

**IN THE COURT OF COMMON PLEAS  
LEHIGH COUNTY**

DANIEL PATRICK SHEEHAN and THE MORNING CALL	:	COURT OF COMMON PLEAS Lehigh County
Petitioners,	:	No. 2022-C-1571
v.	:	JUDGE MELISSA T. PAVLACK
SOUTH WHITEHALL TOWNSHIP,	:	
Respondent.	:	

**PETITIONERS' BRIEF**

**INTRODUCTION**

More than a decade ago, the Pennsylvania General Assembly recognized that citizens lacked sufficient information about their government’s operations. Through the Right to Know Law (“RTKL”), the legislature expanded access to public records; it is a law that “empower[s] citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). 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. Ct. 2010), *aff’d*, 75 A.3d 453 (Pa. 2013).

In the instant case, a Lehigh County newspaper seeks to use the RTKL to shed light on the resolution of a federal civil rights lawsuit, *Serano v. Golden*, alleging that an on-duty, uniformed police officer raped a woman. South Whitehall Township and several individual

police officers were sued, and the case settled. This RTKL appeal centers on access to the settlement agreement.

Petitioners now seek this Court’s review to reverse the final determination of the Office of Open Records (“OOR”), predicated on an incomplete and flawed analysis of RTKL policy and precedent. The OOR cursorily dismissed Petitioners’ arguments and failed to engage meaningfully with the letter and intent of the RTKL. Furthermore, Petitioners request that the Court award Petitioners their reasonable costs and attorney’s fees and statutory damages pursuant to Section 1305(a) of the RTKL.

### **STATEMENT OF PERTINENT FACTS**

#### **A. Federal civil rights lawsuit: *Serano v. Golden, et al.***

On January 7, 2021, Theresa Serano filed a civil rights complaint in the Eastern District of Pennsylvania against Officer Kyle Golden both individually and in his official capacity as a member of the South Whitehall Township Police Department, additional members of the South Whitehall Township Police Department, and South Whitehall Township itself. *See* Ex. A. In her complaint, Ms. Serano alleged that on or about the evening of January 7, 2019, Officer Golden raped Ms. Serano while she was “highly intoxicated and physically and mentally vulnerable.” *Id.* ¶ 12. Officer Golden’s introduction to Ms. Serano followed a call by the Comfort Suites hotel to the South Whitehall Township Police Department requesting assistance after Ms. Serano had become heavily intoxicated. *Id.* ¶¶ 9–10. Several police officers, including Officer Golden, responded to the call, arriving “in full uniform (equipped with body cameras) and operating marked patrol vehicles.” *Id.* ¶ 11. Officer Golden then offered Ms. Serano a ride to another hotel in his marked police vehicle. *Id.* ¶ 14. Ms. Serano agreed and was transported to a hotel across town, where Officer Golden proceeded to engage in sexual intercourse with her, without

her consent, as she “[went] in and out of consciousness.” *Id.* ¶¶ 18–31. Throughout the encounter, Ms. Serano maintains that “[Officer] Golden remained in his full police uniform.” *Id.* ¶ 29.

According to reporting by The Morning Call, Officer Golden was discharged from the Police Department in February 2019, but investigations by the Lehigh County District Attorney’s Office and state police found no criminal charges were warranted. Peter Hall, *Federal lawsuit accuses former South Whitehall police officer of raping intoxicated woman*, The Morning Call (Jan. 11, 2021), <https://www.mcall.com/news/police/mc-nws-former-south-whitehall-police-sexual-assault-20210111-gulmeukq7vcdbm3qczomcejhka-story.html>.

Ms. Serano further claimed that “members of the South Whitehall Township Police Department have a history of being disrespectful, sexually harassing, and even assaultive to women, as well as for other Constitutional violations—all of which were known to the supervisors, decisionmakers, and the Township.” *See* Ex. A ¶ 44. According to Ms. Serano, this pattern of behavior was never investigated nor were any officers disciplined, suggesting this conduct was effectively “condoned, if not encouraged, by deliberately indifferent supervisors, decision-makers, and the Township itself.” *See id.* ¶ 46. What is more, Ms. Serano claimed that neither the Township nor the Police Department made available any internal rules or regulations “pertaining to the proper treatment of visib[ly] intoxicated persons, especially females, [and] if they did, [] they were routinely not enforced.” *See id.* ¶ 48. The seemingly inescapable conclusion from Ms. Serano’s allegations is that a permissive culture of abuse and bad behavior was allowed to fester within these government agencies, obscured from public view.

Ms. Serano’s case ultimately settled on September 21, 2021—the very same day that the Township was dismissed from the lawsuit. *See* Exs. B–C. On October 6, 2021, the federal

district court issued an order “barr[ing] . . . public disclosure of the settlement terms between the parties and of the underlining [sic] allegations and claims brought in this matter unless pursuant to other valid legal process” (“Confidentiality Order”). *See* Ex. D.

### **B. RTKL request seeking *Serano v. Golden* settlement agreement**

Petitioners, The Morning Call and Sheehan, are a newspaper and one of its reporters, respectively. Founded in 1883, The Morning Call is the leading media company in the Lehigh Valley and among the top five largest newspapers in Pennsylvania. The Morning Call’s coverage area includes reporting on local government, including townships, boroughs, school districts and the like. The Morning Call’s reporters utilize the RTKL to provide enhanced information to their readers in their daily print edition and online with their platform [www.mcall.com](http://www.mcall.com).

South Whitehall Township is one of the municipalities within The Morning Call’s coverage area. Reporters cover local political news, law enforcement efforts, development plans, and high school sports.<sup>1</sup> In addition to reporting on the municipalities’ regular business, The Morning Call also covers legal actions filed by and against municipalities.

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<sup>1</sup> *See, e.g.,* Jennifer Sheehan, *Whitehall Township takes first step in potential settlement over mayor accused of harassment*, The Morning Call (Dec. 5, 2022), <https://www.mcall.com/news/local/mc-nws-whitehall-township-mayor-settlement-latest-20221206-uiapx3b5hfffbefak2ofjsp2e-story.html>; Leif Greiss, *South Whitehall Police seek help finding endangered person*, The Morning Call (Sept. 11, 2022), <https://www.mcall.com/news/local/whitehall/mc-nws-endangered-individual-south-whitehall-police-assistance-20220911-behynx45yvginirhzjxd4w34wa-story.html>; Emily Baxter, *Strawberry (Acres) forever? Slow development plans frustrate North Whitehall residents*, The Morning Call (Dec. 6, 2022), <https://www.mcall.com/news/local/mc-nws-north-whitehall-strawberry-acres-update-20221206-tbip66ugbnabl7yjpgzvh7sli-story.html>; Michael Blouse, *As training begins, Whitehall girls soccer honors and remembers teammate Mia Grace Due, who lost her life in car crash*, The Morning Call (Aug. 15, 2022), <https://www.mcall.com/sports/varsity/mc-spt-mia-grace-due-whithall-soccer-player-killed-car-crash-20220815-ui7ejhu5evbojb74a3uwxybfza-story.html>.

When The Morning Call learned of the *Serano v. Golden* case filed against the Township, the newspaper published all available information. *See* Hall, *supra*. The RTKL request reflects the newspaper's further efforts to use the state's public records law to gain information related to the lawsuit, including the expenditure of taxpayer dollars or other actions in furtherance of the settlement reached in the *Serano* case.

### **HISTORY OF THE CASE**

On April 11, 2022, Peter Hall, a reporter for The Morning Call, submitted a RTKL request to South Whitehall Township, seeking records pursuant to the RTKL, 65 P.S. §§ 67.101 *et seq.* The request sought, among other records, "Any settlement and release ending litigation in Theresa M Serano's federal civil rights lawsuit, *Serano v. Golden*, docketed at 5:21-cv-84 in the U.S. District Court for the Eastern District of Pennsylvania." *See* Record at OOR\_013.<sup>2</sup> The Interim Township Manager of South Whitehall Township, Randy Cope, denied the request on May 18, 2022, stating that the requested settlement agreement was not in the Township's possession, custody, or control. *See* Record at OOR\_020.

On June 2, 2022, Mr. Hall authorized a different reporter at The Morning Call, Daniel Sheehan (together with The Morning Call, "Petitioners"), to substitute for him in this matter because he was no longer employed by The Morning Call. *See* Record at OOR\_009. On the same day, Mr. Sheehan appealed the denial of the RTKL request to the Office of Open Records.

In the proceedings before the OOR, the Township maintained that the records "do not exist in the[ir] possession, custody and control," because the Township was dismissed from this

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<sup>2</sup> For the Court's convenience, Petitioners' Counsel have added Bates-stamps (OOR\_001 through 049) to the OOR certified record filed by the OOR on November 18, 2022 with the Lehigh County Clerk of Judicial Records. The OOR record did not have page numbers; no other changes have been made to the document. The Bates-stamped OOR certified record is appended to this document as Appendix 1, following the Exhibits.

litigation, and they therefore cannot produce the requested settlement agreement. *See* Record at OOR\_037–38. Counsel for the Township has further stated that, even if the Township did have access to the settlement agreement, it could not produce it pursuant to a valid RTKL request because of the October 6, 2021 Confidentiality Order entered by Magistrate Judge Timothy R. Rice in the *Serano v. Golden* litigation in the Eastern District of Pennsylvania. “[P]ursuant to the Court Order the Township lacks possession, custody, or control over the document due to a Court Order dismissing it as a party to the litigation, and a subsequent Court Order preventing public disclosure of any settlement terms between the remaining parties.” *See* Record at OOR\_038. Counsel for the Township insists that receiving a copy of the settlement agreement “would be a violation of the October 6, 2021 Court Order preventing public disclosure.” *Id.*

Petitioners argued before the OOR that settlement agreements involving a government agency—here, involving the alleged conduct of a Township employee in his official capacity—are public records and are accessible regardless of whether the agency has actual physical possession of the agreement. *See, e.g., Trib.-Rev. Publ’g Co. v. Westmoreland Cnty. Hous. Auth.*, 833 A.2d 112, 118 (Pa. 2003). Furthermore, Petitioners interpret the federal court’s Confidentiality Order, which explicitly permits disclosure “pursuant to other valid legal process,” to include disclosure pursuant to a valid RTKL request. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3d Cir. 1994) (holding that “a strong presumption exists against granting or maintaining an order of confidentiality whose scope would prevent disclosure of that information pursuant to [a] relevant freedom of information law”). Despite Petitioners’ well-reasoned arguments and supporting case law, the OOR on July 5, 2022 issued a Final Determination denying Mr. Sheehan’s appeal to the agency. *See* Record at OOR\_046. The determination stated that “based on the evidence provided, the Township has met its burden of

proof that it does not possess the records sought in the Request.” *See* Record at OOR\_048. The OOR credited each of the Township’s arguments, finding, based solely on Mr. Cope’s attestation, that the Township’s evidence of its dismissal from the *Serano* litigation was sufficient to conclude the Township “was not a participant in or party to the settlement.” *See id.* The OOR also concluded that “there is no evidence in the record to suggest Marshall Dennehey, the law firm retained by the Township’s insurer to represent the Township, or any other attorney prepared the requested settlement agreement on behalf of the Township.” *See id.* As a result, the Township had met its burden that the records sought were not in its possession. *See id.*

However, neither the Township nor the OOR addressed whether the Township was involved in the *Serano* settlement *prior* to its dismissal, which was secured on the very same day that the settlement was reached and announced by the federal court. Nor did the Township or the OOR sufficiently consider that Officer Kyle Golden, the only named police officer defendant, was sued in his official capacity.<sup>3</sup>

Petitioners appealed the OOR final determination to this Court on July 28, 2022. Following a status conference on November 18, 2022, this Court entered a briefing schedule and Petitioners now submit the instant brief in adherence to that schedule.

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<sup>3</sup> The OOR addressed this fact in a brief footnote. *See* Record at OOR\_048 n.4. It accepted Mr. Cope’s attestation that the Township had discharged Officer Golden as sufficient evidence of the Township’s lack of possession, notwithstanding the fact that Officer Golden had been sued in his official capacity.

**STATEMENT OF QUESTIONS INVOLVED**

Did the OOR err as a matter of law in determining that the Township met its burden of proving the *Serano v. Golden* settlement agreement is not in its possession, custody, or control?



## SUMMARY OF ARGUMENT

The OOR's analysis of Petitioners' RTKL appeal was incomplete and flawed, focusing exclusively on the issue of actual possession, without considering the possibility of disclosure via constructive possession. The OOR did not even reach the issue of whether the settlement agreement is a public record under the RTKL. The Court of Common Pleas should therefore reverse for the following reasons. **First**, the OOR decision failed to consider that the settlement agreement is in the Township's constructive possession. *See, e.g., Trib.-Rev. Publ'g Co. v. Westmoreland Cnty. Hous. Auth.*, 833 A.2d 112 (Pa. 2003). **Second**, had the OOR conducted the proper analysis of possession, it would have then concluded that the *Serano* settlement agreement was a public record subject to disclosure under the RTKL because the defendant-police officer was sued in his official capacity and the underlying conduct directly related to a governmental function. **Third**, the OOR decision denying Petitioners' records request contravenes the remedial intent of the RTKL, which provides access to exactly this kind of information and enables 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). For all these reasons, this Court should reverse the OOR decision and order the Township to release the settlement agreement. In addition, this Court should award Petitioners their reasonable costs and attorney's fees and statutory damages pursuant to Section 1305(a) of the RTKL.

## ARGUMENT

### **I. The settlement agreement is undeniably a public record in the Township's constructive possession.**

The Township maintains it cannot produce the requested record because it lacks possession, custody, or control over it. *See* Record at OOR\_037. The OOR accepted this

argument in its final determination, based solely on averments by Interim Township Manager of the South Whitehall Township, Randy Cope. Mr. Cope attested that the requested record was not in the Township's possession, custody or control, that the Township was dismissed from the litigation, and that the Township had not been involved in any settlement agreement as a result of its dismissal. *See* Record at OOR\_048. However, it is well-established that settlement agreements involving a government agent are public records and are accessible under Pennsylvania's RTKL regardless of whether the agency has actual physical possession of the agreement. *See, e.g., Trib.-Rev. Publ'g Co.*, 833 A.2d at 117–18; *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644, 649 n.11 (Pa. Commw. Ct. 2006) (“[A] school district may not contract away the public's right of access to public records . . .”).

Indeed, Section 901 of the RTKL provides that, “[u]pon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has *possession, custody or control* of the identified record.” 65 P.S. § 67.901 (emphasis added). “Constructive possession is the concept of accessing records ‘of’ an agency that are outside an agency’s possession, but are within its legal custody or control.” *UnitedHealthcare of Pa., Inc. v. Baron*, 171 A.3d 943, 958 (Pa. Commw. Ct. 2017). “[R]ecords may be ‘of’ a person or entity that is not subject to the RTKL, and yet be accessible under the RTKL because they document agency activities.” *Bagwell v. Pa. Dep’t of Educ.*, 76 A.3d 81, 89 (Pa. Commw. Ct. 2013) (discussing *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177 (Pa. Commw. Ct. 2006)).

In *Tribune-Review Publishing Co.*, a newspaper sought access to a confidential settlement agreement between the Westmoreland County Housing Authority’s liability insurer and a former employee arising out of a civil rights action filed by the employee. 833 A.2d 112.

In denying the Tribune-Review's request, the Housing Authority argued, *inter alia*, that the settlement agreement was not in its possession or control. *Id.* at 114–15. The Housing Authority maintained that “it did not authorize or sign the document at issue, nor did it ever see or possess the document.” *Id.* at 118. The Pennsylvania Supreme Court rejected this argument. It held instead that “lack of possession of an existing writing by the public entity at the time of a request pursuant to the [Right to Know] Act is not, by itself, determinative of the question of whether the writing is a ‘public record’ subject to disclosure. A writing is within the ambit of the Act if it is subject to the control of the agency.” *Id.*

Here, too, the Township's arguments about a lack of actual possession must similarly fail. Rather than evaluate whether the settlement agreement was subject to the Township's control, the OOR summarily concluded that the Township's lack of actual possession was dispositive. The OOR should have considered whether the agreement was subject to the Township's control, as precedent from this state's Supreme Court requires. But instead, the OOR's analysis stopped short after simply noting that the Township was “dismissed from the litigation prior to the settlement and, as a result, was not a participant in or party to the settlement.” *See* Record at OOR\_048. Puzzlingly, the OOR did not address the fact that the Township's dismissal occurred on the very same day as the settlement was reached, a fact which common sense suggests would be relevant in discerning whether the Township was involved in negotiating settlement terms or perhaps even granted or sought certain concessions prior to its dismissal. Such inquiries would have determined whether the agreement was subject to the Township's control and therefore in its constructive possession and subject to disclosure.

The Township further argues that it lacks possession, custody, or control over the records because the federal court issued the Confidentiality Order “preventing public disclosure of any

settlement terms between the remaining parties.” See Record at OOR\_038. The Township insists that any access to, or receipt of, the settlement agreement by the Township would violate that Confidentiality Order. *Id.* However, the Third Circuit has held that a confidentiality order such as the one entered by the court in the *Serano v. Golden* case cannot be maintained “where it is likely that information is accessible under a relevant freedom of information law,” lest such orders render utterly useless federal and state freedom of information laws. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3d Cir. 1994). This decision binds the federal district court and is likely the reason the Confidentiality Order plainly excludes from its scope public disclosure made “pursuant to other valid legal process.” See Ex. D. Indeed, “a strong presumption exists against granting or maintaining an order of confidentiality whose scope would prevent disclosure of that information pursuant to [a] relevant freedom of information law.” *Pansy*, 23 F.3d at 791. In contending, as it did before the OOR, that the federal Confidentiality Order in the *Serano* litigation precludes access to the settlement agreement, the Township conveniently ignores this provision of the Confidentiality Order or otherwise interprets “other valid legal process” not to include an order by this Court granting access to settlement terms via a RTKL request.

Petitioners have therefore moved to intervene in the Eastern District of Pennsylvania for the limited purpose of vacating or modifying the Confidentiality Order to make clear that “other valid legal process” does, in fact, include a state judicial order granting access via a RTKL request. The Morning Call’s motion to intervene and amend confidentiality order – filed on December 9, 2022 – is pending. See Ex. F.

**II. The *Serano v. Golden* settlement agreement is a Township public record because it resolved claims against a defendant-police officer sued in his official capacity under 42 U.S.C. § 1983.**

Had the OOR conducted a more comprehensive analysis of the Township’s constructive possession as outlined above, it would have granted Petitioners’ appeal and ordered disclosure of the requested records upon properly finding that the *Serano* settlement agreement was, in fact, a public record. Should the Township argue otherwise, such argument should be rejected. The RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. Records belonging to or created by individuals—that is, not government agencies—may still qualify as public records and be accessible under the RTKL if they document agency activities or are received by agency members acting in their official capacity. *See, e.g., Bagwell*, 76 A.3d at 89; *Mollick v. Township of Worcester*, 32 A.3d 859 (Pa. Commw. Ct. 2011).

In *Bagwell*, the Pennsylvania Commonwealth Court ordered access to Pennsylvania State University emails, even though the university was not a state agency, because the emails in question were received by the state’s Secretary of Education while acting in his official capacity and performing a governmental function. *Bagwell*, 76 A.3d at 87, 90 (“The non-agency status of the creator or sender of records does not preclude their public status.”). Similarly in *Mollick*, the Commonwealth Court ordered access to Township Supervisors’ emails stored on private servers because they documented township business. *Mollick*, 32 A.3d at 872–73. The same was true in *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Commw. Ct. 2012), where Borough Council members’ emails were found to constitute public records under the RTKL, notwithstanding the fact that they were exchanged using personal email accounts. *See id.* at 95. The Commonwealth Court found the members “were acting in their official capacity as elected officials of the Borough while exchanging the emails in question” and the emails themselves “documented the

Borough's consideration of land development plans"—activity directly related to a governmental function. *See id.* The Commonwealth Court refused to find that “simply because emails are in the personal accounts of individual Council members [] they are not in the possession of the Borough.” *Id.* at 96. The emails were deemed public records “subject to the Borough’s control”—that is, in the Borough’s constructive possession—and ordered to be disclosed. *Id.*

Here, the facts weigh just as heavily in favor of access because the requested settlement agreement resulted from the actions of a Township employee acting in his official capacity. Theresa Serano sued Officer Kyle Golden in both his individual and official capacities as a South Whitehall Township Police Officer pursuant to 42 U.S.C. § 1983. Where an individual is sued in his official capacity, such that a statutory requirement “is proof that the defendant acted under color of state law . . . [i]t is axiomatic that there must be state action to prevail because the statute does not reach entirely private conduct.” *Trib.-Rev. Publ’g Co.*, 833 A.2d at 117. Indeed, a core tenet of Section 1983 jurisprudence is that an official-capacity suit against an individual is really a suit against that official’s government entity. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (“Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent.” (citation and internal quotation marks omitted)).

At all times relevant to the lawsuit’s claims, Officer Golden was acting in his official capacity as a Township officer. Officer Golden’s introduction to Ms. Serano followed from a request for police assistance after Ms. Serano had become heavily intoxicated. Officer Golden was on duty and in uniform throughout the entirety of the evening during which the alleged rape took place. *See* “Statement of Pertinent Facts,” *supra*. Consequently, the settlement agreement was necessarily created in his official capacity and is a public record subject to the RTKL.

Finally, nothing in the federal docket reflects that former Officer Golden was dismissed partially from the case in his official capacity and remained only as a defendant in his personal capacity. *See* Ex. G. But the OOR did not sufficiently consider this dispositive fact in its final determination and instead relied exclusively on the Township’s claim that because it had been dismissed from the case—on the date it settled—it lacked possession, custody or control over the settlement agreement. But, as noted above, government agencies cannot thwart access to public records related to the performance of a government function simply because those records do not reside with the agency.

The fact that the Township was dismissed on the date the *Serano* settlement agreement was entered and filed with the federal district court cannot be dispositive where, admittedly, one of the settling parties remained a police officer sued in his official capacity who therefore negotiated and acceded to the settlement agreement as a Township Police Officer. Indeed, no one disputes that Officer Golden was acting in his official capacity, including Kyle Golden himself, who invoked qualified immunity as an affirmative defense. *See* Ex. E at 48.

Consequently, the settlement agreement qualifies as a public record under the RTKL and the OOR erred in failing to consider the fact that Officer Golden was sued in his official capacity and settled the suit in his official capacity.

**III. The remedial intent of the RTKL strongly favors disclosure of the requested records in this case.**

The Pennsylvania legislature has made clear that its Right to Know Law is “remedial legislation,” and it must therefore be interpreted “liberally to effect its object and promote justice.” *Levy v. Senate of Pa.*, 65 A.3d 361, 380 (Pa. 2013) (citing 1 Pa. C.S. § 1928(c)). The current version of the RTKL “significantly expanded public access to governmental records . . . with the goal of promoting government transparency.” *Id.* at 368. As the Supreme Court of

Pennsylvania has held, the purpose of the RTKL is to promote “access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.” *Id.* at 381 (citation omitted). And “in a society in which each individual has but limited time and resources,” such scrutiny largely takes place through the press, which the public relies on to gather and disseminate facts about government operations. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

Public records are essential to facilitate public understanding and oversight of police conduct, promote confidence in the criminal justice system, and spur changes in law and policy when necessary. Police do not perform their duties in the community under a cloak of absolute secrecy, and the RTKL must be construed in a manner that recognizes the critical and statutorily guaranteed role that timely public access plays in the proper function of law enforcement agencies and the criminal justice system as a whole.

Affirming the OOR decision would contravene the stated public policy objectives of the RTKL. The settlement records sought involve a Township police officer acting in his official capacity and implicate possible misconduct by the Township itself in “condon[ing] and encourag[ing]” sexual harassment by South Whitehall police. Ex. A ¶ 44. The settlement agreement is therefore a matter of significant public concern. The RTKL expressly requires access to the records requested in this case because the public has a right to know when the actions of law enforcement officers result in the settlement of a case against an officer acting in his official capacity, even when the agency is dismissed at the eleventh hour. It is vitally important to the press and the public to be able to access records that shine a light on law enforcement operations and misconduct, as well as records that illustrate the public funding expended to settle such claims. Importantly, there is no way to know the outcome of a case



involving a taxpayer-funded employee without access to the settlement agreement. Because Officer Golden was sued in his official capacity, the public has a strong interest in knowing the content of the settlement, including any payout terms and other concessions made by Officer Golden, such as whether he would agree to relinquish his Municipal Police Officer certification.

Public access also provides a safeguard and means of accountability. If the Township's argument stands, agencies would be able to negotiate secret settlements for a government agent named in his or her official capacity. This would be against public policy and impede public oversight of government officials. The Township official in this case was operating in his official capacity, on behalf of the public, and his conduct resulted in federal litigation and a settlement. The fact that the Township was dismissed as a defendant is irrelevant to the public's right to hold public employees accountable for their official conduct. But for Officer Golden's work for the Township, he would not have been involved in the case or the settlement. His official duties, and the apparent dereliction thereof, give the public a statutory right of access and impose an affirmative duty on the Township to facilitate access to the settlement that arose as a result of its employee's conduct. Although there may be countervailing public policy reasons for confidentiality to encourage settlement, "[t]he people of this state, through their elected representatives, have stated in the clearest of terms that it is more important that they have access to this type of [settlement] information than that it remain confidential." *Trib.-Rev. Publ'g Co.*, 833 A.2d at 121.

The OOR's final determination, however, has enabled the Township to keep the *Serano v. Golden* settlement agreement out of public view for more than a year. The public therefore remains in the dark about how the Township sought to resolve the case out of court and whether the Township has taken any steps to remedy its alleged "culture of abuse." *Hall, Federal lawsuit*

*accuses former South Whitehall police officer of raping intoxicated woman, supra.* Denying this public records request has been an undeserved boon to the Township and Officer Golden, shielding them from public accountability, despite their disclosure obligations under the RTKL.

#### **IV. The Township has acted in bad faith**

A 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. Pa. Dep’t of Corr.*, 197 A.3d 825, 832 (Pa. Commw. Ct. 2018), *aff’d*, 243 A.3d 19 (Pa. 2020) (quoting *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 660–61 (Pa. Commw. Ct. 2015) and citing 65 P.S. § 67.1304). When an agency delays or denies access to public information in bad faith, the court may award reasonable attorney’s fees and costs to the requester and impose civil penalties on the agency. 65 P.S. § 67.1304. “In the RTKL context, ‘bad faith’ does not require a showing of fraud or corruption. The lack of good faith compliance with the RTKL and an abnegation of mandatory duties under its provisions rise to the level of bad faith.” *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161, 1170 (Pa. Commw. Ct. 2018). “Evidence of an agency’s failure to perform its mandatory duties, including a failure to search its records prior to a denial of access, may suffice.” *Id.* at 1171.

A finding of bad faith and attendant sanctions are warranted here for two reasons. First, the record establishes that the Township did not conduct a diligent search before denying the Request. *Compare* Record at OOR\_032–33 (affidavit stating that Mr. Cope, the Township open records officer, simply accepted the representation of the attorneys for the Township’s insurance carrier that the Township had no knowledge of or access to the settlement agreement), *with* *Uniontown Newspapers, Inc.*, 243 A.3d at 28 (holding that an open records officer cannot

“fulfill[] his or her obligation [to conduct a diligent search] simply by relying on the representations of others without inquiring as to what investigation was made and without reviewing the records upon which the individual responding to the request relied”). In addition, Mr. Cope failed to examine the apparent inconsistency between the Township’s positions that, on the one hand, it had no knowledge of the settlement agreement, but on the other hand, it knew of the federal court order barring public disclosure of the settlement’s terms.

Second, the Township’s denial is based on an unreasonable interpretation of law. The Township erroneously claims that, even if it possessed the settlement agreement, it could not disclose it because of the federal Confidentiality Order in the civil rights case. *See* Section I, *supra*, at p. 11-12. This is inconsistent with Third Circuit precedent. *See id.*; *see also Pansy*, 23 F.3d at 791. In addition, the Township’s position that it is not obligated to obtain and disclose the agreement conflicts with the Pennsylvania Supreme Court’s previous holding in *Tribune-Review Publishing Co.*, as well as holdings by the Commonwealth Court in *Bagwell*, *Mollick*, and *Barkeyville*. *See* Section II, *supra*, at pp. 13–14.

The Court should therefore find that the Township has acted in bad faith, award Petitioners their reasonable attorney’s fees and impose civil penalties on the Township.

### **CONCLUSION**

At bottom, the Township’s argument is that a settlement agreement reached between a Township agent, Officer Kyle Golden, and his alleged rape victim should not be publicly accessible under the RTKL, notwithstanding the fact that the alleged rape took place while Officer Golden was on duty—in uniform—and acting in his official capacity. The Township further insists it *cannot* produce the requested record because the Township itself has never been privy to settlement terms because it was dismissed from the litigation. The Township cannot

hide behind Officer Golden and assert it lacks custody, possession, or control over records of an agreement settling claims stemming from the actions of a Township agent. Although the Township was ultimately dismissed from the *Serano v. Golden* litigation by agreement of the parties, its dismissal was secured and announced by the federal court on the very same day as the settlement was reached. *See Exs. B–C.*

It is hard, if not impossible, to imagine that Plaintiff Serano would have ever agreed to a settlement that extracted zero concessions from the Township in exchange for its dismissal with prejudice. Indeed, the idea that the plaintiff would agree to dismiss the employer of her alleged rapist in exchange for nothing strains credulity. Any settlement terms that are binding on South Whitehall Township further compel a finding by this Court that the settlement agreement is a public record subject to disclosure under the RTKL. And yet, in spite of all of this, the Township asks this Court to believe it had no involvement nor access. The public deserves—indeed, has a statutory right—to know the contents of a settlement agreement reached between a government employee and his alleged rape victim, and the Township’s arguments to the contrary are unsupported by law, public policy, and common sense.

For the foregoing reasons, Petitioners respectfully request that this Court reverse the July 5, 2022 final determination of the OOR, order the Township to release the requested records, and, because the Township failed to comply in good faith with its obligations under the RTKL, award Petitioners reasonable attorney’s fees and impose civil sanctions on the Township.

DATED: December 19, 2022

/s/ Paula Knudsen Burke

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**CERTIFICATE OF SERVICE**

I certify, that on this 19<sup>th</sup> day of December, 2022, I served a true and correct copy of the forgoing brief on counsel for the Respondent, South Whitehall Township, via email:

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Date: Dec. 19, 2022

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**CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY**

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.

Date: Dec. 19, 2022

Submitted by: Paula Knudsen Burke  
Signature: */s/Paula Knudsen Burke*  
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