### IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA	A STATE	:
POLICE,		:
Petitioner,		:
		:
	<b>V.</b>	:
		:
<b>CARTER WALK</b>	ER and	:
LNP MEDIA GRO	OUP, INC.	:
<b>Respondents.</b>		:

No. 710 CD 2022

### BRIEF OF RESPONDENTS CARTER WALKER and LNP MEDIA GROUP, INC.

Appeal from the Final Determination of the Office of Open Records dated June 9, 2022 at Docket No. AP 2022-0712

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#### **COUNTER STATEMENT OF THE CASE**

On January 14, 2022, Carter Walker, then an investigative journalist for Lancaster-based LNP Media Group, Inc.<sup>1</sup> (together with Walker, "Media Respondents"), submitted a request to the Pennsylvania State Police ("PSP") under Pennsylvania's Right-to-Know Law ("RTKL")<sup>2</sup> seeking records related to hate crimes. Walker sought the records to further understand a recent rise in these crimes.<sup>3</sup> Mr. Walker requested "[t]he underlying dataset which is used to create the 'Hate Crime Report' search function on the Uniform Crime Reporting website" and "[a]ny data dictionary, code tables, or other types of manuals that define, in plain English, the meaning of the column headers in the data, and any codes, acronyms, abbreviations or other shorthand terms for entries in the data." See R.001a-002a. On February 8, 2022, the PSP told Mr. Walker that "the estimated cost for a one time extraction for the data would be \$6,000" and, after Mr. Walker twice requested clarification of the reason for the charge, told him that PSP was passing on a third-

<sup>&</sup>lt;sup>1</sup> Since filing his RTKL request in this case, Mr. Walker left his role at LNP Media Group, Inc. to become a reporter for Votebeat Pennsylvania. Mr. Walker and LNP Media Group, Inc. continue to collaborate on any reporting that will result from the public records sought through this RTKL request.

<sup>&</sup>lt;sup>2</sup> 65 P.S. §§ 67.101 - 67.3104.

<sup>&</sup>lt;sup>3</sup> Walker later reported on "inconsistencies in the hate crimes database[,]" including "significant[]" changes to the historical number of crimes reported in Pennsylvania. Carter Walker, *Hate Crime Reporting in Pa. Is Inconsistent, But Trends Clearly Show an Increase*, Lancaster Online (May 15, 2022), https://lancasteronline.com/news/local/hate-crime-reportingin-pa-is-inconsistent-but-trends-clearly-show-an-increase/article\_51c0af38-d2ef-11ec-bca4-0fe6a1c0a473.html.

party contractor's bill to retrieve the data. *See* R.023a, R.104a, R.190a. The PSP indicated that the contractor, Optimum Technology, Inc. ("OTECH"), which the PSP had hired to "provide the underlying database processing and database management . . . software" for the Pennsylvania Uniform Crime Reporting System , controlled PSP's access to the raw data sought, and "wants to charge us to collect that since it wasn't part of the original data." *See* R.104a, R.190a. After successive 30-day and one-week extensions of its time to respond to Mr. Walker's original request, the PSP denied it in full on February 22, 2022, reiterating that the \$6,000 charge was for the "labor cost of approximately 60 hours by OTECH employees." *See* R.030a–032a.

Media Respondents appealed the PSP's denial to the Office of Open Records ("OOR") on March 22, 2022. Both parties submitted briefing on April 15, 2022. Prior to issuing its decision, the OOR requested that the PSP provide a "specific breakdown" of the \$6,000 in costs it sought to charge Media Respondents as well as the mode of transmission that the PSP would use to convey the records to Mr. Walker if his request were granted. *See* R.211a. The PSP responded to the OOR the same day, again stating only that "the \$6000 is the approximate cost for the estimated 50-60 hours of labor required by OTECH employees to facilitate the one time PA SRS Hate Crime data pull." *See* R.210a. And the PSP reaffirmed this attribution of the \$6,000 fee to labor costs again on May 6, 2022, stating in a memorandum to the OOR that "[t]his request would require a labor cost of approximately 50 – 60 hours

by OTECH employees at an estimated cost of approximately \$6000." *See* R.218a. Likewise, in his affidavit submitted to the OOR, the PSP's Agency Open Records Officer ("AORO") William A. Rozier elaborated only that, after the PSP "contacted OTECH with the request and asked for an estimate of cost to pull the raw data-set responsive to this request[,]" OTECH responded "with the estimated labor effort of 50 to 60 hours at a cost of approximately \$6000 for a one-time PA SRS Hate Crime data pull." *See* R.104a. At no point has the PSP explained the basis for these estimates of labor hours or cost to fulfill Mr. Walker's request with specificity.

The OOR granted the Media Respondents' appeal in full on June 9, 2022, finding that "the PSP cannot require [Media Respondents] to pay labor fees, regardless of whether the fees are for third party labor, as such fees are not authorized by the RTKL, nor can the OOR order [Media Respondents] to pay labor costs in order to receive access to public records" and highlighted that "[t]o find otherwise would encourage an agency to avoid disclosing public records by storing records in a third-party database and charging excessive data retrieval fees." *See* Pet'r's Br., App. A ("OOR Final Determination") at 10. The OOR further held that "[t]he PSP has not set forth any evidence to demonstrate that the fees a[r]e reasonable and based on prevailing fees" or that disputes Mr. Walker's qualification for the RTKL's fee exemption for journalists. *Id.* The PSP appeals the OOR's determination that it

cannot charge Media Respondents \$6,000 in labor costs to fulfill Mr. Walker's request under the RTKL. *See* Pet'r's Br. at 8.

#### SUMMARY OF ARGUMENT

Media Respondents urge this Court to affirm the OOR's finding that the PSP cannot charge Media Respondents for labor costs in fulfilling Mr. Walker's request under the RTKL. The RTKL prohibits agencies from charging requesters for any fees beside those enumerated in the RTKL "unless the agency necessarily incurs costs for complying with the request." 65 P.S. § 67.1307(g). As the OOR found, the PSP would not necessarily incur the labor cost of responding to Mr. Walker's request, and therefore such fees are impermissible under the RTKL. *See* OOR Final Determination at 10.

Moreover, the PSP cannot charge Media Respondents for labor costs because this Court has already held that "the RTKL does not expressly authorize the charging of labor costs" and affirmed the OOR's determination that labor costs are "not a proper charge to pass along to a requester." *State Emps.* '*Ret. Sys. v. Office of Open Records*, 10 A.3d 358, 360, 363 (Pa. Commw. Ct. 2010) (citation omitted). The General Assembly's exclusion of labor costs from the RTKL's enumerated list of permissible fees further underscores their inconsonance with the RTKL's fee scheme. 65 P.S. § 67.1307(g). The PSP concedes that the proposed fees are exclusively labor costs, which this Court disallowed absent a showing that the costs were "necessarily incurred." See Pet'r's Br. at 8–9; State Emps. 'Ret. Sys., 10 A.3d at 363.

Even if the PSP deviated from the prescribed practice for Commonwealth agencies by charging for labor costs in this case, the RTKL nonetheless exempts journalists like Mr. Walker from any fees to fulfill requests for "complex and extensive data sets[.]" 65 P.S. § 67.1307(b)(4). This Court should also defer to the OOR's conclusive rejection of the PSP's proposed fees, as the RTKL charges the OOR with determining which fees may be charged to requesters. Finding otherwise would permit Commonwealth agencies to circumvent their obligations under the RTKL altogether by farming out recordkeeping responsibilities to third-party contractors.

In sum, the PSP may not charge Media Respondents for labor costs, or any other fees, for the data sets requested by Mr. Walker. This Court should affirm the OOR's decision.

#### **ARGUMENT**

### I. The fees sought by the PSP violate the RTKL because the PSP did not "necessarily incur" them under 65 P.S. § 67.1307(g).

*A.* The PSP could not "necessarily incur" labor costs that are expressly forbidden by its contract with OTECH.

The PSP did not "necessarily incur" the \$6,000 labor cost it seeks to charge Media Respondents for retrieving the records requested by Mr. Walker because the PSP's contract with OTECH requires that OTECH comply with RTKL requests at no additional charge.<sup>4</sup> *See* R.164a. The PSP points to conclusory statements by its AORO to incorrectly suggest that, because the estimated internal cost *to OTECH* of complying with Mr. Walker's request would be \$6,000, the PSP thereby "necessarily incurs" the same. Pet'r's Br. at 17–18. This assertion misrepresents the PSP's rights against OTECH under its own contract with the company, which obligates OTECH to provide "access to, and copies of, any document or information in [OTECH]'s possession arising out of this Contract that . . . may be a public record under the RTKL[.]" R.163a. Given that the data set sought by Mr. Walker is an agency record,<sup>5</sup> and under the RTKL all agency records are presumed to be public records unless the RTKL, privilege, or federal or state law provide otherwise, the data set requested by Mr. Walker is a public record. *See* 65 P.S. § 67.305(a).<sup>6</sup> Mr. Walker's

<sup>&</sup>lt;sup>4</sup> IT Contract Terms and Conditions, Section 69(i) establishes that "[t]he Commonwealth will reimburse the Contractor [OTECH] for any costs associated with complying with these provisions only to the extent allowed under the fee schedule established by the Office of Open Records or as otherwise provided by the RTKL if the fee schedule is inapplicable." R.164a.

<sup>&</sup>lt;sup>5</sup> Because the Hate Crime Report is a summary of individual hate crimes, not only is the compiled data set underlying the Report a public record of the PSP, but every individual data point (what the PSP refers to as "flat files") within the data set is a public record of the agency or division which first responded to and reported the individual hate crime reflected in that data point. *See* Pet'r's Br. at 13.

<sup>&</sup>lt;sup>6</sup> Notably, the RTKL considers an agency's internally maintained public records and those maintained by third-party contractors as equivalent for the purpose of responding to and charging for RTKL requests. *See generally Shannon v. Conneaut Lake Borough*, No. AP 2021-0529, 2021 WL 2209353, at \*8 (Pa. Off. Open Recs. May 28, 2021) ("Requester is entitled to access public records that are in the possession of a party with whom the [agency] has contracted with to perform a governmental function." (citing 65 P.S. § 67.506(d)(3))). The data set of "flat files" maintained by OTECH is thus PSP's public record for the purpose of the RTKL, even if OTECH possesses and manages it on PSP's behalf.

request thus falls squarely within the RTKL compliance obligations required of OTECH by its contract with the PSP.

Furthermore, the contract between the PSP and OTECH requires that the PSP "necessarily" reimburse OTECH for the costs associated with such requests "only to the extent allowed under the fee schedule established by the Office of Open Records or as otherwise provided by the RTKL[.]" See R.164a. And while the OOR's fee schedule provides for charging the cost of items like paper copies, flash drives and CDs, neither the schedule nor the RTKL otherwise allows for the reimbursement of labor costs.<sup>7</sup> Thus, not only does the PSP not "necessarily incur" any additional cost in compelling OTECH to comply with Mr. Walker's RTKL request, but the contract with OTECH outright excludes labor costs from the incorporated list of charges under the RTKL that OTECH may convey to the PSP in complying with RTKL requests. See R.164a. It is thus implausible that the PSP would "necessarily incur" any labor costs charged by OTECH in complying with Mr. Walker's request, since an extracontractual payment would amount to a voluntary exception to the reimbursement cap that the PSP has already secured against OTECH in their contract.

<sup>&</sup>lt;sup>7</sup> OOR, *Official RTKL Fee Schedule* (updated Dec. 30, 2022), https://www.openrecords.pa.gov/RTKL/FeeStructure.cfm.

## B. OTECH's labor costs were not "necessarily incurred" by the PSP under the RTKL.

Even if the PSP's contract with OTECH did not already exclude labor costs from the list of allowable RTKL charges, the PSP still did not "necessarily incur" the labor costs it seeks to charge Mr. Walker. 65 P.S. § 67.1307(g). A court should not interpret a statute to have a "meaning other than that dictated by the plain and unambiguous language of the statute." J.C.B. v. Pa. State Police, 35 A.3d 792, 796 (Pa. Super. Ct. 2012) (citation omitted). The word "necessary" is commonly defined as "absolutely needed,"<sup>8</sup> and something that "must exist or happen and cannot be avoided."9 The OOR has interpreted the term "necessarily" in Section 1307(g) of the RTKL to require an agency to pursue "the lowest-cost solution" that will enable it to complete a records request. DiFelice v. Easton Area Sch. Dist., No. AP 2022-0513, 2022 WL 860249, at \*4 n.6 (Pa. Off. Open Recs. Mar. 18, 2022) (finding that a school district must utilize the lowest-cost software available to redact portions of requested video). An agency does not "necessarily incur" costs to convert records into a format that it does not have a "statutory duty to create" and accordingly "cannot charge" for that conversion. State Emps. 'Ret. Sys., 10 A.3d at 363.

<sup>&</sup>lt;sup>8</sup> *Necessary*, Merriam-Webster Online Dictionary (last updated Feb. 24, 2023), https://www.merriam-webster.com/dictionary/necessary.

<sup>&</sup>lt;sup>9</sup> *Necessary*, Black's Law Dictionary (11th ed. 2019).

The PSP's claim that it necessarily incurred the \$6,000 retrieval cost it seeks to charge Mr. Walker misconstrues the scope of 65 P.S. § 67.1307(g) and directly conflicts with the OOR's and this Court's interpretations of that provision. For example, in State Employees' Retirement System, costs were not necessarily incurred where the agency was not statutorily required to convert its records into spreadsheet form in response to a records request. Id. Likewise, while the Uniform Crime Reporting Act requires the PSP to collect and present its repository of hate crime data, the PSP is not statutorily required to do so using OTECH's software. See 18 P.S. §§ 20.501 - 20.509. Nor does any statute require or Mr. Walker's request ask the PSP to convert this repository into a different software format than its present, unmodified raw form as it exists in OTECH's possession.<sup>10</sup> The PSP thus would not "necessarily incur" the labor cost of converting those records in retrieving them for Mr. Walker. Rather, the cost of doing so would directly stem from the PSP's own election-not "absolutely needed," by statute or otherwise-to house its data in the proprietary software of a third-party contractor. The "lowest-cost solution" to fulfill RTKL requests involving records held by a third-party contractor is to include data

<sup>&</sup>lt;sup>10</sup> In fact, Mr. Walker specifically seeks the PSP's data set "in its complete form" as "an export/extraction of raw data" and expressly clarifies that the PSP should *not* "manually input or alter any information into the data for the purposes of fulfilling this request." *See* R.003a. And because this data set sought by Mr. Walker "in its complete form" is a public record subject to request under the RTKL, not only is the PSP under no statutory obligation to modify the record, but it is statutorily *prohibited* from doing so unless the record's information meets the rigorous standard for redaction. *See id.; Shannon,* 2021 WL 2209353, at \*8; 65 P.S. § 67.706.

retrieval within the services bargained for in its contract instead of paying for individual requests on an ad hoc basis.<sup>11</sup> *See DiFelice*, 2022 WL 860249, at \*4 n.6. It follows that the labor cost of complying with Mr. Walker's request was not "necessarily incurred" under Section 1307(g) because it was neither "absolutely needed" nor part of the "lowest-cost solution" for managing RTKL request compliance.

The PSP's continued effort to pass on labor costs to Mr. Walker also fails to comply with the agency's own RTKL policy.<sup>12</sup> The PSP's RTKL policy allows the PSP to "only" pass on costs to requesters that are "based . . . on fees and charges specified in the current RTKL processing fee schedule."<sup>13</sup> The PSP's own policy thus requires it to account for this obligation under the RTKL in negotiating its contract with a third-party contractor like OTECH. The PSP's contract with OTECH appears to reflect this understanding, since OTECH contractually agreed to receive reimbursements from the PSP "only to the extent allowed under the fee schedule," which does not permit labor fees. *See* R.164a. But even if the PSP had failed to include this provision in its contract, the PSP's own RTKL policy demonstrates that any ad hoc costs for records housed with OTECH would only result from the PSP's

<sup>&</sup>lt;sup>11</sup> Notably, the PSP never provided information describing the scope of the labor involved or the reason behind the 50–60 hour labor estimate. Those estimates are ostensibly conclusory assertions based only on two affidavits from PSP employees. *See* R.099a–105a; R.221a–222a. <sup>12</sup> PSP, *Right-to-Know Law*, AR 6-2 § 1.01 (Apr. 24, 2017),

https://www.psp.pa.gov/contact/RTKL%20DOCUMENTS/AR%206-02.pdf.

<sup>&</sup>lt;sup>13</sup> *Id.*, AR 6-2 § 1.12(A)(2)(a).

failure to require OTECH to assist the agency in complying with the RTKL and thus not be "necessarily incurred."

In sum, decisions of this Court and the OOR and the plain meaning of Section 1307(g) demonstrate that the PSP did not "necessarily incur" \$6,000 in labor costs and accordingly cannot charge Media Respondents such a fee to fulfill Mr. Walker's request.

## II. The PSP cannot charge Media Respondents for labor costs because the RTKL expressly prohibits agencies from doing so.

# *A.* The RTKL prohibits agencies from charging requesters for labor costs.

The RTKL prohibits agencies from charging any fees not expressly provided for by the RTKL or other state statute "unless the agency necessarily incurs costs for complying with the request, and such fees must be reasonable." 65 P.S. § 67.1307(g). Labor costs are not "necessarily incurred," even when employees must stop performing other agency functions to fulfill a request because agencies are "subject to the RTKL and must invest the staff time necessary to comply with the RTKL requests." *State Emps.* '*Ret. Sys.*, 10 A.3d at 362. An OOR determination affirmed by this Court made clear that "[c]harging for the time it takes an agency employee to respond to a request during normal business hours is not a proper charge to pass along to a requester." *Id.* at 360 (citation omitted). The PSP's conclusory \$6,000 fee estimate for labor costs is an impermissible charge because, even if the fee arises only from third-party labor, as the PSP contends,<sup>14</sup> an agency may not recoup labor costs generated by a third-party contractor. *Shannon*, , 2021 WL 2209353, at \*8. When obtaining copies of records in the possession of third parties, a requester's fees "are limited to the fees that the [agency] could otherwise assess had such records been in the [agency's] possession." *Id*.<sup>15</sup> Charging a requester for "costs generated from time spent by [third-party] employees in searching for and organizing responsive records[,]" as PSP did here, is thus impermissible under the RTKL. *Id*.

Moreover, agencies may only pass the actual non-labor costs of third-party services onto requesters when the agency contracted with the third party *as a result of* the request. *Id.*; *see DeBartola v. Greater Johnstown Sch. Dist.*, No. AP 2019-1261, 2020 WL 4227201, at \*4–6 (Pa. Off. Open Recs. July 20, 2020) (citing *Allen v. Fairview Twp.*, No. AP 2010-0758, 2010 WL 4155150 (Pa. Off. Open Recs. Sept. 14, 2010)) (finding that a requester seeking video footage had to pay "reasonable

<sup>&</sup>lt;sup>14</sup> Following the OOR's request for clarification on the costs, the PSP submitted verification statements from two PSP officers, William Rozier and Joshua Kembel, confirming that the "cost of approximately \$6000 for a one-time PA SRS Hate Crime data pull" corresponds to "the estimated *labor effort* of 50 to 60 hours" of work from OTECH employees. R.104a, 222a (emphasis added).

<sup>&</sup>lt;sup>15</sup> See also Amspacher v. North York Borough, No. AP 2021-1815, 2021 WL 5279866, at \*4 (Pa. Off. Open Recs. Nov. 9, 2021) (holding that a \$50.00 fee was necessarily incurred when the requester sought physical copies of checks that were in possession of a bank); OOR, *Official RTKL Fee Schedule, supra* note 7.

and necessary fees" because the agency did not have the equipment needed to redact faces). Here, the PSP contracted with OTECH for database processing and management of the PSP's data years before Mr. Walker submitted his records request. *See* R.093a, R.106a–109a. The PSP thus did not seek OTECH's services *as a result of* Media Respondents' request in order to render a response. Rather, the PSP's contract with OTECH predated Media Respondents' request altogether. The PSP thus cannot charge Mr. Walker for *any* of the costs charged by OTECH to fulfill his request, including any labor costs.

# *B.* The RTKL evinces the General Assembly's affirmative choice that charging requesters for labor costs is impermissible.

As the General Assembly made clear by carefully enumerating which fees may be charged under the RTKL and explicitly withholding from agencies any discretion to create their own, permitting the PSP to devise a novel fee for Mr. Walker's request would be inconsistent with the RTKL's intended statutory scheme. This result is compelled by the *expressio unius* canon of statutory construction that establishes that "the inclusion of a specific matter in a statute implies the exclusion of other matters." *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020) (citation omitted). The *expressio unius* canon applies "only when 'circumstances support[] a sensible inference that the term left out must have been meant to be excluded."" *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017) (citation omitted). To determine whether the circumstances support said inference, courts examine whether the legislature included language imparting discretion on agencies or courts. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80 (2002). Additionally, "[w]here a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a different legislative intent." *Commonwealth v. Sanchez-Frometa*, 256 A.3d 440, 448 (Pa. Super. Ct. 2021) (citation omitted) (noting that the legislature "explicitly authorized trial courts to sentence juvenile offenders to 'life imprisonment without parole' for first-degree murder convictions" in the statute at issue, but excluded that language from the section relating to second-degree murder).

Here, the RTKL limits the list of charges that agencies may convey to requesters to postage, duplication, certification, conversion to paper, and enhanced electronic access. 65 P.S. § 67.1307(a)–(e). Notably, the General Assembly not only enumerates permitted fees in the RTKL, but it also specifies which entity has the discretion to set the numerical value of those fees and the basis for calculating those values. *Id.* For instance, the RTKL states that duplication fees "shall be established . . . by the Office of Open Records," "each judicial agency," and "each legislative agency" and must be reasonable and based on "comparable" fees charged by "local business entities." 65 P.S. § 67.1307(b)(1)–(2). Likewise, in certain circumstances, an agency "may establish" fees for enhanced electronic access that "must be approved by" the OOR "and may not" have "the intent or effect of

excluding persons from access to records or duplicates thereof or of creating profit for the agency." 65 P.S. § 67.1307(e). Conspicuously absent from the RTKL, however, is any mention of permissible labor fees, much less any description comparable to other fee types addressing how and by whom they would be calculated. *See* 65 P.S. § 67.1307.

Moreover, the RTKL does not give the OOR, agencies, or courts discretion to create new fee categories outside of the enumerated ones. In fact, the RTKL clearly states that "no other fees may be imposed unless the agency necessarily incurs costs for complying with the request," which is not the case here. 65 P.S. § 67.1307(g); see, e.g., Milwaukee J. Sentinel v. City of Milwaukee, 815 N.W.2d 367, 371–75 (Wis. 2012) (holding that the phrase "actual, necessary and direct costs" does not expand the acceptable costs for which to charge requesters beyond those specifically enumerated in the governing statute). Furthermore, the RTKL provides that, in certain instances, "the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to a requester [.]" 65 P.S. § 67.1304. The legislature's willingness to grant discretion to impose costs in other sections of the RTKL, but not in the section that delineates permissible and impermissible production fees, demonstrates that the legislature deliberately omitted any language granting discretion to create new fees like the PSP proposes here.

Given that "the RTKL does not expressly authorize the charging of labor costs," *State Emps.' Ret. Sys.*, 10 A.3d at 363, and the language in the RTKL favors the application of *expressio unius*, the RTKL should be construed to prohibit agencies from charging labor costs. In short, if the General Assembly wanted to allow agencies to pass on labor costs, it would have said so.

### III. Even if the PSP could recoup labor costs, as journalists, Media Respondents are exempt from any and all fees to fulfill their request under the RTKL.

Even if labor costs were permitted, the PSP cannot charge Media Respondents any fees because Mr. Walker is a journalist. Mr. Walker covered hate crimes and extremism in Pennsylvania for LNP Media Group, Inc. and now reports for Votebeat Pennsylvania.<sup>16</sup> The RTKL provides that fees for copying "complex and extensive" data sets "may be based on the reasonable market value of the same or closely related data sets" *unless* the request is made "by an individual employed by or connected with a newspaper or magazine of general circulation, weekly publication, press association or radio or television station, for the purpose of obtaining information for publication or broadcast" or "a nonprofit organization for the conduct of educational research." 65 P.S. § 67.1307(b)(4).

<sup>&</sup>lt;sup>16</sup> See, e.g., Carter Walker, Pennsylvania Ranks Number One in Nation for Hate Propaganda, Anti-Defamation League Says, Lancaster Online (Mar. 3, 2022), https://lancasteronline.com/news/politics/pennsylvania-ranks-number-one-in-nation-for-hatepropaganda-anti-defamation-league-says/article\_4af15c1a-9b32-11ec-aac7-a7d7587364c4.html; Carter Walker, Hate Crime Reporting in Pa. Is Inconsistent, But Trends Clearly Show an Increase, supra note 3.

Although neither this Court nor the OOR has interpreted the journalism prong of this exemption, the OOR found that the identically worded nonprofit organization prong prohibits agencies from charging non-profit organizations for data sets like the one Mr. Walker seeks. See Pennsylvanians for Union Reform v. Bucks County, No. AP 2013-1984, 2013 WL 6405910, at \*3–4 (Pa. Off. Open Recs. Dec. 3, 2013) (finding requester was entitled to a complete "internal database" at no charge because it was a registered non-profit organization, which provided an affidavit attesting an intent to use the information for educational research). Moreover, in passing the RTKL, members of the General Assembly highlighted in their remarks that "[the RTKL] raises the cost of obtaining complex data on the public, [and] it waives the cost for newspapers[.]"<sup>17</sup> This Court should likewise apply the General Assembly's intended waiver of the cost of data retrieval for journalists here as it applies the identically worded waiver under the same statutory section to non-profit organizations.

While a journalist like Mr. Walker may still be subject to duplication charges for non-complex records requests, "[t]he OOR has established that no fee may be charged for records that exist electronically, except that an agency may charge for the actual cost of the medium through which the electronic records are provided."

<sup>&</sup>lt;sup>17</sup> Pa. Legis. J. (Feb. 6, 2008), at 368,

https://www.openrecords.pa.gov/Documents/RTKL/Legislative%20History.pdf.

*Id.* (allowing only the charge for a compact disc) (citing *Landis v. Springettsbury Twp.*, No. AP 2013-0829, 2013 WL 3147269 (Pa. Off. Open Recs. June 10, 2013)). Given that the underlying data set used to create the Hate Crime Report search function exists electronically and Mr. Walker requested the data set in electronic format, the PSP may not charge its labor costs in the form of duplication fees to Media Respondents either.

In contesting Media Respondents' qualification for the journalism exemption, the PSP seeks to distinguish the "records and information that is used to create" a data set from a data set itself. Pet'r's Br. at 19. This interpretation of the journalism exemption appears to create a muddled distinction between "data" and "data sets" completely unmoored from the RTKL, which makes no mention of "records and information" associated with, yet somehow distinct from, the "complex and extensive data sets" that it specifically sanctions as exempt. See 65 P.S. § 67.1307(b)(4). Although no cases or OOR opinions directly address the definition of "complex and extensive data sets," the OOR has consistently treated requests closely resembling Mr. Walker's as such. For example, the OOR treated a request for a county's real estate tax assessment database, in which the requester sought the underlying information used to create an online search function, as a "complex and extensive data set." Pennsylvanians for Union Reform, 2013 WL 6405910, at \*3. Likewise, here, Media Respondents seek the information used to create the search

function on the Uniform Crime Reporting website. *See also Maniloff v. Pa. Dep't* of Lab. & Indus., No. AP 2009-0918, 2009 WL 6503949, at \*1–2 (Pa. Off. Open Recs. Nov. 23, 2009) (copy of workers' compensation fee schedule was a "complex and extensive data set" even though part of the information sought by the requester was already available online). The PSP's unfounded, technicality-laden distinction is thus inconsistent with the OOR's broadly inclusive interpretation of what constitutes a "complex and extensive data set" and the RTKL's remedial purpose, both of which mandate that the exemptions are to be "narrowly construed." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010).

Remarkably, the cases cited by the PSP in support of its data-versus-data set distinction do not even remotely relate to the issue at hand in this appeal. The PSP contends that these cases somehow show that the term data sets "does not include records used 'to create the Hate Crime Report search function on the Uniform Crime Reporting website." Pet'r's Br. at 19. However, the legal issues in the cases cited by the PSP were completely unrelated to the RTKL, and neither court even considered the meaning of the term "data set" or how information used to populate the search function on a website differs from that term. In *Carter v. Chapman*, in which the Pennsylvania Supreme Court evaluated congressional redistricting plans, the closest thing to a definition provided by the Court is a single sentence in which the majority passingly refers to a compilation of past elections as a "dataset" without

once mentioning the RTKL or public records requests. 270 A.3d 444, 450, 462 (Pa. 2022). In another case involving whether to uphold a school's charter (and again wanting of any reference to public records requests), the PSP points to a single sentence in the dissent that mentions a "data set." Reading Sch. Dist. v. I-Lead Charter Sch., 206 A.3d 27, 29, 50 (Pa. Commw. Ct. 2019). The majority opinion, however, uses the term "data set" in a footnote to refer to a compilation of data concerning student performance in a specific year and at no point ties this term to the RTKL. Id. at 36 n.21. And even if these uses of the term "data set" were portable to the public records context, both examples are still consistent with applying the term "data set" to Mr. Walker's request. A compilation of information related to past elections and a compilation of information about student performance both show "[r]elated items of ... information that should be considered collectively" and are "used for reference, analysis, or calculation," thereby consistent with the common definition of "data set."<sup>18</sup> Here, Mr. Walker's request is also consistent with that definition, as it seeks a compilation of information commonly related to the reported hate crimes during a specific time period.

<sup>&</sup>lt;sup>18</sup> The Oxford English Dictionary defines data set as "[a] collection of data." *Dataset*, OED Online (Oxford Univ. Press Dec. 2022), www.oed.com/view/Entry/261122. Data is defined as "[r]elated items of (chiefly numerical) information considered collectively, typically obtained by scientific work and used for reference, analysis, or calculation." *Data*, OED Online (Oxford Univ. Press Dec. 2022), www.oed.com/view/Entry/296948.

The PSP's data-versus-data set distinction also ignores the significance of the journalism exemption's location within the RTKL's fee scheme. The RTKL exempts journalists specifically from fees charged for "complex and extensive" data sets. *See* 65 P.S. § 67.1307(b)(4). The inclusion of a fee exemption for journalists for records with these particular characteristics suggests that the General Assembly anticipated that complex data sets could result in larger retrieval costs than other requests and intended this provision to ensure that such costs are not borne by journalists. Setting aside the unclear definitional distinction between data and data sets, the PSP contradicts the apparent purpose of this targeted exception by limiting its application to "complex and extensive *data sets*" but not applying it to the— presumably also complex and extensive— "records and information" that form those data sets.

In a last attempt to justify the \$6,000 charge, the PSP claims that the journalism exemption does not apply because Media Respondents did not present specific evidence of an intent to publish or broadcast the data requested. Pet'r's Br. at 20–21. However, this argument misrepresents the facially clear meaning of the exemption's intent requirement, which states that requests must be made "for the purpose of obtaining information for publication or broadcast." *See* 65 P.S. § 67.1307(b)(4). Nowhere does the statute require that the requester intend to publish the records in raw form. The statute only requires that the requester aim to glean

*information* from the records to be published or broadcasted. In fact, in drafting the RTKL's journalism exemption, the General Assembly anticipated that newspapers would not merely print copies of public records, but use the information therein "for the purpose of writing their story, which is, in fact, what newspapers do."<sup>19</sup> This broadly inclusive intent requirement for the journalism exemption is also consistent with the RTKL's broad mandate that agencies' responses to public records requests cannot take the requester's motivations into consideration.<sup>20</sup>

The PSP goes on to invent additional requirements for the journalism exemption, contending that it only applies when the public record is "understandable to any general audience that the Requester may have." Pet'r's Br. at 21. Again, nowhere in the RTKL is such a requirement found. *See* 65 P.S. § 67.1307(b)(4). Notably, the publishable information potentially extracted from a public record goes well beyond the substantive content of the record itself. For instance, the "information" ultimately obtained could concern the record's comparison with another record or "metadata" about the record file (*e.g.*, size, age, format, *etc.*). These types of information, while undoubtedly publishable and thereby consistent with the intent requirement of the journalism exemption, do not require that the

<sup>&</sup>lt;sup>19</sup> Pa. Legis. J. (Feb. 6, 2008), at 364,

https://www.openrecords.pa.gov/Documents/RTKL/Legislative%20History.pdf.

<sup>&</sup>lt;sup>20</sup> "A Commonwealth agency may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law." 65 P.S. § 67.301(b).

substantive content of the requested public record be "understandable to any general audience[.]" Pet'r's Br. at 21. To that end, Mr. Walker falls squarely within the intended application for the journalism exemption to fees for complex and extensive data sets, and his request for the data underlying the PSP's Hate Crime Report is consistent with the exemption's requirements.

## IV. This Court should defer to the OOR's decision because the RTKL grants the OOR exclusive authority to set fees.

The RTKL designates the OOR as the agency responsible for establishing which types and amounts of fees Commonwealth agencies may charge requesters for any form of records duplication. *See* 65 P.S. § 67.1307(b). Further, the RTKL requires the OOR to review the fee schedule biannually. *See* 65 P.S. § 67.1310. The OOR accordingly serves as the Commonwealth agencies' point of reference for permissible fees to charge requesters, and its fee schedule enumerates the delivery methods for which agencies can charge a fee and sets precise limits on the price agencies may charge for each delivery method.<sup>21</sup>

When interpreting administrative statutes like the RTKL, the Pennsylvania Supreme Court awards "great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation," especially where the interpreting agency is "specifically delegated administration and

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See OOR, Official RTKL Fee Schedule, supra note 7.

enforcement" of those areas. *Highmark Inc. v. Voltz*, 163 A.3d 485, 493 (Pa. Commw. Ct. 2017) (quoting *Winslow-Quattlebaum v. Md. Ins. Grp.*, 752 A.2d 878, 881 (Pa. 2000)). The Pennsylvania Supreme Court has also clarified that the OOR's duties over fee supervision include discretionarily "*setting* duplication fees for most government agencies" under the RTKL. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142, 155 n.7 (Pa. 2016) (emphasis added).

Here, the OOR rendered a definitive determination forbidding the PSP from charging Media Respondents \$6,000 in third-party labor costs because "such fees are not authorized by the RTKL[.]" See OOR Final Determination at 10. The OOR further emphasized that charging such fees would sharply undermine the purpose of the RTKL by "encourag[ing] an agency to avoid disclosing public records[.]" See id. As the agency granted statutory deference to interpret appropriate types and amounts of fees charged under the RTKL, the OOR is the best positioned to assess which fees, if any, an agency may charge requesters in different factual circumstances and in response to different records requests. 65 P.S. § 67.1307(b). Here, the OOR found that the costs that the PSP seeks to pass on to Media Respondents are labor costs, and it concluded that the costs are impermissible under the RTKL and the OOR's fee schedule. See OOR Final Determination at 10. This Court should accord deference to the OOR's statutory authority to determine the fees permissibly charged under the RTKL by affirming its June 9, 2022 decision.

### V. Requiring Media Respondents to pay \$6,000 in labor costs would severely undermine Commonwealth agencies' accountability to Pennsylvanians under the RTKL.

Overturning the OOR's decision here would fly in the face of the RTKL's public policy objectives, potentially imperiling its utility to journalists that cover Pennsylvania and to all but the wealthiest requesters. The General Assembly passed the RTKL "to reach what our government should be, and that is open and accessible to our constituents."<sup>22</sup> 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*, 990 A.2d at 824.

Adopting the PSP's reasoning here would unacceptably undermine this aspired transparency. Under the PSP's preferred application of the RTKL, any state agency could avoid its obligations to respond to records requests by outsourcing its records storage to third-party contractors and then charging exorbitant fees for subsequent retrieval. For most individual journalists and private citizens, a bill for several hundred dollars, much less a \$6,000 labor charge like the PSP proposes here, is prohibitive and effectively functions as a subversive denial of their request. Such a scheme starkly contravenes the General Assembly's goal of ensuring an "open and accessible" government. The General Assembly believed that "the true foundation

<sup>&</sup>lt;sup>22</sup> Pa. Legis. J. (Nov. 28, 2007), at 1406,

https://www.openrecords.pa.gov/Documents/RTKL/Legislative%20History.pdf.

of government reform is a strong open records law."<sup>23</sup> Allowing agencies to charge such high fees would crack the foundation the Commonwealth sought to build by passing the RTKL.

Importantly, as Commonwealth agencies increasingly utilize third-party contractors to modernize the state's recordkeeping technology,<sup>24</sup> third-party contractors' provision of record storage and organization services like those provided to the PSP by OTECH is on the rise. Notwithstanding this expanded use of third-party contractors, state agencies remain responsible for complying with their obligations to fulfill requests under the RTKL and accounting for those obligations in third-party contractual relationships.<sup>25</sup> Absent enforcement of this responsibility, state agencies could opt to charge requesters retrieval fees, as the PSP seeks to do here, deterring requesters from exercising their rights under the RTKL through prohibitively exorbitant fees inconsistent with the fee-adverse presumption of the law's text and spirit.

<sup>&</sup>lt;sup>23</sup> Pa. Legis. J. (Nov. 28, 2007), *supra* note 22, at 1405.

<sup>&</sup>lt;sup>24</sup> See, e.g., Joseph N. DiStefano, *Pennsylvania Is Using Its No-Bid IT Contract Method More and More, But It Has a Checkered Past*, Gov't Tech. (last accessed Mar. 2, 2023), https://www.govtech.com/budget-finance/pennsylvania-is-using-its-no-bid-it-contract-methodmore-and-more-but-it-has-a-checkered-past.html.

<sup>&</sup>lt;sup>25</sup> This Court has previously reprimanded the PSP for using its third-party contractor relationships to attempt to circumvent its obligations under the RTKL. *See, e.g.*, Gary Harki, *Judge Admonishes Pa. State Police for Response to Request Seeking Email, Phone Records*, Spotlight PA (Mar. 21, 2022), https://www.spotlightpa.org/news/2022/03/pa-state-police-phonerecords-lawsuit/.

Thus, as applied to Mr. Walker, finding for the PSP would allow agencies to effectively deny, without justification under the RTKL, rightful public records requests by news organizations and individuals that do not have the means to comply with excessive fees. Since news organizations often rely on public records in vital reporting,<sup>26</sup> such a ruling would hinder the press's ability to "bare the secrets of government and inform the people." N.Y. Times Co. v. United States, 403 U.S. 713, The impact of prohibitive pricing will be particularly salient in 717 (1971). Pennsylvania, where over seven million Pennsylvanians turn to print and digital newspapers weekly.<sup>27</sup> Confronted with fees of the magnitude charged to Media Respondents here, Mr. Walker and similarly situated journalists will have no choice but to abandon their critical reporting altogether. Therefore, to preserve Pennsylvanians' access to agency records pivotal to holding their government accountable as the Commonwealth's recordkeeping technology modernizes, this Court should uphold the OOR's rejection of the PSP's proposed \$6,000 labor fee.

See, e.g., Carter Walker, Staffing Shortages and Low Morale in Sheriff's Office Leading to Intraoffice Tension, Problems for the Court, Lancaster Online (Aug. 21, 2019), https://lancasteronline.com/news/local/staffing-shortages-and-low-morale-in-sheriffs-office-leading-to-intraoffice-tension-problems-for-the/article\_e7f0a56a-c3c7-11e9-8ee3 17bba9a04fc3.html (RTKL request used to obtain comparative data on employee departures); Carter Walker, DA Spent \$21,000, Intended for Drug Enforcement, To Lease SUV, Records Show, Lancaster Online (Mar. 6, 2019), https://lancasteronline.com/news/local/da-spent-intended-for-drug-enforcement-to-lease-suv-records/article\_34d90d86-3f5c-11e9-a42c-035d89dc0997.html (RTKL request used to obtain and compare account expenditure records and personnel expense reports).

<sup>&</sup>lt;sup>27</sup> Pa. News Media Ass'n, *Pennsylvania's Newspaper Industry Makes a Significant Impact* 11 (June 2021), https://panewsmedia.org/legal-and-legislative/pennsylvanias-newspaperindustry-makes-a-significant-impact/.

### **CONCLUSION**

For the foregoing reasons, Respondents respectfully ask this Court to affirm

the OOR's Final Determination.

Dated: March 2, 2023

Respectfully submitted,

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### **CERTIFICATES OF COMPLIANCE**

I hereby certify that:

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Dated: March 2, 2023

/s/ Paula Knudsen Burke

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### **PROOF OF SERVICE**

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