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IN THE SUPREME COURT OF PENNSYLVANIA

44 MAP 2022

AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA,
Appellant,

v.

PENNSYLVANIA STATE POLICE,
Appellee.

BRIEF OF AMICI CURIAE THE PENNSYLVANIA NEWSMEDIA ASSOCIATION AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPELLANT

On appeal from the Commonwealth Court's Opinion and Order dated November 17, 2021 at Docket No. 1066 C.D. 2017, on remand from the Supreme Court's Order of June 16, 2020 at Docket No. 66 MAP 2018, vacating the May 18, 2018 Opinion and Order of the Commonwealth Court

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STATEMENT OF INTEREST OF AMICI CURIAE

The Pennsylvania NewsMedia Association ("PNA") is a Pennsylvania non-profit member corporation with its headquarters located in Harrisburg, Pennsylvania. The Association represents the interests of more than 300 daily and weekly newspapers, digital publications, and other media organizations across the Commonwealth of Pennsylvania in ensuring that the press can gather information and report to the public. A significant part of the Association's mission is to defend the media's statutory rights of access to public records in Pennsylvania.

The Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Amici curiae The Pennsylvania NewsMedia Association and Reporters Committee for Freedom of the Press (together, "Amici") submit this brief pursuant to Pa. R.A.P. 531(b)(1)(i) in support of appellant the American Civil Liberties Union of Pennsylvania ("ACLU"). Amici have a strong interest in ensuring that journalists can timely gather information about matters of public concern under

Pennsylvania's Right to Know Law, 65 P.S. §§ 67.101 *et seq*. (the "RTKL"). If allowed to stand, the decision below would significantly frustrate that access by permitting lengthy delays for supplementation of the record despite agencies' having failed to meet their burden of proof, and absent any other compelling reason for remand. For the reasons set forth herein, Amici urge the Court to reverse the decision below and grant access to the record requested in this case.

Pursuant to Pa. R.A.P. 531(b)(2), Amici certify that no other person or entity other than Amici, their members, or counsel paid in whole or in part for the preparation of this brief, nor authored this brief in whole or in part.

SUMMARY OF THE ARGUMENT

The Right to Know Law ("RTKL") allows the public to secure timely, efficient access to records kept by state and local government agencies, facilitating government oversight and public discourse. The Commonwealth Court's decision upends the law's pro-disclosure mandate by creating delays that eviscerate the ability of the press and public to access information in a timely manner. By remanding to the Office of Open Records ("OOR") for further development of the record—despite the fact that the Pennsylvania State Police ("State Police") never suggested that additional evidence was needed or available in this five-year-old dispute—the lower court contravened the plain letter and remedial intent of the RTKL. The Commonwealth Court's holding also rests on the faulty and troubling

rationale that remanding for new evidence is especially warranted when agencies invoke the RTKL's public safety exemption. This holding would impermissibly write a special public-safety exemption process into the RTKL, encouraging agencies invoking that exemption to ignore their burden of proof before the initial fact-finder and delay access to public records that are essential to holding law enforcement agencies accountable. If affirmed, the decision below would severely undermine the ability of the press and public to access records, including law enforcement records, in a timely fashion, leading to unjustifiable delays in obtaining and reporting on information of public concern.

The RTKL was enacted to remedy decades of abysmal government transparency in the Commonwealth, an environment that fostered a culture of secrecy which has yet to be completely reversed. The law creates a presumption of access, sets strict timelines for responding to requests and resolving disputes, and places the burden of proof on agencies to establish that an exemption to disclosure applies. These burdens and procedures do not vary based on which exemption an agency may invoke. In all cases, agencies must submit evidence to meet their burden of proof at the fact-finding stage. If the fact-finder's assessment of the evidence leads them to conclude an agency's claimed exemptions do not apply—as the OOR found in this case—the agency must promptly release the requested record. Alternatively, the agency may appeal, in which case the reviewing court

conducts a *de novo* review of the law and facts before it and renders a decision on the record's disclosure. Here, the Commonwealth Court first ignored the requirements of the law by refusing to review the requested record, instead crediting the State Police's conclusory affidavit, which the OOR had already found did not support the claimed public-safety exemption. After this Court reversed, the Commonwealth Court again ignored the requirements of the RTKL by holding that the State Police's affidavit did not satisfy the agency's burden, yet rather than ordering release of the record, it instead remanded to the OOR to try again with more fact-finding. Just as this Court reversed the Commonwealth Court's first decision in this case as contrary to the RTKL, Amici urge this Court to again reverse the decision below and order the Commonwealth Court to promptly issue its decision on the record before it.

Access to information and resolution of disputes must be swift to fully effectuate the core purposes of the RTKL. Access delayed can be access denied, especially where the press is concerned. Timely, efficient access to public information is a cornerstone of the RTKL as well as the exercise of First Amendment rights, and Amici urge this Court to reinforce those access rights in this case.

ARGUMENT

I. The Commonwealth Court's order remanding the case for further review by the OOR is antithetical to the RTKL's plain text and remedial purpose.

As this Court has stated, the RTKL "empower[s] citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). In light of the RTKL's transparency goals, the statute must be interpreted to provide maximal access to public records. *See Levy v. Senate of Pa.*, 65 A.3d 361, 380–81 (Pa. 2013). The starting point in any RTKL case is that records are presumed public. 65 P.S. § 67.305(a). Agencies bear the burden of proving an exemption to full access applies by a preponderance of the evidence. *Id*. § 67.708(a)(1). To meet that burden, agencies may present affidavits and other evidence to the fact-finder—typically the OOR—during the initial administrative appeal. *Id*. §§ 67.1101, 67.1102(a)(2). Then, the appeals officer must make a final determination within 30 days. *Id.* § 67.1101(b)(1). The parties thereafter have 30 days to appeal to the Commonwealth Court or a Court of Common Pleas, which reviews the record and issues findings of facts and law. *Id.* §§ 67.1301(a), 67.1302(a), 67.1303(b). As these provisions show, the RTKL envisions a scheme of prompt disclosure of public records, aided by the timely and thorough submission of evidence at the fact-finding stage.

Contrasting the RTKL with its more restrictive predecessor sheds further light on the RTKL's purpose of facilitating timely, efficient access to records. Under the Right-to-Know-Act ("RTKA") in effect until 2002, requesters bore the burden of justifying why they were entitled to records, instead of the other way around. *Bowling v. Off. of Open Recs*., 75 A.3d 453, 455 (Pa. 2013). Agencies had no deadlines for responding to records requests. *Id.* If the agency denied a request, a requester could only challenge that denial by filing a lawsuit. *Id.* Even after the General Assembly amended the law in 2002 to impose response deadlines on agencies, requesters still bore the burden of justifying access and still had to file a lawsuit to obtain impartial, third-party review of denials. *Id.* The RTKA thus encouraged litigation, which created substantial delays and burdens on requesters and thereby discouraged appeals and created significant barriers to public access and accountability. With the RTKL's 2008 enactment, the General Assembly sought to remedy this flawed system and significantly expand access to public records. *Id.* at 457. To accept the State Police's position in this case would be to undo those reforms, encouraging unnecessary, costly, and protracted litigation and delaying access to public records to the point that it is no longer meaningful.

This Court, too, has recognized that the RTKL requires agencies to present their pertinent evidence to the fact-finder at the administrative appeal stage to facilitate a timely adjudication process. Recently, in *McKelvey v. Pennsylvania*

Department of Health, this Court rejected an agency's attempt to submit evidence it did not raise before the OOR:

> [A]llowing the submission of additional evidence at the judicial review stage would undermine the presumption of openness attendant to the RTKL, as doing so would permit agencies to withhold records, without legal ground to do so, until reaching a court. Accordingly, in light of the foregoing considerations, the court denied the requests to supplement the record.

255 A.3d 385, 393 (Pa. 2021); *see also Sch. Dist. of Phila. v. Calefati*, No. 1285 C.D. 2020, 2022 WL 108455, at *6 n.11 (Pa. Commw. Ct. Jan. 12, 2022) (applying *McKelvey* and finding that respondent "cannot now rebut Requesters' evidence before the trial court with new allegations"). This Court has emphasized that submitting new evidence after the fact-finding stage impermissibly evades the RTKL's mandate for the timely, efficient resolution of cases:

> We agree that an agency must raise all its challenges before the fact-finder closes the record. This will allow efficient receipt of evidence from which facts may be found to resolve the challenges. In the ordinary course of RTKL proceedings, this will occur at the appeals officer stage . . . . In the rare, extraordinary case in which the initial reviewing court must act as a fact-finder, an agency must raise all its challenges before the close of evidence before the court.

Levy v. Senate of Pa., 94 A.3d 436, 441–42 (Pa. Commw. Ct. 2014) (internal citations omitted); *see also Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (rejecting request to introduce new evidence where "[t]o allow a remand under these circumstances amounts to giving [respondent] the proverbial second bite at the apple"); *Twp. of Worcester v. Off. of Open Recs.*, 129 A.3d 44,

59, 62 (Pa. Commw. Ct. 2016) ("[W]e express concern about the potential for an agency to bypass OOR as the fact-finder in the first instance and seek a more receptive audience in a Chapter 13 court."); *Pa. State Police v. Muller*, 124 A.3d 761, 766 (Pa. Commw. Ct. 2015) ("An agency is not entitled to ignore its burden to show an exemption from disclosure before OOR and rely on supplementation of the record in this Court to avoid the consequences of that conduct."); *Pa. Tpk. Comm'n v. Murphy*, 25 A.3d 1294, 1298 (Pa. Commw. Ct. 2011) (denying request to supplement record as "a proverbial second bite of the apple").[1]

Those same concerns apply in this case and militate in favor of reversing the decision below. The State Police had a full and fair opportunity to provide evidence to meet their burden of proof before the OOR. The State Police provided an affidavit describing their view on why each segment of the requested record was exempt. Upon careful consideration of that affidavit and *in camera* review of the

[1] The decisions cited by the Commonwealth Court in support of its remand for supplementation of the record are readily distinguishable. *See Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 377 (Pa. Commw. Ct. 2013) (remanding for supplementation in case involving high volume of requested records, and where, unlike here, the agency "did not describe the responsive records or connect the security threat to them"); *Delaware Cnty. v. Schaefer ex rel. Phila. Inquirer*, 45 A.3d 1149, 1158–59 (Pa. Commw. Ct. 2012) (remanding for supplementation in case where agency did not submit any evidence at OOR stage); *Commonwealth v. Rudberg*, 32 A.3d 877, 881 (Pa. Commw. Ct. 2011) (same); *Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1040 (Pa. Commw. Ct. 2011) (same, and identifying specific document missing from record that was necessary to adjudicate dispute).

requested record, the OOR determined that the State Police failed to justify their withholdings and ordered disclosure; the State Police appealed. This is not a "rare, extraordinary" case in which the Commonwealth Court reopened the record to admit additional evidence as a fact-finder. Nor did the State Police ask it to do so. Instead, the Commonwealth Court received the record from the OOR proceedings, including the requested public record and State Police's affidavit. The Commonwealth Court failed to examine the requested public record and was ordered to do so by this Court on remand. *ACLU of Pa. v. Pa. State Police*, 232 A.3d 654, 670–71 (Pa. 2020). The Commonwealth Court then found that the State Police's affidavit did not establish that disclosure would harm public safety or preparedness, but that the court could not render a decision based on the record before it and remanded to the OOR for supplementation of the record.

Neither the Commonwealth Court nor State Police identified any specific new evidence that might be available and probative. And neither has identified any intervening changes in law or fact that would justify submitting new evidence at this late stage in the proceedings. Instead, the Commonwealth Court simply declined to decide the case on the fully developed record before it. Under the circumstances, this Court should reverse the Commonwealth Court's decision giving the State Police an unsought and unwarranted "proverbial second bite at the

apple," and direct the Commonwealth Court to decide the case on the record before it. *Highmark Inc.*, 163 A.3d at 491.

Amici further call this Court's attention to one other particularly flawed and dangerous aspect of the Commonwealth Court's decision: its reasoning that remanding for additional evidence is especially warranted "'[w]hen security-related [exemptions] are asserted in the police or prison context, and responsive records implicate valid security concerns, and an agency's proof is insufficient to discern the contents of responsive records.'" *Pa. State Police v. ACLU of Pa.*, No. 1066 C.D. 2017, 2021 WL 5356532, at *5 (Pa. Commw. Ct. Nov. 17, 2021) (quoting *Carey*, 61 A.3d at 377). This sweeping pronouncement, if allowed to stand, would write into the RTKL a rule specific to the public safety exemption, 65 P.S. § 67.708(b)(2), encouraging agencies to invoke it and delay disclosure for years while litigation unfolds, despite having failed to meet their burden of proof. During those years-long lawsuits, law enforcement policies or records will become outdated, press and public attention will move on to other matters, and requesters will give up when they can no longer afford to spend time and money fighting for access.

If the General Assembly had wished to create public-safety-exemption specific rules, it could have done so; instead, it applied the same evidentiary burdens, procedures, and strict timelines across the board. 65 P.S. § 67.708(a)(1),

(b)(2). Under the RTKL's plain text, any agency, invoking any exemption, must sustain its burden of proof before the fact-finder, or else promptly disclose the requested records. To find otherwise rewrites the RTKL and undermines its pro-disclosure mandate, in violation of the rule that a court interpreting a statute must "ascertain and effectuate the intention of the General Assembly" by "giv[ing] effect to all its provisions." 1 Pa. C.S. § 1921(a); *see also* 1 Pa. C.S. § 1922(2) (establishing presumption "[t]hat the General Assembly intends the entire statute to be effective and certain").

Moreover, the swift and efficient determination of public records requests is ***especially*** important in the law enforcement context, where public records are essential to facilitate public understanding and oversight of police conduct, promote confidence in the criminal justice system, and spur changes in law and policy when necessary. Police do not perform their duties in the community under a cloak of absolute secrecy, and the RTKL must be construed in a manner that recognizes the critical and statutorily guaranteed role that timely public access plays in the proper function of law enforcement agencies and the criminal justice system as a whole.

Amici therefore urge this Court to reverse the decision below and remand for the Commonwealth Court to decide the case based on the State Police affidavit and an *in camera* review of the requested record.

II. Press and public access to law enforcement records, including records on social media surveillance, is necessary for government accountability.

The news media will particularly feel the harmful effects of the Commonwealth Court's decision below, which will interfere with the press' ability to timely access and report on public records held by law enforcement and other agencies. As this Court has held, the purpose of the RTKL is to promote "access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions." *Levy*, 65 A.3d at 381 (citation omitted). And "in a society in which each individual has but limited time and resources," such scrutiny largely takes place through the press, which the public relies on to gather and disseminate facts about government operations. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975). Press access must be timely to be meaningful, though, or else "the value of the right of access would be seriously undermined," especially in the digital era and its 24-hour news cycle. *United States v. Wecht*, 537 F.3d 222, 229 (3d Cir. 2008). Specifically, journalists rely on timely access to records obtained from law enforcement agencies via public records requests, like the record requested by the ACLU here, to inform their communities about law enforcement activity and hold police accountable.

For example, Spotlight PA and The Philadelphia Inquirer used records obtained under the RTKL to report on the fact that the State Police had ended their practice of tracking racial data during traffic stops, making it impossible to determine if racial profiling was occurring. *See* Angela Couloumbis & Daniel Simmons-Ritchie, *State Police Race Data*, Spotlight PA (Jan. 2021), https://perma.cc/9679-MJNB. As a direct result of this coverage, the State Police resumed tracking racial data during traffic stops, remedying their missteps and creating the potential for public oversight related to racial profiling. *Id.*

As to police social media surveillance specifically, the ACLU of Massachusetts learned via public records request that the Boston Police Department used software called Geofeedia "to track online racial justice activism in the wake of the events in Ferguson, MO and to conduct broad surveillance of ordinary Muslims in Boston." Nasser Eledroos & Kade Crockford, *Social Media Monitoring in Boston: Free Speech in the Crosshairs*, PrivacySOS (2018), https://perma.cc/TKB6-CG2Z. Although the department had already stopped using Geofeedia—a decision made after a different public records request revealed its flaws—further reporting led city councilors to revisit Boston's procedures for adopting new surveillance tools. *See* Iqra Asghar, *Boston Police Used Social Media Surveillance for Years Without Informing City Council*, ACLU (Feb. 8,

2018), https://perma.cc/J44F-UUG2.[2] Similarly, documents a journalist obtained from the Philadelphia Police Department via RTKL request revealed that it had also purchased Geofeedia. Aaron Cantú, *#Followed: How Police Across the Country Are Employing Social Media Surveillance*, MuckRock (May 18, 2016), https://perma.cc/E24F-9ASL.

These records requests are among many nationwide that have revealed alarming trends in police surveillance of social media, including social media of journalists, leading to public outcry and policy changes. *See, e.g.*, *id.*; Rachel Levinson-Waldman & Mary Pat Dwyer, *We're Suing DC Police for Records on Social Media Surveillance*, Brennan Ctr. (Mar. 1, 2022), https://perma.cc/GHY8-THJ6; Shane Harris, *DHS Compiled 'Intelligence Reports' on Journalists Who Published Leaked Documents*, Wash. Post (July 30, 2020), https://perma.cc/9CJY-3G7F; Sam Biddle, *Police Surveilled George Floyd Protests with Help from Twitter-Affiliated Startup Dataminr*, Intercept (July 9, 2020), https://perma.cc/2BUC-BT2X (noting that the surveillance tool at issue was used to monitor protests in York, Pennsylvania).

[2] A public records request filed by WBUR further revealed that the Boston Police Department purchased controversial cell phone tracking technology with hidden funds. Shannon Dooling & Christine Willmsen, *Boston Police Bought Spy Tech With a Pot of Money Hidden from the Public*, WBUR (Dec. 17, 2021), https://perma.cc/MN87-NMA8.

The aforementioned reporting illustrates the importance of public access to police records—including those pertaining to social media surveillance—and underscores that such records must be timely provided under the RTKL. Members of the media, and the communities they serve, need access to this kind of information to learn more about law enforcement so that issues and trends can be discovered and understood, and policy changes made if needed. If law enforcement agencies are permitted to ignore their evidentiary burden and delay access under the RTKL for years, as the Commonwealth Court's decision would allow, the public will remain in the dark about problems that could have been promptly addressed.

CONCLUSION

For all the reasons stated above, Amici urge the Court to reverse the decision of the Commonwealth Court.

Dated: June 9, 2022

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

I hereby certify that the above brief complies with the word count limits of Pa. R.A.P. 531(b)(1)(i) and 531(b)(3). Based on the word count feature of the word processing system used to prepare this brief, this document contains under 7,000 words, exclusive of the supplementary matter listed in Pa. R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby 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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I hereby certify that on June 9, 2022, I electronically filed this brief with the Clerk of Court for the Supreme Court of Pennsylvania by using the PACfile electronic filing system. Notice was provided to the following via PACfile:

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