IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 914 CD 2021

SAMANTHA MELAMED and THE PHILADELPHIA INQUIRER,
Petitioners,

v.

PHILADELPHIA POLICE DEPARTMENT,
Respondent.

PETITIONERS' BRIEF

Appeal from the Final Order of the Court of Common Pleas
of Philadelphia County dated July 23, 2021 at Docket No. 01744,
December 2020 Term

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STATEMENT OF JURISDICTION

The Commonwealth Court has jurisdiction over this matter pursuant to 65 P.S. § 67.1301 and 42 Pa. C.S. § 763(a)(1).

SCOPE AND STANDARD OF REVIEW

The Commonwealth Court exercises *de novo* and plenary review of the Office of Open Records' findings on both factual and legal questions. 65 P.S. § 67.1301(a); 42 Pa. C.S. § 763(a); *Bowling v. Office of Open Records*, 75 A.3d 453, 474 (Pa. 2013). Under this standard, the Court may "adopt[] . . . the appeals officer's factual findings and legal conclusions when appropriate," but may affirm or reverse the decision below on the basis of any rationale. *Id.* The Court is entitled to the broadest scope of review. *Id.* at 477.

TEXT OF THE ORDER IN QUESTION

AND NOW, this 23rd day of July, 2021, upon consideration of the briefs filed by the parties, this Court's review of the certified record, and after oral argument, it is ORDERED that the appeal is DENIED and the decision of the Office of Open Records is AFFIRMED.

* * * * * * * * * * *

/s/ Joshua Roberts

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Hon. Joshua Roberts
Court of Common Pleas of Philadelphia County
First Judicial District of Pennsylvania

STATEMENT OF QUESTIONS INVOLVED

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

   Suggested answer: Yes

2. Was the trial court correct in deciding that the Philadelphia Police Department is not required to produce records related to the termination of personnel who are arbitrating their dismissals?

   Suggested answer: No

STATEMENT OF THE CASE

This case raises an issue of fundamental importance regarding adherence to the plain language of the Right to Know Law ("RTKL" or the "Law"), 65 P.S. §§ 67.101 *et seq.*, in an age when the public demands meaningful transparency from its institutions—including law enforcement agencies.

Petitioners are Samantha Melamed and The Philadelphia Inquirer. Ms. 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.

In July 2020, Petitioners submitted a RTKL request to the Philadelphia Police Department seeking "[a]ny record that reflects the police personnel dismissed in 2020, including name and rank and effective date of dismissal" (the "Request"). R.001a.[1] When the Department failed to provide a timely determination, 65 P.S. § 67.901, on July 23, 2020, Petitioners appealed to the Office of Open Records

[1] All references to the record can be found in the Reproduced Record filed herewith.

("OOR") challenging the agency's constructive denial of the Request, R.002a–005a. The Parties then advanced their respective positions to the OOR on the availability of the requested records under the Law. *See* R.006a–024a. 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. R.025a–032a.

Petitioners filed a notice of appeal in the Philadelphia Court of Common Pleas on December 29, 2020. R. 033a. Following briefing and an oral argument, the court below affirmed the decision of the OOR. Appx. A–B. Petitioners now ask this Court to reverse the lower court and order disclosure of the requested records.

SUMMARY OF ARGUMENT

At issue in this case is whether the Philadelphia Police Department properly invoked 65 P.S. § 67.708(b)(7)(viii) to deny Petitioners' request for records reflecting "police personnel dismissed in 2020, including name and rank and effective date of dismissal," *see* R.007a–009a—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:

> 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*.

Id. (emphasis added).

That Petitioners 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 not exempt and must be disclosed. This position is further bolstered by the Law's guiding principle that exemptions to the RTKL must be narrowly construed. *Pa. State Police v. Grove*, 161 A.3d 877, 892 (Pa. 2017) ("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 *Office of Governor v. Davis*, 122 A.3d 1185,

1191 (Pa. Commw. Ct. 2015))). In affirming the OOR and permitting the Department to withhold responsive records related to the termination of personnel who arbitrate their dismissals, the lower court erroneously distorted the plain language of Section 67.708(b)(7)(viii), and appended to the statute's text additional criteria neither found in the Right to Know Law nor supported by public policy.

For these reasons, Petitioners respectfully ask the Court to find that Respondent has not—and cannot—meet its burden of demonstrating that the requested records are exempt from disclosure, and accordingly to reverse the lower court's determination that the records must be withheld.

ARGUMENT

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).

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*

R.001a—thus falls squarely within the *exception* to the exemption set forth in Section 67.708(b)(7)(viii). Yet, Respondent 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." R.008a. In so contending, Respondent 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"). Respondent 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. <u>The requested records comprise "final actions."</u>

As to the scope of Section 67.708(b)(7)(viii)—and 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," *id.* at 760, the requested records were held to be exempt from disclosure under the RTKL, *id.* at 764.

Here, the ***opposite*** is true. Petitioners 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* R.001a. 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 informative. At issue in *Silver* was an employment termination letter, produced to the Pittsburgh Post-Gazette, wherein the employment termination language was

disclosed, but information about prior disciplinary action had been redacted. *Id*. at 126. The court found that "the agency's 'final action' was the employment termination," *id*. at 128, but 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, Petitioners seek ***only*** records that reflect "police personnel dismissed in 2020, including name and rank and effective date of dismissal." R.001a. 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.[2]

Despite this case law, Respondent 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." R.009a. That purported intention is far from "clear," *id*.; indeed, Respondent's argument is baseless, as discussed further in Section I.B., *infra*. "As a matter of statutory interpretation, although 'one is admonished to listen attentively to what a statute says[;] [o]ne must

[2] The Sunshine Act, 65 Pa. C.S. §§ 701–716, similarly provides for transparency when a government employee is terminated. Although Section 708(a)(1) of the Sunshine Act allows an agency to hold an executive session to discuss employment matters, including termination, promotion or discipline, Section 708(c) requires that all ***official action*** on matters discussed at an executive session take place at a meeting open to the public. 65 Pa. C.S. § 708(c). Courts of this Commonwealth have long held that the Sunshine Act is *in pari materia* with the RTKL. *See Silver*, 58 A.3d at 128.

also listen attentively 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 General Assembly wanted to clearly "exempt records which are still at issue in a labor dispute," R.009a, it would have said so expressly. Instead, the Right to Know Law's exemption for personnel information explicitly "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), Respondent cannot disregard the statute's plain text and replace it with unsupported speculation.

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

When it enacted the RTKL, the General Assembly separately addressed records pertaining to arbitrations and labor disputes. Indeed, the General Assembly enacted an exemption dealing specifically with arbitrations—Section 708(b)(8)—which is clear evidence of the General Assembly's intent to demarcate actions of an ***agency*** from those of an ***arbitrator***. *Compare* 65 P.S. § 67.708(b)(7)(viii), *with id.* § 67.708(b)(8)(ii) (exempting from disclosure exhibits and transcripts of arbitrations born out of disputes stemming from collective bargaining agreements, *except* that

the exemption "shall not apply to the final award or order of the arbitrator in a dispute or grievance procedure"). That the General Assembly enumerated a specific exemption related not just to arbitrations, generally, but those ***specifically*** arising out of provisions within collective bargaining agreements, evinces a clear legislative intent ***not*** to conflate processes of arbitration with the processes of government. Tellingly, both Section 708(b)(7) and 708(b)(8) contain *exceptions* to the stated exemptions, revealing an understanding on the part of the General Assembly that the public is entitled to access records reflecting the final actions of entities making consequential, salient decisions—decisions of *government* actors on the one hand, 65 P.S. § 67.708(b)(7)(viii), and *non*-government actors on the other, 65 P.S. § 67.708(b)(8)(ii).

Simply put, the arbitration process in which dismissed police officers may elect to participate 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). Heeding the axiom "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), 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)). One must also juxtapose 65 P.S. § 67.708(b)(7)(viii) against 65 P.S. § 67.708(b)(8)(ii), which bears on the final actions of ***arbitrators***—illuminating a legislative intent to treat these sets of records distinctly. Thus, as the plain text of the RTKL indicates, Petitioners' request for records that reflect "police personnel dismissed in 2020, including name and rank and effective date of dismissal," R.001a, must be granted, as those records encompass final actions of the Department resulting in discharge.

C. The requested records reflect final agency actions of "discharge."

In "according the words their plain and ordinary meaning" as statutory interpretation requires, *In re Condemnation*, 873 A.2d at 17, it is common for courts to consult dictionary definitions of words and phrases. *See, e.g.*, *Gregg v. Ameriprise Fin., Inc.*, 245 A.3d 637, 656 (Pa. 2021). The word "discharge," according to Merriam-Webster, is to "dismiss from employment." *Discharge*, Merriam-Webster, https://www.merriam-webster.com/dictionary/discharge. Here, the officers who are the subject of the Request were dismissed from employment by the Department. That fact remains true regardless of whether a fired officer chooses to arbitrate his or her dismissal, the outcome at arbitration, and whether the officer is eventually re-hired.

On this point, the record below is instructive. As the Court of Common Pleas recognized, the officers who chose to arbitrate their dismissals "had been previously

discharged." Appx. A at A6. Thus, records related to the Department's decision to discharge those officers constitute records reflecting "the final action of an agency that results in demotion or discharge." 65 P.S. § 67.708(b)(7)(viii). Indeed, the very termination letters issued by the Department leave no question that the Department took final agency action when it notified former officers: "You are hereby notified that effective August 15, 2019, you are dismissed from your position with the City of Philadelphia." *See, e.g.*, R. 124a (linking to, *inter alia*, one arbitration decision dated February 26, 2021, which cites a notice of dismissal the Department issued to an officer). Given the express meaning of "discharge" and "dismissal" in the RTKL and the record, no further analysis is required.

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

In rendering its opinion, the court below "concluded that because the Philadelphia Police Department is covered by Act 111 of 1968, which mandates appeals through binding arbitration of all discharges of police officers, then the 'final action' of the police department resulting in an officer's discharge does not take place until the conclusion of the" arbitration process. Appx. A at A1. For the reasons outlined above, this reasoning is unsupported by law. In addition to contravening the plain text of the RTKL, *see supra*, the decision below ignores the well-established principle that contracts—including collective bargaining agreements—cannot be used to subvert statutes—including the RTKL. Thus, for the purposes of

this case, it is of no consequence that the "Philadelphia Police Department is covered by the Act Governing Collective Bargaining by Policemen or Firemen, [also known as] as Act 111," Appx. A at A5, "created to protect the rights of police officers and fire fighters through collectively bargained rights and arbitration provisions," *id.*; what matters is the plain text of the RTKL, *see supra* Sections I.A–C, which cannot be undercut by an employment contract, as explained below.

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.*, *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1040 (Pa. 2012) (affirming that government agencies must not "be free to contract away the public access requirements of the [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."); *Mills v. Doyle*, 407 So. 2d 348, 350 (Fla. Dist. Ct. App. 1981) ("[T]he trial court was correct in shunting aside the argument that the collective bargaining contract between the CTA and the School Board established the confidentiality of the subject records, for to allow the elimination of public records from the mandate of Chapter 119 by private contract would sound the death knell of the Act."). In short, Respondent cannot invoke its collective bargaining agreement with the Fraternal Order of Police,

which provides that officers who are dismissed by the Department may choose to arbitrate their dismissal, 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. v. Pa. State Police*, 232 A.3d 654, 656 (Pa. 2020), this Court should resolve this case in favor of the public's right to know, recalling the tangible benefits that transparency yields for both the public and law enforcement.

Consider, for instance, the Citizens Police Data Project published by the Invisible Institute, which contains the disciplinary records of Chicago police officers in a comprehensive, searchable format, from which copious examples of meaningful analysis and reporting have flowed. The data covers more than 30,000 officers and almost 23,000 complaints between 2000 and 2018. *Citizens Police Data Project*, Invisible Institute, https://perma.cc/3S6W-H9MK (last accessed Jan. 2022). Reporting based on this data has revealed striking trends in how misconduct spreads by way of example when new officers are exposed to the harmful tendencies of other officers. *See, e.g.*, Rob Arthur, *Bad Chicago Cops Spread Their Misconduct Like a Disease*, The Intercept (Aug. 16, 2018), https://perma.cc/K7F5-CLL8 ("The data shows that [officers prone to misconduct] also may be teaching their colleagues bad habits. . . . The officers who had been exposed to the . . . misconduct-prone cops . . . went on to show complaint rates nine times higher over the next ten years than those who hadn't."). A consent decree between the State of Illinois and the City of Chicago entered in 2019 directly responded to the troubling trends illuminated by the Citizens Police Data Project by formalizing an "early intervention" program to "proactively identify at-risk behavior by officers" in an effort to stem the injurious ripple effect of officer misconduct. Consent Decree at 177, *Illinois v. City of Chicago*, No. 1:17-cv-06260 (N.D. Ill. Jan. 31, 2019), ECF No. 703-1.

Members of the news media, like Petitioners, 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, Petitioners reported on a detective with the Philadelphia Police Department who had been the subject of at least eleven citizen complaints and five internal investigations, and was twice accused of intimate-partner violence. Samantha Melamed, *Dozens accused a detective of fabrication and abuse. Many cases he built remain intact.*, The Phila. Inquirer (May 13, 2021), https://perma.cc/2KM4-M3ZK. During a 2011 trial, a witness alleged that Detective James Pitts hit her inside the Stout Center for Criminal Justice; court proceedings on that allegation were conducted under seal. *Id*. In Pitts' defense, he stated that "he's never had a finding against him by the Police Board of Inquiry, which makes disciplinary findings on sustained Internal Affairs complaints." *Id*. But that claim is not surprising in light of widespread "reluctance of investigators . . . to second-guess an officer's split-second decision" in the context of internal affairs investigations. Shaila Dewan & Serge F. Kovaleski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. Times (May 30, 2020), https://perma.cc/FB27-

4CPF. Thus, when a law enforcement department decides to take the consequential, final action of terminating an officer from duty, the public deserves—and, indeed, has a right—to know. Yet, by Respondent's logic, the public has no right under the Law to timely learn whether and when the Department dismissed such personnel.

A glaring defect in Respondent'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," R.008a, is that arbitrators rarely uphold such dismissals. *See* Editorial Board, *Disarm Philly's police union from the weapon of secret arbitration*, The Phila. Inquirer (Nov. 27, 2020), https://perma.cc/3VLN-CTHE (finding that between 2011 and 2019, when the Fraternal Order of Police 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). Respondent'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.

Finally, the lower court's reasoning that withholding is compelled because "once the police department discharge information is out in the public realm, the potential harm to the officer is irreparable," Appx. A at A6, is meritless. Numerous courts that have weighed the privacy and reputational interests of law enforcement officers against the public's right to know about those officers' official conduct have concluded that the public's right to know outweighs the diminished expectations of privacy that attach to public officials acting in their official capacity. *See, e.g.*, *State ex rel. Bilder v. Delavan Twp.*, 334 N.W.2d 252, 262 (Wis. 1983) ("By accepting his public position Bilder has, to a large extent, relinquished his right to keep confidential activities directly relating to his employment as a public law enforcement official. The police chief cannot thwart the public's interest in his official conduct by claiming that he expects the same kind of protection of reputation accorded an ordinary citizen."); *In re Att'y Gen. L. Enf't Directive Nos. 2020-5 & 2020-6*, 240 A.3d 419, 446 (N.J. Super. Ct. App. Div. 2020), *aff'd as modified*, 252 A.3d 135 (N.J. 2021) ("We are thus confident the Attorney General's release of a summary of the findings that led to a law enforcement officer's termination . . . does not rise to the level of a substantive due process violation

implicating petitioners' reputation or privacy rights."); *City of Baton Rouge v. Capital City Press, L.L.C.*, 4 So. 3d 807, 813, 821 (La. Ct. App. 2008) (ordering disclosure of internal affairs reports of police officers despite the Fraternal Order of Police's concerns that release could, *inter alia*, "cause embarrassment"; finding diminished privacy interests attached to officers where "investigations concerned public employees' alleged improper activities in the workplace").

The RTKL's presumption in favor of transparency is ***explicit***. *See* 65 P.S. § 67.305.[3] And "[t]ransparency facilitates healing. Without transparency, fear of future harm continues, [and] officers are able to exploit the power of reliable anonymity[.] . . . [W]hen police processes are perceived as procedurally just, communities are more likely to cooperate with the police, and policing, in turn, is more effective." Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. Rev. 148, 154, 166 (2019) (citation omitted). For these reasons, Petitioners respectfully request that this Court reverse the lower court and order disclosure of the requested records.

[3] *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").

CONCLUSION

The records sought are public records pursuant to the Right to Know Law, and the trial court incorrectly analyzed the legal arguments pertaining to the public release of these records. Petitioners respectfully request that this Court REVERSE the Court of Common Pleas' Order of July 23, 2021.

Respectfully submitted,

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Counsel for Petitioners

CERTIFICATE OF WORD COUNT COMPLIANCE

I hereby certify that this filing complies with the word count limit set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Based on the Microsoft Word program word count function, the brief contains 4753 words.

/s/ Paula Knudsen Burke
Paula Knudsen Burke (No. 87607)

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify that Petitioner's Brief 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.

/s/ Paula Knudsen Burke
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2022, I caused a true and correct copy of the foregoing Petitioners' Brief to be served via email on the following, with consent, as required by Pennsylvania Rule of Appellate Procedure 121(c)(4):

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APPENDIX A

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CIVIL

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Appeal of: SAMANTHA MELAMED, ET AL.	:	Commonwealth Court Docket: 914 CD 2021
From a Decision of: OFFICE OF OPEN RECORDS	:	Trial Court Docket: December Term 2020 No. 1744

1925(a) OPINION

In this appeal from a decision of the Commonwealth of Pennsylvania Office of Open Records, Appellants Samantha Melamed and The Philadelphia Inquirer sought Philadelphia Police Department personnel files for all officers dismissed from January 1, 2020 through the date a response was provided. The Office of Open Records determined that personnel files for police officers in the process of arbitrating their discharge are exempt under the Right-to-Know Law ("RTKL").

The issue on appeal to this Court was when a police officer's discharge becomes a "final action" such that the police officer's personnel file is no longer exempt. This Court concluded that because the Philadelphia Police Department is covered by Act 111 of 1968, which mandates appeals through binding arbitration of all discharges of police officers, then the "final action" of the police department resulting in an officer's discharge does not take place until the conclusion of the binding mandatory arbitration process. As a result, this Court denied the appeal and affirmed the decision of the Office of Open Records.

Ms. Melamed and The Philadelphia Inquirer filed this timely appeal arguing, *inter alia*, that this Court's decision frustrates the purpose of, and is contrary to the underlying policy of the RTKL. Specifically, Ms. Melamed and The Philadelphia Inquirer contend that the final action of the Philadelphia Police Department is separate and distinguishable from the decision resulting from the mandatory arbitration.

For the reasons discussed, the Commonwealth Court should affirm this Court's decision denying the appeal and affirming the decision of the Office of Open Records.

A. Factual and Procedural Background

In July 20, 2020, Samantha Melamed, a reporter for The Philadelphia Inquirer,[1] submitted a Right-to-Know request to the Philadelphia Police Department seeking the name, rank and effective date of dismissal for all police personnel that had been dismissed in 2020.[2] When the Police Department failed to respond by the statutory deadline, Ms. Melamed filed an appeal with the Office of Open Records on the basis that the Philadelphia Police Department had constructively denied the request by failing to respond in a timely manner. In December 2020, the Office of Open Records issued a decision finding that the Police Department was not required to produce records for officers who were still in the process of arbitrating their discharges. The Office of Open Records also concluded

[1] The Court will refer to both appellants collectively as "Ms. Melamed."
[2] Ms. Melamed's request used the word "dismissal," while the Right-to-Know Law uses the word "discharge." For ease of reference in this opinion, this Court will use "discharge."

that the police department had to produce all records for personnel whose discharge became final, following arbitration, during 2020.

Ms. Melamed filed an agency appeal action in this Court on December 29, 2020. As part of the appeal to this Court, the American Civil Liberties Union filed an amicus brief in support of the position taken by Ms. Melamed.

B. Right-To-Know Legal Standard

Right-to-Know requests empower citizens by affording them access to information concerning the activities of the government. *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). The statutory paradigm establishes a presumption in favor of disclosure. *Id.* Thus, the burden is on the agency to prove an exemption applies, by a preponderance of the evidence. *Id.* Exemptions are to be narrowly construed. *Office of Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commw. 2013).

When the issue is solely an assertion of a legal error or a constitutional violation, this Court reviews the agency's Right-to-Know decision *de novo*. *Bowling v. Office of Open Records*, 75 A.3d 453, 467-68 (Pa. 2013). While the RTKL contemplates that the trial court's decision shall contain findings of fact and conclusions of law, the trial court may, as part of the *de novo* review, adopt in whole or in part the agency's decision. *York Cty. v. Coyle*, slip op., 182 CD 2020, 2021 WL 3439685, at *5 (Pa. Commw. Aug. 6, 2021) (quoting *Bowling*, 75 A.3d at 473-74).

C. The Employee Discipline Exemption

Under the RTKL, there are thirty (30) categories (with included sub-categories) of records exempt from disclosure. 65 P.S. § 67.708(b). The specific subsection at issue in this case exempts disclosure of "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).

Stated another way, the exemption applies (and records are shielded from public view) until there is a final action of an agency resulting in discipline, demotion or discharge. The RTKL does not define the term "final action."

The Commonwealth Court, applying the rule of statutory construction requiring words be given their plain and ordinary meaning, has defined the term "final action" in the Right-to-Know context, drawing on the dictionary definitions of "final" as "forming or occurring at the end ... or constituting the last element in a series, process or procedure" and "action" as "the process of acting or doing ... [a]n act or deed." *Silver v. Borough of Wilkinsburg*, 58 A.3d 125, 127 (Pa. Commw. 2012) (*en banc*) (citing and quoting *In re Condemnation of a Permanent Right - of - Way*, 873 A.2d 14, 17 (Pa. Commw. 2005) and Webster's Third New College Dictionary 428, 12 (2008)).

The question, then, is when the discharge of a police officer becomes "final" so that the records related to the discharge are no longer shielded from public view. While Ms. Melamed argues that the final action is the police department's decision,

this reading of the police officer disciplinary process is too narrow. Police departments are not typical agencies, and they are subject to different rules for police officer discharge.

D. Act 111 of 1968 Grievance Arbitration

The Philadelphia Police Department is covered by the Act Governing Collective Bargaining by Policemen or Firemen, which is commonly known as Act 111 of 1968. *See* Act of June 24, 1968, P.L. 237, No. 111 (as amended, 43 P.S. §§ 217.1 - 217.10).

Act 111 of 1968 was created to protect the rights of police officers and fire fighters through collectively bargained rights and arbitration provisions. *Pa. State Police v. Pa. State Troopers' Ass'n*, 656 A.2d 83, 89 (Pa. 1995). The Act creates, as a term of employment for police officers and fire fighters, a binding grievance arbitration procedure for disciplinary matters. *Upper Gwynedd Tp. v. Upper Gwynedd Tp. Police Ass'n*, 777 A.2d 1187, 1190 (Pa. Commw. 2001).[3] The grievance arbitration process is mandatory. *Upper Makefield Tp. v. Pa. Labor Relations Bd.*, 717 A.2d 598, 600 (Pa. Commw. 1998).

E. The Act 111 Grievance Arbitration is the "Final Action"

An Act 111 grievance arbitrator may issue an award covering the terms and conditions of a police officer's employment. *Pa. State Police v. Pa. State Troopers*

[3] Although the Act uses the term "binding," shortly after Act 111 was enacted, the Pennsylvania Supreme Court opined that an appeal may lie from an arbitration in the nature of a narrow certiorari scope of review. *City of Washington v. Police Dept. of City of Washington*, 259 A.2d 437, 440-41 (Pa. 1969).

Ass'n, 741 A.2d 1248, 1252 (Pa. 1999). Such an award may, for example, order reinstatement of an officer who had been previously discharged by the police department. *Id.*

If an arbitrator, as part of a mandatory grievance arbitration, has the authority to reinstate a police officer who had been previously discharged by the police department, the police department's action cannot be the final action.

The arbitrator's decision, and not the police department's decision, is the "last element" in the process. *See Silver*, 58 A.3d at 127. To conclude otherwise would not only frustrate the very purpose of Act 111, but it would be inconsistent with the RTKL exemption. Act 111 provides police officers with a collectively bargained right to a mandatory binding grievance process. This collectively bargained right protects police officers from personnel decisions motivated by political whims, inter-personal disputes, and other potentially spurious decisions by management. If the exemption on disclosure ended with the police department's disciplinary decision, then the public could learn of police department discipline that an arbitrator could later modify or reverse. Yet, under this scenario, even if the arbitrator reinstated an officer, once the police department discharge information is out in the public realm, the potential harm to the officer is irreparable.

In sum, the reason discharge records are exempt from public disclosure until an agency's final action is to protect a government employee whose workplace discipline may later be reversed or modified. *See Highlands Sch. Dist. v. Rittmeyer*, 243 A.3d 755, 764 (Pa. Commw. 2020). In the unique circumstances of police

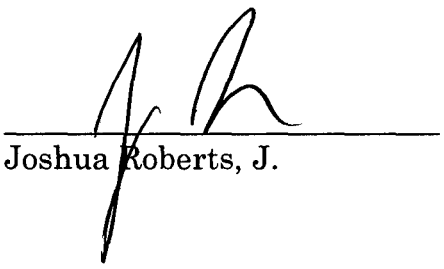
officers, that reversal or modification must come about via mandatory grievance arbitration, while in other agencies, the agency may have a different process in place.

This Court's decision did not "elevate" Act 111's purpose over the Right-to-Know law's purpose, or minimize the purpose of the RTKL, as both Ms. Melamed and the ACLU argued. This Court, mindful of the RTKL's purposes, has narrowly construed the exemption at issue. Even applying this narrow construction, however, leads to the conclusion that the mandatory grievance arbitration is a required and inevitable last step in the police officer discharge process. As noted, if records pertaining to a police officer's discharge were exposed to public view prior to the conclusion of the arbitration process, then the reputations of those officers may be unfairly tarnished for conduct for which they were later absolved. *See, e.g.*, *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 732-34 (Pa. 2020) (recognizing privacy implications of Right-to-Know disclosure). Thus, because the Court concluded that the final action in the police officer discharge process is the grievance arbitration, the Court affirmed the decision of the Office of Open Records.

F. Conclusion

For the foregoing reasons, this Court respectfully submits that the Commonwealth Court should affirm this Court's decision denying the appeal of Samantha Melamed and The Philadelphia Inquirer.

BY THE COURT:



Joshua Roberts, J.

Dated: October 20, 2021

APPENDIX B

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

Appeal of: SAMANTHA MELAMED, ET AL.	:	December Term 2020
From a Decision of: OFFICE OF OPEN RECORDS	:	No. 1744

ORDER

AND NOW, this **23rd day of July, 2021**, upon consideration of the briefs filed by the parties, this Court's review of the certified record, and after oral argument, it is **ORDERED** that the appeal is **DENIED** and the decision of the Office of Open Records is **AFFIRMED.**[1]

ORDRF-In Re: Appeal Of Samantha Melamed Etal

20120174400037

BY THE COURT:

J.

[1] The issue in this Right-to-Know appeal is when a police officer's personnel files are no longer exempt pursuant to 65 P.S. § 67.708(b)(7)(viii). The exemption covers "Information regarding discipline, demotion or discharge contained in a personnel file." The exemption does not "apply to the final action of an agency that results in demotion or discharge." The Philadelphia Police Department is subject to and covered by Act 111 of 1968, which provides that Police Department disciplinary actions or dismissals against police officers are appealable through a binding arbitration procedure. In other words, there can be no final action of the Police Department – the agency – resulting in demotion or discharge until the conclusion of the binding arbitration. Therefore, the appeal is denied and the decision of the Office of Open Records is affirmed.