

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 359 & 360 CD 2021

LIZ EVANS SCOLFORO AND THE YORK DISPATCH

Appellants,

v.

THE COUNTY OF YORK,

Appellee,

On Appeal from the January 25, 2021 Order of the York County Court of Common Pleas Denying Appellants' Petition for Review of a decision of the Office of Open Records, and the March 17, 2021 Order of the Court of Common Pleas of York County denying an Appeal under Pa. R.J.A Rule 509(c)(5)

**BRIEF OF AMICUS CURIAE THE PENNSYLVANIA NEWSMEDIA
ASSOCIATION IN SUPPORT OF APPELLANTS LIZ EVANS SCOLFORO
AND THE YORK DISPATCH**

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INTEREST OF THE AMICUS 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 three hundred (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 constitutional, common law and statutory rights of access in Pennsylvania. The media’s ability to access public records is crucial to providing the oversight and accountability that is a foundational element of our democratic society.

The present case raises important issues regarding public access to financial records under the Right to Know Law and corresponding Rule of Judicial Administration Number 509. The lower court’s decision in this case is contrary to both the letter and intent of both the RTKL and Rule 509, and if affirmed, would result in significant, negative consequences for the public’s ability to understand and scrutinize staff-related expenditures by elected county row officers.

The PNA seeks to participate pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure, both to emphasize the important public access issues raised

by this case, and to stress the legal and policy considerations that mandate an interpretation of the law in favor of public access.

No party, person or entity other than the PNA financed or authored this brief.

QUESTIONS INVOLVED

- I. Was the lower court incorrect in affirming the denial of access to length of service records for Prothonotary employees.

Suggested answer: in the affirmative.

SUMMARY OF ARGUMENT

The PNA adopts and incorporates the Statement of the Case of Appellants as if set forth fully herein. Moreover, PNA agrees with and supports the legal and public policy arguments set forth in Appellants' principal brief. PNA writes separately to bring the Court's attention to additional analysis not raised in the Appellants' brief which support their position and public access to the records requested in this case.

The county judicial records manager's decision to redact length of service information from salary records and the trial court's affirmance is not supported by law or public policy, and affirmation would confer a category of confidentiality where is none justified or permitted by law. Length of service records are expressly

public pursuant to the Right to Know Law, and, as set forth by Appellants, as a record “of the county,” this information is clearly public.

To the extent this Court determines Prothonotary salary records are record of a “judicial agency” subject to access under Rule 509 of the Rules of Judicial Administration, length of service information is public under Rule 509’s definition of “financial record” and must be provided.

The RTKL and Rule 509 serve the same purpose and use the same key language, and as such, they must be applied in a similar manner so that all branches of government are subject to the same public access requirements for similar records. The length of service records clearly arise from and are connected to the expenditure of public funds, and as such, they are “financial records” as that term has been applied for decades in the context of Pennsylvania transparency law. Moreover, length of service information is a “financial record” because it provides necessary context for salary expenditures that in turn, provide insight into and accountability for those expenditures.

The public depends on the RTKL and Rule 509 to shine a light on financial records related to public employees, and as such, Rule 509 must be applied in a manner that is consistent with both the RTKL and the Supreme Court’s stated policy of transparency.

ARGUMENT

I. Length of service records are “financial records” subject to public access.

As Appellants have aptly argued, Prothonotary salary records, including length of service records, are records “of the county” and as such, they are expressly public as “financial records” pursuant to Section 708(b) of law. 65 P.S. §§ 67.102; § 67.708(b)(6)(ii).

To the extent this Court finds that the salary records are records of a “judicial agency,” length of service records are still “financial records” and must be provided in the context of a request submitted under PA Rule of Judicial Administration No. 509 (Rule 509). PA.R.J.A. No. 509.

A. The Right to Know Law and Rule 509 require public access to financial records, including length of service records for public employees.

The Right to Know Law (“RTKL”) was enacted in 2008 as remedial legislation designed to increase public access and government transparency across all branches of Pennsylvania government. *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Cmwlth. 2010), *aff’d* 621 Pa. 133, 75 A.3d 453 (2013) (holding the RTKL is remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions.)

The legislative and judicial branches were not covered by the prior, more restrictive Right to Know Act, and as such, the public had no statutory right to access

public records in their possession. 65 P.S. §§ 66.1, *et seq.* (repealed). To address this inequity in public access rights, the remedial Right to Know Law expanded access across the board by adding the legislative and judicial branches under its broad umbrella of required transparency. See 65 P.S. §§ 67.305(b). The law also recognizes the inherent differences between the branches by mandating different levels of access.¹

In addressing criticism that the RTKL did not go far enough, the prime sponsor of Senate Bill 1, which became the Right to Know Law, noted in legislative testimony:

“First, the legislature and judiciary are created differently than the executive agencies and local agencies. Some think that the legislature and judiciary should be treated the same. I do not agree. Each branch of government has a unique set of constitutional responsibilities, and the structure of Senate Bill No. 1 respects those differences.”

2007 Legislative Journal – Senate, Comments of Senator Pileggi, November 27, page 1406.

Recognizing the inherent and constitutional differences between the judicial and executive branches, the RTKL mandates different levels of access for judicial agencies, but the law makes clear that the public has a statutory right to access “financial records”² of the judicial branch. 65 P.S. § 67.304.

¹ The Right to Know Law’s presumption of access applies generally to “records” in possession of local and commonwealth agencies, to “legislative records” in possession of legislative agencies and to “financial records” in possession of judicial agencies. 65 P.S. § 67.305.

² Section 102 of the Right-to-Know Law defines a "financial record" as any of the following:

The Right to Know Law also makes clear that if the court system chooses to operate under its own framework for access, any such framework must comply with the minimum public access requirements of the RTKL, stating:

“(a) Requirement.--A judicial agency shall provide financial records in accordance with this act or any rule or order of court *providing equal or greater access to the records*.

65 P.S. § 67.304(a) (emphasis added).

In June 2008, in accordance with Section 304, the Supreme Court adopted Pennsylvania Rule of Judicial Administration Number 509, which sets out a framework for public access to financial records of the Unified Judicial System. PA.R.J.A No. 509.

The key determination to be made here is whether length of service records are “financial records” as that term is defined in the RTKL and under the substantially similar language of Rule 509.

1. Access is required under the RTKL.

-
- (1) Any account, voucher or contract dealing with:
 - (i) the receipt or disbursement of funds by an agency; or
 - (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.
 - (2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.
 - (3) A financial audit report. The term does not include work papers underlying an audit.

65 P.S. §67.102.

There is no question that salary records, including length of service records of public employees, are public pursuant to the RTKL when in possession of a local or commonwealth agency. 65 P.S. §§ 67.102; 708(b)(6). Section 102 of the Right-to-Know Law defines a "financial record" as any of the following:

- “(1) Any account, voucher or contract dealing with:
 - (i) the receipt or disbursement of funds by an agency; or
 - (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.
- (2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.
- (3) A financial audit report. The term does not include work papers underlying an audit.

65 P.S. §67.102.

In interpreting and applying this definition, this Court is bound by decisions from our Supreme Court, which has long recognized that the definition of “financial record” reaches records that are not financial on their face. For example, the Supreme Court held under the prior, more restrictive Right to Know Act (RTKA) that “the accounts/vouchers/contracts category of public records" dealing with the receipt or disbursement of public funds was meant to encompass "some range of records beyond those which on their face constitute actual accounts, vouchers or contracts.” *N. Hills News Record v. Town of McCandless*, 555 Pa. 51, 722 A.2d 1037, 1039 (1999). In reaching that conclusion, the Supreme Court noted that “to constitute a public record, the material at issue must bear a sufficient connection to fiscally related accounts, vouchers or contracts.” *Id.*

The Supreme Court recently affirmed this logic in the context of the current RTKL and found the definition of “financial record” reaches records that are not financial on their face. City of Harrisburg v. Prince, 219 A.3d 602, 613 (Pa. 2019) (interpreting the account, voucher or contract category broadly under the RTKL to effectuate expanded access to information about the activities of government.) Length of service records bear a “sufficient connection to” salary records because they serve as the factual basis for and provide context to salary payments made to public employees.

Furthermore, our Supreme Court has held that public employee service histories are public financial records as “accounts, vouchers or contracts” dealing with the receipt or disbursement of public funds. In Pa. State Univ. v. State Emples. Ret. Bd. (Penn State), the Supreme Court held that service histories (and salaries) of various Penn State employees constituted public records of the State Employees' Retirement System and were therefore subject to disclosure under the RTKL's predecessor statute. Pa. State Univ. v. State Emples. Ret. Bd., 594 Pa. 244, 935 A.2d 530 (2007) (holding public employee service histories fall within the definition of financial records because they bear some close connection to accounts, vouchers and contracts dealing with the receipt or disbursement of public funds). The Supreme Court held that service histories are public financial records because they provided the “factual bases for, and details of, guaranteed disbursements of Commonwealth

funds.” *Id.* at 538. Like the length of service records in this case, service histories illustrate and provide context for payments made to public employees; length of service and service histories are functionally equivalent financial records. Because service histories were found to be public as a “financial record” by the Supreme Court under the prior, more restrictive RTKA, they must also be public under nearly identical statutory language in the current, remedial RTKL.

Moreover, in recognition of the long history of public access arising from similar statutory language and corresponding litigation, the legislature settled any doubt as to the public nature of length of service as a financial record by enacting section 708(b)(6), which expressly requires agencies to provide public access to:

“...name, position, salary, actual compensation or other payments or expenses, employment contract, employment-related contract or agreement and *length of service* of a public official or an agency employee.”

65 Pa.C.S. § 67.708(b)(6)(ii) (emphasis added).

The law requires public access because this information arises from, is connected to, and provides context for the expenditure of public funds in the form of publicly funded salaries. The definition of “financial record” itself sets the minimum bar for public access, and the specific exemptions go even further by preventing the exemption dealing with “personal information” from applying to this category of public financial record. 65 P.S. § 67.708(b)(6).

In the RTKL context, the definition of “financial record” has repeatedly been held to reach more than records that are facially financial, including public employee service histories. See *Pa. State Univ. v. State Emples. Ret. Bd.*, *supra*; see also *City of Harrisburg v. Prince*, 219 A.3d 602 (Pa. 2019). The PA Supreme Court in *Prince* carefully reviewed numerous cases decided under the prior, more restrictive RTKA as well as the language of the current, remedial RTKL and found that the definition of financial record must reach records that “bear a sufficient connection to” facially financial records in light of the purpose of the law. *Id.* at 615.

2. Access is required under Rule 509.

Like the service histories in *Penn State* and the expanded access provisions that attach to financial records in the RTKL³, length of service records are public under Rule 509 because the former RTKA, the current RTKL and Rule 509 use the same key terminology in defining “financial record.” The definition of “public record” under the former Right to Know Act mandated public access to “accounts, vouchers or contracts dealing with the receipt or disbursement of public funds.” 65 P.S. § 66.1, *et seq.* (repealed). The current definition of “financial record” in the RTKL includes, in pertinent part, “[A]ny account, voucher or contract dealing with ...the receipt or disbursement of funds by an agency..” 65 P.S. § 67.102. Likewise,

³³ Section 708(c) of the RTKL provides expanded access to financial records by making most of the exemptions in section 708(b) inapplicable to financial records. 65 P.S. § 67.708(c).

Rule 509 defines “financial record” as “any account, contract, invoice or equivalent dealing with: 1) the receipt or disbursement of funds appropriated to the system.”

PA.R.J.A. No. 509.

This terminology is key because it is well-settled that if the legislature uses the same language used in a prior statute which has been construed by the courts, there is a presumption that the repeated language must be interpreted in the same manner as it was under the earlier statute. 1 Pa.C.S.A. § 1922(4); *see also Pa. State Educ. Ass'n v. Commonwealth*, 637 Pa. 337, 148 A.3d 142 (2016). The “account, voucher contract” language in the former RTKA is nearly identical to the current RTKL’s definition of “financial record,” and as such, it must be construed to have the same meaning and provide the same access. Likewise, the terminology used in Rule 509’s definition of “financial record” is substantially similar and uses the same key terminology.

As the Unified Judicial System’s equivalent public access framework under Section 304 of the RTKL, Rule 509’s definition of “financial record” must be applied in the same manner as the definition in the RTKL. 65 P.S. § 67.304; *see also* PA.R.J.A. No. 509. Our Supreme Court has held the definition of “financial record” includes service histories in the context of the RTKL, and the RTKL expressly requires public access to this information. Accordingly, Rule 509 must also provide

access because the courts are required to provide “equal or greater access” to that enabled under the Right to Know Law. 65 P.S. § 67.304.

3. The burden of proof for denial has not been met.

Finally, there is no evidence to support a denial of access to length of service records. As explained more fully above, the records requested are clearly “financial records” and as such, the court records manager bears the burden of showing that an exemption applies. 65 P.S. § 67.708; *see also Grine v. Cty. of Ctr.*, 138 A.3d 88, 91 (Pa. Cmwlth. 2016) (holding once it is established that the record meets the definition for financial record, the presumption of access applies and the judicial agency bears the burden of proof to show an exemption applies).

The record contains no evidence showing that length of service records are exempt from public access. On the contrary, the law is clear that “financial records” under both the RTKL and Rule 509 must include length of service records because they arise from, are connected to and provide necessary context for publicly funded salaries.

Because length of service records are public financial records under the RTKL and Rule 509, and the burden of proof has not been overcome, the denial of access in this case must be reversed.

B. Public policy supports public access to the requested records.

Lastly, length of service records must be public as “financial records” under Rule 509 because, importantly, Rule 509 serves the same purpose as the RTKL: public access to and accountability for the expenditure of public funds. When the courts interpret remedial legislation, they must do so liberally to effect its object and promote justice. See, *e.g.*, 1 Pa.C.S. § 1928(c); *see also Levy v. Senate of Pa.*, 619 Pa. 586, 617, 65 A.3d 361, 380 (2013). The RTKL is remedial legislation, and as such, its provisions must be applied in manner that recognizes and promotes its intent. *Bowling, supra*. Additionally, statutes and parts of statutes that relate to the same persons or things must be read *in pari materia*. 1 Pa.C.S. § 1932; *Levy* at 38. These sound interpretation requirements should also provide guidance when the courts are called upon to interpret their own administrative policies that serve the same purpose as statutory law. Justice and equity recommend the courts use these rules of construction to ensure equal transparency among the branches of government since all three branches are publicly funded. The public should be able to access the same financial records regardless of whether they make a request under a statute or an administrative rule.

Further, public employee salary records must include length of service information because it provides necessary context. This is equally true for all public employees, regardless of whether this Court finds they are employees of a “judicial agency” or “local agency.” The law has long required access to facially financial

records *as well as* those that bear a sufficient connection to them because the legislature and the courts recognize that context is critical to the public's ability to understand and scrutinize the expenditure of public funds. A salary record viewed in a vacuum can be difficult to understand and provides few means by which to gauge the appropriateness of the expenditure or its compliance with contractual or legal requirements. The salary expenditure must be accompanied by records that provide context, such as the length of service information in this case, to engender the accountability intended and required by law.

For example, length of service records illustrate whether the highest salaries are being paid to the longest serving employees who perform similar jobs, and it could highlight any variants to that general rule that might deserve more attention. Length of service records would also provide information necessary to determine whether the court system (or county) adheres to employee pay scales and/or the terms of employment contracts that contain salary terms based on seniority or service time. Moreover, length of service is key to pension and retirement salary calculation made under various public pension laws and employment contracts and the corresponding payments, which are public financial records. As the Supreme Court found in the *Penn State* case, service histories were necessary to understanding pension calculation and payments made to public employees. *Pa. State Univ. v. State Emples. Ret. Bd.*, *supra*. Length of service records would also show if there is high

turnover at a public agency, which could illustrate numerous issues that should be addressed from a policy perspective like management style, hostile work environment, inadequate training, lack of advancement opportunity or a plethora of other issues that impact staff retention. These examples ring true for all public employee salary records and length of service, regardless of their status as an employee of a “judicial agency,” “local agency” or “legislative agency.”

Finally, there’s no legitimate public policy reason that supports withholding length of service records for public employees, regardless of which branch they serve under. The General Assembly recognized judicial precedent and common sense when it guaranteed public access to financial records, including length of service information, under the RTKL because a salary record on its own does not provide the necessary information for the public to understand the expenditure or to hold public officials accountable. The salary record, without further context, leaves the public to wonder whether expenditures are necessary, appropriate and legal. Amounts alone simply do not paint a full or accurate picture of salary expenditures. When dealing with the heightened public access rules that apply to financial records and the remedial intent and purpose of the law, records that provide context are critical and necessary under each branch’s definition of “financial record.”

In the RTKL context, the term “financial record” is broad and requires access to length of service records, and as such, the term must be similarly applied in the

context of Rule 509 because both the RTKL and Rule 509 contain the same language and serve the same purpose: public accountability for the disbursement of public funds. The court records manager’s decision to redact length of service information from the salary records in this case is not supported by evidence and is inconsistent with the law and public policy.

CONCLUSION

For all the foregoing reasons, Amicus Curiae respectfully requests this Court find that salary records for Prothonotary employees are records “of the county” and accordingly public under the RTKL, or alternatively, find that public employee length of service records are “financial records” within the meaning of Rule 509 and required to be provided in this case and to the public upon request.

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CERTIFICATES 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.

I hereby further certify that the content of the foregoing amicus brief falls within the word limits enumerated in Pa.R.A.P. 531(b)(3), with approximately 3900 words.

Submitted by: Melissa Bevan Melewsky

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