

PENNSYLVANIANS HAVE A RIGHT-TO-KNOW, BUT NO
RIGHT TO KNOW *WHEN* THEY HAVE A RIGHT-TO-KNOW

I. INTRODUCTION

Under the Right-to-Know Law (RTKL),¹ individuals have a right to access certain public, legislative, and financial records.² In *Office of the Governor v. Donahue*,³ the Commonwealth Court of Pennsylvania was asked to determine when an agency is required to respond to a written request.⁴ In a unanimous decision, the court held that "the RTKL requires an agency to respond to a written request for records within five days of the request's receipt by an agency's *open-records officer*."⁵ Although the court's reasoning in *Donahue* is sound based on the text of the RTKL, the practical effect of the holding may have undesirable consequences.⁶

Part II of this survey discusses the RTKL,⁷ the Statutory Construction Act of 1972,⁸ and *Pennsylvania Gaming Control Board v. Office of Open Records*,⁹ all three of which are instrumental in understanding the court's decision in *Donahue*. Part III begins with the Office of Open Records' (OOR) disposition of *Donahue* and then turns to the holding of the Commonwealth Court of Pennsylvania, analyzing the arguments advanced by each party. Finally, the author provides commentary of *Donahue* in Part IV, and Part V briefly concludes this survey.

¹ 65 PA. STAT. ANN. § 67.101 (West 2010).

² See *infra* notes 13-16 and accompanying text.

³ *Office of the Governor v. Donahue*, 59 A.3d 1165 (Pa. Commw. Ct. 2013).

⁴ *Id.* at 1167.

⁵ *Id.* at 1170 (emphasis in original).

⁶ See *infra* Part IV.

⁷ 65 PA. STAT. ANN. § 67.101-.3104 (West 2010).

⁸ 1 PA. CONS. STAT. § 1501 (1975).

⁹ *Pa. Gaming Control Bd. v. Office of Open Records*, 48 A.3d 503 (Pa. Commw. Ct. 2012).

II. BACKGROUND

A. *Right-to-Know Law*

In 2008, the General Assembly of Pennsylvania made significant revisions to the RTKL,¹⁰ which was originally passed in 1957.¹¹ The purpose of the RTKL is "to promote access to official government information"¹² in each Commonwealth agency,¹³ local agency,¹⁴ legislative agency,¹⁵ and judicial agency,¹⁶ "in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions."¹⁷ The RTKL presumes that every record in possession of an agency is a public record.¹⁸ This presumption, however, does not apply to records: (1) exempt under section 708 of the RTKL;¹⁹ (2) protected by a privilege; or (3) exempt under any other federal or state law, regulation, or judicial order or decree.²⁰

In order to facilitate requests under the RTKL, each agency is directed to "designate an official or employee to act as the open-records officer,"²¹ who is responsible for receiving and responding to all requests for records within his or her respective agency.²² Upon receiving a request for records, the open-records officer must, *inter alia*, "[n]ote the date of receipt on the written request[,] [c]ompute the day on which the five-day period under section 901

¹⁰ Act of Feb. 14, 2008, P.L. 6, Act 2008-3.

¹¹ See Act of June 21, 1957, P.L. 390, Act 1957-212.

¹² *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

¹³ 65 PA. STAT. ANN. § 67.301 (West 2010).

¹⁴ *Id.* § 67.302.

¹⁵ *Id.* § 67.303.

¹⁶ *Id.* § 67.304.

¹⁷ *Bowling*, 990 A.2d at 824.

¹⁸ tit. 65, § 67.305.

¹⁹ See *id.* § 67.708(b).

²⁰ *Id.* § 67.305.

²¹ *Id.* § 67.502(a)(1); see also *id.* § 67.502(a)(2) (providing that the Legislative Reference Bureau will designate the open-records officer for a legislative agency other than the Senate or the House of Representatives).

²² *Id.* § 67.502(b)(1).

will expire[,] and make a notation of [the expiration] date on the written request."²³

There are multiple ways to request information under the RTKL.²⁴ A requester may submit either a verbal or written request, and both may be done anonymously if the requester so chooses.²⁵ A request, however, must be in writing "[i]f the requester wishes to pursue the relief and remedies provided for in this act."²⁶ A written request "may be submitted in person, by mail, by e-mail, by facsimile or, to the extent provided by agency rules, by any other electronic means."²⁷

The RTKL outlines two requirements a written request must conform to in order to be valid.²⁸ First, the request "should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested and shall include the name and address to which the agency should address its response."²⁹ Second, "[a] written request must be addressed to the [agency's] open-records officer."³⁰ But the request does not need to "contain a formal salutation" to the open-records officer; the RTKL merely requires the request be "'directed' to the open-records officer."³¹ If an agency employee receives a written request for records, the employee must forward the request to the agency's open-records officer,³² the purpose of which is to "ensure that the requester does not shop around the agency for an employee sympathetic to his request."³³ Notably, however, the statute fails to

²³ *Id.* § 67.502(b)(2)(i)-(ii).

²⁴ *See infra* notes 25-27 and accompanying text.

²⁵ *See* tit. 65, § 67.702.

²⁶ *Id.*

²⁷ *Id.* § 67.703.

²⁸ *See id.*

²⁹ *Id.*

³⁰ *Id.*; *see also id.* § 67.502(a) (requiring agencies to establish an open-records officer and providing the functions of the open-records officer).

³¹ *Pa. Gaming Control Bd. v. Office of Open Records*, 48 A.3d 503, 509 (Pa. Commw. Ct. 2012) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 24 (3d ed. 1986)).

³² tit. 65, § 67.703.

³³ *Pa. Gaming Control Bd.*, 48 A.3d at 509.

outline any timeframe for when an agency employee must forward the request to the open-records officer.³⁴

The RTKL requires agencies to "make a good faith effort" to determine whether the requested record is subject to disclosure.³⁵ The agency has five days to respond to the request "from the date the written request is received by the *open-records officer*."³⁶ Any denial of a written request, whether in whole or in part, must be issued in writing and include, *inter alia*, the specific reasons for denying the request and the procedure to appeal the denial.³⁷ In addition to an explicit denial by the open-records officer, a written request will be deemed denied "[i]f the agency fails to send the response within five business days of receipt of the written request."³⁸ A requester whose written request is denied or deemed denied "may file an appeal with the [OOR] . . . within 15 business days of the mailing date of the agency's response or within 15 business days of a deemed denial."³⁹ The appeal must include: (1) the reasons why the requester believes the record is a public record, legislative record, or financial record; and (2) a response to any reasons given by the agency for delaying or denying the request.⁴⁰

B. *Statutory Construction Act of 1972*

Whenever a court in the Commonwealth of Pennsylvania is construing the text of a statute, the Statutory Construction Act of 1972 must guide its analysis.⁴¹ Under this act, "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly . . . [and] give effect to all its provisions."⁴² The best indication of legislative

³⁴ See tit. 65, § 67.703 (failing to specify a timeframe for forwarding the request).

³⁵ *Id.* § 67.901.

³⁶ *Id.* (emphasis added); see also *id.* § 67.902(a) (providing for an extension of time for the open-records officer to respond to a request).

³⁷ *Id.* § 67.903.

³⁸ *Id.* § 67.901.

³⁹ *Id.* § 67.1101(a)(1).

⁴⁰ tit. 65, § 67.1101(a)(1).

⁴¹ 1 PA. CONS. STAT. § 1901 (1975).

⁴² *Id.* § 1921(a).

intent is the text of the statute.⁴³ Accordingly, a court may not engage in its own statutory construction if the words of the statute are "clear and free from all ambiguity."⁴⁴ A statute is ambiguous, and therefore subject to independent judicial construction, when its "language is subject to two or more reasonable interpretations."⁴⁵ Finally, the Statutory Construction Act of 1972 presumes "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable."⁴⁶

C. Pennsylvania Gaming Control Board v. Office of Open Records

In *Pennsylvania Gaming Control Board v. Office of Open Records*, the Pennsylvania Gaming Control Board (Gaming Board) appealed the OOR's holding that a request under the RTKL is valid "even though [the] request did not mention the [RTKL] or use the Gaming Board's form adopted for record requests."⁴⁷ In *Pennsylvania Gaming Control Board*, the requester sent an e-mail on March 20, 2009 to the Gaming Board Communications Office requesting access to certain documents and the ability to speak at a public hearing.⁴⁸ The request, however, did not conform to the Gaming Board's policy regarding RTKL requests in two ways: "(1) it did not cite to the [RTKL] and (2) it was not submitted on either the Gaming Board's request form or [the OOR's] uniform request form."⁴⁹ Responding to the request, the Gaming Board permitted the requester to speak at the next public hearing but did not address the request for access to documents.⁵⁰ When the requester heard

⁴³ *See id.* § 1921(b).

⁴⁴ *Id.*

⁴⁵ *Bethenergy Mines, Inc. v. Dep't of Env'tl. Prot.*, 676 A.2d 711, 715 (Pa. Commw. Ct. 1996) (citing *Drummond v. Univ. of Pa.*, 651 A.2d 572, 580 (Pa. Commw. Ct. 1994)).

⁴⁶ tit. 1, § 1922(1).

⁴⁷ *Pa. Gaming Control Bd. v. Office of Open Records*, 48 A.3d 503, 504 (Pa. Commw. Ct. 2012); *see also* 65 PA. STAT. ANN. § 67.505(a) (West 2010) (providing "[t]he [OOR] shall develop a uniform form which shall be accepted by all Commonwealth and local agencies in addition to any form used by the agency to file a request under [the RTKL]").

⁴⁸ *Pa. Gaming Control Bd.*, 48 A.3d at 504.

⁴⁹ *Id.* at 507.

⁵⁰ *Id.* at 505.

nothing more from the Gaming Board in regard to his request, on March 30, 2009 – after the five-day response time had lapsed – the requester considered his request to have been deemed denied and appealed to the OOR.⁵¹

On review to the OOR, the Gaming Board contested the ripeness of the requester's appeal, arguing the OOR had no authority under section 1101 of the RTKL to review the denial of the request because it did not conform with the Gaming Board's internal policies regarding requests under the RTKL and, therefore, was not properly submitted.⁵² Since the request was not properly submitted to the agency, the Gaming Board reasoned, the request cannot have been deemed denied.⁵³ The OOR disagreed and held the request was deemed denied.⁵⁴ Thus, the Gaming Board's failure to respond to the request constituted a deemed denial because an agency "cannot simply choose to ignore a citizen's written request for records because it does not conform with its policies and/or procedures." ⁵⁵ The Gaming Board appealed to the Commonwealth Court of Pennsylvania for review of the OOR's decision.⁵⁶

The Gaming Board argued the OOR erred in concluding that the March 20, 2009 request was valid under the RTKL.⁵⁷ The court disagreed.⁵⁸ Noting that the RTKL imposes no statutory requirement that a valid request must cite the RTKL and that section 703 mandates employees to forward such requests to the agency's open-records officer, the court upheld the OOR's decision.⁵⁹ Specifically, the court held a written request for records is not required to cite the RTKL, be submitted via a particular request form, or be specifically addressed to an agency's open-records officer in order to be valid.⁶⁰ Thus, the issue in

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Pa. Gaming Control Bd.*, 48 A.3d at 506.

⁵⁵ *Id.* (internal citation omitted).

⁵⁶ *Id.*

⁵⁷ *Id.* at 507.

⁵⁸ *See id.* at 514.

⁵⁹ *Id.* at 510, 514.

⁶⁰ *Pa. Gaming Control Bd.*, 48 A.3d at 508-09.

Pennsylvania Gaming Control Board concerned the substance and form of a written request and whether an agency was entitled to ignore a request that does not conform to its policy for receiving requests.⁶¹

III. OFFICE OF THE GOVERNOR V. DONAHUE

In *Office of the Governor v. Donahue*, the Office of the Governor (the Office) appealed the OOR's holding that "the five-day timeframe within which an agency is required to respond to a written request for records begins on the day on which *any* agency employee receives the request."⁶²

The facts giving rise to the dispute began on March 7, 2012, when Sean Donahue e-mailed a written request for various records to the Office.⁶³ Twelve days later, on March 19, 2012, Donahue received a letter from the Office of General Counsel responding to the request.⁶⁴ The letter stated the Office's open-records officer received the request on March 12, 2012, but "the request was not

⁶¹ See *id.* at 510.

⁶² *Office of the Governor v. Donahue*, 59 A.3d 1165, 1166 (Pa. Commw. Ct. 2013) (emphasis in original). The Office originally filed a "dual jurisdiction action against Donahue and [the] OOR" in the Commonwealth Court of Pennsylvania's original and appellate jurisdiction. *Id.* at 1167 n.4. The court, however, quashed the appellate jurisdiction count, finding the Office did not have standing "because [it] was not 'aggrieved' by the order but merely disagreed with an issue decided against it." *Id.*

The court also dismissed Donahue as a party to the declaratory judgment action in the court's original jurisdiction "because the relief sought [by the Office] may only be granted against [the] OOR and not Donahue." *Id.* The OOR filed preliminary objections to the Office's declaratory judgment action, arguing the Commonwealth Court of Pennsylvania did not have jurisdiction over the declaratory judgment action and the Office did not have standing, which the Commonwealth Court of Pennsylvania denied in single-judge orders dated July 2, 2012 and August 28, 2012. *Id.* at 1167 n.5. Consequently, the court declined to address those challenges in the above-captioned matter. *Id.* After the case was filed, the OOR appealed to the Supreme Court of Pennsylvania, and the court granted oral arguments, which occurred on November 20, 2013. *Office of the Governor v. Donahue*, 10 MAP 2013 (Pa. 2013).

⁶³ *Id.* at 1166 (citing Final Determination on Reconsideration at 1, *In re Donahue v. Office of the Governor*, No. AP 2012-0485R (Pa. Office of Open Records Apr. 30, 2012) [hereinafter Final Determination]).

⁶⁴ *Id.* (citing Final Determination, *supra* note 63, at 2).

directly received by the open-records officers from Donahue."⁶⁵ The letter then proceeded to grant the request in part and deny the request in part, and Donahue timely appealed this decision to the OOR.⁶⁶

A. Proceedings Before the Office of Open Records

In order to address Donahue's appeal, the OOR had to first determine whether his request was, in fact, denied.⁶⁷ The OOR first noted, pursuant to section 901 of the RTKL, a written request is deemed denied if the agency fails to respond within five business days.⁶⁸ Next, the OOR called attention to conflicting language in the RTKL.⁶⁹ Section 703 of the RTKL states "[a] written request must be addressed to the open-records officer," but then goes on to require "[e]mployees of an agency . . . to forward requests for records to the open-records officer."⁷⁰ The OOR reasoned a response to Donahue's request was required within five business days from its submission on March 7, 2012 because any Office employee receiving the e-mail was obligated to forward the e-mail to the open-records officer.⁷¹ Donahue's request, according to the OOR, was thus deemed denied when he did not receive a response on or before March 14, 2012.⁷²

The Office countered by presenting an attestation by the Office's open-records officer stating the Office did not receive a copy of the request until March 12, 2012.⁷³ The OOR responded by asserting " '[an agency's] error in processing [a request] does not alter the agency's responsibility to timely respond under the

⁶⁵ *Id.* (citing Final Determination, *supra* note 63, at 2).

⁶⁶ *Id.* (citing Final Determination, *supra* note 63, at 2).

⁶⁷ *Id.* (citing Final Determination, *supra* note 63, at 5); *see also* 65 PA. STAT. ANN. § 67.1101(a)(1) (West 2010) (authorizing the OOR to hear an appeal of a denial or deemed denial of a written request).

⁶⁸ *Donahue*, 59 A.3d at 1166 (quoting Final Determination, *supra* note 63, at 5).

⁶⁹ *See id.*

⁷⁰ tit. 65, § 67.703.

⁷¹ *Donahue*, 59 A.3d at 1166 (citing Final Determination, *supra* note 63, at 5).

⁷² *Id.* (citing Final Determination, *supra* note 63, at 5).

⁷³ *Id.* (citing Final Determination, *supra* note 63, at 6).

RTKL.' "⁷⁴ Moreover, since the e-mail was sent to an Office employee and indicated the request was made pursuant to the RTKL, the Office was thereby put on notice that it was required to respond within five business days.⁷⁵ The OOR therefore held the request was deemed denied when the Office did not respond to Donahue by March 14, 2012,⁷⁶ the statutorily-based timeframe within which an agency must respond to a request.⁷⁷ Although the OOR ultimately denied Donahue's request for want of specificity,⁷⁸ the Office appealed the OOR's interpretation of the five-day period to respond to a written request under section 901 of the RTKL to the Commonwealth Court of Pennsylvania.⁷⁹

B. Proceedings Before the Commonwealth Court of Pennsylvania

The sole question on appeal was "whether Section 901 of the RTKL requires an agency to respond to a written request for records within five days of the request's receipt by the agency's open-records officer *or* by any agency employee."⁸⁰ A unanimous panel, speaking through Judge Brobson, reversed the OOR's decision and held "Section 901 of the RTKL requires an agency to respond to a written request for records within five days of the request's receipt by an agency's *open-records officer*."⁸¹

⁷⁴ *Id.* (alterations in original) (quoting Final Determination, *supra* note 63, at 6).

⁷⁵ *Id.* (citing Final Determination, *supra* note 63, at 6).

⁷⁶ *Id.* (citing Final Determination, *supra* note 63, at 5).

⁷⁷ See 65 PA. STAT. ANN. § 67.901 (West 2010) (requiring an agency to respond to a request within "five business days from the date the written request is received by the open-records officer for an agency").

⁷⁸ See *generally id.* § 67.703 (requiring written requests to "identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested").

⁷⁹ *Donahue*, 59 A.3d at 1166-67; see also tit. 65, §§ 67.1301(a), 67.1302(a) (providing for judicial review of a decision by the OOR). The Supreme Court of Pennsylvania recently held the Commonwealth Court of Pennsylvania's "standard of review is *de novo* and [] its scope of review is broad or plenary when it hears appeals from determinations made by [the OOR] under the RTKL." *Bowling v. Office of Open Records*, 75 A.3d 453, 477 (Pa. 2013).

⁸⁰ *Donahue*, 59 A.3d at 1167 (emphasis in original).

⁸¹ *Id.* at 1165, 1170 (emphasis in original).

i. Arguments of the Office of the Governor

The Office argued, *inter alia*, "that the plain language of Section 901 of the RTKL is clear and unambiguous, providing that the five-day timeframe within which an agency must respond to a written request for records commences when the 'written request is received by the open-records officer for an agency.'"⁸²

In addressing the Office's argument, the court first noted that the Statutory Construction Act of 1972 guides its analysis when interpreting a statute.⁸³ With this in mind, the court turned to the text of section 901 of the RTKL, which provides: "[t]he time for response [to a request] shall not exceed five business days from the date the written request is received *by the open-records officer for an agency*.'"⁸⁴ The court determined the text of section 901 unambiguously supports finding the five-day period for response begins "once the open-records officer for an agency, *not* any agency employee, receives a written request for records."⁸⁵ Based on its conclusion that the wording of the statute was unambiguous, the court found "no need to resort to other indicia of legislative intent"⁸⁶ in order to "ascertain and effectuate the intention of the General Assembly."⁸⁷

ii. Arguments of the Office of Open Records

The OOR advanced two substantive arguments and two policy rationales to support its holding that the five-day response time in section 901 commences upon receipt of a request by any agency employee.⁸⁸

First, the OOR argued "its interpretation is the only logical, internally consistent reading of Section 901 of the RTKL, as it is in accordance with the plain language of Section 901's provisions."⁸⁹ Specifically, the OOR contended the Office's interpretation of

⁸² *Id.* at 1167 (quoting tit. 65, § 67.901).

⁸³ *Id.* at 1168 (quoting 1 PA. CONS. STAT. § 1921(a) (1975)).

⁸⁴ *Id.* (emphasis in original) (quoting tit. 65, § 67.901).

⁸⁵ *Id.* (emphasis in original).

⁸⁶ *Donahue*, 59 A.3d at 1168-69.

⁸⁷ tit. 1, § 1921(a).

⁸⁸ *Donahue*, 59 A.3d at 1167-68.

⁸⁹ *Id.* at 1167.

section 901 would ignore the plain language of the statute's provisions because, "under the last sentence of Section 901, a written request for access is deemed denied if an 'agency' fails to respond to the written request within five business days."⁹⁰ The OOR thus reasoned the Office's interpretation of section 901 is contrary to the Statutory Construction Act because it would fail to "give effect to all [of section 901's] provisions."⁹¹ It follows, the OOR argued, that the language of section 901 requires "the five-day response time must commence when the 'agency' receives the request."⁹²

The court rejected this argument on two grounds.⁹³ First, as mentioned above, the court found the text of section 901 unambiguous.⁹⁴ Accordingly, " 'any further deliberation as to [section 901's] meaning is unwarranted' " because the language of section 901 is "clear and free from all ambiguity."⁹⁵ The second reason for rejecting the OOR's interpretation of section 901 was it "would require [the court] to ignore the language of Section 901 specifically referring to receipt of the written request 'by the open-records officer for an agency.' "⁹⁶ Therefore, the court held the OOR's interpretation of section 901—and not the Office's—would "prohibit [the court] from giving effect to all of [its] provisions."⁹⁷

Second, the OOR asserted its interpretation of the five-day response time is consistent with the Commonwealth Court of Pennsylvania's holding in *Pennsylvania Gaming Control*.⁹⁸ The court disagreed and said the OOR's reading of *Pennsylvania Gaming Control Board* mischaracterized the holding of the case, which involved a situation where an agency failed to respond

⁹⁰ *Id.* at 1169.

⁹¹ *See id.*; tit. 1, § 1921(a).

⁹² *Donahue*, 59 A.3d at 1169.

⁹³ *See infra* notes 94-97 and accompanying text.

⁹⁴ *Donahue*, 59 A.3d at 1169.

⁹⁵ *Id.* (quoting *Meier v. Maleski*, 670 A.2d 755, 759 (Pa. Commw. Ct. 1996)).

⁹⁶ *Id.* (quoting 65 PA. STAT. ANN. § 67.901 (West 2010)).

⁹⁷ *Id.*

⁹⁸ *Id.* at 1167-68; *Pa. Gaming Control Bd. v. Office of Open Records*, 48 A.3d 503 (Pa. Commw. Ct. 2012).

altogether to a request for records.⁹⁹ *Pennsylvania Gaming Control Board* thus "concerned the substance and form of a written request for records and whether an agency was entitled to ignore such a request," and the *Pennsylvania Gaming Control Board* court made no decision about when section 901's five-day period commences.¹⁰⁰ The holding in *Pennsylvania Gaming Control Board*, therefore, had no effect on the case at bar.¹⁰¹

Third, the OOR argued "the Office's interpretation would prohibit a requester from knowing when the deadline to appeal begins to run and would prevent [the] OOR from knowing when an appeal is timely."¹⁰² The court rejected this argument on both grounds.¹⁰³ First, due to the court's holding in *Pennsylvania Gaming Control Board*, which merely affirmed a requester's right to appeal a deemed denial to the OOR when an agency fails to respond to a written request,¹⁰⁴ the court did not believe its holding would prohibit a requester from knowing when the deadline to appeal begins to run.¹⁰⁵ This is because "[o]nce a requester files an appeal" of a deemed denial, the OOR is responsible for determining "whether and when a request was received by an agency's open-records officer and decide the appeal accordingly."¹⁰⁶ The court then addressed whether its interpretation of section 901 prevents the OOR from knowing when an appeal is timely.¹⁰⁷ Based on the open-records officer's duties listed in section 502 of the RTKL,¹⁰⁸ the court held its interpretation of the five-day period to respond would not prevent the OOR from knowing when an appeal is timely.¹⁰⁹

⁹⁹ *Donahue*, 59 A.3d at 1169 (citing *Pa. Gaming Control Bd.*, 48 A.3d at 505, 508-10).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1168.

¹⁰³ *Id.* at 1169-70 & n.6.

¹⁰⁴ *Id.* at 1169 (quoting *Pa. Gaming Control Bd.*, 48 A.3d at 512-13).

¹⁰⁵ *Donahue*, 59 A.3d at 1169 n.6.

¹⁰⁶ *Id.* at 1169.

¹⁰⁷ *Id.* at 1169 n.6.

¹⁰⁸ 65 PA. STAT. ANN. § 67.502(b) (West 2010).

¹⁰⁹ *Donahue*, 59 A.3d at 1169-70 & n.6. Specifically, the court was persuaded by section 502 mandating open-records officers to: (1) "note the date of receipt of the request on the request itself;" (2) "[c]ompute the day on which

Fourth, the OOR "essentially argue[d]" that making the commencement of the five-day response time dependent on agency discretion would "incentivize agencies to delay forwarding requests in order to gain more time to respond or enable agencies to refuse to respond until the agency's open-records officer receives the request."¹¹⁰ The court responded by noting "[n]o rule of law requires this Court to presume that an agency will act in bad faith in complying with its statutory duties."¹¹¹ Rather, the presumption is "every agency attempts to comply with the RTKL in good faith,"¹¹² which the court said is supported by two provisions of the RTKL.¹¹³ The first is section 901's directive that agencies " 'make a good faith effort . . . to respond [to a written request for records] as promptly as possible under the circumstances existing at the time of the request.' "¹¹⁴ Second, the RTKL requires an agency employee who receives a request to forward it to the agency's open-records officer.¹¹⁵ "Thus, although an agency may exercise some discretion in handling a request before the request reaches the agency's open-records officer, an agency will presumably act in good faith and respond to such requests as promptly as possible."¹¹⁶

IV. EVALUATION

Due to the Statutory Construction Act of 1972's mandate and the text of section 901, the court's decision in *Donahue* was sound. Indeed, since a court's goal when construing a statute is to ascertain the intent of the General Assembly by first looking at the words of the statute,¹¹⁷ section 901 clearly supports the court's holding. The decision, however, may create unintended

the five-day period under section 901 will expire;" and (3) note the expiration date of the five-day period on the request. *Id.* at 1169 n.6 (quoting tit. 65, § 67.502(b)(2)(ii)).

¹¹⁰ *Id.* at 1168.

¹¹¹ *Id.* at 1170.

¹¹² *Id.*

¹¹³ *See id.*

¹¹⁴ *Id.* (alteration in original) (quoting tit. 65, § 67.901).

¹¹⁵ *Donahue*, 59 A.3d at 1170 (citing tit. 65, § 67.703).

¹¹⁶ *Id.*

¹¹⁷ *See* 1 PA. CONS. STAT. § 1921(b) (1975).

consequences that deserve future consideration by the General Assembly of Pennsylvania.

First, by presuming agencies always act in good faith when responding to requests, the decision leaves agencies with a lot of discretion in determining when to respond to future requests. Given the fact that section 901 explicitly directs agencies to "make a good faith effort" when responding to requests,¹¹⁸ it appears that the General Assembly was cognizant of the potential that agencies would delay responding to requests when it passed the RTKL. Accordingly, by amending the RTKL to provide some statutory safeguard against this potential source of abuse, the General Assembly would strengthen an individual's right to access information. One provision of the RTKL that could be amended to ameliorate the potential for abuse is section 703, which provides, in relevant part: "Employees of an agency shall be directed to forward requests for records to the open-records officer."¹¹⁹ As currently written, section 703 imposes "no deadline by which agency employees must forward such requests."¹²⁰ Therefore, amending section 703 of the RTKL to impose a timeframe for when an agency employee *must* forward a request to the open-records officer would decrease the possibility of abuse by replacing the employee's discretion with a specific, statutory deadline.

Moreover, amending the RTKL in such a fashion would remedy another consequence of the court's holding in *Donahue*. Despite the court's contention to the contrary,¹²¹ the RTKL as currently written does not provide requesters the ability to know exactly when a request has been deemed denied and is ripe for appeal under section 1101. Accordingly, amending the RTKL to include a specific timeframe for when an agency employee must forward a request to the open-records officer would give requesters who have yet to receive the agency's response a much more

¹¹⁸ tit. 65, § 67.901.

¹¹⁹ *Id.* § 67.703.

¹²⁰ *Donahue*, 59 A.3d at 1170 n.7.

¹²¹ *See id.* at 1169 n.6 (rejecting the "OOR's argument that [the court's] interpretation [of section 901] would prohibit a requester from knowing when the deadline to appeal begins to run").

concrete idea of the exact date their request has been deemed denied.

V. CONCLUSION

Faced with the specific issue in *Donahue*, the Commonwealth Court of Pennsylvania's holding was legally sound. But this case demonstrates, similar to the adage within the profession that "hard cases make bad law,"¹²² sometimes an easy case can result in unfortunate consequences for the law. As the branch of government with the responsibility to change the law, the General Assembly should amend the RTKL to assure Pennsylvanians they have a right to know *when* they have a Right-to-Know.

*Timothy R. Bishop**

¹²² *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

* Law Clerk, Supreme Court of Pennsylvania, Chambers of Justice J. Michael Eakin. J.D. Candidate, Widener University School of Law (Harrisburg), May 2014; Arizona State University, B.S. Political Science & B.S. Justice Studies, 2007. This survey is dedicated to the memory of my childhood best friend, Aaron Alto, whose grievous passing reminded everyone who knew him that, unfortunately, Billy Joel was correct – "Only the Good Die Young." I miss you, Aaron.