100 years. PSATS also advocates for its members before the legislative, executive and judicial branches at the state and federal levels on matters of importance to the administration of townships and the performance of township officials' duties. One of its affiliate professional associations is the Pennsylvania State Association of Township Solicitors; through

that association PSATS provides consulting services and educational opportunities to approximately 300 hundred municipal solicitors.

Pennsylvania School Boards Association ("PSBA") is a voluntary non-profit association whose membership includes nearly all of the 500 local school districts and 29 intermediate units of this Commonwealth, numerous area vocational technical schools and community colleges, and the members of the boards of directors of those public-school entities. The mission of the PSBA, organized in 1895 and the first such association in the nation, is to promote excellence in school board governance through leadership, service and advocacy for public education. The efforts of PSBA in assisting local school entities and representing the interests of effective and efficient governance of our public schools also benefit taxpayers and the general public interest in the education of our youth.

In that capacity, PSBA endeavors to assist courts and other decision-makers in selected cases presenting important legal issues of statewide or national significance, by offering the benefit of PSBA's statewide and national perspective, experience and analysis relative to the legal policy, management, liability, fiscal, ethical and other considerations, ramifications and consequences that should inform any resolution of the particular disputed issues in such cases. For decades, PSBA's informed insight, thorough research and careful legal analysis have made

the Association a respected and valued participant in all types of legal proceedings involving public schools.

The Pennsylvania Municipal Authorities Association ("PMAA") is the recognized association for municipal authorities in the Commonwealth of Pennsylvania. Founded in 1941, PMAA was established "...to assist authorities in providing services that protect and enhance the environment, to present a united and common front in advocating favorable legislation and opposing detrimental legislative proposals, and to promote economic vitality and the general welfare of the Commonwealth of Pennsylvania and its citizens."

Today, PMAA represents more than 700 municipal authorities across the state. The authorities provide drinking water, sewage treatment, waste management, and recreational and community projects valued at billions of dollars to over six million Pennsylvania citizens. In addition to active members, PMAA has over 500 associate members, such as CPAs, engineers and solicitors, who provide services to municipal authorities.

Amici's interest in this case is the effectuation of the text of the RTKL, specifically with respect to the limited duties of the open records officer ("ORO") and the requirement that a court find that a government entity act in bad faith before imposing an award of the requestor's attorneys' fees against a government agency.

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2), *Amici Curiae* certifies that no person other than *Amici Curiae*, their counsel, and their members contributed money intended to fund the brief's preparation or submission.

II. SUMMARY OF ARGUMENT

This case implicates the courts' interpretation of when an agency's conduct constitutes "bad faith" in violation of the Right-to-Know Law ("RTKL"). The appealed order, authored by Judge Simpson of the Commonwealth Court of Pennsylvania, relates to a request from September 2014, in which Appellee Christine Haines, a reporter with Appellee Uniontown Newspapers, Inc., sought information from the Pennsylvania Department of Corrections ("DOC") regarding inmate diagnoses at one of its correctional facilities, SCI-Fayette, and comparative data of inmate illnesses at all other correctional facilities (the "Request"). Just weeks before the Request was received, the Department of Health ("DOH") and DOC initiated a coordinated investigation of inmate illnesses at the SCI-Fayette (the "Investigation"). The Investigation arose as a result of a report published by a non-profit which alleged a correlation between inmate illnesses at SCI-Fayette and local exposure to toxic materials.

On March 23, 2018, Judge Simpson determined that the Pennsylvania Department of Corrections ("DOC") acted in bad faith when its Open Records Officer ("ORO") failed to gather responsive records immediately upon receipt of the request:

> [DOC's Health Care Bureau (the "Bureau")] did not respond in writing. Rather, one of its representatives . . . advised [the ORO] in person that DOC and DOH were involved in the [Investigation] and that all responsive records would be related to the [Investigation], other than medical files.
>
> Significantly, [the ORO] did not receive any potentially responsive records from [the Bureau]. Without understanding the records involved, [the ORO] relied on [the Bureau's] assessment that any responsive records related to the [Investigation]. [The ORO] also did not discern what records were allegedly investigative either to document their content or to assess any exemptions. . . .
>
> Accordingly, DOC did not perform its duties during the request stage in several material respects. In short, DOC neglected to: perform a good faith search; obtain records from sources consulted during [the Investigation]; review all potentially responsive records; and, assess the content of responsive records before withholding access.

Uniontown Newspapers, Inc. v. Pa. Dep't of Corrections, 185 A.2d 1161, 1168 (Pa. Commw. Ct. 2018). Further, the Court noted:

> Here, DOC did not attempt to discern what records purportedly related to the No Escape Investigation until the appeal stage. DOC did not document the sources of potentially responsive records, such as the four Inmate Illness Sources. As a result, DOC was unaware what records its [Bureau] deemed responsive, and yet investigative. Without obtaining or reviewing any records, DOC denied access to responsive public records. DOC's failure to comply with Section 901 prior to issuing its "denial" under Section 903 constitutes bad faith.

185 A.3d 1161, 1172 (Pa. Commw. 2018).

This Court granted the DOC's Petition for Review of the Commonwealth Court's March 23, 2018 Opinion to determine two issues: 1) whether the Commonwealth Court erred in determining that the DOC acted in bad faith based on the ORO's failure to perform an independent review of responsive documents and 2) whether the Commonwealth had the authority to award attorneys' fees when the Commonwealth Court did not reverse the agency's denial or a final determination by the OOR.

Amici Curiae submit this brief in support of reversal of the Commonwealth Court's determination that the agency acted in bad faith. Specifically, *Amici curiae* take issue with the court's implicit requirement that the ORO personally conduct a review of potentially responsive documents and assess responsiveness independent of information obtained from others in the agency with personal knowledge of the documents and their context. This interpretation of the RTKL is inconsistent with the express language of the RTKL with respect to the duties of the agency and the ORO. Further, the decision misinterprets the agency's obligation to review all responsive documents before responding to a request. Additionally, the decision ignores basic principles of agency consistent with an entity's obligation to ascertain facts known to its individual employees or representatives. Finally, the decision will create an insurmountable burden for local agencies with limited manpower and resources.

III. ARGUMENT

Here, Judge Simpson imposed an unnecessary burden on OROs – and their agencies by extension - to perform a "detailed search" of potentially responsive records, which will be virtually impossible for smaller government organizations to comply with. The standard imposed on DOC's ORO in this matter, and which will be applied against all agency OROs, is not required by the RTKL and is sure to have a detrimental impact on localities and the important services they provide to the public, including timely responses to RTKL requests.

A. The RTKL Permits An Agency To Deny Access To Records After It Ascertains The Types Of Records Implicated In The Request, And Without Individual Review Of Each Record, Where Asserting The Basis For The Denial Would Promote Prompt Adjudication Of The Dispute And Advance Disclosure Of Public Records.

The Commonwealth Court erred in determining that the DOC acted in bad faith because the ORO did not personally review potentially responsive records from the Bureau before responding to the Request. Imputing bad faith based on a lack of an individual review, and thereby imposing an individual review requirement, will only delay the disclosure of public records in the future, in direct contravention of the express intent of the RTKL. Such a rule would furthermore impose undue burdens on agencies and result in the waste of public resources, when the nature of records for purposes of applicable exceptions can be

determined by the custodians without gathering and review on a record-by-record basis by the ORO.

The Commonwealth Court was bound to construe the RTKL in a manner which effectuates the Legislature's intent. In interpreting any provision of a larger statute:

> [S]tatutory parts are not to be construed as if one part operates to nullify, exclude or cancel the other, unless the statute expressly says so[,] [and if] they can be made to stand together, effect should be given to both as far as possible. Finally, statutory language must be read in context, that is, in ascertaining legislative intent, every portion of statutory language is to be read together and in conjunction" with the remaining statutory language, and construed with reference to the entire statute as a whole.

Commonwealth v. Office of Open Records, 103 A.3d 1276, 1284-85 (Pa. 2014) (internal citations and quotations omitted).

Nowhere in the RTKL does it expressly require the ORO (or anyone else at the agency) to perform a detailed search of records in order to render an initial denial of the documents. Rather, section 901 of the RTKL only requires that the *agency* make a good faith effort to determine if the record is public record:

> Upon receipt of a written request for access to a record, an agency shall 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 Pa. Stat. Ann. § 67.901. The same provision, however, requires the agency to "respond as promptly as possible *under the circumstances existing at the time of*

the request." *Id.* (emphasis added). A finding that the RTKL inherently requires a full, detailed search for and review of documents in all circumstances to satisfy the "good faith effort" obligation essentially delays and ignores the obligation for promptness of the agency's proposed response. It further prevents the court from taking into consideration any of the individual "circumstances existing at the time of the request" as is expressly required in Section 901 of the RTKL.

For instance, in the underlying case, DOC did not necessarily need to review individual responsive records in order to appropriately and promptly respond, as the Bureau was "mindful of the [R]equest and already familiar with the subject matter." Respondent's Brief in Opposition to Motion for Summary Judgment, Uniontown Newspapers, Inc. v. Dep't of Corrections, Docket No. 66 M.D. 2015, Pa. Commw. Ct. at 33. Under the circumstances existing at the time of the request, it would have been redundant to review documents when the DOC was already familiar with the subject matter and status of the documents requested, and such a review would have unnecessarily delayed a prompt agency response. Again, the statutory language of the RTKL does not proscribe a specific course of conduct that must be followed in each case to "review" potentially responsive documents, but only requires that an agency engage in a "good faith effort to determine if the record requested is a public record." 65 P.S. § 67.901. DOC's specific familiarity with the requested documents appropriately allowed for it to make a determination

of what records were responsive without an individualized review in direct response to the request. Under the Commonwealth Court's holding, even if an ORO had reviewed a document the day prior in relation to a prior request, a failure to pull that document for a renewed review when it became the subject of a subsequent request could constitute bad faith.

In *Pa. State Police v. OOR*, 995 A.2d 515 (Pa. Commw. 2010), the Court suggested that a denial on the face of the records is entirely appropriate in that it permits the requestor to receive prompt notice of the agency's basis for denial:

> [A]n agency must make a good faith effort to determine the type of record requested and then respond as promptly as possible to the request. .. .
>
> . . . .
>
> Under these provisions, the requestor tells the agency what records he wants, and the agency responds by either giving the records or denying the request by providing specific reasons why the request has been denied. The requestor can then take an appeal to the OOR where it is given to a hearing officer for a determination.
>
> . . . .
>
> [A]gencies as a normal practice should raise all objections to access when the request is made if the reason for denying access can be *reasonably discerned* when the request is made.

Id. at 516 (emphasis added). Even further, that court discouraged asserting objections in "piecemeal" fashion, or "the purpose of the RTKL in allowing access to public records in a *timely manner* will be frustrated." *Id.* at 517 (emphasis added). It is clear from this precedent that the RTKL is extremely concerned with timely responses to requests, and that the timeliness of such responses would be

impeded and impacted by requiring an individualized review of each and every potentially responsive record.

The cases cited by the Commonwealth Court as examples of bad faith do not compel the result imposed by the Court in this matter. In *Parsons v. PHEAA*, 910 A.2d 177, 189 (Pa. Commw. 2006), the Commonwealth Court found that a requestor was entitled to "at least some portion of their attorney's fees" where the agency had conducted no review of requested documents, and no documents produced, even with redactions, through the date of the court's hearing. Importantly, PHEAA's stated reasons for not producing responsive records included that some of the records included personal or private information jeopardizing security, and that some of the records constituted trade secrets. *Id.* at 181. This suggested that some of the records could have been produced in redacted format. Nothing in the court's opinion specifically stated that the failure to conduct a search in and of itself constituted bad faith; had that been the case, it is more likely that the entirety of attorneys' fees – as opposed to merely "some portion" - would have been recoverable. Given that only "some portion" of recovery was authorized, it is entirely likely that it was the combined factors of not searching and producing some documents in redacted format that caused the "bad faith" finding in *PHEAA*. *See id.* at 189. As such, *PHEAA* cannot justify a finding that the absence of a search and individualized review constitutes bad faith.

Similarly, in *Chambersburg Area School District v. Dorsey*, 97 A.3d 1281 (Pa. Commw. 2014), the agency produced thousands of pages of responsive public documents it discovered, as part of another litigation matter, two years after the original request and while appeals proceedings were pending. *Id.* at 1286. Upon receiving these additional responsive records, the requestor moved the trial court to supplement the record regarding the late disclosure of records and make a determination of the agency's bad faith for failing to produce same initially, and the trial court denied the motion. *Id.* at 1286-87. On appeal, the Commonwealth Court noted that there was no indication in the record why, with diligence, the agency could not have produced these later-discovered documents in responding to the original RTK request. *Id.* at 1292-93. As such, it remanded the case back to the trial court to determine whether or not the agency had made a good faith effort to locate the responsive records, and therefore whether or not an award of attorneys' fees and costs were justified under the RTKL. *Id.* Importantly, the Commonwealth Court did not itself hold as a matter of law that the facts presented showed bad faith – only that the question should be explored. Again, the Court's opinion does not support a finding that an individualized search and review is required in every case to establish "good faith."

This Court has acknowledged in the past that the intensity of an initial review will vary depending on the context of the request. *Levy v. Senate of Pa.*, 65

A.3d 361, 374-75 (Pa. 2013) ("While the applicability of some of the exceptions requires little analysis, such as DNA or RNA records, other exceptions require more subtle consideration, such as whether disclosure of the record 'creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system.'") (internal citations omitted)). Given that neither *Parsons* nor *Dorsey* stand for the proposition that the lack of an individual search and review, without an examination of the conduct of the agency in its entirety, in and of itself constitutes bad faith, and in light of this Court's decision in *Levy* on that point, the Commonwealth Court's opinion should be reversed..

Specifically, the Commonwealth Court determined that the agency engaged in bad faith because the ORO failed to review records before (or rather than) relying on the Bureau's assertion that the records were subject to an investigative exemption. 185 A.2d at 1172. However, the Court engaged in no evaluation of: (1) the circumstances under which the ORO relied on the Bureau's representations (and whether the reliance was therefore reasonable); (2) whether, based on those representations, a more extensive review was necessary; nor (3) the extent to which the Bureau engaged in any analysis regarding the potentially responsive records and the application of exemptions to disclosure. This context in which the effort to

ascertain the applicability of the exception should and does matter given the prior precedent as set forth above.

In the absence of such an evaluation by the Commonwealth Court, application of an inflexible rule as established by the Court not only disregards the express language of the RTKL, which requires an agency to make a good faith effort to determine whether public records exist *under the circumstances*, but also thwarts the very purpose of the RTKL to allow prompt access to public records where required by the Law.

B. The Commonwealth Court Imposed A Heightened Obligation Upon Open Records Officers In Contravention Of The Express Intention Of The Legislature.

The Commonwealth Court defied the express terms of the RTKL by imposing duties on the ORO beyond those identified in the law.

The Legislature has clearly defined the function and responsibilities of the ORO:

> **(b) FUNCTIONS.—**
>
> **(1)** The open-records officer shall receive requests submitted to the agency under this act, direct requests to other appropriate persons within the agency or to appropriate persons in another agency, track the agency's progress in responding to requests and issue interim and final responses under this act.
>
> **(2)** Upon receiving a request for a public record, legislative record or financial record, the open-records officer shall do all of the following:
>
> **(i)** Note the date of receipt on the written request.

> **(ii)** Compute the day on which the five-day period under section 901 will expire and make a notation of that date on the written request.
>
> **(iii)** Maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been fulfilled. If the request is denied, the written request shall be maintained for 30 days or, if an appeal is filed, until a final determination is issued under section 1101(b) or the appeal is deemed denied.
>
> **(iv)** Create a file for the retention of the original request, a copy of the response, a record of written communications with the requester and a copy of other communications. This subparagraph shall only apply to Commonwealth agencies.

65 Pa. Stat. Ann. § 67.502. Notably, nowhere in this section is the ORO tasked with assessing the response, reviewing documents to be withheld or produced, or making determinations as to applicability of any exemptions.

The Commonwealth Court has already interpreted that the ORO does not have the authority to make determinations of the applicability of the RTKL on behalf of the agency. The ORO position is merely "administrative and ministerial in nature." *See Bd. of Supervisors v. McGogney*, 13 A.3d 569, 574 (Commw. 2011), *appeal denied*, 24 A.3d 364 (Pa. 2011). In *McGogney*, the requestor sought several pages of solicitor's invoices to the township's board of supervisors. The solicitor advised the ORO to wait for him to review the requested documents before producing, but the ORO ignored the direction and produced the documents out of concern for the impending response deadline. After the township sought injunctive relief against the requestor to have the records returned, the requestor

argued that the ORO had the authority to waive the township's attorney-client privilege, and thus the documents were responsive under the RTKL. On appeal, the Commonwealth Court determined that the ORO could not waive the attorney-client privilege on behalf of the board of supervisors, because the ORO lacked the authority under the RTKL or the township's RTK ordinance to act on behalf of the board of supervisors. *McGogney* makes clear that it was never intended for the ORO to be the sole authority to make RTKL decisions on behalf of the agency. Instead, the RTKL instructs the ORO to "direct" a request to the "appropriate persons in the agency." 65 Pa. Stat. Ann. § 67.502(b). This language clearly contemplates that the ORO will rely on the advice and assistance of other agency employees and officials.

As a practical matter, this assistance and reliance recognizes that the RTKL applies to agencies of all shapes and sizes, and with varying degrees of sophistication, both at the agency and ORO level. In holding that the ORO must conduct an individualized search and review of all potentially responsive documents him- or herself despite the language above, the Commonwealth Court failed to consider how the difference in sophistication and resources could impact or detract from the very purpose of the RTKL. For instance, a search for the identity of OROs for just a few local agencies indicate that the positions tend to be administrative and lack full or sole authority to make decisions on behalf of the

agency, and yet the Court's decision would prevent them from consulting with or relying on those that do:

- **Oil City: Mark G. Schroyer, City Manager.** *See Open Records Request Form*, Oil City, available at http://www.oilcity.org/online-forms-and-permits (last accessed Nov. 19, 2019).
- **Clearfield Borough: Betsy Houser.** *Agency Open Records Info*, Office of Open Records, Oct. 11, 2019, https://www.openrecords.pa.gov/RTKL/AOROInfo.cfm?id=895.
- **Clearfield County: Maryanne Sankey, Director of Human Resources.** *Human Resources*, Clearfield County, https://clearfieldco.org/human-resources/ (last accessed Nov. 22, 2019).
- **Chambersburg Borough: Jamia Wright, Borough Secretary.** *Right to Know Request Form*, Chambersburg Borough, http://www.borough.chambersburg.pa.us/pdf/Right%20to%20Know%20Request%20Form%20and%20Policy%20FINAL%20030618.pdf
- **Harrisburg School District: Kristen Keys, Public Relations Coordinator.** *Agency Open Records Info*, Oct. 17, 2019, Office of Open Records, https://www.openrecords.pa.gov/RTKL/AOROInfo.cfm?id=3272.
- **Central Montco Technical High School: Charles Braun, Business Manager.** *Right to Know*, Central Montco Tech. H.S., https://www.cmths.org/right-to-know (last accessed Nov. 22, 2019).

The respective positions of the identified OROs infer that neither the agency, nor the RTKL, anticipate that the ORO would solely undertake the responsibility to decide on behalf of the agency what documents are responsive to the request or utilize the ORO's judgment in responding to requests. Indeed, some local agencies specifically instruct the ORO to consult with others. *See, e.g.*, *Public Records Inspection And Duplication Policy*, Pittsburgh Water & Sewer Auth., https://apps.pittsburghpa.gov/pwsa/PWSA_Right_to_Know_Regulations.pdf (last

accessed Nov. 22, 2019) (authority permitted to seek additional time to respond in order to consult with solicitor); *Right to Know Policy*, Lebanon County, Dec. 30, 2008, http://www.lebcounty.org/Right_to_Know/Documents/Open_Record_policy.pdf ("[I]f deemed necessary, the County Open records Officer may consult with the County Solicitor for a determination on the availability of record.").

Requiring an ORO to make his/her own determination as to the applicability of an exemption would require most localities to reassess their response process and the current designation of the ORO. The current OROs may not all be fully equipped to make such determinations. It is unlikely that an ORO for a local agency would have the detailed, all-encompassing knowledge of the agency and its functions which would allow the ORO to singlehandedly assess the applicability of the RTKL.

That the ORO is not necessarily equipped with the specific personal knowledge required to assess the applicability of an exemption to the full breadth of agency records is evident in the instant situation, where the OOR's decision required an analysis of the applicability of the "noncriminal investigative exemption" in the matter at hand:

> In order for this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter.

Final Determination, at 5 (quoting *Dep't of Health v. OOR*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010)). The OOR also noted that the inquiry must be "comprehensive" and "repeated" and "must be 'conducted as part of an agency's official duties.'" *Id.* (internal citations omitted)[1]. Here, the ORO was not a member of the Bureau, and thus not involved in the Investigation with DOH. The ORO would not, therefore, have had first-hand knowledge as to whether the records involved were created during the course of the Investigation or the specific details as to the purpose of the Investigation. Thus, the ORO sought more specific information from appropriate officials within the Bureau, the subset of the agency with direct knowledge of the Investigation.

In the instance where an ORO is an administrative employee, that employee is even less likely to have personal knowledge of the agency's operations sufficient to determine the applicability of the RTKL and its exemptions – even with an independent review of potentially responsive documents. Not only does that application require knowledge of the law and the training to perform a sufficient

[1] Although the OOR's determination regarding whether DOC's Investigation qualified as such under the RTKL is not presently before the Court, *Amici Curiae* strongly disagree with the OOR's limited view of the investigative exemption. Such a narrow interpretation ultimately requires that an ORO rely even more heavily on the representations of others within the agency more closely involved in an investigation, which is then contrary to the holding that the ORO conduct an independent review and analysis.

analysis of the issues, but it may also require access to information regarding the context of the document for which an administrative employee is simply not privy.

Review and assessment of potentially responsive documents requires knowledge of the agency, the specific contents of the documents, and the law which are simply beyond the obligations imposed upon the ORO under the RTKL. Moreover, where there are potentially thousands or millions of records at issue, that only the ORO can assess whether a document is responsive would render an agency's compliance to the RTKL infeasible. As such, the Court's finding of bad faith – and the obligations it imposes on OROs to avoid such findings – is simply impractical and unworkable.

C. The Commonwealth Court's Ruling Contravenes General Notions Of Agency And Organizational Accountability.

The entirety of the RTKL imposes an obligation on the agency, not a specific position therein. Indeed, a request is submitted to an agency, although it is received by the ORO. 65 P.S. § 67.502 (empowering the ORO to "receive requests submitted to the *agency*" and direct the request to the "appropriate persons"). The ORO is merely a conduit through which the agency receives the request.

In many other contexts of evidence or discovery, the individual serving as the conduit of information for an entity is permitted to rely on information from others inside the organization. *See, e.g.,* Pa. R.C.P. 1024(a) (allowing a party to verify a pleading based on "knowledge or information and belief"); Pa. R.C.P.

4007.1(e) (allowing a corporation to designate one or more individuals to testify on behalf of the entire corporation with respect to certain subject matters). If an agency was involved in civil litigation, for example, it would be totally appropriate for a single agency employee to acquire *information* from others within the agency in order to attest to allegations in a pleading, even under penalty of perjury. *See* Pa. R.C.P. 1024(a).

Indeed, courts have already applied the principal of agency in construing the RTKL. In *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Commw. 2011), the Commonwealth Court determined that a record not in the agency's physical possession but in the possession of one of its councilmembers was nonetheless constructively within the agency's "possession, custody, or control" such that it constituted a public record. *Id.* at 93, 97. Similarly, in *Office of the Governor v. Scalforo*, 65 A.3d 1095, 1103 (Pa. Commw. 2013), the Commonwealth Court expressly provided for the use of affidavits from members of the agency as an appropriate offer of evidence of the search which was performed by the agency: "Affidavits are the means through which a governmental agency details the search it conducted for the documents requested and justifies nondisclosure of the requested documents under each exemption upon which it relied upon." *Id.* (quoting *Manchester v. Drug Enforcement Administration, U.S. Department of Justice*, 823 F. Supp. 1259, 1265 (E.D. Pa. 1993)).

The aforementioned cases obviate the inevitability that, on some level, an ORO will necessarily rely on the representations of others in the course of the agency's "good faith effort" to determine the responsiveness of the request – both in terms of gathering documents in the possession of others and in the gathering of information they have about those documents. By way of example, had DOC's ORO obtained documents from the Health Care Bureau, the ORO would need to rely on the Bureau's representations regarding the completeness of what is forwarded. If the ORO physically entered DOC's repositories directly, it would rely on the Bureau to accurately represent the locations of documents. If the ORO asked the Bureau to identify custodians of records, the ORO would nonetheless rely on the Bureau's representations as to the appropriate custodians. Even in the review of documents, it is likely that the ORO will need to rely on information from the individuals in the agency who are most familiar with these documents to understand their context. Thus, the idea that the ORO is the *only* individual who can review potentially responsive documents for applicability is just not reasonable.

The idea that the ORO must physically review documents or ultimately determine the response is arbitrary, as there is no circumstance in which the ORO can apprise him/herself of the personal knowledge necessary to preclude the need to rely on others within the agency.

D. The Commonwealth Court's Ruling Would Place An Undue Burden On Government Agencies, And Thus Taxpayers.

The Commonwealth Court also failed to consider the implications of imposing an obligation upon an ORO to conduct a detailed search of records before responding to the initial RTKL request. The likely outcome of such an obligation benefits no one—not the agency, not the requestor, and not the public. Specifically, the requirement places the agency between a rock and a hard place. Requiring OROs to conduct a detailed search of records in every instance of a request, rather than relying on those records custodians with the most detailed knowledge of those records, would essentially require the ORO to become familiar with every single agency document (or at least every single class of documents). This knowledge would come at potentially significant agency (and taxpayer) cost, compounded by an ongoing significant cost to review each individual potentially responsive document for each individual request.

Frankly, many localities lack the manpower and administrative capacity to timely review the breadth of documents that might be implicated in a RTK request. *See, e.g.*, Oil City, Pennsylvania, *Organizational Chart*, http://www.oilcity.org/home/organizational-chart (last viewed November 19, 2019) (showing the city's administration comprised of a mayor, four council members, and a city manager with no legal department); Chambersburg, Pennsylvania, *Staff Directory*, http://www.borough.chambersburg.pa.us/government/directory.html (last visited

November 21, 2019) (showing borough's employment of less than twenty borough employees and use of a solicitor from a private firm)[2]. The result is that many local governments might be inclined to ignore (and by operation of law, be deemed to deny) any RTKL request which would potentially require review of a large swath of documents rather than make at least a general assessment of applicability of exemptions. Because a formal denial without a review could subject them to a bad faith attorneys' fee award, and the deemed denial would not, allowing the deemed denial would potentially be the less risky course of action under the circumstances.

In the alternative, the agency may opt to delay its response indefinitely until it can perform a detailed review of the request and responsive documents. While the RTKL law favors full disclosure of public records, it also demands fast, efficient disclosure of public documents. A prompt denial with an explanation of the agency's position that the documents are not public records gives the requestor an opportunity to adequately address the agency's position on appeal before the OOR – and whether or not it's even worthwhile to appeal the denial. A denial by operation of the agency's failure to timely respond, however, would only delay apprising the requestor of the agency's basis for denial. If the applicability of an exemption does not require review of the contents, for example, where it is known

[2] Attorney Salzmann is with the firm Salzmann Hughes, P.C. *See G. Bryan Salzmann*, Salzmann Hughes, P.C., https://salzmannhughes.com/Our-People/G-Bryan-Salzmann (last visited Nov. 22, 2019).

by an appropriate agency custodian (even if not the ORO specifically) that the documents were created to further an investigation, delaying the denial is without purpose. In that context, it begs the question of whether failing to promptly assert the exemption when the exemption is evident before review of the documents could be, in itself, a basis for a requestor to argue the agency acted in bad faith – and thus the suggestion that the agency is between a rock and a hard place.

That the RTKL contemplates that an agency (not solely the ORO) could perform a more detailed review after initially denying the request was confirmed in *PASSHE v. Ass'n State Coll. & Univ. Faculties*, 142 A.3d 1023 (Pa. Commw. 2016), *appeal denied*, 166 A.3d 1218 (Pa. 2017). In *PASSHE*, the state system argued that the OOR erred when it determined that the system failed to meet its burden to prove the requested documents fit within the exemption. The state system did not have the time to review the "sizeable volume" of records which were potentially responsive to the request. 142 A.3d at 1031. Notably, the agency offered testimony to the OOR that it had obtained more than 74 gigabytes of data for the request and that 25 gigabytes consisted of 1.87 million pages of documents. *Id.* at 1028.

The *PASSHE* court first noted that agencies are not excused from producing documents just because the request covers a large number of records. *Id.* at 1031. Moreover, the agency would still need to respond by asserting applicable

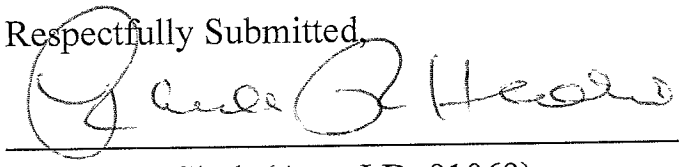
exemptions to records, no matter how large the request. *Id.* ("[J] ust because a request is large does not mean that an agency should be foreclosed from carrying out its statutory duty to determine whether exemptions apply when it is incapable of reviewing the requested documents within the time-period it is given."). Thus, the agency should provide evidence to the OOR that would allow the OOR to understand the breadth of the documents which would need to be reviewed and the amount of time needed to conduct the review, and the format of the documents. *Id.* The OOR is to use that information to allow the agency a reasonable time to review the documents.

As *PASSHE* makes clear, the RTKL anticipates that a request may be too broad in scope for individual documents to be searched before it is denied. The *PASSHE* ruling also infers that it cannot be the responsibility of the ORO alone to review the responsive records. *Id.* If it was appropriate for the Commonwealth Court to allow the agency to offer the OOR evidence as to the scope of the review of documents to obtain a request for more time, then it cannot be said that an agency acts in bad faith when an ORO relies on information from others within the agency as to the contents of the records.

IV. CONCLUSION

For the reasons set forth herein, *amici curiae* CCAP, PSATS, PSBA and PMAA request the Court reverse the decision of the Commonwealth Court in its March 31, 2018 Order.

Respectfully Submitted,



Date: December 4, 2019

Crystal H. Clark (Atty. I.D. 91069)
Rachel R. Hadrick (Atty I.D. 316383)
McNees Wallace & Nurick LLC
570 Lausch Lane, Suite 200
Lancaster, PA 17601-3057
(717) 581-2313
cclark@mcneeslaw.com
rhadrick@mcneeslaw.com

Attorneys for Amici Curiae the County Commissioners Association of Pennsylvania, Pennsylvania State Association of Township Supervisors, Pennsylvania School Boards Association, and Pennsylvania Municipal Authorities Association

CERTIFICATE OF COMPLIANCE

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

McNEES WALLACE & NURICK LLC

By _____
Rachel R. Hadrick (Atty I.D. 316383)

Date: December 4, 2019

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons indicated via the Court's electronic filing system, which service satisfies the requirements of Pa. R.A.P. 121.

Theron R. Perez, Esq.
Maria Gerarda Macu, Esq.
Debra S. Rand, Esq.
PA Department of Corrections
1920 Technology Parkway
Mechanicsburg, PA 17050-8507
Counsel for Appellant Department of Corrections

Michael J. Joyce, Esq.
Charles Kelly, Esq.
Saul Ewing, LLP
1 PPG Place, Suite 3010
Pittsburgh, PA 15222-5419
Counsel for Appellees Uniontown Newspapers, Inc. d/b/a The Herald Standard and Christine Haines

McNEES WALLACE & NURICK LLC

By _____

Date: December 4, 2019

Crystal H. Clark (Atty. I.D. 91069)
Rachel R. Hadrick (Atty I.D. 316383)
570 Lausch Lane, Suite 200
Lancaster, PA 17601-3057
(717) 581-2313
cclark@mcneeslaw.com
rhadrick@mcneeslaw.com