IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DANIEL SCHWARTZ,	)	
	)	
Petitioner,	)	Docket No. 481 MD 2021
	)	
	)	
v.	)	
	)	
PENNSYLVANIA STATE POLICE,	)	Office of Open Records
	)	Docket No. AP 2021-0916
Respondent.	)	

PETITIONER'S POST-HEARING BRIEF

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QUESTIONS PRESENTED

Question One: Did Respondent conduct a good faith search and provide an adequate response to the Requestor?

Suggested Response: No.

Question Two: Whether Respondent and the Office of Administration are prohibited from compelling Verizon to turn over the records?

Suggested Response: No.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

The repeated refusal of the Pennsylvania State Police ("PSP") to comply with RTKL requirements and the OOR's Final Determination to conduct a good faith search for its own text messages and voicemails held by third-party contractor Verizon clearly warrant a finding of bad faith here. To make matters worse, PSP rests its refusal to comply on several unreasonable interpretations of the law that it failed to raise before the OOR, including that (i) it has no ability or obligation to retrieve public records created on Commonwealth-issued mobile devices and maintained by Verizon because the RTKL does not specifically vest subpoena power with PSP; (ii) Verizon does not qualify as a third-party contractor subject to the RTKL; and (iii) the federal Stored Communications Act establishes a sweeping prohibition against access to public records stored with third-party telecommunications providers. If PSP's arguments were accepted by this Court, any agency could easily hide its communications with third-party telecommunications providers to evade the RTKL. This cannot be the law.

Petitioner, therefore, requests that the Court issue an order directing PSP to produce the requested text messages and voicemails or a good faith search affidavit in compliance with the RTKL and that the Court award Petitioner its reasonable costs and attorney's fees and statutory damages pursuant to Section 1305(a) of the RTKL.

ARGUMENT

I. Respondent's Repeated Failures to Comply with the RTKL and the OOR Final Determination Constitute Bad Faith

Contrary to controlling precedent, PSP claimed at the March evidentiary hearing and in its supplemental briefing that a showing of bad faith under the RTKL requires more than the "human error" it concedes occurred here. PSP Supp. Br.[1] at 11. Even if that were true (and it is not), there is ample bad faith evidence from the proceedings before the OOR and this Court, during which demonstrating PSP repeatedly refused to comply with RTKL requirements and the OOR's Final Determination and put forth wholly unreasonable interpretations of the RTKL. The Court should thus find that PSP has acted in bad faith and award costs and attorney's fees as appropriate.

A. The Legal Standard for Bad Faith

This Court may "award attorney fees if the court . . . grants access when either: (1) an agency acted with willful or wanton disregard of the right to access in bad faith; or, (2) an agency's denial was not based on a reasonable interpretation of law." *Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corr.*, 197 A.3d 825, 832 (Pa.

[1] PSP's Post-Hearing Brief, which was filed on March 29, 2022, is referenced herein as "PSP Supp. Br."

Commw. Ct. 2018), *aff'd*, 243 A.3d 19 (Pa. 2020) (citing 65 P.S. § 67.1304)). Demonstrating bad faith under the RTKL does not require evidence of "fraud or corruption. Rather, an abnegation of mandatory duties by an agency, including performance of a detailed search and review of records to ascertain if the requested material exists, or if any exclusion may apply, prior to denial of access will support a finding of bad faith." *Uniontown Newspapers, Inc. v. Pennsylvania Dep't of Corr.*, 243 A.3d 19, 25 (Pa. 2020) (internal citations omitted).

1. PSP's Failure to Comply with the OOR's Final Determination Establishes That It Acted in Bad Faith

PSP has repeatedly failed before the OOR and this Court to "make a good faith effort to determine if . . . the agency has possession, custody or control" of the requested text messages or voicemails as required. 65 P.S. § 67.901. PSP ignores its basic duty to contact third-party contractors and instead unpersuasively argues that "contacting the bureau most likely to contain the records" and determining that "no Commonwealth agency" has them is sufficient to meet its burden here. PSP Supp. Br. at 4-6. As the OOR outlined in its Final Determination, PSP is required under the RTKL to not only contact potential Commonwealth custodians, but also to "[c]ontact agents within its control, including third party contractors" and "[r]eview the records and assess their public nature[.]" *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161, 1172 (Pa. Commw. Ct. 2018), *aff'd*, 243 A.3d 19 (Pa. 2020).

PSP's initial April 2021 RTKL response asserted that the PSP "does not have any records in its possession, custody, or control that respond to your request[,]" Ex. J-1[2] at OOR Ex. 4, Pg. 16, a claim that the OOR rejected because the PSP did "not sufficiently describe the search for records such that the OOR can determine that no text messages or voicemails exist." *Id.* at OOR Ex. 8, Pg. 9. Despite the OOR ordering the PSP to provide a good faith search affidavit, PSP ignored this obligation entirely until after Petitioner commenced litigation. PSP then produced a January 2022 affidavit that still fails to comply with its duty to conduct a good faith search and proceeded to rely on this affidavit to support its motion to dismiss the case for mootness based on an unreasonable interpretation of the law. *See* PSP's Motion to Dismiss for Mootness, filed on Feb. 23, 2022, at ¶ 7 & Ex. 1.

PSP's new affidavit fails to demonstrate that PSP fulfilled its mandatory duties because it reveals that PSP took no additional steps after a Commonwealth Telecommunication Services Supervisor advised that "a subpoena to Verizon Security Assistance Team would be necessary to search for any voice or text messages to begin an inquiry." Ex. J-3 at Ex. 1, ¶ 13. An open records officer cannot "fulfill[] his or her obligation simply by relying on the representations of others without inquiring as to what investigation was made and without reviewing the

[2] References to Exhibits J-1 to J-4 refer to Parties' Joint Exhibits, filed on March 3, 2022. For Exhibit J-1, page numbers refer to the OOR Exhibit page numbering.

records upon which the individual responding to the request relied." *Uniontown*, 243 A.3d 19, 28 (Pa. 2020).

At the March evidentiary hearing, counsel for PSP, again relying on an unreasonable interpretation of the law, claimed that the agency had fulfilled its duty to reach out to third-party contractors by speaking to a Commonwealth Telecommunication Services Supervisor. When questioned further about the PSP's lack of diligence evidenced in its affidavit, counsel introduced new evidence not in the record at the hearing by testifying that she had called Verizon and was told that the requested records did not exist. Neither of the two PSP witnesses' testimony or affidavits indicated that they had any interaction with Verizon. *See, e.g.,* Ex. J-3 at Exs. 1, 4. PSP also argued for the first time that it was unable to subpoena records from Verizon because the RTKL provided no mechanism for it to do so and in bad faith claimed that it had no contract with Verizon that would facilitate access to its records.

In a clear attempt to avoid the Court issuing an Order to PSP to obtain the requested records or a good faith affidavit, PSP apparently again reached out to Verizon following the hearing and filed an unsworn letter with the Court. *See* PSP's Response to Notice of Supplemental Authority, filed on March 22, 2022, at Ex. A. At no point in these proceedings has PSP acknowledged this fundamental fact: the contract between the Commonwealth and Verizon contains an RTKL provision

expressly obligating Verizon to comply with public records requests. Instead, PSP has not only refused to enforce the provision but also argued that it may be *void ab initio*. *See id.* at 3. PSP's repeated abnegation of its duties to perform a good faith search, including a refusal to enforce a clear provision of the Commonwealth's agreement with Verizon, demonstrates bad faith.

2. Other Evidence of Bad Faith

In addition to its failure to conduct a good faith search for the requested text messages and voicemails, PSP's lack of diligence throughout the OOR and Court proceedings supports a finding of bad faith. While "[e]nforcement proceedings should not be necessary to ensure an agency's compliance with its statutory duties," an agency's unreasonable delay in complying, as was the case here, often necessitates court action. *See Uniontown*, 185 A.3d at 1161.

While PSP argues that "untimeliness is not synonymous with bad faith," PSP Supp. Br. at 10, this Court has found that an agency's failure to "discern the sources of or review all potentially responsive records *before the compliance deadline*" "evinced a lack of good faith[.]" (emphasis added) *Uniontown,* 185 A.3d at 1174. The Court has likewise found that a "persistent denial of access constitutes bad faith." *Id.* Like the agency in *Uniontown*, PSP's continual lack of diligence here has resulted in denying Petitioner access to records without any good faith basis.

PSP's initial response to Petitioner in April 2021 failed to demonstrate certain emails were exempt before heavily and indiscriminately redacting them and provided no evidence for its claim that requested texts and voicemails did not exist. *See* Ex. J-1 at OOR Ex. 8, Pgs. 8-9. In reversing the PSP's determination, the OOR found that the PSP "has not met its burden as it relates to any other redactions [than personal identification information] or withheld records."[3] By indiscriminately redacting records and failing to conduct an adequate search, PSP abnegated its duty under 65 P.S. § 67.901 to make a "good faith" effort to determine which records were public.

PSP then failed to meet the 30-day compliance deadline set by the OOR in June 2021 to turn over certain unredacted emails and either texts and voicemails or a good faith search affidavit. *See* Ex. J-3 at Ex. 3, pgs. 5-6. A day after the deadline, Petitioner asked whether the PSP planned to comply with the order, and ultimately granted the agency a four-day extension. *See id.* at 4-6. PSP failed to meet the extended deadline as well and only turned over the unredacted emails after Petitioner followed up again. *See id.* at 1-3. PSP continued to withhold text and voicemails or a good faith search affidavit until after Petitioner filed litigation.

[3] Ex. J-1 at OOR Ex. 8, Pg. 10. As Petitioner noted in his OOR appeal, "many of the pages are inherently public[,]" including "waiver requests[,]" "non-exempt emails between public officials[,]" and information that "ha[d] already been released to the public." *Id.* at OOR Ex. 1, Pg. 4.

PSP claims that it withheld the affidavit because it assumed, with no apparent basis, that "Petitioner was accepting PSP's previously asserted position that it possessed neither responsive text messages nor voicemails under its control[.]" *See id.* at Ex. 4. But PSP's position ignores the fact that when the RTKL was overhauled in 2008, the presumption of access flipped. Under the old law, requesters had to justify why they were entitled to records. Now, it is the requester who is entitled to access unless and until the agency justifies withholding. The RTKL is "remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. 2010), *aff'd*, 75 A.3d 453 (2013). As a result, agencies have a continuing duty to provide records to requesters and to make it as easy as possible to facilitate access.

Nearly a month after Petitioner filed its enforcement action, PSP sent Petitioner an affidavit that still did not reflect a good faith search. *See* Ex. J-3, Exs. 1-2. PSP's lack of diligence in "locat[ing] responsive records until motivated by litigation evinces bad faith, meriting consideration by a factfinder." *Uniontown*, 185 A.3d at 1172.

While PSP claims that under the RTKL no attorney's fees can be awarded here because the "court has not reversed the final determination of the OOR[,]" *see*

PSP Supp. Br. at 12, the Supreme Court of Pennsylvania has soundly rejected that illogical interpretation of RTKL Section 1304(a)(1). Instead of insulating agencies from incurring any attorney's fees if they in bad faith refuse to comply with an OOR determination, as was the case here, the Court found that this provision "permit[s] recovery of attorney fees when the receiving agency determination is reversed, and it deprived a requester of access to records in bad faith." *Uniontown*, 243 A.3d at 34. Because PSP's RTKL determinations were reversed and it indisputably deprived Petitioner of access to records in bad faith, the Court should award Petitioner its costs, attorney's fees and statutory damages. *See* Petitioner's Fee Application, which is attached as Exhibit A.

II. PSP Has the Ability and an Obligation to Conduct a Good Faith Search and Retrieve Public Records Maintained by Third-Party Contractor Verizon

PSP erroneously claims that it has no ability or obligation to retrieve public records created on Commonwealth-issued mobile devices and maintained by Verizon because the RTKL does not specifically vest subpoena power with the PSP. *See* PSP Supp. Br. at 14. But PSP's own RTKL policy demonstrates—consistent with caselaw and with the Commonwealth's contract with Verizon—that no subpoena to Verizon is required to access PSP's own public records. To the contrary,

PSP's procedure for accessing its records stored with third-party contractors states that it should "direct" the contractor to provide access to PSP public records.[4]

PSP additionally claims now that Verizon does not qualify as a third-party contractor subject to the RTKL and that the requested records are exempt from disclosure by federal law. PSP's arguments against disclosure fail as a threshold matter because it waived these arguments by not raising them before the OOR or appealing the OOR's Final Determination that it must either produce the records or an affidavit describing its good faith search.

A. PSP Waived Arguments Not Raised Before the OOR

It is well-established that arguments not raised before the OOR are waived and only "[i]n the rare, extraordinary case" can they be raised for the first time before the Commonwealth Court. *Levy v. Senate of Pennsylvania*, 94 A.3d 436, 442 (Pa. Commw. Ct. 2014); *see also Picarella v. Dep't of Corr. (Off. of Open Recs.)*, No. 93 C.D. 2021, 2021 WL 6139802, at *1 n.5 (Pa. Commw. Ct. Dec. 30, 2021) (noting that "OOR deemed the Department's argument waived" because it "did not develop this position on appeal to the OOR"). The only argument that the PSP made at the OOR stage of the proceedings to deny Petitioner access to the requested text

[4] PSP Administrative Regulation 6-2, Right-to-Know Law, § 1.05 G.1.b (Apr. 24, 2017), *available at* https://www.psp.pa.gov/contact/RTKL%20DOCUMENTS/AR%206-02.pdf ("Upon the [Agency Open Record Officer's] determination that a record in the possession of a Department contractor is a PSP public record, the [Agency Open Record Officer] shall direct the contractor to deliver a true-and-correct copy of the record to the [Agency Open Record Officer] within **ten** calendar days[.]") (emphasis in original).

messages and voice mails was a conclusory assertion that the records did not exist. *See* J-1 at OOR Ex. 8, Pgs. 3, 6-7. Because the PSP failed to raise any other grounds for exemption before the OOR and did not appeal the Final Determination, it waived the claims it now belatedly asserts regarding its lack of subpoena power, Verizon not qualifying as a third-party contractor subject to the RTKL, and the records' purported exemption from access under federal law. *See* PSP Supp. Br. at 5-8, 13-15.[5]

B. Even if PSP's New Arguments Are Not Waived, PSP Is Required to Enforce the RTKL Provision in the Commonwealth's Contract with Verizon

The OOR outlined for the PSP in its Final Determination the requirement under this Court's precedent in *Uniontown* for the agency to "[c]ontact agents within its control, including third party contractors" to determine whether the text messages and voice mails exist. OOR Ex. 8 at 6 (citing *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018)). PSP is then "required to take reasonable steps to secure the records from" Verizon. *Uniontown*, 185 A.3d at 1172. This Court has found that an agency cannot discharge this duty under the

[5] Even in its earlier briefing before this Court requesting that the case be dismissed for mootness, the PSP failed to assert these new claims. An affidavit from the Agency Open Records Officer merely clarified PSP's earlier position on the records' existence by stating that "a subpoena to Verizon Security Assistance Team would be necessary to search for any voice or text messages to begin an inquiry." Ex. J-3 at Ex. 1, ¶ 13. The affidavit then doubled down on the PSP's conclusory assertion that "the PSP does not have any records such as Requestor described in its possession, custody or control." *Id.* ¶ 15.

RTKL by merely asking a third-party contractor to search for records. *See Staub v. City of Wilkes-Barre*, No. 2140 C.D. 2012, 2013 WL 5520705, at *2-3 (Pa. Commw. Ct. Oct. 3, 2013). "Instead, as the statutory possessor of the records under [RTKL] Section 506(d)(1), the [PSP] had a duty to independently ascertain the existence or nonexistence of the records" in Verizon's possession. *Id.* at *3 (finding "trial court did not err in imposing a further duty upon the [agency] and in directing the [agency] to pay a portion of the sanctions imposed under Section 1304").

1. RTKL Section 506(d)(1) Requires That the PSP Retrieve Its Public Records from Verizon

Under the RTKL, "[a] public record that . . . is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt . . . , shall be considered a public record of the agency[.]" 65 P.S. § 67.506(d)(1). The governmental function performed by a third-party contractor must involve "the delegation of some non-ancillary undertaking of government[.]" *SWB Yankees LLC v. Wintermantel*, 615 Pa. 640, 662 (2012).

PSP claims that provision of telecommunications services is not a governmental function under Section 506(d)(1) because it is "provided to the public at large" and "Pennsylvania's executive government is [not] empowered to sell phone service." PSP Supp. Br. at 7. But PSP ignores that one of its core duties is responding to "public requests [for] assistance or advice . . . either by telephone or

in person" and "provid[ing] immediate police service" when necessary.[6] Access to wireless telecommunications devices is not merely ancillary to the PSP's core governmental function of public safety. *See, e.g.*, *Municipality of Monroeville v. Drack*, No. 2123 C.D. 2012, 2013 WL 3716891, at *4–5 (Pa. Commw. Ct. July 16, 2013) (finding contractor "ensuring the accuracy of speed timing devices is sufficiently governmental in nature" where the agency was responsible for "enforcing traffic offenses under the Vehicle Code").

If PSP's argument were accepted by this Court, any agency could hide its communications with a third-party provider to evade the RTKL. PSP's own RTKL regulations define a record to include "without limitation . . . correspondence, voice and text messages."[7] PSP's argument for non-disclosure rests purely on the location of the communications with third-party provider Verizon. But it is axiomatic that an agency "cannot privatize . . . public correspondence[.]" *Paint Twp. v. Clark*, 109 A.3d 796, 809 (Pa. Commw. Ct. 2015) (affirming order directing agency to provide Verizon cell phone records from public official's personal account that was used to conduct public business). PSP is thus required to retrieve the records.

[6] PSP Field Regulation 1-2, Duty Requirements, § 2.14 (May 21, 2021), *available at* https://www.psp.pa.gov/contact/RTKL%20DOCUMENTS/FR%20%201-%202.pdf.
[7] PSP Administrative Regulation 6-2, Right-to-Know Law (Apr. 24, 2017), *available at* https://www.psp.pa.gov/contact/RTKL%20DOCUMENTS/AR%206-02.pdf.

2. Commonwealth's Contract with Verizon Requires Compliance with the RTKL

Because an agency has a duty to produce its public records maintained by a third-party contractor, *see id.*, it cannot simply contract away that right and remain in full compliance with the RTKL. To that end, the relevant public contract between Verizon and the Commonwealth of Pennsylvania, acting through its Governor's Office of Administration, details Verizon's obligations under the Right-to-Know Law to provide Commonwealth records in its possession upon request. *See* Notice of Supplemental Authority, filed Mar. 16, 2022, Ex. A § 15.

The contract states unequivocally that, as Verizon is a contractor with the Commonwealth, "the [RTKL] applies to this Contract." *See id.* Ex. A § 15(a). Verizon is required under the contract to "[p]rovide the Commonwealth, within ten (10) calendar days after receipt of written notification, access to, and copies of, any document or information in the Contractor's possession arising out of this Contract that the Commonwealth reasonably believes is Requested Information and may be a public record under the RTKL[.]" *See id.* Ex. A § 15(c). Verizon is also required to "[p]rovide such other assistance as the Commonwealth may reasonably request, in order to comply with the RTKL with respect to this Contract." *Id.* The contract specifies that Verizon's "duties relating to the RTKL are continuing duties that survive the expiration of this Contract and shall continue as long as [Verizon] has

Requested Information in its possession." *See id.* Ex. A § 15(i).[8] Despite PSP's claim that the RTKL provision in the contract does not apply to the requested records, PSP has nonetheless demonstrated in recent weeks that it is indeed able to request from Verizon information regarding the requested text messages and voice mails. *See* PSP's Response to Notice of Supplemental Authority, filed on March 22, 2022, at Ex. A.

PSP nonetheless argues that if the RTKL provision of its contract is found to apply to the requested records, the provision violates federal law and is thus *void ab initio*. *Id.* at 3. PSP's argument fails as a threshold matter because it waived this argument by not raising it before the OOR or appealing the OOR's Final Determination that it must either produce the records or an affidavit describing its good faith search. The argument additionally fails because the federal law it relies on does not bar access to records under the RTKL.

[8] PSP claims that because Petitioner is not a party to the contract with Verizon he cannot "attest to what it means." PSP's Response to Notice of Supplemental Authority, filed on March 22, 2022, at 3. But the Court can ascertain the parties' intention "from the document itself[,]" as Petitioner has done, because "its terms are clear and unambiguous." *Empire Sanitary Landfill, Inc. v. Riverside Sch. Dist.,* 739 A.2d 651, 654 (Pa. Commw. Ct. 1999).

3. PSP Fails to Demonstrate that Federal Law Bars Access to the Records

PSP cites no precedent for the sweeping proposition that "records in the possession of telecommunications providers are not 'public records' subject to disclosure under RTKL because they are exempt from access under federal law." PSP Supp. Br. at 8. The PSP solely relies on Sections 2702 and 2703(a) of the Stored Communications Act ("SCA"), which it claims conclusively cuts off access to public records absent consent from the user of the device or a search warrant. *See id.* But caselaw demonstrates that public records stored on nongovernmental accounts on behalf of a government agency are indeed that agency's public records.

In the leading case examining access to agency records stored with a third-party telecommunications provider, the Eastern District of Michigan noted that "it would be problematic, to say the least, to conclude that the City lacks a legal right to obtain these [text message] records as necessary to discharge its statutory duty of disclosure." *Flagg v. City of Detroit*, 252 F.R.D. 346, 356 (E.D. Mich. 2008). So, too, here. State public records law in Michigan, like in Pennsylvania, requires that an agency disclose public records that are within its control and that it "preserve[s] and maintain[s] such records until access has been provided or a court executes an order finding the record to be exempt from disclosure." *Id.* at 356 (citing *Walloon Lake Water System, Inc. v. Melrose Township,* 415 N.W.2d 292, 295 (1987) (footnote omitted)).

While the issue before the court in *Flagg* centered on access to public records via civil discovery rules, its analysis of the SCA is equally applicable here. The court's detailed opinion allowing access to scandal-ridden Detroit Mayor Kwame Kilpatrick's text messages rejects an argument that is analogous in scope to the PSP's claimed exemption of access to communications held by Verizon. For reasons applicable here, the court found that the SCA establishes no "sweeping prohibition against civil discovery of electronic communications" because that would "dramatically alter discovery practice . . . by permitting a party to defeat the production of electronically stored information . . . through the simple expedient of storing it with a third party." *Flagg*, 252 F.R.D. at 347.

Contrary to the PSP's interpretation of the SCA, several specified exceptions that are applicable here allow a provider to disclose records, including prior authorization, that disclosure is necessarily incident to Verizon's performance under the contract, and consent of the subscriber or customer. *See infra* at 17-21. PSP acknowledges in its briefing that consent is one such exception, but claims it is inapplicable since "PSP is not required to demand consent[.]" *See* PSP Supp. Br. at 9. PSP's analysis improperly ignores that the question of when—and from whom—consent is required under the SCA is much more nuanced than it has represented to this Court. And, even if this Court were to find that the consent exceptions do not allow for disclosure here, other SCA exceptions to withholding also apply here.

First, PSP ignores that the analysis the Court must undertake depends on whether the Court determines that the specific type of service Verizon was providing the Commonwealth here is a "remote computing service" or an "electronic communication service" under the Act. *See Flagg*, 252 F.R.D. at 349 (citing 18 U.S.C. § 2510(15); 18 U.S.C. § 2711(2)). Verizon would be considered an electronic communication service under the Act if text messages and voicemails were being maintained for the purpose of backup protection and a remote computing service if any archive is more properly viewed as computer storage. *Id.* at 362 (citing 18 U.S.C. § 2702(a)(1); 18 U.S.C. § 2711(2)). Because PSP maintains that none of the records exist on the relevant devices, any archive of messages that Verizon maintains would be classified as remote computing because it "constitutes the *only* available record of these communications, and cannot possibly serve as a 'backup' copy of communications stored elsewhere." *Id.* at 363 (emphasis in original).

Second, if this Court determines that Verizon is a remote computing service, as was the case for the text message provider in *Flagg*, Verizon is only prohibited from divulging the content of communications "*if* the service provider 'is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.'" *Flagg*, 252 F.R.D. 346, 358–59 (emphasis in original). But the contract between the Commonwealth and Verizon explicitly "provide[s] a mechanism for the

[Commonwealth] to request the retrieval of text messages" and thus a request by the PSP supplies the necessary authorization under the Act. *See id.* at 359; Notice of Supplemental Authority, filed on Mar. 16, 2022, at Ex. A.

Third, even if the Court finds the requisite authorization has not been granted, the "consent of the 'subscriber' is sufficient to permit [Verizon] to divulge the contents of a communication" it maintains as a remote computing service. *Flagg*, 252 F.R.D. at 359 (citing 18 U.S.C. § 2702(b)(3)). PSP "is both able and obligated to give its consent, as subscriber," *id.* at 363, to comply with the RTKL's mandate to produce public records within its control.

Fourth, even if Verizon is instead deemed an electronic communication service, PSP has "both the ability and the obligation to secure any such consent that the SCA may require." *Flagg*, 252 F.R.D. at 359. For an electronic communication service, the "lawful consent of the originator or an addressee or intended recipient" is required. 18 U.S.C. § 2702(b)(3). PSP "has an obligation to secure the requisite consent from its employees that would permit [Verizon] to proceed with its retrieval of communications." *Flagg*, 252 F.R.D. at 363-64.

Here, the Commonwealth already obtains consent from all employees utilizing Commonwealth-issued mobile devices through a User Agreement in which employees attest to the following:

> I further understand that my Commonwealth IT Resource usage, including electronic communications such as email, voicemail, text

> messages, and other Commonwealth Data and records, may be accessed and monitored at any time, with or without advance notice to me. By signing this agreement, I specifically acknowledge and consent to such access and monitoring.[9]

All Commonwealth users are provided with a copy of the Acceptable Use Policy on an annual basis, which requires each agency to maintain copies of the user agreement signed by each authorized user.[10] Courts have found that prior consent has been impliedly given by employees in similar circumstances. *See, e.g.*, *Griffin v. City of Milwaukee*, 74 F.3d 824, 827 (7th Cir. 1996) (finding "systematic monitoring of workstation telephones occurred with [employee's] consent" and did not run afoul of wiretapping act where employees were informed that telephone conversations might be monitored and that emergency calls would be recorded).

Commonwealth employees cannot claim that they have any expectation of privacy in these records, since the Commonwealth has put all users of commonwealth-issued wireless communications devices on notice that they "are subject to compliance with the Right to Know Law[.]"[11] Commonwealth employees also are explicitly told in the Acceptable Use Policy that they "shall have no expectation of privacy in any IT Resource or . . . in any communications sent or

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[9] Management Directive 205.34, Commonwealth of Pennsylvania Information Technology Acceptable Use Policy, at 20 (Feb. 18, 2021), *available at* https://www.oa.pa.gov/Policies/md/Documents/205_34.pdf.

[10] *Id.* § 5.k-m.

[11] Management Directive 240.11, Commonwealth Wireless Communication Device Policy, § 5a.(8) (Apr. 11, 2012), *available at* https://www.oa.pa.gov/Policies/md/Documents/240_11.pdf.

received via, or stored within, IT resources."[12] Indeed, the very "use of an IT Resource by an Authorized User constitutes consent to monitoring . . . with or without notice, to examine or retrieve the Authorized User's historical or real-time activity."[13] In an analogous case finding the search of a law enforcement officer's text messages reasonable, the U.S. Supreme Court noted that "[e]ven if [an officer] could assume some level of privacy would inhere in his messages, it would not have been reasonable for [him] to conclude that his messages were in all circumstances immune from scrutiny." *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 762 (2010). A law enforcement officer "would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications" on his employer-provided pager. *Id.* So, too, here.

Fifth, the Court need not analyze consent at all if it finds that another exception is applicable here. The Stored Communications Act also permits the contents of a communication to be divulged "as may be necessarily incident to the rendition of the service[.]" 18 U.S.C. § 2702(b)(5). Given that the contract between the Commonwealth and Verizon explicitly provides for access to records under the

[12] Management Directive 205.34, Commonwealth of Pennsylvania Information Technology Acceptable Use Policy, § 5.d (Feb. 18, 2021), *available at* https://www.oa.pa.gov/Policies/md/Documents/205_34.pdf.
[13] *Id.* § 5.g.

RTKL, Verizon's retrieval of messages pursuant to this contract is "necessarily incident to" its performance under the contract. *See, e.g.*, *Flagg*, 252 F.R.D. at 359.

Because several exceptions to the SCA apply here, PSP cannot now claim that the requested records are exempt from disclosure under federal law.

4. PSP is Required to Maintain Public Records Pursuant to Applicable Retention Policies

PSP argues that "any request to Verizon would have been futile" "given the retention policy applicable to transitory records and the short or non-existent retention periods for both with Verizon." PSP Supp. Br. at 9. But PSP has not and cannot demonstrate that the requested text messages and voicemails are of a "transitory" nature and thus should "be disposed of once [their] short-term administrative value is completed."[14] To the contrary, the Commonwealth treats text messages and voicemails like any other record. "If the content of the message is related to the business of the agency, the message is a record[,]" and this content-based determination "must be made on a case-by-case basis."[15] PSP indisputably made no such determination, as required, and it continues in bad faith to allow potentially public records to be destroyed under Verizon's standard retention policy. To the extent the requested records no longer exist, PSP must still comply with the

[14] Management Directive 205.36, Right-to-Know Law Compliance, § 7.i.(3)(a) (Mar. 18, 2010), *available at* https://www.oa.pa.gov/Policies/md/Documents/205_36.pdf.
[15] *Id.* § 7.i.(3)(a)-(b).

OOR's Final Determination by conducting a good faith search and providing an appropriately detailed affidavit.

CONCLUSION

For all these reasons, Petitioner respectfully requests that the Court:

(i) issue an order to PSP to obtain copies of any PSP records responsive to Part II of the Right to Know Law Request within 10 calendar days, or, if the records do not exist, to: (a) produce an affidavit describing PSP's good faith search to Petitioner; and (b) obtain and produce to Petitioner an affidavit from Verizon describing its good faith search and whether Verizon retained the records in accordance with applicable retention policies;

(ii) award Petitioner its reasonable costs and attorney's fees;

(iii) and grant any other relief the Court deems appropriate, including a maximum civil penalty of $1,500 pursuant to pursuant to 65 P.S. § 67.1305(a), which provides that a court may impose a civil penalty of not more than $1,500 if an agency denied access to a public record in bad faith.

Dated: April 12, 2022

Respectfully submitted,

By: */s/Paula Knudsen Burke*

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[16] Cornell student Steven Marzagalli drafted portions of this brief. The Cornell Clinic is housed within Cornell Law School and Cornell University. Nothing in this Petition should be construed to represent the views of these institutions, if any.

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

On this 12th day of April, 2022, I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Paula Knudsen Burke
Signature: ___*/s/Paula Knudsen Burke*_____
Attorney No.: 87607