

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

<b>PENNSYLVANIA STATE</b>	:	
<b>POLICE,</b>	:	
<b>Petitioner,</b>	:	<b>No. 710 CD 2022</b>
	:	
<b>v.</b>	:	
	:	
<b>CARTER WALKER and</b>	:	
<b>LNP MEDIA GROUP, INC.,</b>	:	
<b>Respondents.</b>	:	

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**RESPONDENTS’ ANSWER TO PETITIONER’S  
APPLICATION TO DISCONTINUE**

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**PRELIMINARY STATEMENT**

In a gambit to price Mr. Walker and LNP Media Group, Inc. (“Media Respondents”) out of pursuing their Right-to-Know Law (“RTKL”) request, the Pennsylvania State Police (“PSP”) brought this appeal to argue that an agency can charge a requester to retrieve public records it electively housed with a third-party contractor. Now, attempting to avoid this Court’s input, the PSP seeks to discontinue its appeal. This Court should reject the PSP’s procedural maneuver because, aside from the significant implications of this case for the practical utility of the RTKL, this Court should award Media Respondents attorney fees, costs, and sanctions because the PSP acted in bad faith.

As this Court is already aware from the parties' briefing on the merits, this appeal arises from a RTKL request that Mr. Walker submitted to the PSP on January 14, 2022. Mr. Walker requested the underlying dataset that the PSP uses to create the "Hate Crime Report" search function on the "Uniform Crime Reporting" website from 1997 through 2021 and the related reference tables used to define the data. R.001a, 002a. In response, the PSP informed Mr. Walker in an email dated February 8, 2022, a subsequent phone conversation, and its ultimate denial of his request on February 22, 2022, that because the PSP purportedly did not possess or have direct access to the requested data, the data's "one time extraction" would cost the agency \$6,000. R.023a. After Mr. Walker appealed the denial to the Office of Open Records ("OOR"), the PSP doubled down in both its brief and accompanying affidavit, stating that "the data and servers [on which the data is housed] are outside of the agency's possession" and that the "compilation of data would require" the PSP to pay OTECH "an estimated cost of approximately \$6[,]000." R.094a, 095a. And after the OOR found for Media Respondents, the PSP repeated these representations in its appeal to this Court on December 23, 2022, again asserting that its "access does not provide an avenue for the PSP to acquire the underlying dataset Requester seeks[,]'" and thus "for PSP to provide the Requester with these records it would require a labor cost of approximately 50 – 60

hours by OTECH employees at an estimated cost of approximately \$6,000.” *See* Pet’r’s Br. at 12–14.

On March 21, 2023, almost 13 months after the PSP denied Mr. Walker’s request, counsel for the PSP offered to produce the hate crime data. Following this discussion, which occurred during a virtual Teams conference between the parties on March 21, 2023, Ms. Knudsen Burke drove to PSP headquarters in Harrisburg on March 22, 2023, and obtained a disc with the requested data. *See* Pet’r’s Appl. for Leave, Ex. B at 1–2. In short order, the PSP filed its Application for Leave to Discontinue Appeal on March 30, 2023, noting without further explanation that it “did not charge Requester for any labor costs associated with its compliance with the RTKL Request or the OOR’s Final Determination” and that Mr. Walker’s “request was misinterpreted.” Pet’r’s Appl. for Leave at 4, Ex. B at 2.

Both because it conducted its initial response to this request and the ensuing litigation in bad faith and because it only fulfilled Mr. Walker’s request after Media Respondents litigated against it, the PSP should pay attorney fees and costs to Media Respondents. Accordingly, this Court should deny the PSP’s motion to discontinue the present appeal, enter an order—in the form proposed and filed herewith—cancelling oral argument currently tentatively scheduled for the Commonwealth Court session of June 5, 2023, and implement a briefing schedule on attorney fees, costs, and sanctions.

## ARGUMENT

### **I. The PSP’s grossly negligent conduct entitles Mr. Walker to recover attorney fees, costs, and sanctions under Pennsylvania’s RTKL and the Costs Act.**

Under the RTKL, a requester is entitled to “reasonable attorney fees and costs of litigation” where “the court finds that the legal challenge” under the RTKL “was frivolous” or where “the receiving agency determination is reversed,” yet the agency “deprived a requester of access to records in bad faith.” 65 P.S. § 67.1304; *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.* (“*Uniontown III*”), 243 A.3d 19, 34 (Pa. 2020) (citation omitted). Likewise, the Costs Act also provides for attorney fees from an opposing party where that party engages in “dilatory, obdurate or vexatious conduct during the pendency of a matter” or where that party’s conduct “in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.” 42 Pa. C.S. § 2503(7), (9). Where a party engages in bad faith conduct, the Court may award attorney fees even “when the relevant statutory scheme does not so provide.” *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.* (“*Uniontown II*”), 197 A.3d 825, 835 (Pa. Commw. Ct. 2018), *aff’d*, 243 A.3d 19 (Pa. 2020).

“[A]n 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 III*, 243 A.3d at 25. In the RTKL context, “[t]he lack of good faith compliance with the RTKL . . . rise[s] to the level of bad faith.”

*Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.* (“*Uniontown I*”), 185 A.3d 1161, 1170 (Pa. Commw. Ct. 2018), *aff'd*, 243 A.3d 19 (Pa. 2020). In *Uniontown I*, this Court found bad faith based on the agency’s denial without conducting a good faith search, its decision to contest the requester’s appeal to the OOR and claim that records were exempt without having reviewed them, and its failure to comply with the OOR’s disclosure order. *Id.* at 1172–73. An agency’s denial of access to information that it knew was a “public record” or engaging in “persistent denial of access” likewise constitute bad faith. *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644, 650 (Pa. Commw. Ct. 2006); *Uniontown I*, 185 A.3d at 1174. Importantly, whether an agency acted in bad faith “is predicated ‘not on the mental state of the actor but [upon] the actions taken by the agency.’” *Sawicki v. Wessels*, No. 1046 C.D. 2021, 2022 WL 17750940, at \*7 (Pa. Commw. Ct. Dec. 19, 2022), *reconsideration denied* (Feb. 10, 2023) (quoting *Off. of Dist. Att’y of Phila. v. Bagwell*, 155 A.3d 1119, 1141 (Pa. Commw. Ct. 2017)).

An agency’s bad faith refusal to grant access to public records also provides for the imposition of a civil penalty against the agency. *See* 65 P.S. § 67.1305(a). “[T]he maximum statutory civil penalty is warranted” where an agency engages in “noncompliance throughout the RTKL process,” including failing to “perform the steps required upon receiving the Request” such that the Requester is “precluded access to public records.” *Uniontown I*, 185 A.3d at 1175–76.

As an agency subject to the RTKL, the PSP had a duty to make a “good faith,” reasonable inquiry in response to Mr. Walker’s January 2022 RTKL request, which was extremely detailed and sought records that are readily available and clearly public. *See* 65 P.S. § 67.901; *see also In re Silberstein*, 11 A.3d 629, 633 (Pa. Commw. Ct. 2011) (“[T]he burden [is placed] upon a local agency, through its designated open-records officer, to first make a good faith determination as to whether any requested record is in fact a ‘public record’ and, if so, then determine whether the identified public record is within its possession, custody[,] or control.”). “Under the RTKL, an agency bears the burden of demonstrating that it has reasonably searched its records to establish that a record does not exist.” *Dep’t of Lab. & Indus. v. Earley*, 126 A.3d 355, 357 (Pa. Commw. Ct. 2015).

However, in response to Mr. Walker’s RTKL request, the record is now abundantly clear that the PSP performed, at most, a cursory search for the requested data. It was not until more than a year later, and after the case had already progressed through the OOR and briefing in this Court, that the PSP apparently took the request seriously, delved into reading it, and determined what records it actually possessed. The PSP’s failure to adequately search for records, both at the outset of the RTKL request and during the briefing process before this Court, evinces bad faith. Even if this Court finds that the PSP simply failed, for 14

months, to discover that it possessed the requested records all along and faced no fee to acquire them, the record amply supports a bad faith finding here; all the more so if this Court finds that PSP knowingly filed this frivolous appeal. The PSP attempts to explain away the extraordinary delay in its disclosure by pointing to an alleged misinterpretation of the request that led the PSP to believe that Mr. Walker wanted “more than ‘PSP’s data set “in its complete form” as “an export/extraction of raw data”” and that “PSP should *not* ‘manually input or alter any information into the data for the purposes of fulfilling [the] request.’” *See* Pet’r’s Appl. for Leave, Ex. B at 2. But it is difficult to understand the root of such a consequential misunderstanding when Mr. Walker’s request could not have been clearer: “I am asking for an *export/extraction of raw data*, to the extent maintained in the agency’s databases. I *do not* expect the agency to manually input or alter any information into the data for the purposes of fulfilling this request.” *See* R.091a (emphasis added).

Any doubt as to the nature of Mr. Walker’s request should have been resolved by Media Respondents’ request for “[a]ny data dictionary, code tables, or other types of manuals that define, in plain English, the meaning of the” different elements in the data. *See* R.090a. If Mr. Walker expected the PSP to provide more than unaltered raw data or to “produce one standard format and file with the requested information,” Pet’r’s Appl. for Leave, Ex. B at 2, he would not have

asked for decoding information. Additionally, the PSP seems to imply that clearing up this apparent misunderstanding altered its level of access, thus suddenly allowing it to access raw data that had been out of reach for over a year because, purportedly, the PSP's level of "administrative access" did not "provide an avenue for the PSP to acquire the underlying dataset." R.217a; *see* Pet'r's Appl. for Leave, Ex. B at 2.

The PSP's dubious explanation, repeated requests for extension, the circumstances surrounding its release of the data, and its attempt to discontinue this appeal support a finding of bad faith. *See Sawicki*, 2022 WL 17750940, at \*7. The PSP's conduct in denying the initial request, contesting the OOR appeal, seeking appeal of the OOR decision, and waiting until after Media Respondents' brief was filed to turn over the data that it had all along indicates that, at minimum, the PSP did not seriously attempt a good faith search for Mr. Walker's request until months into litigation. *See Uniontown I*, 185 A.3d at 1172 (finding that not "locat[ing] responsive records until motivated by litigation evinces bad faith"). At best, the PSP's misrepresentations as to its possession of the requested data and what costs it would incur in retrieving it reflect gross negligence; at worst, the PSP's repeated assertion of these falsehoods before this Court exhibits knowingly frivolous maneuvering to circumvent Mr. Walker's request. Regardless of whether the PSP knowingly engaged in this misconduct, however, for the purpose of awarding



attorney fees, its failure to comply with the RTKL in good faith and its numerous misrepresentations to Media Respondents, the OOR, and this Court constitute bad faith. *Sawicki*, 2022 WL 17750940, at \*7.

Moreover, the PSP's bad faith refusal to produce the data warrants the award of the "maximum statutory civil penalty" as provided for by the RTKL. *Uniontown I*, 185 A.3d at 1175; *see* 65 P.S. § 67.1305(a). Like in *Uniontown*, where the agency consistently denied access to the requested records throughout the lifetime of the request, the PSP has parried Mr. Walker's efforts to vindicate his rights under the RTKL in bad faith for nearly 15 months. Because of this conduct, this Court should accordingly award Respondents not only their reasonable attorney fees and costs but also impose a civil penalty against the PSP.

**II. Even if the PSP acted in good faith, because it nonetheless refused to comply with its RTKL obligations until Mr. Walker litigated against it, the PSP must pay attorney fees to Mr. Walker.**

Under the catalyst approach, when a party shows that their action "brought about a change in an opposing party's conduct" that "caused the plaintiff to obtain some of the relief it sought," that party has met their burden "to obtain attorneys' fees." *Upper Gwynedd Towamencin Mun. Auth. v. Dep't of Env't Prot.*, 9 A.3d 255, 266 (Pa. Commw. Ct. 2010). In the public records context, where a "factual causal nexus exists between" litigation and "the release of records[,]" the requester is "entitled to attorneys' fees" under the catalyst approach. *Golden v. N.J. Inst. of*

*Tech.*, 934 F.3d 302, 305, 315 (3d Cir. 2019); *see also First Amend. Coal. v. U.S. Dep't of Justice*, 878 F.3d 1119, 1128 (9th Cir. 2017) (applying the catalyst theory to award attorney fees in Freedom of Information Act litigation where there is “a causal nexus between the litigation and the voluntary disclosure or change in position by the Government”).

Here, the PSP was obstinate in its refusal to fulfill Mr. Walker’s request, repeatedly conditioning compliance on charging Mr. Walker a fictitious \$6,000 labor cost<sup>1</sup> before ultimately denying his request in full on February 22, 2022. The PSP did not relent in its denial until Mr. Walker appealed his decision to the OOR, which ordered the PSP to fulfill the request on June 9, 2022. And even then, after nearly six months of vigorously maintaining its meritless opposition to Mr. Walker’s access, the PSP continued to frivolously resist compliance with the OOR’s decision for another eight months by appealing to this Court. The PSP’s sudden “discovery” of the requested data in its possession and unexplained circumvention of the \$6,000 fee it sought to charge Media Respondents only came after Media Respondents briefed this Court and, in doing so, previewed the PSP’s poor likelihood of success on the merits of its appeal. The only intervening change

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<sup>1</sup> Throughout the course of this case, the PSP never provided a concrete invoice or bill detailing the \$6,000 fee. Instead, the agency made vague references to the cost, even when the OOR requested that the PSP clarify how it arrived at the seemingly arbitrary figure. R.209a, 210a, 211a.

in factual circumstances to take place between PSP's briefing on December 23, 2022, in which it argued that the \$6,000 charge was unavoidable, and its wholesale recanting of the merits of its appeal and continued denial on March 21, 2023, was Media Respondents' filing. This conspicuous timing strongly suggests that Media Respondents' filing was the "catalyst" that drove the PSP's eventual change in its conduct and subsequent provision of relief. *See Upper Gwynedd Towamencin Mun. Auth.*, 9 A.3d at 266. Thus, under the catalyst approach, because the PSP waited to comply with the RTKL and the OOR's Final Determination until Media Respondents forced its hand in litigation against it, the PSP must pay Media Respondents their attorney fees.

## CONCLUSION

For the foregoing reasons, Respondents respectfully ask this Court to deny the PSP's application to discontinue its appeal, enter an order—in the form proposed and filed herewith—cancelling oral argument currently tentatively scheduled for the Commonwealth Court session of June 5, 2023, and implement a briefing schedule on costs, fees, and sanctions.

Respectfully submitted,

/s/ Paula Knudsen Burke

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*Counsel for Respondents Carter Walker and LNP Media Group, Inc.*

Dated: April 13, 2023

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<sup>2</sup> Clinic students Matthew Hornung and Maria Kearns-Galeano drafted portions of this brief. The Clinic is housed within Cornell Law School and Cornell University. Nothing in this brief should be construed to represent the views of these institutions, if any.

**CERTIFICATE OF SERVICE**

I, Paula Knudsen Burke, hereby certify that on this 13 day of April 2023, I caused to be served by e-mail and PACFile a copy of the forgoing Respondents' Answer to Petitioner's Application to Discontinue upon the following:

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*/s/ Paula Knudsen Burke*  
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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: April 13, 2023

Submitted by: Paula Knudsen Burke

Signature: /s/*Paula Knudsen Burke*

Attorney No.: 87607

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<b>Respondents.</b>	:	

[PROPOSED] ORDER

AND NOW, this \_\_\_\_\_ day of April, 2023, upon consideration of the Pennsylvania State Police’s Application for Leave to Discontinue Appeal and Respondents’ Response to Petitioner’s Application for Leave to Discontinue, it is HEREBY ORDERED as follows:

1. The Application of the Pennsylvania State Police for Leave to Discontinue Appeal, filed March 30, 2023, is hereby DENIED.
2. The Prothonotary of the Commonwealth Court is directed to remove this case from the oral argument list for the Court’s June 2023 session.
3. The parties shall submit briefing to the Court on the question of fees, costs, and sanctions. Respondents, as the party seeking sanctions, shall file an application for fees, costs, and sanctions, along with any supporting

memorandum of law, within thirty (30) days of entry of this Order.

Petitioner shall file its response within thirty (30) days of submission of Respondents' application and brief. Respondents may file any responsive brief within fourteen (14) days of the Pennsylvania State Police's submission.

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BY THE COURT