IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 914 CD 2021

SAMANTHA MELAMED and THE PHILADELPHIA INQUIRER,
Petitioners,

v.

PHILADELPHIA POLICE DEPARTMENT,
Respondent.

PETITIONERS' REPLY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

At issue in this Right to Know Law ("RTKL" or the "Law") case is Petitioners' request for records reflecting "police personnel dismissed in 2020, including name and rank and effective date of dismissal" (the "Request"), *see* R.007a–009a—records expressly available under Section 67.708(b)(7)(viii) of the RTKL. Section 67.708(b)(7)(viii) states that while "[i]nformation regarding discipline, demotion or discharge contained in a personnel file" is exempt from the disclosure requirements of the Law, 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). It is this exception to the exemption in Section 67.708(b)(7)(viii) that compels disclosure of the instant records.

That Petitioners sought records limited solely to final actions 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. In recognition of the fact that the Law, as written, compels release, Respondent resorts to a distortion of the Law to manufacture a limitation on disclosure—one neither present in the statute nor supported by legislative intent.

In its Brief for Appellee Philadelphia Police Department ("Respondent's Brief"), Respondent proffers an interpretation of Section 67.708(b)(7)(viii) that impermissibly slices and removes the clause "of an agency" from the phrase "final

action of an agency that results in demotion or discharge"; the Department posits that ***even*** when it takes the final action of firing an employee, a records request that seeks final agency actions of discharge must nonetheless be denied if the employee elects for arbitration of their dismissal—arbitration that takes place ***outside*** of the agency. Respondent's interpretation of the Law contravenes the plain statutory text and subverts the RTKL's principal goal: "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).

I. Respondent distorts the plain text of Section 708(b)(7)(viii) to improperly withhold records required to be disclosed.

The fundamental error in Respondent's position can be evinced from its statement of this case. According to the Department, "[t]he instant appeal centers on one narrow legal question: when a police officer's discharge becomes a 'final action' such that PPD is obligated to disclose records of it under Section 708(b)(7)(viii) of the Right-to-Know Law." Respondent's Br. at 4. What Respondent has conspicuously omitted is that Section 708(b)(7)(viii) looks to not just "final actions" in a vacuum—but final actions ***of an agency*** resulting in demotion or discharge. 65 P.S. § 67.708(b)(7)(viii). Respondent's exclusion of this essential qualifier from its statement of the case encapsulates how its position of nondisclosure is wholly incompatible with the Right to Know Law.

This incorrect framing is found in two Office of Open Records ("OOR") decisions to which Respondent cites in its brief. *See* Respondent's Br. at 11 (citing *Nolen v. Phila. Police Dep't*, No. AP 2017-1039, 2017 WL 3124453, at *1 (Pa. Off. Open Recs. July 19, 2017); *Hofius v. Old Forge Sch. Dist*., No. AP 2017-2319, 2018 WL 852246, at *2 (Pa. Off. Open Recs. Feb. 9, 2018)). In both *Nolen* and *Hofius*, the OOR misstated the scope of Section 708(b)(7)(viii)—necessarily leading to legally unsound results. In *Nolen*, the OOR stated that when a records request implicates Section 708(b)(7)(viii), "the threshold question is what constitutes 'final action' in a disciplinary setting where the matter is subject to the grievance process." *Nolen*, 2017 WL 3124453, at *4. What the OOR omitted from the framing of this ostensibly "threshold question" is that the "final action" to be examined for the purposes of Section 708(b)(7)(viii) is the final action ***of the agency***. 65 P.S. § 67.708(b)(7)(viii). The same error was reproduced in *Hofius*. *See Hofius*, 2018 WL 852246, at *2 (relying upon *Nolen*). These OOR determinations are not binding on this Court, *Bowling v. Office of Open Records*, 75 A.3d 453, 457 (Pa. 2013); in addition, because these OOR decisions omit an entire clause from the plain language of 65 P.S. § 67.708(b)(7)(viii) in framing and ultimately deciding the questions presented therein, they are wholly unpersuasive.

Here, Respondent has adopted the OOR's distortion of Section 708(b)(7)(viii)'s text and relied upon it in continuing to advocate for withholding the

instant records. Thus, the Department's position that the "inquiry here turns on whether an officer's discharge is considered [a] 'final action' when PPD initially makes its decision to discharge an officer . . . or . . . when the discharge decision is ultimately upheld through the grievance arbitration process," Respondent's Br. at 8, must be rejected as a flawed premise that necessarily generates a flawed result—one that deviates starkly from the Law's plain language. Notwithstanding that an agency's action of discharge is ***inherently*** its final employment action, as opposed to being an "initial" one, *see infra* p. 6, Respondent's insistence on folding the arbitration process—a ***non***-governmental procedure—into the ambit of the clause "final action *of an agency* that results in . . . discharge," 65 P.S. § 67.708(b)(7)(viii) (emphasis added), is not permitted by the RTKL. *See, e.g.*, *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co*., 788 A.2d 955, 962 (Pa. 2001) ("As a matter of statutory interpretation, although 'one is admonished to listen attentively to what a statute says[;] [o]ne must also listen attentively to what it does not say.'" (citation omitted)); 1 Pa. C.S. § 1903(a).

Further, Respondent's attempt to invoke *Highlands School District v. Rittmeyer*, 243 A.3d 755 (Pa. Commw. Ct. 2020), in support of withholding rather than disclosing the requested records is unavailing. The Court in *Highlands*, faced with a request for disciplinary records ***prior*** to the completion of an agency's disciplinary proceedings, noted that if the school district's disciplinary process

results in the demotion or discharge of its employees, "then records relating to that discipline will no longer be exempt from disclosure under [Section 708(b)(7)(viii) of] the RTKL." *Id*. at 763–64. In light of this, Respondent draws the wrong conclusion from *Highlands*. There, where the employees were placed on unpaid leave while the agency's disciplinary process was pending—***before*** the agency took any final action of dismissal—no records subject to the Section 708(b)(7)(viii)'s disclosure requirement existed; in other words, in *Highlands*, the arc of the agency's dismissal process had not been completed at the time the RTKL request was made. Here, however, that arc was complete at the time the Request was made because the Department had already dismissed the officers at issue. Thus, according to Section 708(b)(7)(viii), the records must be disclosed.

A. <u>The final agency action within the meaning of Section 708(b)(7)(viii) is the Department's act of terminating its officers from duty; post-discharge activity, like arbitration, has no bearing on the application of Section 708(b)(7)(viii) to the requested records.</u>

In attempting to argue that the phrase "final action of an agency that results in . . . discharge," 65 P.S. § 67.708(b)(7)(viii), somehow encompasses an entire arbitration proceeding that takes place ***outside*** of the agency, Respondent characterizes grievance arbitration as "one and the same" with agency action. Respondent's Br. at 14. The Department posits that "because the PPD must participate in mandatory grievance arbitration, its initial decision to discharge an officer does not become its 'final action' under the RTKL until an arbitrator reviews

and upholds that discharge." *Id*. at 6. Respondent's representation is misleading for several reasons.

First, the Department's attempt to paint its decision to discharge an officer as an "initial decision" rather than a final one is meritless. The Philadelphia Police Department's disciplinary code sets forth a wide range of penalties with which an officer may be sanctioned; those penalties range from suspension or reprimand to demotion or dismissal. *See* Philadelphia Police Department, *Disciplinary Code* (July 2014), https://perma.cc/T4XT-NNHA. Critically, "[t]he Police Commissioner is the *final authority* on all disciplinary matters." *Id.* (emphasis added). That the Department asserts its own commissioner retains the "final authority" to terminate an officer from duty, yet also alleges that its decision to discharge that same officer is somehow ***non***final, is nonsensical at best and disingenuous at worst.[1]

Second, Respondent's reference to grievance arbitration as "mandatory" and a process that "the PPD must participate in" is not accurate. Philadelphia Police

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[1] Looking to any grievance arbitration decision, which frequently reference termination letters issued by the Department, supports the point that the Department, itself, does not treat its decision to fire an officer as "preliminary" or an otherwise "initial" course of action. *See, e.g.*,

• Discharge of Shavon Ghee: Op. & Award, *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, AAA Case No. 01-18-0003-5724 (June 23, 2019), https://perma.cc/TVW9-4FC7 ("The Notice of Dismissal served on Grievant states, *verbatim*: You are hereby notified that effective 8/23/18 you are dismissed from your position with the City of Philadelphia[.]");

• Discharge of Khalil Shaheed: Op. & Award, *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, AAA Case No. 01-19-0000-3398 (Aug. 23, 2019), https://perma.cc/8JN4-MBUU ("Grievant was terminated from employment . . . . The critical issue is whether [the agency] had just cause to impose the ultimate penalty of dismissal."); *see also Ultimate*, Merriam-Webster, https://www.merriam-webster.com/dictionary/ultimate (last accessed Mar. 17, 2022) (defining "ultimate" as "final" and "last in a progression or series").

Department officers terminated from duty who seek to challenge their dismissals may do so through arbitration as set forth in Act 111 of 1968, P.L. 237. It is not, however, correct that grievance arbitration is "a required and inevitable last step in the police officer discharge process." Respondent's Br. at 6 (citation omitted). *Compare id.*, *with* 43 P.S. § 217.1 (noting that officers and firefighters "shall *have the right* to a[] . . . settlement of their grievances or disputes in accordance with the terms of this act" (emphasis added)); *see also* R.124a (noting, in the Supplemental Affidavit of Lt. Barry Jacobs, that Officer Luis Miranda was dismissed by the Department in July 2020 and chose not to appeal his dismissal). Indeed, the FOP *refused* to file a grievance on Officer Deric Lewis' behalf in 2018—where Lewis "managed to get arrested four times . . . during 12 years with the department," primarily for engaging in domestic abuse against his wife. William Bender & David Gambacorta, *Fired, then Rehired*, The Philadelphia Inquirer (Sept. 12, 2019), https://perma.cc/LAR4-FRKR. The Department may not engage in linguistic acrobatics to evade its disclosure requirements. It is required to "accord[] the words [of Section 708(b)(7)(viii)] their plain and ordinary meaning," and not "disregard[] 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).

II. Waiting until the completion of arbitration not only contravenes the Right to Know Law's plain text but also the Law's express goals of timely disclosure and transparency.

The United States Supreme Court has long noted that "[t]he peculiar value of news is in the spreading of it while it is fresh . . . ." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918). Courts across the country have similarly observed that "information [obtained via public records statutes] is often useful only if it is timely." *Gilmore v. Dep't of Energy*, 33 F. Supp. 2d 1184, 1189 (N.D. Cal. 1998) (quoting H.R. Rep. No. 93-876 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6271). This Commonwealth has recognized the same: "The legislative intent for efficient resolution [of RTKL requests] is justifiable given that the public's interest in government documents is often time dependent." *Levy v. Senate of Pennsylvania*, 65 A.3d 361, 381 (Pa. 2013). It is for these reasons that the RTKL contains an explicit mandate of timeliness. 65 P.S. § 67.901 ("The time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency."). Indeed, "various provisions of the RTKL demonstrate an intent for an expedited determination of RTKL requests," *Levy*, 65 A.3d at 381 (citing, *inter alia*, 65 P.S. § 67.1101; 65 P.S. § 67.1301), because "the *overriding purpose* of the RTKL . . . relate[s] to ensuring expanded and expedited transparency in our government," *id.* at 382 (emphasis added).

Consider the termination of Officer Casey D. Morse, whom the Philadelphia Police Department dismissed from employment in July 2020. Decision & Award, *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, AAA Case No. 01-

20-0007-3523 (Aug. 26, 2021), https://perma.cc/P7CG-NF47. Officer Morse chose to arbitrate his dismissal, and the arbitrator determined that the Department "ha[d] met its burden of showing just cause for [his] termination"—but not until ***more than a year*** after his discharge. *Id.* at 12. Morse had engaged in a pattern of domestic abuse: threatening to kill his former girlfriend; vandalizing her property; and using police department infrastructure to engage in stalking-like behavior; he was arrested and charged with making "terroristic threats" and harassment. *Id*. at 4–6.

Under the plain text of the RTKL, 65 P.S. § 67.901; 65 P.S. § 67.708(b)(7)(viii), Petitioners had a right to records reflecting the officer's termination ***contemporaneously*** with the agency's final act of discharge. *See id.* At the time Petitioners made their RTKL Request in July 2020—the same time at which Officer Morse was discharged—Pennsylvanians had made it resoundingly clear that they seek meaningful accountability and oversight of the institutions tasked with serving their interests, including law enforcement. R.068a. The RTKL's mandate of prompt disclosure of an agency's final action of discharge, ***compounded*** with the principle that "the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly[,]" *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976), render it utterly essential that the press and public timely learn about salient actions the Department takes to ensure that it retains only those officers most fit for duty.

Respondent suggests that "[g]iven the[] privacy and reputational implications" associated with officer discipline, "simply waiting until the end of the grievance arbitration process to disclose this information protects the non-final discharge information in an officer's personnel file[.]" Respondent's Br. at 18–19. Notwithstanding that the discharge information at issue ***is*** final as far as the ***agency's*** action is concerned, *see supra* pp. 2–7, the Department ignores the Law's explicit mandate of timeliness—a mandate that doesn't contemplate agencies asking the press and the public to "simply wait" for the disclosure of records to which no exemption applies.

As to the purported "privacy and reputational" implications of Petitioners' Request, Respondent's concerns are outweighed by the critical need for transparency surrounding the instant records. As helpfully articulated by a neighboring jurisdiction:

> Public employees have less entitlement to privacy than do non-public employees[] where job performance is concerned. This is due to the high priority placed on accountability. . . . It may well be true that a public employee (including a police officer) and/or his collective bargaining unit or labor union, views a particular record as private or embarrassing . . . but, it is nonetheless [] within the ambit of disclosure.

Schenectady Police Benevolent Ass'n v. City of Schenectady, No. 2020-1411, 2020 WL 7978093, at *5 (N.Y. Sup. Ct. Dec. 29, 2020). Such is the case here, where the ambit of disclosure explicitly encompasses the Philadelphia Police Department's decision to fire its officers. The court in *Schenectady* weighed concerns of

"reputational harm" against the need for timely disclosure of even unsubstantiated allegations of misconduct; while cognizant of each concern raised by the parties, the court reiterated its "role to apply the current statutory scheme to the facts before it," noting that "[i]n our current times, our state lawmakers have seen fit to require disclosure of police personnel records," and they "did so in the name of opening the door to transparency[;] having done so, it would be palpably improper for th[e] [c]ourt to close it." *Schenectady*, 2020 WL 7978093, at *6.

Here, 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). "[T]he overriding legislative intent of transparency of government and speedy resolution of requests" found in the RTKL, *Levy*, 65 A.3d at 382, is of particular import with respect to the records at issue in this case. That is because Petitioners, whom "[t]he Constitution specifically selected . . . to play an important role in the discussion of public affairs," *Mills v. Alabama*, 384 U.S. 214, 219 (1966), "do[] not simply publish information . . . but guard[] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to . . . the cleansing effects of exposure and public accountability," *Neb. Press Ass'n*, 427 U.S. at 586–87 (citation omitted). Just this month, a neighboring court reiterated the importance of public records laws as vehicles "to

hold officers accountable, to deter misconduct, to assess whether the internal affairs process is working properly, and to foster trust in law enforcement." *Rivera v. Union Cnty. Prosecutor's Off.*, No. 084867, 2022 WL 760664, at *11 (N.J. Mar. 14, 2022). And where records pertain to "serious discipline, like an officer's termination, resignation, [or] reduction in rank, . . . [it counsels in] favor [of] disclosure." *Id*. at *12. Here, both the plain text of the RTKL—and accompanying public policy considerations—compel disclosure.

CONCLUSION

The records sought by the Request 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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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 3130 words.

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify that Petitioners' Reply 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.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2022, I caused a true and correct copy of the foregoing Petitioners' Reply 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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