IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

SAMANTHA MELAMED

and

THE PHILADELPHIA INQUIRER

Appellants,

v.

PHILADELPHIA POLICE DEPARTMENT,

Appellee.

December 2020 Term
Case No. 01744

Appeal from the Final Determination of the Office of Open Records dated Dec. 4, 2020 at Docket No. AP 2020-1213

BRIEF OF APPELLANTS

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MATTER BEFORE THE COURT

The matter before the Court is an appeal from a final determination of the Office of Open Records. Appellants Samantha Melamed and The Philadelphia Inquirer request that this Court overturn the decision of the Office of Open Records permitting withholding of public records and order the Philadelphia Police Department to disclose records required to be released under Pennsylvania's Right to Know Law.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns a request submitted by The Philadelphia Inquirer (the "Inquirer") and journalist Samantha Melamed (collectively, "Appellants") to the Philadelphia Police Department (the "Department" or "Appellee") pursuant to the Pennsylvania Right to Know Law ("RTKL" or the "Law"), 65 P.S. §§ 67.101 *et seq*., for records concerning the Department's dismissal of police officers from the force in 2020. Appellants submitted their RTKL request in July 2020 against a backdrop of renewed calls for increased accountability of public servants—including law enforcement officers—across the country and in Pennsylvania;[1] their request, and the instant case, is motivated by the central tenet that the Right to Know Law "is designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions." *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142, 155 (Pa. 2016).

[1] *See, e.g.*, Vinny Vella et al., *Protests, not parades, mark Philly's July Fourth*, The Philadelphia Inquirer (July 4, 2020), https://perma.cc/UF3Q-S2SF (describing a series of protests taking place in Philadelphia on Independence Day in 2020, where individuals "raised their . . . fists for nine minutes, symbolizing the amount of time that a Minneapolis police officer kneeled on the neck of George Floyd, killing him in May," called for "reform of the [Philadelphia] Police Department," and raised awareness of not only "physical violence" against persons of color but of "discrimination in housing [and] at the workplace" as well).

The request at issue, seeking records reflecting the name, rank and date of dismissal of police personnel dismissed by the Department in 2020, neither places an undue burden on the Department nor implicates any valid claim of exemption under the Right to Know Law. In fact, the request falls squarely within the RTKL's mandate of disclosure for records embodying the "final action of an agency that results in demotion or discharge," 65 P.S. § 67.708(b)(7)(viii). Yet, nearly one year after Appellants submitted their request, the Department has still not fulfilled its obligations under the Law. Instead, the Department has withheld all responsive records, arguing that records reflecting officers it dismissed in 2020 are not final actions of discharge because the officers chose to arbitrate their dismissals. That misreading of the Law, accompanied by the Department's unjustified withholdings, has obstructed Appellants' access to crucial government records necessary for their reporting.

As detailed herein, Section 67.708(b)(7)(viii) expressly states that the Right to Know Law's exemptions to disclosure do *not* apply to records reflecting the "final action of an agency that results in demotion or discharge," 65 P.S. § 67.708(b)(7)(viii)—precisely the information sought by the Inquirer and Ms. Melamed. As such, the question presented in this case—whether Appellants are entitled to the records they requested under the RTKL—is a straightforward one that should be answered affirmatively in view of both the plain text of the RTKL and its purpose "to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012).

For the reasons set forth below, Appellants respectfully request that the Court reverse the determination of the Office of Open Records and order the requested records be disclosed.

STATEMENT OF THE QUESTION

Do records reflecting personnel dismissed from the Philadelphia Police Department in 2020 constitute the "final action of an agency that results in demotion or discharge" such that their disclosure is mandated by the Right to Know Law? ***Yes.***

FACTS, BACKGROUND, AND PROCEDURAL HISTORY

Samantha Melamed has been reporting on the City of Philadelphia since she began her employment with The Philadelphia Inquirer in 2013; her reporting focuses on police-community relations, the legal system, and the Philadelphia Police Department. The Philadelphia Inquirer is a public-benefit corporation that publishes a news site (Inquirer.com) and two daily newspapers, including The Philadelphia Inquirer, that serve the Philadelphia metropolitan area. Founded in 1829, the Inquirer is the largest newspaper in the United States organized under nonprofit ownership. It has won twenty Pulitzer Prizes to date.

Appellants rely on government records in order to gather news and shed light on the operations of local government. For example, Appellants recently reported on the Philadelphia Police Department's suggestion that officers conduct increased vehicle stops and issue additional code-violation notices despite its ongoing negotiations with the Philadelphia City Council on proposed legislation that would ban police stops for vehicle code violations—a practice that disproportionately results in the stopping and frisking of Black Philadelphians. Samantha Melamed, *A leaked memo suggests Philly police use vehicle stops to get around stop-and-frisk reform*, The Philadelphia Inquirer (Mar. 2, 2021), https://perma.cc/J9DT-KCXW. In the course of their reporting, Appellants regularly file RTKL requests to obtain information about law enforcement in Philadelphia and to inform Pennsylvanians about police-community relations, the criminal justice system, and related topics of pressing concern to individuals in Pennsylvania and

beyond. *See, e.g.*, Samantha Melamed, *A man died after assault in Philly jail, where violence has surged under pandemic lockdown*, The Philadelphia Inquirer (Jan. 20, 2021), https://perma.cc/5JBA-TA7D (reporting on prison conditions during the COVID-19 pandemic and discussing records obtained through the RTKL regarding death of Philadelphia inmate).

In July 2020, Appellants submitted a RTKL request to the Department seeking "[a]ny record that reflects the police personnel dismissed in 2020, including name and rank and effective date of dismissal" (hereinafter the "Request"). BL015.[2] When the Department failed to provide a determination within the RTKL's statutory time limit, 65 P.S. § 67.901, on July 23, 2020, Appellants filed with the Office of Open Records ("OOR") an appeal challenging the agency's constructive denial of the Request, BL011–13. The Parties then advanced their respective positions to the OOR on the availability of the requested records under the RTKL. *See* BL014, BL026–31. In December 2020, the OOR issued its determination, deciding that the Department is not required to produce records related to the termination of personnel who are arbitrating their dismissals.[3] BL058. To date, Appellants have received no records responsive to the Request.

Appellants filed the notice of appeal giving rise to this case on December 29, 2020.

LEGAL STANDARDS

In 2009, the Pennsylvania General Assembly enacted the Right to Know Law, replacing its predecessor, the Right to Know Act, "with an alternative paradigm that more strongly tilted in favor of maximizing transparency." *ACLU of Pa. v. Pa. State Police*, 232 A.3d 654, 656 (Pa.

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[2] All references to the record can be found in the Reproduction of Record filed by the Office of Judicial Records on April 5, 2021.

[3] Specifically, the OOR determined that "while the Department is not required to produce records related to the termination of personnel who are still involved in the grievance process, it must produce records of personnel whose dismissal became final during the timeframe identified in the Request, regardless of when the dismissal was initiated." BL058.

2020). "Under the [RTKL], agency records are *presumed* to be public records, accessible for inspection and copying by anyone requesting them, and must be made available to a requester unless they fall within specific, enumerated exceptions[.]" *Bowling v. Office of Open Records*, 75 A.3d 453, 457 (Pa. 2013) (emphasis added). The RTKL "is designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions." *Office of the Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015) (en banc) (quoting *Pa. State Police v. McGill*, 83 A.3d 476, 479 (Pa. Commw. Ct. 2014) (en banc)).

As a local agency, the Philadelphia Police Department is subject to the disclosure requirements of the RTKL. *See Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173, 1179 (Pa. Commw. Ct. 2017) ("As a local agency, the [Department] has a statutory duty to 'provide public records in accordance with [the RTKL].'" (quoting 65 P.S. § 67.302)). Thus, records in the Department's possession are presumed to be public records, unless they are (1) exempt from disclosure under section 708 of the RTKL; (2) protected by a privilege; or (3) exempt from disclosure under federal or state law or judicial decree. 65 P.S. § 67.305(a).

This Court may function as a fact finder and exercise plenary review, applying a *de novo* standard of review to the findings of the Office of Open Records. *Bowling*, 75 A.3d at 459. The RTKL requires the courts of common pleas to render decisions that "contain findings of fact and conclusions of law based upon the evidence as a whole." *Bowling*, 75 A.3d at 458 (quoting 65 P.S. § 67.1301(a)). Critically, "courts reviewing [Office of Open Records] decisions[] must construe" exceptions to disclosure "strictly, lest they subvert the RTKL's purpose." *ACLU of Pa.*, 232 A.3d at 656–57 (citing *Pa. State Police v. Grove*, 161 A.3d 877 (Pa. 2017)).

ARGUMENT

At issue in this case is whether the Philadelphia Police Department properly invoked 65 P.S. § 67.708(b)(7)(viii) to deny Appellants' request for records reflecting "police personnel dismissed in 2020, including name and rank and effective date of dismissal," *see* BL015—records expressly available under the RTKL. Exemptions to the RTKL's mandate of disclosure are contained in Section 708 of the Law, *see* 65 P.S. § 67.708. Relevant here, Section 67.708(b)(7)(viii) of the RTKL exempts:

> (7) The following records relating to an agency employee . . .
>
> (viii) Information regarding discipline, demotion or discharge contained in a personnel file. *This subparagraph shall not apply to the final action of an agency that results in demotion or discharge*.

65 P.S. § 67.708(b)(7)(viii) (emphasis added).

That Appellants sought records limited solely to "final action[s] of" the Philadelphia Police Department resulting in the discharge of its officers should mark the end of the inquiry; the requested records are required to be disclosed. This position is further bolstered by the Law's guiding principle that the exemptions of the RTKL must be narrowly construed. *Grove*, 161 A.3d at 892 ("Consistent with the RTKL's goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed." (quoting *Davis*, 122 A.3d at 1191)). In unlawfully withholding responsive records, the Department distorts the plain language of Section 67.708(b)(7)(viii), appending to the statute's text additional criteria neither found in the Right to Know Law nor supported by public policy—both of which Appellants address in turn.

I. The plain language of 65 P.S. § 67.708(b)(7)(viii) requires disclosure of the requested records.

The object of statutory construction is to ascertain and effectuate legislative intent, 1 Pa. C.S. § 1921(a), and a statute's "plain language generally provides the best indication of legislative intent." *See Commonwealth v. McClintic*, 909 A.2d 1241, 1245 (Pa. 2006); *see also Milner v. Dep't of Navy*, 562 U.S. 562 (2011) (explaining that statutory interpretation begins with the language employed by the legislature and the assumption that the ordinary meaning of that language accurately expresses legislative purpose). Thus, statutory construction begins with an examination of the text, itself. *Se. Pa. Transp. Auth. v. Holmes*, 835 A.2d 851, 856 (Pa. Commw. Ct. 2003). In reading a statute's plain language, "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage." 1 Pa. C.S. § 1903(a). Courts "*may not* insert a word the legislature failed to supply into a statute." *Girgis v. Bd. of Physical Therapy*, 859 A.2d 852, 854 (Pa. Commw. Ct. 2004) (emphasis added).

The Right to Know Law exempts from disclosure "[i]nformation regarding discipline, demotion or discharge contained in a personnel file," but that exemption "*shall not* apply to the *final action of an agency* that results in demotion or discharge." 65 P.S. § 67.708(b)(7)(viii) (emphasis added). The Request—seeking the names, ranks, and dates of dismissal for police personnel terminated in 2020, *see* BL015—thus falls squarely within the *exception* to the exemption set forth in Section 67.708(b)(7)(viii). Yet, Appellee contends that any records the Department maintains of officers dismissed in 2020 "are not final actions of discharge because no officers that were dismissed by [the Department] in 2020 have completed the arbitration process. Thus, none of the pending 2020 PPD officer dismissals constitute final actions of demotion or discharge." BL028. In so contending, Appellee refuses to read the text of the statute as written. Because Section 67.708(b)(7)(viii) requires disclosure of records encompassing "final action[s] of

an agency that result[] in . . . discharge," it is of no consequence what post-discharge steps—including through arbitration—an officer may take in an effort to be reinstated after the agency's final action resulting in dismissal. *Cf. Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (emphatically stating that the Supreme Court of the United States "has repeatedly refused to alter [the federal Freedom of Information Act's] plain terms"). Appellee cannot be permitted to graft on to the RTKL additional, contrary language that obstructs the public's right to know. The only inquiry, based on the plain text of the Law, is whether the requested records are "the final action of an agency that results in . . . discharge," in which case they must be disclosed. 65 P.S. § 67.708(b)(7)(viii) (emphasis added).

A. The requested records comprise "final actions."

As to the scope of Section 67.708(b)(7)(viii)—and, in particular, the meaning of "final"—*Highlands School District v. Rittmeyer*, 243 A.3d 755 (Pa. Commw. Ct. 2020) ("*Highlands*") is instructive. In *Highlands*, the requesters sought records reflecting the names of school district employees who had been placed on unpaid leave "and a statement of the charges that resulted in the disciplinary action." *Id.* at 757. Crucially, "the records relat[ed] to the employees after the school board issued a pre-termination resolution authorizing disciplinary action . . . *but before* the board took any 'final action' with respect to the employees' discipline." *Id*. at 758 (emphasis added). Because the employees had not been subject to any *final agency action* resulting in their demotion or discharge, "but rather, were placed on unpaid leave while the disciplinary process was pending,"[4] *id.* at 760, the requested records were held to be exempt from disclosure under the RTKL, *id.* at 764.

[4] It is worth noting that the "disciplinary process" in *Highlands* was a government-facilitated process, *see Highlands*, 243 A.3d at 758 (discussing the process for dismissing school district employees, which involves furnishing the employee with a written statement of the charges upon

Here, the opposite is true. Appellants seek neither preliminary nor interim records regarding a pending disciplinary process; they seek records pertaining to police officers the Department dismissed—a final agency action. *See* BL015. Such records are required to be disclosed under the plain text of the Law. *See* 65 P.S. § 67.708(b)(7)(viii).

Silver v. Borough of Wilkinsburg, 58 A.3d 125 (Pa. Commw. Ct. 2012) is also instructive. At issue in *Silver* was an employment termination letter, produced to the Pittsburgh Post-Gazette, wherein the employment termination language itself—and that the employee had been given notice of said termination—was disclosed; redacted from the letter was information about prior disciplinary action. *Id*. at 126. The court easily found that "the agency's 'final action' was the employment termination," *id*. at 128, and because "discipline is not included in the exception" to Section 67.708(b)(7)(viii)—only demotion and discharge are—information about prior discipline could be redacted from the record, *id*. at 129. Again, here, Appellants seek only records that reflect "police personnel dismissed in 2020, including name and rank and effective date of dismissal." BL015. The Request does not seek information about prior discipline, nor any antecedent action beyond the Department's dismissal of the officers in 2020. The clear scope of the Request renders the Department's obligation to release responsive records unequivocal.

Despite this case law, Appellee insists that "[b]y their inclusion of the word 'final' in [Section 67.708(b)(7)(viii)], it is clear that the General Assembly intended to exempt records which are still at issue in a labor dispute." BL029. That purported intention is far from "clear," *id*.; indeed, Appellee's argument is baseless. "As a matter of statutory interpretation, although 'one is admonished to listen attentively to what a statute says[;] [o]ne must also listen attentively

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which their proposed dismissal is based and a hearing "before the board of school directors"). After such a hearing, the school board is then in a position to take a "'final action' with respect to the employees' discipline," *see id.*, which would constitute a public record subject to disclosure.

to what it does not say.'" *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co*., 788 A.2d 955, 962 (Pa. 2001) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947)). Had the agency wanted to clearly "exempt records which are still at issue in a labor dispute," BL029, it would have said so expressly. Instead, the Right to Know Law's exemption for personnel information expressly "shall not apply to the *final action of an agency* that results in demotion or discharge." 65 P.S. § 67.708(b)(7)(viii) (emphasis added). Thus, "according the words their plain and ordinary meaning," and not "disregarding their obvious meaning in search of a particular result," *In re Condemnation of a Permanent Right-of-Way*, 873 A.2d 14, 17 (Pa. Commw. Ct. 2005), one may not sever the term "final action" from the clause "*of the agency*," discussed below.

B. *The requested records comprise the final actions of the Department—"an agency."*

Appellee's argument in support of its withholdings rests on the fact that Philadelphia Police Department employees dismissed from the agency (1) "have the opportunity to arbitrate their dismissal," and (2) "no officers that were dismissed by [the Department] in 2020 have completed th[at] arbitration process." BL028, BL037.[5] However, the decision of certain officers to arbitrate their dismissal has no bearing on the Department's obligations under the Right to Know Law to process and release records responsive to the Request.

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[5] Appellants note that the form of Lt. Barry Jacobs' affidavit submitted to the OOR is improper. An affidavit is "[a] statement in writing of a *fact or facts* signed by the party making it," 1 Pa. C.S. § 1991 (emphasis added); *see also FOIA Update: Approaching the Bench: Affidavits*, U.S. Dep't of Justice (Jan. 1, 1980), https://perma.cc/FSB2-7BQC ("[Affidavits serve as] evidence about the facts demonstrating that the government's claims are legally correct. [They are] not a presentation of legal arguments or legal conclusions."). Here, Lt. Jacobs' affidavit contains legal conclusions which are entitled to no deference. *See* BL037. Thus, while it is always the case that the OOR's findings "do not bind the reviewing court and are not entitled to deference on appeal," *ACLU of Pa.*, 232 A.3d at 663, that principle is especially apt where the evidence on which the OOR relied is improper.

The arbitration process in which Department employees may elect to participate in order to challenge an agency's decision to discharge or dismiss them requires the Fraternal Order of Police ("FOP"), the parent organization of the Department's union, to communicate its intent to have the matter arbitrated—known as the arbitration demand—to the local office of the American Arbitration Association ("AAA"), the non-governmental organization that coordinates arbitrations for the City of Philadelphia. *See, e.g.*, *PPD Policy Translation for Public Review*, City of Phila., Police Advisory Comm'n, https://perma.cc/VB9S-WEBV (last accessed Apr. 13, 2021). Upon receiving notification of an arbitration demand, the AAA chooses an arbitrator—who is not a government actor—and then schedules a hearing date. *See id.* Once the closing arguments are delivered before the arbitrator, the arbitrator has thirty days to deliver his or her decision in a written arbitration award. *See id.*; *see also* BL039–40 (Aff. of Rebecca Hartz) (explaining that a terminated employee has the option of submitting the issue to an arbitrator according to a grievance process outlined in the collective bargaining agreement between the FOP and the City of Philadelphia). Simply put, the arbitration process takes place outside the Department, and decisions rendered by arbitrators do not constitute a "final action of [the] agency." 65 P.S. § 67.708(b)(7)(viii); *see also* Peter F. Vaira and John C. Gregory Jr., *Arbitrations of Philadelphia Police Discipline*, The Philadelphia Lawyer (2002), https://perma.cc/ZP3F-P2VY (explaining that a grievance to be arbitrated appears before a civilian arbitrator).

It is "axiomatic that in determining legislative intent, all sections of a statute must be read together and in conjunction with each other." *Hous. Auth. v. Pa. State Civil Serv. Comm'n*, 730 A.2d 935, 945 (Pa. 1999). Heeding that axiom, one must read the phrase "final action" alongside the phrase "*of an agency*." 65 P.S. § 67.708(b)(7)(viii) (noting that the RTKL's personnel files exemption "shall not apply to the *final action of an agency* that results in demotion or discharge"

(emphasis added)). As the plain text of the RTKL indicates, Appellants' request for records that reflect "police personnel dismissed in 2020, including name and rank and effective date of dismissal," BL015, must be disclosed, as those records encompass final actions of the Department resulting in discharge.[6]

II. Collective bargaining agreements may not be used to subvert the Right to Know Law.

Appellee's argument against disclosure of the requested records is that "[p]er the [Department's] Collective Bargaining Agreement with the Fraternal Order of Police, officers who are dismissed by [the Department] have the opportunity to arbitrate their dismissal," and thus "[a]ny records [the Department] maintains of officers dismissed in 2020 are not final actions of discharge because no officers that were dismissed by [the Department] in 2020 have completed the arbitration process." BL028. Even setting aside that Appellee's argument contravenes the plain language of Section 67.708(b)(7)(viii), *see supra*, Appellee's attempt to invoke a collective bargaining agreement to curtail its public disclosure obligations under the RTKL is unavailing.

It is well established that contracts may not be used to evade transparency requirements under state law. Indeed, courts in Pennsylvania and around the country that have addressed the interaction between contracts and state public records laws have consistently held that a contract cannot override a statutory mandate of access. *See, e.g.*, *Wintermantel*, 45 A.3d at 1040 (affirming that government agencies must not "be free to contract away the public access requirements of the

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[6] Appellee has also suggested that the Personnel Files Act, 43 P.S. §§ 1321 *et seq.*, exempts the requested records from disclosure. *See* BL029–30. That argument has no merit. The Personnel Files Act permits employees to inspect their own individual personnel files, and empowers employers to take measures to ensure that employees do not alter their personnel files or remove them from the employer's premises. 43 P.S. §§ 1322–1323. It in no way curtails access to a "final action of an agency that results in demotion or discharge," 65 P.S. § 67.708(b)(7)(viii). Appellee's invocation of *Bangor Area Education Association v. Angle*, 720 A.2d 198 (Pa. Commw. Ct. 1998), is thus inapposite.

[law]"); *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist*., 911 A.2d 644, 649 n.11 (Pa. Commw. Ct. 2006) ("[An agency] may not contract away the public's right of access to public records because the purpose of access is to keep open the doors of government, to prohibit secrets, [and] to scrutinize the actions of public officials[.]"); *State ex rel. Dispatch Printing Co. v. Wells*, 481 N.E.2d 632, 634 (Ohio 1985) (holding that a contractual provision between a city and its employees could not alter the duties of the city to provide access to public records under that state's public records law); *N.M. Found. for Open Gov't v. Corizon Health*, No. A-1-CA-35951, 2019 WL 4551658, at *5 (N.M. Ct. App. Sept. 16, 2019) (explaining that attempting to circumvent a citizen's right of access to public records by way of contracts was a practice that stands to "thwart the very purpose of [the Public Records Act] and [would] mark a significant departure from New Mexico's presumption of openness at the heart of [New Mexico] access law" (citation omitted)); *New Orleans Bulldog Soc'y v. La. Soc'y for the Prevention of Cruelty to Animals*, 200 So. 3d 996, 1002 (La. Ct. App. 2016) (making clear that Louisiana's "Public Records Law cannot be circumscribed by a contract").

The well-established principle that a government agency cannot contract away its disclosure obligations under state public records laws applies to collective bargaining agreements. *See, e.g.*, *City of Chicago v. Fraternal Order of Police*, 2020 IL 124831 (holding that a provision in a collective bargaining agreement that interfered with disclosure of public records violated public policy); *Keller v. City of Columbus*, 797 N.E.2d 964, 970 (Ohio 2003) ("[T]he Public Records Act controls over any conflicting provision in a collective bargaining agreement."). In short, Appellee cannot invoke its collective bargaining agreement with the FOP, which provides that officers who are dismissed by the Department may choose to arbitrate their dismissal, in order to subvert the plain language of the RTKL.

III. The public interest in disclosure of the requested records vastly outweighs any interest in restricting access.

"When words of a statute are not explicit, but ambiguous, a reviewing court looks to other principles of statutory construction, among them: the occasion and necessity for the statute; the circumstances under which the statute was enacted; the mischief to be remedied; the object to be attained; [and] the consequences of a particular interpretation[.]" *Bowling*, 75 A.3d at 466 (citing 1 Pa. C.S. § 1921(c)). Here, the plain text of Section 67.708(b)(7)(viii) is unambiguous. *See supra*. However, even assuming, *arguendo*, that the plain text of Section 67.708(b)(7)(viii) is unclear, this Court is empowered to consider "the mischief to be remedied; the object to be attained; [and] the consequences of" the parties' competing interpretations of the Law in reaching its conclusion. *Bowling*, 75 A.3d at 466. Because the General Assembly enacted the RTKL to expressly "replac[e] its predecessor Right to Know Act with an alternative paradigm that more strongly tilted in favor of maximizing transparency," *ACLU of Pa.*, 232 A.3d at 656, this Court should resolve this case in favor of the public's right to know.

Members of the news media like Appellants play a vital role in facilitating trust in government institutions. *See, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Indeed, "[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). This is particularly true with respect to the news media's reporting on the conduct of law enforcement officers and agencies, a subject of immense public concern. For example, last year, Appellants reported on Philadelphia police officers who had committed acts of domestic violence—a largely unaddressed problem among law enforcement officers. Samantha Melamed, *Six Philly police were quietly fired, charged with abuse last year. Many will likely get their jobs back*, The Philadelphia Inquirer (Feb. 28, 2020), https://perma.cc/SCA4-UULX. Specifically, six Philadelphia police officers were

fired as a result of domestic violence incidents in 2019—incidents ranging from stalking to strangulation—and all six officers chose to arbitrate their dismissals. *See id.* One officer was accused of "throwing a glass at [a former intimate partner], biting him, striking him in the face, and crashing her car into his—alleged behavior that spanned more than a year before her termination." *Id*. Another officer reportedly "grabbed his girlfriend by the throat, banged her head against a refrigerator, and, once she fell to the ground, began kicking her in the head." *Id*. By Appellee's logic, the public has no right under the Law to know whether and when the Department dismissed such personnel.

A glaring defect in Appellee's position that "[a]s soon as any of the officers dismissed by [the Department] in 2020 complete the arbitration process, if their dismissals are upheld, the dismissal would be a final action of discharge and considered public," BL028, is that arbitrators rarely uphold such dismissals. *See* Editorial Board, *Disarm Philly's police union from the weapon of secret arbitration*, The Philadelphia Inquirer (Nov. 27, 2020), https://perma.cc/3VLN-CTHE (finding that between 2011 and 2019, when the FOP fought disciplinary actions brought by the Department, arbitrators reduced or overturned the penalties seventy percent of the time). If the availability of public records reflecting an agency's decision to dismiss a police officer is predicated solely on the subsequent decision of an unelected, non-governmental arbitrator to uphold it, then the press and the public are left unable to "access . . . official *government* information [necessary] to prohibit secrets," and powerless to "scrutinize the actions of *public* officials, and make public officials accountable for their actions"—the fundamental goals of the Right to Know Law. *Pa. State Police v. McGill*, 83 A.3d 476, 479 (Pa. Commw. Ct. 2014) (emphasis added). Appellee's interpretation of the Law, if adopted, would shield government

records containing final, consequential actions of local government agencies, and undercut the RTKL's promise to illuminate the conduct of government actors.

The RTKL's presumption in favor of transparency is explicit. *See* 65 P.S. § 67.305.[7] Indeed, the City of Philadelphia has previously complied with the Law's mandate of transparency by releasing the names of the officers the Department dismissed in 2019 in response to a RTKL request from the Defender Association of Philadelphia, *see* BL047. Several of those officers had been terminated due to serious incidents of domestic violence, as discussed above. *See* Melamed, *Six Philly police were quietly fired*, *supra.* The public has a powerful interest in understanding the actions law enforcement agencies are taking, if any, when confronted with patterns of conduct that demonstrate an officer's inability to continue to serve the community. And "[b]y placing the information in the public domain . . . , the [City] must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975). There is no reason why the Department may refuse to comply with its obligations under the RTKL in failing to release the very information for year 2020 that the City of Philadelphia Law Department released for year 2019.

Indeed, there is a clear trend toward increased transparency with respect to records of law enforcement agencies across the nation. Just last year in neighboring New Jersey, the attorney general issued Law Enforcement Directive Numbers 2020-5 and 2020-6 which amended New Jersey's Internal Affairs Policy and Procedures to require every law enforcement agency in the

[7] *See also* 65 P.S. § 67.506(c) (providing agencies with "discretion" to make an "otherwise exempt" record accessible if "[t]he agency head determines that the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access").

state to publish annual reports with a synopsis of all complaints for which an officer received, *inter alia*, final discipline of termination, including the name of the officer and the sanction imposed. *Att'y Gen. Law Enf't Directive Nos. 2020-5 & 2020-6*, State of N.J., Office of the Att'y Gen. (June 15, 2020; June 19, 2020); *see also In re Att'y Gen. Law Enf't Directive Nos. 2020-5 & 2020-6*, 240 A.3d 419, 448 (N.J. Super. Ct. App. Div. 2020) (upholding issuance of the directives, noting that they are "obviously rationally related to the Attorney General's goal of increasing transparency of internal affairs and officer discipline in the State's law enforcement agencies, thereby making them more accountable to the communities they serve"). Likewise, last year, the New York legislature repealed Section 50-a of its Civil Rights Law, a law which had kept all police personnel files confidential for nearly forty-five years. *See* S.B. S8496, 2019-2020 Leg. Sess. (N.Y. 2020). Here, the Philadelphia Police Department is not being tasked with issuing a new directive or enacting a new policy—it is simply being asked to follow the RTKL as written, *see* 65 P.S. § 67.708(b)(7)(viii), and to release the requested records to Appellants.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Appellants respectfully request the Court to reverse the determination of the Office of Open Records and order the requested records be disclosed.

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**Pro Hac Vice* application pending

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