

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

98 CD 2025

William Towne,

Appellant,

v.

Allegheny County and the Allegheny County Board of Elections,

Appellees.

**BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS AND THE PENNSYLVANIA NEWSMEDIA
ASSOCIATION IN SUPPORT OF APPELLANT**

Appeal from the January 17, 2025 Order in GD-22-007739 by the Honorable John T. McVay, Jr. in the Court of Common Pleas of Allegheny County, Pennsylvania.

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STATEMENT OF INTEREST OF AMICI CURIAE

The Reporters Committee for Freedom of the Press (“Reporters Committee”) is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. As part of its Local Legal Initiative, in 2020, the Reporters Committee hired a Pennsylvania-based attorney to provide direct legal services to journalists and news organizations in the Commonwealth.

The Pennsylvania NewsMedia Association (“PNA”) is a Pennsylvania non-profit member corporation with its headquarters located in Harrisburg, Pennsylvania. The Association represents the interests of daily and weekly newspapers, digital publications, and other media organizations across the Commonwealth of Pennsylvania in ensuring that the press can gather information and report to the public. A significant part of the Association’s mission is to defend the media’s statutory rights of access to public records in Pennsylvania.

Amici curiae the Reporters Committee and PNA (together, “amici”) submit this brief pursuant to Pa. R.A.P. 531(b)(1)(i) in support of Appellant William Towne. Amici have a strong interest in ensuring that journalists can timely gather

information about matters of public concern under Pennsylvania’s Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* (the “RTKL”). Amici write because if allowed to stand, the decision below would significantly frustrate the access to public records afforded under the law.

Pursuant to Pa. R.A.P. 531(b)(2), amici certify that no other person or entity other than amici, their members, or counsel paid in whole or in part for the preparation of this brief, nor authored this brief in whole or in part.

SUMMARY OF ARGUMENT

The Right to Know Law (“RTKL”) allows the public to secure timely, efficient access to records kept by state and local government agencies, facilitating government oversight and public discourse. In the underlying matter that gave rise to this mandamus action, the Office of Open Records (“OOR”) correctly determined that Appellant William Towne was entitled to records he had requested—specifically, envelopes from absentee and mail-in ballots from the 2020 election. After Appellee Allegheny County (“the County”) failed to produce the records, Towne initiated this mandamus action to enforce the disclosure order, however, the Court of Common Pleas allowed the County to relitigate the substantive issues, despite the County declining to appeal OOR’s Final Determination.

In so doing, the Court of Common Pleas decision contravenes the plain letter and remedial intent of the RTKL and, if allowed to stand, would significantly

frustrate the law's pro-disclosure mandate by creating delays and uncertainty that eviscerate the ability of the press and public to access information in a timely manner. Permitting an agency to treat an RTKL requester's subsequent mandamus action to enforce production as a *de facto* appeal and relitigating the breadth of access to responsive records negates the appellate procedure provided in the RTKL and undermines the law's purpose of providing prompt access to presumptively public records.

Notwithstanding this Court, or the Court of Common Pleas before it, needing to parse the exact meaning of the OOR's instruction that the County "grant access to the requested records, subject to the provisions of the Election Code," *Towne v. Allegheny County*, OOR No. AP 2021-2542R, at 8 (F.D. filed Feb. 15, 2022), R51A, the County should not be permitted to use this mandamus proceeding to re-assert arguments that the OOR rejected and the County failed both to timely present to the OOR before it reconsidered the matter and to properly and timely appeal thereafter.

Permitting such a "second bite at the apple" traps RTKL requesters in an unnecessary, expensive, redundant quagmire in which they must repeatedly argue their right to presumptively public records. Further, it would incentivize government officials and agencies to sleep on their appellate rights under the RTKL, knowing they can always ignore the orders of the OOR, withhold records, and resume their arguments against production when the requester brings an action in an attempt to

enforce the OOR's ruling. This would have significant and real-world impacts on the ability of journalists to report the news. The County's attempts to muddy this mandamus proceeding with legal arguments seeking to limit Towne's access to records should be rejected. For the reasons set forth herein, amici urge the Court to reverse the decision below and remand to the trial court where the only issue should be Towne's right to mandamus relief enforcing the OOR's February 15, 2022 Final Determination Upon Reconsideration directing the County to provide access to the responsive records at issue.

ARGUMENT

I. The RTKL includes a procedure to challenge merits decisions on disclosure, and mandamus is not the appropriate proceeding for such attacks.

The County cannot continue to argue the legal issues presented by Towne's RTKL records request once the OOR proceeding has closed, Towne failed to appeal the OOR's decision, and the proceeding at hand is one of mandamus seeking enforcement.¹ The time for such merits-based arguments came and went thirty (30) days after the OOR issued its February 15, 2022 Final Determination Upon

¹ Beyond the arguments premised on the RTKL and its associated case law, *see infra*, this Court may also apply collateral estoppel and/or res judicata as the County attempts to argue issues previously decided in this action, the OOR adjudicated those issues, the parties remain the same, and the County had a "full and fair opportunity" to make these arguments before the OOR and did not. *Dep't of Corr. v. Maulsby*, 121 A.3d 585, 588–89 (Pa. Commw. Ct. 2015) (discussing collateral estoppel principles as applied to RTKL matter where agency had "full and fair opportunity" to litigate the claims at issue in prior proceeding).

Reconsideration requiring the County to grant Towne access to the records at issue. *See* 65 P.S. § 67.1101(b) (providing 30 days to appeal a final determination by the OOR). “Nothing in the statute contemplates judicial action after it has been determined that an agency did not carry its burden.” *Pa. State Police v. Am. C.L. Union of Pa.*, 300 A.3d 386, 394 (Pa. 2023) (holding that if Commonwealth Court could not determine, without supplemental evidence, from the record whether agency met its burden, “that simply means that the [agency] did not carry its burden”).

“Mandamus is not available to establish legal rights but only to enforce rights that have been established.” *Sinkiewicz v. Susquehanna Cnty. Bd. of Comm’rs*, 131 A.3d 541, 546 (Pa. Commw. Ct. 2015); *see also* *Wilson v. Pa. Bd. of Prob. & Parole*, 942 A.2d 270, 272 (Pa. Commw. Ct. 2008) (“Mandamus is an extraordinary writ designed to compel performance of a ministerial act or mandatory duty where there exists a clear legal right in the petitioner, a corresponding duty in the respondent, and want of any other adequate and appropriate remedy.”). Since at least 2017, this Court has recognized that mandamus is the proper vehicle for a requester to assert his “clear legal right to record production” based upon “a final determination of the Office of Open Records that the requested records are disclosable,” thereby “impos[ing] a mandatory and ministerial duty upon a government agency to provide public records to a requester.” *Capinski v. Upper Pottsgrove Township*, 164 A.3d

601, 606 (Pa. Commw. Ct. 2017). The government cannot use the mandamus proceeding to argue the rightfulness or breadth of the OOR’s ruling that the requester has a right to the records at issue. *See id.* (“Where there has been a final determination of the Office of Open Records that the requested records are disclosable, then the requester has established a clear right to have the agency produce those public records.”).

This Court has previously recognized that by the time RTKL litigation reaches a mandamus action, the agency cannot correct for its failings to properly support exemptions before the OOR, or to timely appeal the final determination. *See Montgomery County v. Brock*, 286 A.3d 402 (Table), No. 228 C.D. 2022, 2022 WL 4490864, at *5 (Pa. Commw. Ct. 2022) (unreported)² (denying nunc pro tunc relief agency sought in response to requester’s complaint for mandamus where agency negligently missed its window to directly appeal OOR final determination). Similarly, when a local agency did not appeal the OOR’s final determination ordering the release of responsive records, this Court held that “any objection . . . on the merits was not properly before the Trial Court.” *Cruz v. Pottsville Police Dep’t*, 305 A.3d 623 (Table), 2023 WL 6053547, at *5 (Pa. Commw. Ct. 2023), *reconsideration denied* (Dec. 11, 2023) (unreported).

² “An unreported opinion of [the Commonwealth Court] . . . issued after January 15, 2008, [may be cited] for its persuasive value, but not as binding precedent.” 210 Pa. Code § 69.414(a).

Further, a mandamus proceeding is also the wrong forum for the County to continue to assert arguments in favor of limiting access because “an agency must raise all its challenges before the fact-finder closes the record.” *Levy v. Senate of Pa.*, 94 A.3d 436, 441 (Pa. Commw. Ct. 2014) (holding that the court could hear evidence if it was acting as fact-finder, but it could not hear new evidence or issues on remand without specifically deciding to reopen the record). “An agency is not entitled to ignore its burden to show an exemption from disclosure before OOR and rely on supplementation of the record in this Court to avoid the consequences of that conduct.” *Pa. State Police v. Muller*, 124 A.3d 761, 766 (Pa. Commw. Ct. 2015); *see also Pa. Dep’t of Lab. & Indus. v. Darlington*, 234 A.3d 865, 877 n.10 (Pa. Commw. Ct. 2020) (“The Department did not raise this argument before the OOR and the appeals officer. Accordingly, the Department cannot raise the new argument before this Court, and it is waived.”).

“Thus, appeals officers are empowered to develop the record to ensure Chapter 13 courts may perform appellate review without the necessity of performing their own fact-finding.”³ *Township of Worcester v. Off. of Open Recs.*, 129 A.3d 44, 59 (Pa. Commw. Ct. 2016). Further, this Court “express[ed] concern about the

³ “[T]he Commonwealth Court and the courts of common pleas will often hereinafter be collectively referred to as the ‘Chapter 13 courts,’ in reference to the chapter of the RTKL in which their relevant duties are discussed.” *Bowling v. Off. of Open Recs.*, 75 A.3d 453, 458 (Pa. 2013) (citing 65 P.S. §§ 1301–02).

potential for an agency to bypass OOR as the fact-finder in the first instance and seek a more receptive audience in a Chapter 13 court.” *Id.* at 62.

Requiring the government to provide all of its arguments against disclosure at once, before the initial fact-finder “maximiz[es] efficiency,” *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (holding no due process violation occurred as OOR did not fail to adequately develop the record, party just failed to supplement the evidence and present a sufficient case), advancing the contested records production towards resolution and preserving this Court, and the Court of Common Pleas’ roles as appellate fora, 65 P.S. §§ 1301–1302, rather than as redundant fact-finders. To permit the County to again present argument about the limits of disclosure gives the County “the proverbial second bite at the apple” it is not owed. *Highmark Inc.*, 163 A.3d at 491; *see also Pa. Tpk. Comm’n v. Murphy*, 25 A.3d 1294, 1298 (Pa. Commw. Ct. 2011) (denying request to supplement record as “a proverbial second bite of the apple”).

Tellingly, this Court routinely rebuffs agency attempts to submit new evidence on appeal, reasoning that “allowing the submission of additional evidence at the judicial review stage would undermine the presumption of openness attendant to the RTKL, as doing so would permit agencies to withhold records, without legal ground to do so, until reaching a court.” *McKelvey v. Pa. Dep’t of Health*, 255 A.3d 385, 393, 404 (Pa. 2021) (rejecting Department’s request to supplement record as

“Department received numerous opportunities to submit evidence and argument before the OOR, and chose not to take advantage of those opportunities.”); *see also Sch. Dist. of Phila. v. Calefati*, No. 1285 C.D. 2020, 2022 WL 108455, at *6 n.11 (Pa. Commw. Ct. Jan. 12, 2022)(unreported) (applying *McKelvey* and finding that respondent “cannot now rebut Requesters’ evidence before the trial court with new allegations”). Allowing agencies to continue to litigate the merits of disclosure “at each stage of the proceedings undercuts the RTKL’s goals of openness and providing expedient access to information.” *McKelvey*, 255 A.3d at 409.

II. Enforcing the RTKL’s procedural mechanisms protects prompt access for journalists and conforms to the legislative intent.

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.” *Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013) (citation omitted). The starting point in any RTKL case is that records are “presumed to be [] public.” 65 P.S. § 67.305(a). Giving agencies an entirely separate and additional avenue to fight disclosure of public records beyond the appellate procedure provided in the RTKL undermines the recognized policy objectives of the General Assembly. *See Am. C.L. Union of Pa.*, 300 A.3d at 387 (“The General Assembly enacted the RTKL in 2008 in an effort to promote transparency.”); *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012)

(explaining that legislature sought to “empower citizens by affording them access to information concerning the activities of their government”).

Contrasting the RTKL with its more restrictive predecessor sheds further light on the RTKL’s purpose of facilitating timely, efficient access to records. *See McKelvey*, 255 A.3d at 399–400 (“While enacted in 2008, the 2009 iteration of the statute dramatically expanded the public’s access to government documents and demonstrated an intent on the part of the General Assembly to expand government transparency.”). As the Supreme Court has noted, “[t]he law’s predecessors, the Right-to-Know Acts (“RTKA”) of 1957 and 2002, set forth no time limit within which an agency was bound to respond to a request for disclosure, and appellate review was limited to determining whether an agency’s denial was supported by ‘just and proper cause.’” *Am. C.L. Union of Pa.*, 300 A.3d at 393–94 (quoting *Bowling*, 75 A.3d at 455). Further, it was previously requesters, rather than the agency, who “bore the burden of demonstrating that a record was a ‘public record.’” *Id.* at 393–94; *accord Bowling*, 75 A.3d at 455–57 (discussing evolution of open records law and change from RTKA to RTKL transferring burden from requester to agency).⁴ In contrast, “the 2009 iteration of the statute dramatically expanded the public’s access to government documents and demonstrated an intent on the part of the

⁴ Agencies now bear the burden of proving, by a preponderance of the evidence, that an exemption to access applies to an RTKL request. 65 P.S. § 67.708(a)(1). To meet its burden, an agency may present affidavits and other evidence to the fact-finder, typically the OOR, during the initial administrative appeal. 65 P.S. §§ 67.1101, 1102(a)(2).

General Assembly to expand government transparency.” *McKelvey*, 255 A.3d at 399–400.

Under current law, a requester must file his appeal with the OOR within 15 business days of the denial or deemed denial of a records request. 65 P.S. § 67.1101(a)(1). The OOR must then produce its Final Determination within 30 days of the receipt of appeal. 65 P.S. § 67.1101(b). Both the requester and the agency have 30 days from the date of the mailing of the final determination to file a petition for review, in this case in the appropriate court of common pleas. 65 P.S. § 67.1302(a).⁵

As such, a request may go from agency denial to an appeal in the trial court in fewer than 90 days. *See Levy*, 65 A.3d at 381 (“Together, [RTKL Sections 1301 and 1302] provide that the parties will have the request resolved or be before an appellate court within less than four months from the initial filing of the request for public access, absent an agreement for an extension from the requester.”). These provisions show that the RTKL envisions a scheme of prompt disclosure of public

⁵ Because Allegheny County, and the Allegheny County Board of Elections, are “local agencies,” *see* 65 P.S. § 67.102, they must appeal a final determination by the OOR to the court of common pleas, here the Allegheny County Court of Common Pleas, 65 P.S. § 67.1302(a), rather than directly to the Commonwealth Court, *see* 65 P.S. § 67.1301(a) (instructing “Commonwealth Agencies” to appeal OOR determinations to the Commonwealth Court); *see also* 65 P.S. § 67.102 (differentiating “commonwealth agency” and “local agency” by noting the former’s statewide activity and creation through the Executive branch of state government, the Constitution of Pennsylvania, or statute).

records, aided by the timely and thorough submission of evidence at the fact-finding stage. *See Am. C.L. Union of Pa.*, 300 A.3d at 393 (“As this Court has recognized, ‘various provisions of the RTKL demonstrate an intent for an expedited determination of RTKL requests,’ and for disputes to be resolved ‘in an efficient and timely fashion.’” (citations omitted)). “The legislative intent for efficient resolution is justifiable given that the public’s interest in government documents is often time dependent.” *Levy*, 65 A.3d at 381.

Journalists rely on such swift resolution to disputes about access to records, because as courts around the country have recognized in contexts involving government and judicial records, newsworthiness is often contingent on timeliness, and prolonged delays to access can thwart investigations meant to hold government actors accountable and to inform the public as to the operations of their government. *See, e.g., Int’l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) (“The peculiar value of news is in the spreading of it while it is fresh.”); *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (“The fact that [requester] eventually obtained the information it sought provides scant comfort when stale information is of little value.”); *Protect Democracy Project, Inc. v. U.S. Dep’t of Just.*, 498 F. Supp. 3d 132, 144 (D.D.C. 2020) (“The public interest is best served by the expedited release of the requested documents because it furthers FOIA’s core purpose of shed[ding] light on an agency’s performance of its statutory duties.”

(citations omitted)); *see also* *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (“The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.”); *Courier-J. & Louisville Times Co. v. Peers*, 747 S.W.2d 125, 129 (Ky. 1988) (“News is news when it happens and the news media needs access while it is still news and not history.”) And “in a society in which each individual has but limited time and resources,” the public largely relies on the press to gather and disseminate facts about government operations, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975), thus providing the scrutiny of government actions and resultant accountability the RTKL was designed to foster, *Levy*, 65 A.3d at 381.

These timeliness concerns become more acute with the newsworthiness of the public controversy to which the responsive records relate. There is little doubt the public, both within the Commonwealth and nationwide, has an interest in Pennsylvania elections.⁶ Concerns about ballots and election integrity prompted

⁶ For example, Pennsylvania has long been considered a so-called “battleground state” whose electors help decide the outcome of federal elections and whose elections are closely scrutinized both within, and outside of, the Commonwealth. *See, e.g.*, Marshall Cohen & Kelly Mena, *Pennsylvania Becomes Epicenter of 2020 Election Chaos*, CNN (Oct. 5, 2020), <https://www.cnn.com/2020/10/05/politics/election-2020-pennsylvania>; Emily Previti, *A Contentious Year: How Pennsylvania’s Tumultuous 2020 Election Unfolded*, WITF (Jan. 6, 2021), <https://www.witf.org/2021/01/06/an-election-year-unlike-any-other-how-pennsylvanias-tumultuous-2020-election-unfolded/>; Olivia Rubin, *In Battleground Pennsylvania, Election Officials ‘Bracing’ for Onslaught of Litigation*, ABC News (Oct. 29, 2024), <https://abcnews.go.com/US/battleground-pennsylvania-election-officials-bracing-onslaught-litigation/story?id=115111489>; *Fact-Checking Pennsylvania-Related Election Claims*, PA.Gov,

particular interest from the press and public.⁷ Though the requester here seeks the records at issue as a private citizen or “qualified elector,”⁸ *see* Compl. in Mandamus at ¶ 4, *Towne v. Allegheny County*, No. GD-22-007739 (Ct. Com. Pl. Allegheny Cnty., Pa. filed June 17, 2022) (slip op.), R12A, the decision in this case will have a profound impact on the news media. Specifically, a journalist whose access to public records was similarly delayed would see much of the news value in a story about voting ballots evaporate if he could not access them, or even adjudicate access to them, until after the subsequent election concludes.⁹

Press access must be timely to be meaningful or else “the value of the right of access would be seriously undermined,” especially in the digital era and its 24-hour

<https://www.pa.gov/agencies/vote/elections/fact-checking-pa-related-election-claims.html> (last visited May 20, 2025).

⁷ *See, e.g.*, Daniel J. Hopkins, Marc Meredith, & Kira Wang, *How Many Naked Ballots Were Cast in Pennsylvania's 2020 General Election?*, MIT ElectionLab (Aug. 26, 2021), <https://electionlab.mit.edu/articles/how-many-naked-ballots-were-cast-pennsylvanias-2020-general-election>; Angela Coulombis/Spotlight PA, *Pa. Was Deluged by Election Lawsuits in 2020. Experts Say 2024 Will Be Even More Intense*, WHYY (Mar. 5, 2024), <https://whyy.org/articles/pennsylvania-election-2024-lawsuits-mail-ballots-voter-registration-joe-biden-donald-trump-josh-shapiro/>; Carter Walker, *Last-Resort Ballots Are Increasingly Being Rejected for Technical Errors in Pennsylvania. Why?*, VoteBeat (Apr. 11, 2025), <https://www.votebeat.org/pennsylvania/2025/04/11/provisional-ballots-increase-more-rejected-envelope-errors/>; Carter Walker/Votebeat, *How 9 Mistakenly Discarded Ballots in Luzerne County, Pa., Fueled Trump's 2020 Lies About Elections*, Spotlight PA (July 29, 2024), <https://www.spotlightpa.org/news/2024/07/luzerne-2020-discarded-trump-ballots-doj-report-freed-barr-disinformation-pennsylvania/>;

⁸ A “qualified elector” is any person possessing the necessary qualifications under Pennsylvania law to vote in the respective election in the Commonwealth. *See* 25 P.S. § 2602(t). Documents deemed “open to public inspection” to qualified electors. *See* 25 P.S. § 2622.

⁹ *See* Ruth Igielnik, *One Thing Helping Trump's Approval Rating: Some People Are Not Paying Attention*, N.Y. Times (Mar. 18, 2025), <https://www.nytimes.com/interactive/2025/05/18/polls/trump-job-approval-news-attention.html>.

news cycle. *United States v. Wecht*, 537 F.3d 222, 229 (3d Cir. 2008). Permitting an agency to continue fighting the merits of the OOR's decision ordering the disclosure of records unnecessarily and inappropriately delays access such that even if the agency finally relents and provides the records at issue, the news value may have been severely diminished by the delay. "The timely and efficient process that the General Assembly designed cannot give way to a system in which well-resourced agencies encounter no urgency to comply with the RTKL, while requesters deplete their coffers playing Sisyphus." *Am. C. L. Union of Pa.*, 300 A.3d at 394. Accordingly, permitting agencies to continue to argue disclosure on the merits after the agency fails to appeal a final determination by the OOR ordering production nullifies the RTKL's provisions governing such appeals and the law's strict time limits, and inhibits journalist from obtaining and disseminating information that can assist the public in scrutinizing government actions and holding officials accountable, as the law intended.

CONCLUSION

For the reasons stated above, Amici urge this Court to reverse the decision of the Court of Common Pleas and to remand with instructions to enforce the OOR's February 15, 2022 Final Determination and order production of the records at issue in Towne's RTKL request.

Dated: May 30, 2025

Respectfully submitted,

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I hereby certify that the above brief complies with the word count limits of Pa. R.A.P. 531(b)(1)(i) and 531(b)(3). Based on the word count feature of the word processing system used to prepare this brief, this document contains under 7,000 words, exclusive of the supplementary matter listed in Pa. R.A.P. 2135(b).

CERTIFICATE OF SERVICE

I hereby certify that I have this day, May 30 2025, served a true copy of the forgoing document upon the parties and in the manner listed below.

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