

IN THE COMMONWEALTH COURT  
OF PENNSYLVANIA

NO. 1469 C.D. 2021

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ALLEGHENY COUNTY,  
*Appellee,*

v.

BRITTANY HAILER and PITTSBURGH CURRENT,  
*Appellants.*

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**PRINCIPAL BRIEF OF APPELLANTS**

ON APPEAL FROM THE DECEMBER 1, 2021 OPINION AND ORDER OF THE COURT OF  
COMMON PLEAS OF ALLEGHENY COUNTY

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## STATEMENT OF JURISDICTION

This Court has jurisdiction over the instant appeal, which is taken from the December 1, 2021 Opinion and Order of the Court of Common Pleas of Allegheny County in the matter of *Allegheny County v. Brittany Hailer and Pittsburgh Current*, pursuant to Section 1302(a) of the Right to Know Law (“RTKL”), 65 P.S. § 67.1302(a), and Section 762(a)(4) of the Judicial Code, 42 Pa. C.S. § 762(a)(4).

## **ORDER UNDER REVIEW**

Appellants seek review of the December 1, 2021 Opinion and Order of the Allegheny County Court of Common Pleas, attached hereto as Exhibit A. The text of the relevant order is as follows:

And now, this 1<sup>st</sup> day of December, 2021, it is hereby Ordered that the Final Determination of the Office of Open Records is reversed, and the Petition for Judicial Review filed by Allegheny County on April 28, 2021, is granted.

BY THE COURT:

W. Terrence O'Brien, S.J.



## **SCOPE AND STANDARD OF REVIEW**

The scope and standard of review by the Commonwealth Court of an order of the Court of Common Pleas regarding a public records request under the Right to Know Law, 65 P.S. §§ 67.101–67.3104 (“RTKL”), is to determine whether “findings of fact are supported by competent evidence[,] or whether the trial court committed an error of law, or an abuse of discretion in reaching its decision.”

*Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 178 n.8 (Pa. Commw. Ct. 2019) (citation omitted). The scope of review for questions of law is plenary. *See Hearst Television, Inc. v. Norris*, 54 A.3d 23, 29 (Pa. 2012).

## QUESTIONS INVOLVED

1. Did the trial court misapply Section 1252-B of the Coroner's Act when it determined that Appellants did not meet the definition of a "nongovernmental agenc[y]" seeking "to determine liability for the death of the deceased"?

Suggested answer: Yes.

2. Did the trial court err in finding that two Supreme Court of Pennsylvania cases establishing that the public has access to autopsy reports were inapplicable? *See Hearst Television, Inc. v. Norris*, 54 A.3d 23, 33 (Pa. 2012) ("*Hearst Television*") (finding that "the Coroner's Act provides two methods of public access" to a coroner's "official records and papers"); *Penn Jersey Advance, Inc. v. Grim*, 962 A.2d 632, 637 (Pa. 2009) ("*Penn Jersey*").

Suggested answer: Yes.

## STATEMENT OF THE CASE

Pursuant to Pa.R.A.P. 2117(d), the statement of the case may consist of the facts as stipulated by the parties. During the litigation in the lower court, the parties submitted agreed-upon stipulated facts, which Appellants have reproduced at R.105a.

These agreed-upon stipulated facts covered the history of the case through the stipulation's filing on July 1, 2021. After the stipulation was filed, an additional filing containing factual information was entered into the record prior to the lower court's final order and opinion on December 1, 2021. That filing—Brittany Hailer's affidavit—is germane to the statement of the case.

On October 1, 2021, investigative reporter Brittany Hailer submitted an affidavit explaining her interest in the records requested. R.164a. In the affidavit, Ms. Hailer detailed her professional work experience, which includes her background as an investigative reporter, visiting university lecturer and recipient of two Reporting Fellowships in the areas of health and criminal justice journalism by the John Jay College of Criminal Justice's Center on Media, Crime and Justice, and the Langeloth Foundation. R.165a. She detailed the numerous topics she covered at the Allegheny County Jail, including deaths of inmates in custody. R.165a–167a. As a particular focus, Ms. Hailer has examined indigent persons who died at the Allegheny County Jail. *Id.* She attested that details about those

who die without next of kin, or whose families lack the support and ability to request records or information surrounding their loved one's death, are presently unknown to the public. In particular, she averred that the subject of her RTKL request, Daniel Pastorek, "was homeless before his incarceration and lacks a family member with capacity to investigate and search for information about his death." *Id.* She explained that she was "seeking access to these records to help determine whether conditions at the Allegheny County Jail contributed to Mr. Pastorek's death," and that "[a]s an investigative journalist, [her] reporting sheds light on government agencies, like the Allegheny County Jail, and the challenges they face, which enables the public to evaluate the need for potential changes or reforms." *Id.*

Allegheny County responded to Ms. Hailer's affidavit with a brief on November 1, 2021. R.169a. In the brief, it argued that she could not seek to establish liability pursuant to Section 1252-B of the Coroner's Act—thus ensuring her access to the records—because she was not involved in a legal action. Judge W. Terrence O'Brien endorsed the County's arguments and on December 1, 2021 issued an order and opinion reversing the previous final determination of the Office of Open Records. The instant appeal followed on December 15, 2021.<sup>1</sup>

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<sup>1</sup> An additional Right to Know Law requester named Monica Fuentes had previously been named in this caption. Ms. Fuentes, an employee of a Pittsburgh law firm, filed a RTKL request for an autopsy for a different man. Because Ms.

## SUMMARY OF THE ARGUMENT

Appellant Brittany Hailer’s reporting about deaths within the Allegheny County Jail (“Jail”) is a topic of significant public interest—namely, the manner in which a government agency is treating incarcerated citizens, and the instances in which those citizens die during their incarceration.<sup>2</sup> This system is publicly funded, and it impacts the lives of citizens throughout Allegheny County and beyond. The release of the records sought in Ms. Hailer’s RTKL request would allow the public to assess any shortfalls within the Jail and to otherwise understand the Jail’s operations, particularly as they relate to inmate health and safety, as seen through the lens of one inmate’s death. The RTKL was designed to provide access

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Fuentes worked for a law firm, Allegheny County determined that although she worked at a non-governmental agency, her firm was seeking to determine liability pursuant to Section 1252-B of the Coroner’s Act. A Rule 908 Notice was lodged with this Court on February 18, 2022 advising that Ms. Fuentes no longer had an interest in the outcome of this case.

<sup>2</sup> Appellant Hailer has reported extensively on deaths at the Jail, and in March 2022 released a lengthy investigative article about the deaths of 13 men at the Jail during a two-year period. Brittany Hailer, *Thirteen men died after going to the Allegheny County Jail. Here are their stories.*, Pittsburgh Inst. for Nonprofit Journalism (Mar. 13, 2022), <https://pinjnews.org/thirteen-men-died-after-going-to-the-allegheny-county-jail-here-are-their-stories/>. Allegheny County Jail conditions continue to draw public scrutiny. In June 2022, the mother of an inmate who died at the Jail confronted members of the Allegheny County Jail Oversight Board about jail conditions and deaths during a public meeting. Jake Dabkowski, *Are we running a jail or a cemetery?* Mother asks Allegheny County Jail warden, Pittsburgh Inst. for Nonprofit Journalism (June 2, 2022), <https://pinjnews.org/are-we-running-a-jail-or-a-cemetery-mother-asks-allegheny-county-jail-warden/>.

to exactly this type of information, allowing the public to “scrutinize the actions of public officials[] and make public officials accountable for their actions.” *ACLU of Pa. v. Pa. State Police*, 232 A.3d 654, 656 (Pa. 2020) (citation omitted).

Accordingly, the RTKL’s exceptions to disclosure are to be construed narrowly, and the agency invoking them must demonstrate their application by a preponderance of the evidence. The Court of Common Pleas committed reversible error in finding that Allegheny County met this burden.

***First***, the lower court erred in finding that Ms. Hailer did not meet the definition of a “nongovernmental agenc[y]” seeking “to determine liability for the death of the deceased” pursuant to Section 1252-B of the Coroner’s Act. 16 P.S. § 1252-B. The lower court’s endorsement of a narrow reading of the “liability” clause was not based on competent evidence and runs counter to the legislative intent of both the Coroner’s Act and RTKL. Additionally, the lower court determined Allegheny County has discretion to determine when to release autopsy records to a nongovernmental agency; this too was not based on competent evidence and is not supported by a reading of the legislative history.

***Second***, the lower court further abused its discretion by misconstruing precedent of the Supreme Court of Pennsylvania on the intersection of the RTKL and the Coroner’s Act.

And *third*, the Supreme Court of Pennsylvania has held that a lower court abuses its discretion where it fails to engage properly with the factual record. *ACLU of Pa.*, 232 A.3d at 657 (finding abuse of discretion where lower court ruled “without considering the entirety of the record upon which OOR based its decision”). Here, the aforementioned errors demonstrate that the lower court failed to properly engage with the record. In doing so, the lower court imposed “a presumption against disclosure that is irreconcilable with the RTKL.” *Id.* at 670. This was an abuse of discretion, and the holding of the Court of Common Pleas should be reversed. *See id.* at 657.

## **ARGUMENT**

### **I. The lower court misapplied Section 1252-B of the Coroner’s Act to determine that Appellants were not entitled to autopsy and toxicology records.**

The Right to Know Law, 65 P.S. §§ 67.101–67.3104 (“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.” *Pa. State Educ. Ass’n v. Commonwealth, Dep’t of Cmty. & Econ. Dev.*, 148 A.3d 142, 155 (Pa. 2016). Records held by agencies subject to the RTKL are presumed to be public and subject to disclosure upon request, unless they fall within a clearly outlined exception.

One provision of the RTKL purports to exempt from disclosure “[a]n autopsy record of a coroner or medical examiner.” 65 P.S. § 67.708(b)(20). However, the RTKL’s conflicts provision—Section 67.3101.1—provides that should “the provisions of this act regarding access to records conflict with any other Federal or State law, the provisions of this act shall not apply.” 65 P.S. § 67.3101.1. Thus, if another Federal or State law provides for the disclosure of autopsy records—such as here, the Coroner’s Act—the exception under Section 67.708(b)(20) of the RTKL does not apply and the autopsy records retain their status as public records subject to disclosure under the RTKL.

**A. The Coroner’s Act permits access to autopsy and toxicology records under the RTKL.**

Article XII-B of the County Code, otherwise known as the Coroner’s Act, authorizes county coroners and medical examiners to investigate certain deaths, including jail deaths, to determine their cause and manner. *See* 16 P.S. §§ 1218-B, 1219-B, 1220-B. The Act was revised in 2018 as part of a larger update to the County Code. *See* SB 1005 (PN 2026) Executive Summary at 1, Pa. Gen. Assemb. (Sept. 25, 2018), <https://perma.cc/X3CR-HAHX> (hereinafter “Executive Summary”). Prior to December 24, 2018—the effective date of the amended Coroner’s Act—the Act applied only to counties of the third, fourth, fifth, sixth, seventh and eighth classes, and excluded counties of the second class such as Allegheny County. *See* 16 P.S. § 102(a) (1955), *amended by* 16 P.S. § 102(a)



(2018). The 2018 amendments to the Coroner’s Act expanded the applicability of the Act to include counties of the second class, like Allegheny, unless otherwise expressly provided. *See* 16 P.S. § 1201-B (“Except as otherwise expressly provided under this article, this article shall apply to counties of the second class, second class A and third through eighth class.”); 16 P.S. § 102(a) (“Except incidentally . . . or as provided in . . . **Article XII-B** . . . this act does not apply to counties of the first or second classes.” (emphasis added)).

The Coroner’s Act contains two provisions allowing for public access to autopsy and toxicology reports. The first, Section 1236-B, requires coroners in counties of the third, fourth, fifth, sixth, seventh and eighth classes to, “within 30 days after the end of each year,” deposit all “official records and papers for the preceding year in the Office of the Prothonotary for the inspection of all persons interested therein.” 16 P.S. § 1236-B. The second applies to all counties subject to the Act, including second class and second class A counties such as Allegheny County, and provides that the “coroner shall charge and collect a fee of \$500 for an autopsy report” and “\$100 for a toxicology report . . . requested by nongovernmental agencies in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased.” 16 P.S. § 1252-B. Ms. Hailer’s RTKL request sought autopsy and toxicology records pursuant to

the second provision as a nongovernmental entity seeking to determine liability for the death of a deceased jail inmate.

**B. The lower court erred by concluding that Section 1252-B allows for discretion in releasing autopsy records to a nongovernmental agency.**

The lower court concluded that Appellants were not entitled to the autopsy and toxicology records under Section 1252-B because Ms. Hailer’s status as an investigative reporter did not implicate the “legal process.” Ex. A at 4. The lower court explained that seeking to uncover systemic inequities by shining a light on public officials and government institutions was a “laudable activity,” but because her investigative journalism did not involve the legal system, Ms. Hailer’s request did not satisfy the “liability” clause within Section 1252-B. Ex. A at 3–4. In endorsing such an interpretation, the lower court held that Section 1252-B “must be read as vesting discretion in the Medical Examiner to determine whether a requester is a ‘nongovernmental agenc[y]’ . . . ‘investigat[ing] a claim asserted under a policy of insurance or [seeking] to determine liability for the death of the deceased.’” Ex. A at 4.

The lower court erred in concluding that Section 1252-B, as amended, grants the Medical Examiner discretion to determine whether a nongovernmental entity qualifies to obtain autopsy and toxicology records under the Coroner’s Act. The lower court’s decision assumes an intent on the part of the General Assembly that

is not reflected in the legislative history or any analysis of the Act. Moreover, the lower court's decision is contrary to public policy and the RTKL's goal of promoting government transparency.

Section 1236.1(c) of the former Coroner's Act provided that:

The coroner may charge and collect a fee of up to one hundred dollars (\$100) for each autopsy report, up to fifty dollars (\$50) for each toxicology report, up to fifty dollars (\$50) for each inquisition or coroner's report and such other fees as may be established from time to time for other reports and documents *requested by nongovernmental agencies*.

16 P.S. § 1236.1(c) (repealed 2018) (emphasis added). Similarly, Section 1252-B of the Coroner's Act, as amended, provides that:

The coroner shall charge and collect a fee of \$500 for an autopsy report, \$100 for a toxicology report, \$100 for an inquisition or coroner's report, \$50 for a cremation or disposition authorization and other fees as may be established from time to time for other reports or documents *requested by nongovernmental agencies in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased*.

16 P.S. § 1252-B (emphasis added).

The addition of the language “in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased” does not reflect an intention on the part of the General Assembly to “limit the types of requesters that coroners could charge for autopsy, toxicology, and coroner's

reports,” an argument that has been advanced by the County. R.118a. No such purpose is reflected in the General Assembly’s comments on Section 1252-B. Indeed, in the Section-by-Section Commentary to the Act, Section 1252-B is described as being “analogous to [former Coroner’s Act] Section 1236.1(c) and SCCC Section 1235.1(c), except that the fees for reports have been increased.” SB 1005 (PN 2026) Section-by-Section Commentary at 14, Pa. Gen. Assemb. (Oct. 24, 2018), <https://perma.cc/N9BM-B6FZ> (hereinafter “Commentary”). The Commentary makes no mention of an intent to limit the types of requesters who may seek access to such records, or for what purpose. Similarly, the Executive Summary describes the “new Section 1252-B (Fees for Reports)” as “contain[ing] the fee schedule previously in Section 1236.1 (Requests for Examinations and Reports)” and notes that “[t]he fees for reports as set forth in this section have been increased per House Bill 1931 to permit a greater recovery of the actual costs of the services.” Executive Summary at 7. No mention is made of any intent to limit the types of requesters to whom Section 1252-B may apply or for what purpose the records are sought.

This commentary comports with legislative history showing that in amending the Coroner’s Act in 2018 the legislature rejected previous efforts to revise the Act to curtail the application of Section 1252-B. Indeed, although limiting language was proposed for years during the legislative process, none of

this narrowing language was adopted. HB 2456, Pr. No. 4017 at 17, Pa. Gen. Assemb. (introduced Sept. 8, 2014), <https://perma.cc/2KEG-Y8FA>; HB 1931, Pr. No. 3045 at 16–17, Pa. Gen. Assemb. (introduced Apr. 1, 2016), <https://perma.cc/5JKA-3U27> (hereinafter “HB 1931”).

For instance, the legislature rejected portions of House Bill 1931 of 2015 (legislation that was previously introduced but never signed into law), which was promoted by the Pennsylvania State Coroners Association. Executive Summary at 6. One provision of HB 1931 that was not incorporated into Section 1252-B of the revised Coroner’s Act would have required that “[a] record produced by the coroner in response” to a request for an autopsy or toxicology report “may not be publicly released except in response to a civil or criminal subpoena, a discovery request, a legally enforceable order from a court, a request from law enforcement or the Commonwealth and its agencies or other governmental agency.” HB 1931 at 16–17. This proposed change was rejected by the legislature, which only adopted provisions “consistent with the purpose of the Code revision.” Executive Summary at 6. Moreover, the House Local Government Committee passed an amendment to Section 1252-B removing a provision of HB 1931 that would have created “a new subsection” specifying “that the section should not be construed as authorizing disclosure of a record exempt from public access under Act 3 of 2008, known as the Right-to-Know Law.” Executive Summary at 7 n.15.

The General Assembly’s rejection of these attempts to restrict public access to coroner’s records under the amended Coroner’s Act and the RTKL reveals its commitment to retaining and protecting such public access as “consistent with the purpose of the Code revision.” *Id.* at 6. Indeed, the language of Section 1252-B itself supports the conclusion that, in amending the Act in 2018, the General Assembly intended to maintain an “analogous” level of access to coroner’s records. Commentary at 14.

**C. The lower court erred in narrowly applying the phrase “to determine liability” to exclude the work of journalists from access rights established in Section 1252-B.**

1. *The lower court’s efforts to interpret the ambit of Section 1252-B failed to consider the provision’s plain meaning.*

The Office of Open Records’ interpretation of Section 1252-B was consistent with the Act’s plain language and legislative history, but also aligned with the policy of government transparency underlying the RTKL. The lower court’s reversal of the OOR leads to an unreasonable interpretation of the plain text of the language in question. *See Bowling v. Office of Open Records*, 75 A.3d 453, 466 (Pa. 2013) (finding that in a RTKL case the best indication of legislative intent is the plain language and that “the General Assembly does not intend a result that is absurd, impossible of execution, or unreasonable”). As the plain text makes clear, Section 1252-B applies fully to Appellants.

The lower court concluded that because Section 1252-B did not define the phrase “to determine liability,” it should look to Black’s Law Dictionary, Ex. A at 3, and it adopted the County’s position that “the Coroner’s Act phrase ‘liability for the death of the deceased,’ means liability in a criminal, civil, or financial sense,” *id.* at 4. The lower court focused on the first definition for “liability” in Black’s: “1. The quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, *enforceable by civil remedy or criminal punishment[.]*” *Liability*, Black’s Law Dictionary (11th ed. 2019) (emphasis added); Ex. A at 4. By focusing solely on the clause referencing the legal system (“enforceable by civil remedy or criminal punishment”), the lower court ignored the “accountable” and “society” portions of the definition.

Even though the plain meaning of the phrase “to determine liability” does not necessitate the involvement of the legal system, even the available Black’s definition provides greater breadth than the court acknowledged. Black’s Law Dictionary defines “accountable” as: “1. Responsible for the effects of one’s actions and willing to explain or be criticized for them; liable to be called upon to explain one’s fulfillment of a duty or execution of a trust. 2. Explainable; capable of being accounted for.” *Accountable*, Black’s Law Dictionary (11th ed. 2019). “Society” is defined as: “1. A community of people, as of a country, state, or locality, with common cultures, traditions, and interests.” *Society*, Black’s Law

Dictionary (11th ed. 2019). Taken together, these aspects of the definition of liability encapsulate the concept of an issue being examined in detail so that the community can understand and respond to the information elicited about the issue—with or without the involvement of the legal system. Providing accountability to society is exactly the role that investigative journalists like Appellants serve.

2. *Investigative journalists, like Appellants, serve to inform the public and in doing so help determine liability on matters of public controversy.*

The Supreme Court of Pennsylvania has long recognized the role of the news media in providing accountability for government actors. In 1963, the Court reflected on the work of the news media in the context of a case examining the Pennsylvania Shield Law, which protects reporters who are subpoenaed for their notes, documents, or testimony.

[I]ndependent newspapers are today the principal watchdogs and protectors of honest, as well as good, Government. They are, more than anyone else, the principal guardians of the general welfare of the Community and, with few exceptions, they serve their City, State or Nation with high principles, zeal and fearlessness. They are, in the best sense of the maxim, ‘pro bono publico’.



*In re Taylor*, 193 A.2d 181, 185 (Pa. 1963).<sup>3</sup> The state Supreme Court’s description of the importance of the news media emphasizes that reporters perform essential investigative roles to help uphold good government and provide accountability when government actors fail to carry out their duties.

The United States Supreme Court has also recognized the accountability function of the press. The Court explained in *Sheppard v. Maxwell* that a “responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field.” 384 U.S. 333, 350 (1966). The Court continued, “[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.” *Id.*

The public relies on the news media to provide information regarding matters of public concern. And the news media, in turn, relies on government records to gather news and shed light on those circumstances. Part of the press’ scrutiny of the criminal justice system involves reviewing and reporting on autopsy records. Members of the news media have long sought access to autopsy reports to

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<sup>3</sup> In 2008, the Pennsylvania Supreme Court reaffirmed *Taylor* and the policy basis for the Shield Law, stating that the privilege “was enacted to protect the free flow of information to the news media in their role as information providers to the general public.” *Castellani v. Scranton Times, L.P.*, 956 A.2d 937, 951 (Pa. 2008).

provide accountability to their community about the circumstances of a person's death.

The late reporter Pete Shellem of the Patriot-News exemplified the ways in which an investigative journalist can use court and autopsy records to provide accountability to society.

In 2003, Pete Shellem of the Harrisburg Patriot News started looking into the Edna Laughman murder case. For ten years, critical DNA samples taken from the Edna Laughman crime scene were believed lost. Mr. Shellem tracked the location of the missing DNA samples to the Max Plank Institute for Evolutionary Anthropology, which is located in Leipzig, Germany. Apparently, Professor Mark Stoneking brought the samples to the Institute in 1998, where he was conducting research.

John T. Rago, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform from the Pennsylvania Eight*, 12 Widener L. Rev. 359, 394 n.179 (2006).

After sixteen years of imprisonment, the man who had been convicted of Ms. Laughman's murder was excluded as the source of DNA left on the victim's body. *Id.* at 394.<sup>4</sup> He was released from prison in November 2003 and exonerated in August 2004. See Barry Laughman, Innocence Project, <https://perma.cc/U2L5-YSCP> (last visited July 27, 2022).

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<sup>4</sup> Last year, authorities arrested Ms. Laughman's neighbor for her murder. Barry Laughman, Nat'l Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3373> (last updated July 28, 2021).

Mr. Shellem's remarkable and life-changing investigative work<sup>5</sup> was based on his ability to review key public records, including autopsy reports.<sup>6</sup> See Pete Shellem, *Who Killed Edna Laughman?*, Patriot-News (Harrisburg), June 1, 2003, at A01; PennLive Editorial Board, *Access Denied? Carbone, Crawford, Laughman, Gladden—Their Names Reveal Why Coroner's Info Is a Must*, Patriot-News (Nov. 26, 2010), <https://perma.cc/2P9J-4HH9>. Former Pennsylvania Attorney General Ernie Preate Jr., who was once a subject of Mr. Shellem's reporting, acknowledged the critical role of such investigative reporting. "He is a one-man Innocence Project," he told American Journalism Review for a 2007 story. "The idea that a single, solitary newspaper reporter can accomplish all this is a remarkable story." *Investigative Reporter Dies*, Innocence Project (Oct. 26, 2009), <https://perma.cc/Z22U-SNB4>.

But Mr. Shellem's investigative work would not have been possible without access to autopsy records. Interpreting the phrase "to establish liability" within Section 1252-B to mean it only encompasses the legal system entirely forgoes the definitional aspect of "liability" that includes accountability to society and the

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<sup>5</sup> Mr. Shellem's work led to the release of five wrongly-convicted prisoners. Dennis Hevesi, *Peter Shellem, Investigative Reporter Who Wrote About Wrongful Convictions, Dies at 49*, N.Y. Times (Oct. 31, 2009), <https://perma.cc/T22S-ZCJD>.

<sup>6</sup> Widener Law Review author John T. Rago credits Mr. Shellem for providing copies of multiple documents from his files, including the autopsy. Rago, *supra*, at 386 n.136, 388 n.148.

work of journalists, scholars, and public interest organizations (to name a few) to investigate and thereby help establish the liability for wrongdoing in our communities and government services.

While liability for a death may, in many cases, be attributable to one or more identifiable individuals, in other cases it may extend to a policy or practice which ultimately led to or contributed to that death. Appellants seek access to the records at issue here as part of an investigation into medical conditions at the Jail which may have led or contributed to the death of Mr. Pastorek. *See* Brittany Hailer, *Daniel Pastorek Died in the Allegheny County Jail But He Shouldn't Have Been There in the First Place*, Pittsburgh Current (Dec. 16, 2020), <https://perma.cc/CV9U-Y7UQ>. Mr. Pastorek, whose criminal record revealed a history of “alcoholism and substance-use disorder,” was found unresponsive in his cell and was later pronounced dead of heart disease. *Id.* Previous reporting by Ms. Hailer and others has called into question the adequacy of medical care available at the Jail particularly for those suffering from substance addictions.

For example, in March 2021, Ms. Hailer reported that because the “Allegheny County Jail currently does not permit individuals in custody to receive methadone or buprenorphine to treat opioid use disorder, unless the incarcerated person is pregnant,” prisoners who rely on such a prescribed medication-assisted treatment have been denied access to this medication, including a 71-year-old

inmate who suffered severe symptoms of withdrawal. *See* Brittany Hailer, *71-Year-Old Incarcerated Man Denied Methadone in Allegheny County Jail*, Pittsburgh Current (Mar. 26, 2021), <https://perma.cc/5N4T-A62G>. Similarly, in January 2021, PublicSource reported on delays and mistakes in connection with medical care provided at the Allegheny County Jail due to understaffing. Juliette Rihl, *Mixed-up Meds & Long Waits: How Understaffing Hurts Medical Treatment at Allegheny County Jail*, PublicSource (Jan. 7, 2021), <https://perma.cc/CL97-9XCC>.

While these articles about medical treatment and substance abuse treatment are illuminating, a complete understanding of prison conditions is only possible through a total examination of an inmate’s cycle through the Jail. And sadly, for those whose lives end in the Jail, an examination of the circumstances of their deaths must take place, if not by lawyers or insurance adjusters, then by investigative journalists, scholars and others seeking to provide context about the death. Only a robust reading of “liability”—which encompasses accountability to society beyond the legal system—will allow full transparency in line with the remedial goals of the RTKL. *See Mollick v. Twp. of Worcester*, 32 A.3d 859, 870 (Pa. Commw. Ct. 2011) (citing *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *petition for allowance of appeal granted*, 15 A.3d 427 (Pa. 2011)).

**D. Releasing the records sought by Appellants pursuant to Section 1252-B achieves important government transparency goals.**

Public access to Mr. Pastorek's autopsy and toxicology reports may help shed light on factors that contributed to the heart condition that caused his death—including the medical treatments available to him while a Jail inmate.

Accordingly, not only is release of these records pursuant to Section 1252-B consistent with the Act's plain language and legislative history, it is also aligned with the policy of government transparency underlying the RTKL. The public has a powerful interest in understanding the operations of county agencies, such as the Jail. Access to government records helps the news media report information necessary to aid the public in determining if government agencies are operating effectively or whether reforms are needed.

In Pittsburgh, investigative journalists like Appellants and others have relied on government records to provide essential reporting on the operations of state institutions, including the Jail. *See Rihl, supra* (noting that PublicSource "reviewed dozens of jail documents spanning 20 months" in the course of researching its story). Such reporting sheds light on those agencies' operations and the challenges they face, and assists the public in evaluating the need for potential changes or reforms. Ms. Hailer and the Pittsburgh Current seek access to the records at issue here to help determine whether conditions at the Jail contributed to the death of Mr. Pastorek. The requested records fit squarely within the types of

records available under Section 1252-B of the Coroner's Act and releasing those records to Appellants would indisputably serve the purpose of aiding a determination of liability on a matter of high public interest.

**II. The lower court erred in disregarding applicable precedent on the intersection of the RTKL and the Coroner's Act.**

The lower court erroneously determined that two Supreme Court of Pennsylvania cases analyzing the intersection of the RTKL and Coroner's Act did not apply to the instant matter. Ex. A at 4–5; *see Hearst Television, Inc. v. Norris*, 54 A.3d 23, 33 (Pa. 2012) (“*Hearst Television*”) (finding that “the Coroner's Act provides two methods of public access” to a coroner's “official records and papers”); *Penn Jersey Advance, Inc. v. Grim*, 962 A.2d 632, 637 (Pa. 2009) (“*Penn Jersey*”) (finding that autopsy reports are “official records and papers” subject to disclosure under the Coroner's Act).

In both *Hearst Television* and *Penn Jersey*, the Pennsylvania Supreme Court specifically found that “the Coroner's Act provides two methods of public access” to the coroner's “official records and papers.” *Hearst Television*, 54 A.3d at 33; *see also Penn Jersey*, 962 A.2d at 637 (finding two methods of public access to autopsy reports under the Coroner's Act—the coroner's year-end archiving of all “official records and papers” with the prothonotary, or rapid access for those who do not wish to wait and are willing to pay a fee).

In reversing the Office of Open Records, the lower court ignored the OOR's well-reasoned decision that appropriately applied *Hearst Television*'s holding to this case. In its appeal to the lower court, the County argued that the requester in *Hearst Television* sought only records stating the cause and manner of death, which, unlike autopsy reports, are not exempt from disclosure under the RTKL. R.115a–116a; *see* 65 P.S. § 67.708(b)(20). Thus, in *Hearst Television*, the Cumberland County coroner's office objected not to the disclosure of the records themselves, but to the timing of the disclosure, arguing that it should not be required to disclose the records until the end of the year, when it would deposit them with the Office of the Prothonotary in accordance with Section 1251 of the former Coroner's Act. *Hearst Television*, 54 A.3d at 27.

The Pennsylvania Supreme Court rejected this argument, citing to its decision in *Penn Jersey* (a case involving access to autopsy reports) for the proposition that “by the terms of Section 1236.1(c) [now Section 1252-B]” the records were “rapidly available for a fee ‘for those who do not wish to wait until after the end of the year, and who are also willing to pay the charges associated with procuring it.’” *Id.* at 33 (quoting *Penn Jersey*, 962 A.2d at 637).

From this, the County argued that “*Hearst Television* was a case about the timing of a coroner's duty to release records. It was not about whether the records were public in the first place[,]” R.116a, and thus should not have been considered



by the OOR. But the mere fact that the Court did not have cause to examine the RTKL’s autopsy records exception in *Hearst Television* does not negate the applicability of its holding to the present case. The conflicts provision of the RTKL, 65 P.S. § 67.3101.1, specifically states that should “the provisions of this act . . . conflict with any other Federal or State law, the provisions of this act shall not apply”—a point which the County has conceded. R.119a (“When the RTKL conflicts with other laws, the other laws shall apply.”). And, in both *Hearst Television* and *Penn Jersey*, the Pennsylvania Supreme Court specifically found that “the Coroner’s Act provides two methods of public access” to the coroner’s “official records and papers.” *Hearst Television*, 54 A.3d at 33; *see also Penn Jersey*, 962 A.2d at 637 (finding two methods of public access to autopsy reports under the Coroner’s Act—the coroner’s year-end archiving of all “official records and papers” with the prothonotary, or rapid access for those who do not wish to wait and are willing to pay a fee).

Thus, the holdings in both cases are applicable here and the lower court should have considered the OOR’s application of those cases in determining that the records were accessible through the RTKL.

## **CONCLUSION**

The Court of Common Pleas abused its discretion and misapplied the law by finding that Allegheny County demonstrated by a preponderance of evidence that

Appellants did not meet the criteria set out in Section 1252-B for obtaining autopsy records. The lower court also erred in finding that *Hearst Television* and *Penn Jersey* do not apply to the instant matter.

For the foregoing reasons, Appellants request that this Honorable Court REVERSE the December 1, 2021 Opinion and Order of the Court of Common Pleas of Allegheny County.

Dated: July 27, 2022

/s/ Paula Knudsen Burke  
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## CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This filing complies with the word count limit set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Based on the word-count function of Microsoft Word, the filing contains 7,029 words.

2. This filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: July 27, 2022

/s/ Paula Knudsen Burke

Paula Knudsen Burke  
REPORTERS COMMITTEE FOR  
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PA ID: 87607

## PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

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Dated: July 27, 2022

/s/ Paula Knudsen Burke

Paula Knudsen Burke

REPORTERS COMMITTEE FOR

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**EXHIBIT A:**  
**DEC. 1, 2021 OPINION AND ORDER OF THE ALLEGHENY COUNTY**  
**COURT OF COMMON PLEAS**

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CIVIL DIVISION

Allegheny County,

No. SA21-000108

Petitioner,

v.

Brittany Hailer and Pittsburgh Current,

Respondents.

OPINION and ORDER UNDER  
65 P.S. §67.1302(a)

Filed by:

W. Terrence O'Brien,  
Senior Judge

705 City-County Building  
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FILED

2021 DEC -1 PM 3:28

DEPT OF COURT RECORDS  
CIVIL/FAMILY DIVISION  
ALLEGHENY COUNTY PA

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CIVIL DIVISION

Allegheny County,

Petitioner,

v.

Brittany Hailer and Pittsburgh Current,

Respondents.

No. SA21-000108

OPINION and ORDER UNDER 65 P.S. §67.1302(a)

O'Brien, S.J.

I adopt the parties' Stipulated Statement of Facts, docketed May 26, 2021, a copy of which is attached hereto.

Section 708(b)(20) of the Right-to-Know Law (RTKL) exempts from disclosure the following:

[a]n autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmortem examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner. This exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death.

65 P.S. §67.708(b)(20). Thus, the records being sought are clearly not accessible under the RTKL.

The real issue in this case is whether Brittany Hailer and the Pittsburgh Current (collectively, Requester), are entitled to the records under Section 1252-B of the Coroner's

Act, which applies to records possessed by the Office of the Allegheny County Medical Examiner. Said section provides, in relevant part, as follows:

The coroner shall charge and collect a fee of \$500 for an autopsy report, \$100 for a toxicology report, \$100 for an inquisition or coroner's report, \$50 for a cremation or disposition authorization and other fees as may be established from time to time for other reports or documents *requested by nongovernmental agencies in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased...*

16 P.S. §1252-B (emphasis added.)

The Affidavit of Brittany Hailer avers, in relevant part, as follows:

1. I am an investigative reporter and a Visiting Lecturer at the University of Pittsburgh.
2. In my capacity as an investigative journalist, I am employed by a nonprofit news outlet, The Pittsburgh Institute for Nonprofit Journalism (PINJ). PINJ is the successor to The Pittsburgh Current, a news outlet that was shuttered after the creation of the PINJ. PINJ is a nongovernmental agency. Prior to its closure, The Pittsburgh Current was also a nongovernmental agency.
3. Through long-form enterprise and investigative reporting, PINJ seeks to uncover systemic inequities by shining a light on private industry, public officials and government institutions that are currently opaque and lacking public accountability.
- • •
6. As part of my continuing investigative work about the Allegheny County Jail, I have worked to identify indigent persons who died at the facility by utilizing the jail's death registry and release lists. Details about those who die without next of kin, or whose families lack the support and ability to request records or information surrounding their loved one's death, are presently unknown to the public. For example, Daniel Pastorek was homeless before his incarceration and lacks a family member with capacity to investigate and search for information about his death.
7. As an investigative reporter, I frequently file public records request with both the state and federal governments.
8. On December 23, 2020, I filed a Right to Know Law request with Allegheny County seeking the Autopsy/External Examination and Toxicology Report for Daniel A. Pastorek, 63, who died November 26, 2020,



at the Allegheny County Jail. I have been covering Mr. Pastorek's death and previously reported that Mr. Pastorek, whose criminal record revealed a history of "alcoholism and substance-use disorder," was found unresponsive in his cell and was later pronounced dead of heart disease. [ ]

9. I am seeking access to these records to help determine whether conditions at the Allegheny County Jail contributed to Mr. Pastorek's death. As an investigative journalist, my reporting sheds light on government agencies, like the Allegheny County Jail, and the challenges they face, which enables the public to evaluate the need for potential changes or reforms.

10. The records requested in this case will allow me, and by extension the public, to determine whether conditions at the prison contributed to Mr. Pastorek's death and whether the county may be liable as a result. Further the records also allow me, and the public, to determine whether liability is the result of systemic deficiencies at the prison and whether those deficiencies put other inmates at risk. The public has a right to know how inmates are treated at the prison, especially those who have died in custody. The public also has a right to know whether that treatment creates risk of harm to other inmates and potential liability for taxpayers who are morally, legally, and financially responsible for inmate treatment. The records I am seeking in this case enable public oversight and government accountability for the jail system and the medical examiner, both of whom act on behalf of the public they serve through taxpayer dollars.

11. I am aware that the coroner/medical examiner charges fees of \$500 for an autopsy report, \$100 for a toxicology report, \$100 for an inquisition or coroner's report and \$50 for a cremation or disposition authorization. I am prepared and able to pay the fees for the reports I have requested.

Date 10/1/2021

Signature: /s/ Brittany Hailer  
Brittany Hailer

In order to be entitled to the records at issue, Requester must qualify as a "nongovernmental agenc[y]" seeking "to determine liability for the death of the deceased," Mr. Pastorek.<sup>1</sup> 16 P.S. §1252-B. As the Coroner's Act does not define the phrase "to determine liability," it is appropriate to consult Black's Law Dictionary. As Petitioner points out, Black's

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<sup>1</sup> Ms. Hailer does not maintain that she is investigating a claim asserted under an insurance policy.

defines “liability” as “1. the quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment... 2. A financial or pecuniary obligation in a specified amount.” Liability, *Black’s Law Dictionary* (11<sup>th</sup> ed. 2019). The term “legal” mean “1. Of, relating to, or involving law generally; falling within the province of law... 2. Established, required, or permitted by law... 3. Of, relating to, or involving law as opposed to equity.” Legal, *Black’s Law Dictionary* (11<sup>th</sup> ed. 2019). Therefore, the Coroner’s Act phrase “liability for the death of the deceased,” means liability in a criminal, civil, or financial sense.

Petitioner’s Response to Affidavit of Brittany Hailer, p.4.

The plain language of Section 1252-B must be read as vesting discretion in the Medical Examiner to determine whether a requester is a “nongovernmental agenc[y]”<sup>2</sup> ... “investigat[ing] a claim asserted under a policy of insurance or [seeking] to determine liability for the death of the deceased.” Coverage under an insurance policy and responsibility under law for a death are issues which are typically decided by a court. Seeking “to uncover systemic inequities by shining a light on ... public officials and government institutions” is a laudable activity, as is seeking to determine “whether conditions at the Allegheny County Jail contributed to Mr. Pastorek’s death.” Hailer Affidavit, paragraphs 3, 9. Nevertheless, the legal process is not directly implicated in such inquiries. Section 1252-B must be read more narrowly than argued by Requester to have any real meaning. Otherwise, anybody with a good cause seeking information about a death would be entitled to access under it.

Requester cites *Hearst Television, Inc. v. Norris*, 617 Pa. 602, 54 A.3d 23 (2012) and *C.F. Penn Jersey Advance, Inc. v. Gram*, 599 Pa. 534, 962 A.2d 632 (2009), for the proposition that the records can be obtained simply by payment of specified fees. In both cases the applicable version of Coroner’s Act required that the coroner deposit all official

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<sup>2</sup> I assume, without deciding, that Requester is a “nongovernmental agency” within the meaning of the statute.

records and papers for the preceding year in the prothonotary's office within 30 days after the year's end, to be available for inspection to anyone interested therein. The Supreme Court held that those who wanted the official records sooner could obtain them for a fee.

The Coroner's Act was revised subsequent to these cases. The current version does not require the Medical Examiner of Allegheny County, a county of the second class, to file any papers at any time for public inspection. (See 16 P.S. § 1236-B). The reasoning applied in *Hearst* was premised on the fact that the records would become available to all requesters on a certain date and the issue was whether they should be available for a fee before that date, or whether the coroner had discretion to deny a request for rapid access. The revised Coroner's Act provides a means of public access to records for a fee when a requester meets the criteria in Section 1252-B. Therefore, *Hearst* and *Penn Jersey* do not apply to the instant matter.<sup>3</sup>

I therefore enter the following:

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<sup>3</sup> Because of this disposition, I need not consider the County's argument that the responsive records relate to a noncriminal investigation and are therefore exempt under Section 708(b)(17) of the RTKL.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CIVIL DIVISION

Allegheny County,

No. SA21-000108

Petitioner,

v.

Brittany Hailer and Pittsburgh Current,

Respondents.

ORDER OF COURT

And now, this 1<sup>st</sup> day of December, 2021, it is hereby Ordered that the Final Determination of the Office of Open Records is reversed, and the Petition for Judicial Review filed by Allegheny County on April 28, 2021, is granted.

BY THE COURT:

W. Terrence O'Brien, S.J.  
W. Terrence O'Brien

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CIVIL DIVISION

ALLEGHENY COUNTY,

**Petitioner,**

**vs.**

BRITTANY HAILER and  
PITTSBURGH CURRENT,

**Respondents.**

Docket No: SA-21-000108

## STIPULATED STATEMENT OF FACTS

Filed on Behalf of: Petitioner Allegheny  
County and Respondent Brittney Hailer

**Filed by counsel for Allegheny County:**

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**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA  
CIVIL DIVISION**

ALLEGHENY COUNTY,

Petitioner,

vs.

BRITTANY HAILER and  
PITTSBURGH CURRENT,

Respondents.

Docket No: SA-21-000108

**STIPULATED STATEMENT OF FACTS**

The undersigned attorneys hereby stipulate to the below:

1. The Respondent, Brittany Hailer, submitted a Right-To-Know-Law ("RTKL") request to the Petitioner, Allegheny County ("County"), on December 23, 2020. The request sought "the Autopsy/External Examination and Toxicology Report for Daniel A. Pastorek, 63, who died November 26 at the Allegheny County Jail." (*See R. at OOR Exhibit 1.*)

2. The County Department of Administrative Services serves as the County's Open Records Office, and its Director, Jerry Tyskiewicz, serves as the County's Open Records Officer.

3. On January 5, 2021, Mr. Tyskiewicz sent Ms. Hailer a letter informing her that her request was denied. (*See R. at OOR Exhibit 1, p. 3.*) The basis for the County's denial was the autopsy records exemption to the RTKL, which exempts from disclosure:

[a]n autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmortem examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner. This exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death.

65 P.S. §67.708(b)(20). (*See id.*)

4. As permitted by the autopsy records exemption, the County provided Ms. Hailer with the decedent's name, cause, and manner of death. (*See id.*)

5. On January 19, 2021, Ms. Hailer appealed the County's response to the Pennsylvania Office of Open Records ("OOR"). (*See R. at OOR Exhibit 1.*) The County submitted a brief in support of its position that the records Ms. Hailer requested are exempt from disclosure under the RTKL. (*See R. at OOR Exhibit 4.*) The County also submitted an affidavit from Mandy Tinkey, Laboratory Director of the Allegheny County Office of the Medical Examiner ("ACOME"). (*See id.*)

6. In its brief, the County argued that the autopsy report is exempt from disclosure pursuant to the autopsy exemption and the toxicology report is also exempt pursuant to the noncriminal investigation exemption, which exempts "[a] record of an agency relating to a noncriminal investigation, including: (i) Complaints submitted to an agency, (ii) Investigative materials, notes, correspondence and reports." 65 P.S. §67.708(b)(17). (*See id.*)

7. On March 31, 2021, the OOR issued a Final Determination granting Ms. Hailer's appeal. (*See R. at OOR Exhibit 6.*)

8. The OOR held that the autopsy and toxicology reports that Ms. Hailer requested are not exempt from disclosure under the autopsy records exemption. (*See id. at p. 6.*) The OOR determined that the ACOME must provide "any Coroner's records responsive to the request identified in Section 1252-B of the Coroner's Act...for the fees set forth in the Coroner's Act." (*Id. at p. 6.*)

9. The County appealed the OOR's decision to this Court on April 28, 2021.

Respectfully submitted,

/s/ Maggie Shiels

Assistant County Solicitor  
Counsel for the Petitioner

/s/ Paula Knudsen Burke

Counsel for Respondents