

*PENNSYLVANIA GAMING CONTROL BOARD V. OFFICE OF  
OPEN RECORDS: UNADDRESSED REQUESTS A VALID  
RIGHT-TO-KNOW REQUEST?*

I. INTRODUCTION

A valid request for public records under Pennsylvania's Right-to-Know Law (RTKL) must: (1) be in writing;<sup>1</sup> (2) be addressed to an open records officer;<sup>2</sup> and (3) contain sufficient specificity to enable the agency to know what records are being sought.<sup>3</sup> Despite this clear statutory language, the Commonwealth Court of Pennsylvania recently held, in a 4-3 decision, that in order for a citizen to seek public records under the RTKL, the written request need not be addressed to the open records officer, sent directly to the open records officer, written on the form required by statute, or make any reference to the RTKL itself.<sup>4</sup> This is a clear expansion of the RTKL and is likely to cause confusion and hardship on the agencies throughout the Commonwealth. As Judge Pellegrini noted in his dissent, "an unaddressed request written on the back of a brown paper bag and given to a PennDot plow driver by the side of the road on a snowy winter night [constitutes] a valid right-to-know request."<sup>5</sup>

This survey begins in Part II with a discussion of the history of Pennsylvania's RTKL – beginning with its inception in 1957 and ending with the most recent amendments added in 2009. Part III will involve an in-depth analysis of *Pennsylvania Gaming Control Board v. Office of Open Records*,<sup>6</sup> including a thorough discussion

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<sup>1</sup> 65 PA. STAT. ANN. § 67.702 (West 2010). The request may also be oral; however, section 67.702 specifically states that if the requester wishes to have the "relief and remedies provided for in this act, the request for access to records must be a written request." *Id.*

<sup>2</sup> *Id.* § 67.703.

<sup>3</sup> *Id.*

<sup>4</sup> Pa. Gaming Control Bd. v. Office of Open Records, 48 A.3d 503, 508-10 (Pa. Commw. Ct. 2012) (en banc), *appeal granted*, 74 A.3d 1027 (Pa. 2013).

<sup>5</sup> *Id.* at 514, 516 (Pellegrini, J., dissenting).

<sup>6</sup> Pa. Gaming Control Bd. v. Office of Open Records, 48 A.3d 503 (Pa. Commw. Ct. 2012) (en banc), *appeal granted*, 74 A.3d 1027 (Pa. 2013).

of the facts and procedural history of the case. Next, Part IV will be a personal critique of the majority's holding and a discussion of why the dissent has the better outcome for Pennsylvania administrative law. Lastly, Part V will contain concluding thoughts on the case and the future of Pennsylvania administrative law.

## II. BACKGROUND

The value of a RTKL is apparent when looking at the history of the United States. James Madison, one of the most influential men in American history, stressed that "[k]nowledge will forever govern ignorance: and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." <sup>7</sup> As the founding fathers envisioned, the staple of a democratic government is that the government belongs to the people.<sup>8</sup> Thus, "the people have a right to learn of those decisions and the information on which they are based."<sup>9</sup>

### *A. Original Statute - 1957*

The original RTKL was passed in 1957 and granted "the release of information by the government of 'public records.'" <sup>10</sup> The person requesting the information had the burden to prove that the record sought was indeed a public record under the statute.<sup>11</sup> Under this version of the statute,

there were three types of public records: 1) each "account, voucher, or contract" that dealt with receipt, disbursement or acquisition of funds; 2) all records that dealt with "use or disposal of services or of supplies;" and 3) each agency "minute, order, or decision" that fixed "personal or

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<sup>7</sup> John L. Gedid, *Pennsylvania's 2008 Right to Know Law: Open Access at Last*, 49 DUQ. L. REV. 459, 460 (Summer 2011) (quoting Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 Emory L.J. 649, 653 (1984)).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 461.

<sup>11</sup> *Id.*

property rights, privileges, immunities, duties or obligations of any person or group of persons."<sup>12</sup>

Although the statute's definition of what constituted a public record appeared broad, the statute contained an exception "that excluded 'any record, document, material, or other paper [that] access to would operate to the prejudice or impairment of a person's reputation or personal security, or which would result in the loss of Federal funds.'"<sup>13</sup> The broad language contained in the exception meant that the courts would have to determine whether a request was for a public record.<sup>14</sup> Courts routinely used a balancing test – balancing the benefit of public access against the extent to which privacy interest should be invaded.<sup>15</sup>

A combination of the confusing statutory language, lack of consistency in courts' interpretations of the law, and a general unfamiliarity by local judges with the intricacies of the law, led commentators to deem Pennsylvania's 1957 RTKL as one of the worst in the country.<sup>16</sup> Further, many government workers had strong, adverse feelings against the law from its inception and frequently denied requests for information, even if the information sought was a public record under the statute.<sup>17</sup> An aggrieved requester had no recourse under the original RTKL for a wrongful refusal for information.<sup>18</sup> Therefore, there was no incentive for "custodians of public records . . . to follow its directives or the appellate court rulings which have interpreted it."<sup>19</sup> The Supreme

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<sup>12</sup> *Id.* (quoting 65 PA. STAT. ANN. § 66.1 (repealed 2008)).

<sup>13</sup> *See* Gedid, *supra* note 7, at 461 (quoting tit. 65, §§ 66.1-2 (repealed 2008)).

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*; Rowland v. Pub. Sch. Emps.' Ret. Sys., 885 A.2d 621, 629 (Pa. Commw. Ct. 2005).

<sup>16</sup> Gedid, *supra* note 7, at 461; Mark Scolforo, *Pa. Open Records Law, to Begin Next Month, Called Much Improved*, PITTSBURGH POST-GAZETTE (Dec. 26, 2008 12:00 AM), <http://www.post-gazette.com/stories/local/state/pa-open-records-law-to-begin-next-month-called-much-improved-626572/>.

<sup>17</sup> *See* Gedid, *supra* note 7, at 462.

<sup>18</sup> *Id.* (citing Stephen P. Drexler, *Pennsylvania's Right-to-Know Act: How It Is Used to Discourage, Delay and Deny Access to Public Documents and Why It Needs to Be Changed*, 33 DUQ. L. REV. 127, 133 (1994)).

<sup>19</sup> Drexler, *supra* note 18, at 133.

Court of Pennsylvania explicitly held that the reason the records are being requested is irrelevant.<sup>20</sup> However, government workers routinely denied this mandate from the court.<sup>21</sup>

The inadequacies of the statute were easily recognized, but it would be forty-four years before a change would come.

### *B. The First Round of Amendments – 2002*

The amendments passed in 2002 did little to fix the problems of the original RTKL; however, there were some positive changes. A notable change included a grant of court costs, attorney's fees, and penalties against an agency that wrongfully denied access to information.<sup>22</sup> Further, agencies were required to act in "good faith" and had to make a determination within a certain timeframe.<sup>23</sup> Many commentators praised the small improvement in access to public records under the 2002 amendments, but there were still problems that needed to be addressed. Those problems being: "the definitions of agency and of public record, and the scope of the exceptions to the definition of public record."<sup>24</sup>

### *C. Change Finally Comes – Amendments of 2008*

The amendments proposed in 2008, officially adopted in 2009, have served as a complete overhaul of the original 1957 RTKL. First, the new RTKL makes no distinction between agencies in different branches – the law is applicable to all agencies in the Commonwealth.<sup>25</sup> Second, the new law vastly expands the definition of what constitutes a "record."<sup>26</sup> Under the statute, "a 'record' is information that pertains to an agency transaction or activity 'created, received, or retained' in connection with agency

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<sup>20</sup> Wiley v. Woods, 141 A.2d 844, 849 (Pa. 1958).

<sup>21</sup> See generally Drexler, *supra* note 18, at 133 (discussing numerous examples of municipalities refusing to grant access to public records based on the reason for the request).

<sup>22</sup> Gedid, *supra* note 7, at 464-65 (citing 65 PA. STAT. ANN. § 66.1 (2002) (repealed 2008)).

<sup>23</sup> *Id.* at 464 (citing tit. 65, § 66.1 (repealed 2008)).

<sup>24</sup> *Id.* at 465.

<sup>25</sup> *Id.* (citing 65 PA. STAT. ANN. § 67.501 (West 2010)).

<sup>26</sup> See tit. 65, § 67.102.

business in any form whatsoever."<sup>27</sup> The definition of "public record" includes anything "that is not 'protected by a privilege' or exempt under the RTKL or another statute."<sup>28</sup> Third, any record under an agency's possession is presumed to be a public record.<sup>29</sup> Further, the burden is no longer placed on the individual seeking the record, but rather the burden is on the agency to prove the record sought is exempt from the RTKL.<sup>30</sup> Lastly, the new RTKL lays out specific procedural steps for agencies and requesters to follow when information is being sought.<sup>31</sup>

For example, section 703 lays out the requirements for submitting a written request to an agency.<sup>32</sup> A person requesting public records from an agency must submit a written request either "in person, by mail, by e-mail, by facsimile or, to the extent provided by agency rules, by any other electronic means."<sup>33</sup> If the request is not submitted directly to the open records office, "[e]mployees of an agency shall be directed to forward requests . . . to the open-records officer."<sup>34</sup> This section also explains that the person submitting the request is required to give his or her name and address and also must explain with "sufficient specificity" the records being sought.<sup>35</sup> However, the request does not need to include an explanation of why the records are being sought.<sup>36</sup>

Supplementing section 703 is section 505, which governs the form in which a request must be submitted.<sup>37</sup> Under section 505, "[t]he Office of Open Records 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 this

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<sup>27</sup> Gedit, *supra* note 7, at 466-67 (quoting tit. 65, § 67.102).

<sup>28</sup> *Id.* at 467 (quoting tit. 65, § 67.102).

<sup>29</sup> *See* tit. 65, § 67.305(a).

<sup>30</sup> *Id.* § 67.708(a)(1).

<sup>31</sup> *Id.* §§ 67.701-.708.

<sup>32</sup> *Id.* § 67.703.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> tit. 65, § 67.703.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* § 67.505.

act."<sup>38</sup> Similar language is used when referring to judicial and legislative agencies.<sup>39</sup>

Lastly, section 902(a) lists seven scenarios in which an agency is given an extended period of time to respond to the request for records.<sup>40</sup> If the open records officer determines that one of the seven scenarios is present, "the open-records officer shall send written notice to the requester within five business days" of the issue.<sup>41</sup> The agency then has thirty days to give the requester a response.<sup>42</sup> If the agency does not respond to the request within thirty days, the request is deemed denied and the requester can appeal.<sup>43</sup>

Although the new RTKL is still in its infancy, there has not been a shortage of cases interpreting the new law. The importance of procedural requirements led the legislature to pass sweeping amendments to the original RTKL<sup>44</sup> and the courts should keep in mind, when interpreting the statute, the reasons for the complete overhaul.

### III. ANALYSIS: *PENNSYLVANIA GAMING CONTROL BOARD V. OFFICE OF OPEN RECORDS*

#### *A. Facts*

The facts of *Pennsylvania Gaming Control Board* are relatively straightforward. A member of Eastern Pennsylvania Citizens Against Gambling, Mr. James Schneller, sent an email to Ms. Catherine Stetler on March 20, 2009.<sup>45</sup> In that email, Mr. Schneller made two requests: (1) to be heard at the next public hearing; and (2) "copies of 'communications' between the Gaming Board and several applicants for gaming licenses and copies of the

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<sup>38</sup> *Id.* § 67.505(a).

<sup>39</sup> *Id.* § 67.505(b)-(c).

<sup>40</sup> *Id.* § 67.902(a).

<sup>41</sup> tit. 65, § 67.902(b)(1).

<sup>42</sup> *Id.* § 67.902(b)(2).

<sup>43</sup> *Id.*

<sup>44</sup> See Gedid, *supra* note 7, at 470.

<sup>45</sup> Pa. Gaming Control Bd. v. Office of Open Records, 48 A.3d 503, 504 (Pa. Commw. Ct. 2012).

financial data that each applicant provided to the Gaming Board."<sup>46</sup> The letter was addressed directly to Ms. Stetler, but made no mention of the RTKL.<sup>47</sup> Four days later, on March 24, Ms. Stetler responded to Mr. Schneller's email.<sup>48</sup> In her return email, Ms. Stetler told Mr. Schneller that he could speak at the next public hearing; however, she made no reference to his request for the communications and financial data.<sup>49</sup> Ms. Stetler did not forward Mr. Schneller's request to the open records officer and the Gaming Board took no further action.<sup>50</sup>

### *B. Procedural History*

Deeming his request denied pursuant to section 901,<sup>51</sup> Mr. Schneller appealed to Open Records.<sup>52</sup> Mr. Schneller argued that the Gaming Board improperly denied his request for information under Pennsylvania's RTKL.<sup>53</sup> In response, the Gaming Board argued Mr. Schneller could not appeal the denial because there was no denial at all.<sup>54</sup> The Gaming Board argued that Mr. Schneller's request was not a valid Right-to-Know request because it "was not presented on the Gaming Board's form for such requests," and thus the agency "had no duty to respond."<sup>55</sup> Further, Mr. Schneller's request made no reference to the RTKL pursuant to the Gaming Board's policy.<sup>56</sup> So, the Gaming Board argued Mr. Schneller had nothing to appeal because his initial request did not conform to the proper procedures.<sup>57</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *See id.* at 504-05.

<sup>48</sup> *Id.* at 505.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 65 PA. STAT. ANN. § 67.901 (West 2010) (stating that if an agency does not respond within five days of a request, the requester can deem the request denied).

<sup>52</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 505.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 506.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

Open Records did not agree with the Gaming Board.<sup>58</sup> First, Open Records stated "that there is no statutory requirement that a person must cite to the [RTKL]." <sup>59</sup> Second, Open Records reasoned that just because a request does not conform to agency policy or procedure does not allow the agency "to ignore a citizen's written request for records."<sup>60</sup> All that is required by the statute is the request be in writing.<sup>61</sup> Not only did Open Records disagree with the Gaming Board's argument, it also held that Ms. Stetler should have forwarded the request to the open records officer pursuant to the Gaming Board's policy as well as the RTKL.<sup>62</sup> Open Records deemed the Gaming Board's refusal to respond within the allotted five-day period to be a denial of Mr. Schneller's request and thus, Mr. Schneller was able to appeal to Open Records.<sup>63</sup> The Gaming Board was ordered to grant Mr. Schneller access to the requested information within thirty days.<sup>64</sup>

### *C. Issues, Holdings, and Rationale*

The Gaming Board filed a timely appeal to the Commonwealth Court of Pennsylvania,<sup>65</sup> which is the subject of this survey. On appeal, the Gaming Board argued (1) Open Records erred in holding that the request was valid under the RTKL; and (2) alternatively, if the request is deemed valid, the information requested is subject to exemption, and thus, Open Records erred in ordering the Gaming Board to turn over the information.<sup>66</sup> The Commonwealth Court of Pennsylvania agreed with Open Records and affirmed its decision regarding the first

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<sup>58</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 506.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* Oral requests are also valid; however, in order for a citizen to take advantage of the remedies provided for in the RTKL, the request must be in writing. 65 PA. STAT. ANN. § 67.702 (West 2010).

<sup>62</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 506 (quoting tit. 65, § 67.703).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 507.

issue and remanded the second issue to figure out if the request at issue fits an exemption.<sup>67</sup>

i. Issue 1: Was Mr. Schneller's Request Valid Under the RTKL?

In analyzing the first issue, the Commonwealth Court of Pennsylvania noted that the newest amendments to the RTKL were "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.'" <sup>68</sup> Next, the court interpreted section 703 of the RTKL. <sup>69</sup> Section 703 lays out the procedures a requester must follow when submitting a written request to an agency. <sup>70</sup> Under that section, "[a] written request must be addressed to the open-records officer . . . . Employees of an agency shall be directed to forward requests for records to the open-records officer." <sup>71</sup> The court agreed with Open Records' assertion that the RTKL does not require a requester to refer to the RTKL in the written request. <sup>72</sup> The RTKL requires written requests to provide "sufficient specificity to enable the agency to ascertain which records are being requested." <sup>73</sup> The majority went further and held that the legislature "intended that state and local agencies should presume that written requests for records are Right-to-Know requests." <sup>74</sup>

The court noted that the real issue is what is meant by the requirement that the written request " 'be addressed to the . . . open-records officer' " and the requirement that "agency employees must 'forward requests' to that officer." <sup>75</sup>

The majority of the court answers the above question by responding to the dissenting opinion. The dissent argues that a request is validly addressed under the RTKL when the written

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<sup>67</sup> *Id.* at 514.

<sup>68</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 507 (quoting *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010)).

<sup>69</sup> *Id.* at 508.

<sup>70</sup> 65 PA. STAT. ANN. § 67.703 (West 2010).

<sup>71</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 508 (quoting tit. 65, § 67.703).

<sup>72</sup> *Id.*

<sup>73</sup> tit. 65, § 67.703.

<sup>74</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 510.

<sup>75</sup> *Id.* at 508 (quoting tit. 65, § 67.703).

request is addressed to the open records officer.<sup>76</sup> The majority contends that the dissent's interpretation of the statute would lead a court to hold invalid a request that is addressed "To Whom It May Concern."<sup>77</sup> Further, the majority stated "it is hard to believe that the legislature was concerned with the niceties of the written salutation."<sup>78</sup> Finding the real purpose behind the addressing language "is to ensure that the requester does not shop around the agency for an employee sympathetic to his request," the majority held that the written request must be "directed" to the open records officer; reasoning that the words "addressed" and "directed" are synonymous with one another.<sup>79</sup> Further, if the legislature intended that the written requests be "formally addressed to the open-records officer," then there would be no need for the second provision that requires forwarding requests to the open records officer.<sup>80</sup> As to the forwarding of requests to the open records officer, the dissent argues that not every request must be forwarded.<sup>81</sup> Only those requests formerly addressed to the open records officer that were not sent directly to the open records officer must be forwarded.<sup>82</sup> The majority believes this is a "strained and limiting interpretation" of the statute.<sup>83</sup>

The majority continued by pointing out that the legislature provided other sections in the RTKL that show an intent not to let technicalities stop a written request.<sup>84</sup> Specifically, section 902(a)(5) provides that the open records officer must determine if "the requester has not complied with the agency's policies regarding access to records."<sup>85</sup> Under this section, if the officer determines the requester has not complied with the applicable procedures, the officer must notify the requester within five days.<sup>86</sup>

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<sup>76</sup> *Id.* at 508, 515 (Pellegrini, J., dissenting).

<sup>77</sup> *Id.* at 508.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 509.

<sup>80</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 509.

<sup>81</sup> *Id.* at 508, 515 (Pellegrini, J., dissenting).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 508.

<sup>84</sup> *Id.* at 509.

<sup>85</sup> 65 PA. STAT. ANN. § 67.902(a)(5) (West 2010).

<sup>86</sup> *Id.* § 67.902(b)(1).

The court thus pointed out that the Gaming Board should have notified Mr. Schneller that his written request did not comply with its procedures – something the Gaming Board did not do.<sup>87</sup> The majority was also not persuaded by an amicus brief filed by the Parole Board.<sup>88</sup> In that brief, the Parole Board pointed out the substantial amount of RTKL requests it receives on a monthly basis.<sup>89</sup> Fearing the effect of an approval of Mr. Schneller's request, the Parole Board indicated that it would be inundated with even more requests each month and would be unable to answer all requests in a timely fashion.<sup>90</sup> The majority called the Parole Board's fear hypothetical at best and held that just because something is burdensome, it does not allow the court to disregard the plain statutory language.<sup>91</sup>

After a detailed analysis of the RTKL, the majority held that Mr. Schneller's request was a valid RTKL request; thus, the Gaming Board's refusal to respond was a denial.<sup>92</sup>

ii. Issue 2: If the Request was Valid, Is the Information Exempt?

The second issue on appeal was less contentious. The Gaming Board argued that the information sought was exempt under both the Gaming Act and the Uniform Trade Secrets Act and was also exempt "because [the records] were generated in an investigation of the Gaming Board."<sup>93</sup> Countering the Gaming Board's position, Open Records argued that the Gaming Board could have raised these issues in front of it, but chose not to and, thus, waived its right to bring the issue up on appeal.<sup>94</sup> In the alternative, Open Records requested a remand.<sup>95</sup> The court noted that the presumption that all records in an agency's possession are public

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<sup>87</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 510.

<sup>88</sup> *Id.* at 511.

<sup>89</sup> *Id.* The Parole Board stated it receives 600 to 1,000 requests each month.

*Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 513.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

records is a rebuttable one.<sup>96</sup> Because the issue was not discussed in front of Open Records, the majority remanded the case.<sup>97</sup>

#### *D. Dissent*

The dissent's view has been briefly discussed above; however, a few more points should be discussed. As previously stated, the dissent believes the phrase " 'addressed' to the open records officer" means exactly what it says – one must address the written request to the open records officer.<sup>98</sup> Further, the dissent also believes that not all requests must be forwarded to the open records officer.<sup>99</sup> Only those requests that are properly addressed to the open records officer must be forwarded by employees that inadvertently receive the written request.<sup>100</sup> The dissent relies on nothing more than the plain language of the statute; "[t]o hold otherwise reads completely out of this provision the sentence that a written request 'must' be made to the open records officer."<sup>101</sup>

Besides disagreeing with the majority on the interpretation of section 703, the dissent also disagrees with the majority's discussion regarding the proper form, required by the Gaming Board, to submit valid RTKL requests.<sup>102</sup> Section 505(a) says "[t]he Office of Open Records shall develop a uniform form which *shall be accepted* by all Commonwealth and local agencies in addition to any form used by the agency."<sup>103</sup> The dissent views this language as requiring all written requests for information to be made on the accepted forms.<sup>104</sup>

Thus, the dissenters relied solely on the language of the statute and would hold that Mr. Schneller's request was not valid under the RTKL and the Gaming Board did not have to respond or

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* The court noted that the requests "may, or may not, be exempt from disclosure." *Id.*

<sup>98</sup> *Id.* at 515 (Pellegrini, J., dissenting).

<sup>99</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 515 (Pellegrini, J., dissenting).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (emphasis in original) (quoting 65 PA. STAT. ANN. § 67.505(a) (West 2010)).

<sup>104</sup> *Id.*

forward the request.<sup>105</sup> To sum up the dissenting opinion, Judge Pellegrini ended the dissent by stating "[b]ecause the majority's holding would make an unaddressed request written on the back of a brown paper bag and given to a PennDot plow driver by the side of the road on a snowy winter night a valid right-to-know law request, I respectfully dissent."<sup>106</sup>

#### IV. EVALUATION

While the majority's opinion is thorough and well-reasoned, it is contrary to the plain statutory language of the RTKL. The holding of the majority is broad and will have adverse implications on agencies throughout the Commonwealth. The Parole Board's amicus brief in this case is an example of these possible implications. At the time this case was heard, the Parole Board stated it receives between 600 and 1,000 RTKL requests monthly.<sup>107</sup> The majority posits that any increase in RTKL requests from finding Mr. Schneller's request valid was hypothetical at best.<sup>108</sup> However, now that agencies must forward and respond to every request for information that comes across an employee's desk, agencies will be inundated with requests. Request after request will go unanswered and will be deemed denied because agencies do not have the manpower to respond to all of the requests. Thus, the courts will also feel the increased burden on the agencies because, presumably, the more requests that are deemed denied by lack of timely agency response, the more these denials will be appealed to the courts. Further, because the majority holds that all written requests for records are presumed to be RTKL requests,<sup>109</sup> more time will be required of the agency to determine if the record sought is actually a valid RTKL request.

The dissent's reliance on the pure statutory language is the better argument. Section 502(b) explicitly states that "[t]he open-records officer shall receive requests submitted to the agency."<sup>110</sup>

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<sup>105</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 515-16 (Pellegrini, J., dissenting).

<sup>106</sup> *Id.* at 516.

<sup>107</sup> *Id.* at 511 (majority opinion).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 510.

<sup>110</sup> 65 PA. STAT. ANN. § 67.502(b) (West 2010).

As the dissent points out, this clearly means that only the open records officer can receive RTKL requests.<sup>111</sup> Read in conjunction with section 703, which requires the request to be addressed to the open records officer, the open records officer is the only person to whom the written requests may be addressed.<sup>112</sup> The majority's characterization that a request addressed "To Whom It May Concern" is facially invalid, under the dissenter's view, is incorrect.<sup>113</sup> The salutation "To Whom It May Concern" could very well satisfy the statutory requirement of being addressed to the open records officer as long as the contents of the written request are specific enough to allow the open records officer to ascertain what information is being sought.<sup>114</sup> The major point of the dissent, arguably, is that if the written request does not contain sufficient information to let an agency know that the requester is seeking information pursuant to the RTKL, then how is the agency supposed to know what procedures to follow?

Complicating the matter even more is the majority's holding that every RTKL request that is not addressed to the open records officer must be forwarded to the open records officer.<sup>115</sup> The majority's holding is at odds with reality. Not every agency employee is going to be familiar with the RTKL. How is an employee supposed to know that a letter that happens to come across her desk should be forwarded to the open records officer because the RTKL tells her to do so? Contrary to the majority's interpretation of the legislature's intent, it is unlikely that the legislature intended for every agency employee to be familiar with the intricacies of the RTKL in order to know if a request that comes across her desk should be forwarded to the open records officer. The better interpretation of the statute is that a letter that comes across an unsuspecting employee's desk that is addressed to the open records officer would be forwarded to the open records officer per the salutation.

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<sup>111</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 515 (Pellegrini, J., dissenting).

<sup>112</sup> *Id.*; tit. 65, § 67.703.

<sup>113</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 508.

<sup>114</sup> *See* tit. 65, § 67.703. I do, however, recognize that this salutation would be hard to overcome.

<sup>115</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 508.

The majority's reading of the addressing and forwarding requirements places an undue burden on agencies. While the statutory language cannot be ignored just because it is burdensome on a particular party,<sup>116</sup> the majority held " '[w]here it is unambiguous, the plain language controls, and it cannot be ignored in pursuit of the statute's alleged contrary spirit or purpose.' "<sup>117</sup> A reading of this case seems to be contrary to the majority's argument. The RTKL is clear – written requests must be addressed to the open records officer and any requests that, for some reason, do not go directly to the open records officer must be forwarded, as long as the forwarder knows it is to be forwarded to that officer (knowing presumably means the request is addressed to the open records officer).<sup>118</sup> Therefore, because the statutory language is unambiguous, the majority cannot state a contrary spirit or purpose. While the majority's policy reasons are admirable – to allow easier access to public records – the broad holding of the majority is the wrong way to achieve this policy goal. The agencies and courts will be burdened with endless amounts of what may or may not be valid RTKL requests.

Lastly, the majority's holding that the RTKL request does not have to be on the specified agency form is erroneous.<sup>119</sup> Why would the legislature include section 505(a), which requires the Open Records to adopt a uniform form for RTKL requests and which also requires that the form must be accepted by all agencies in the Commonwealth,<sup>120</sup> if it did not intend for all RTKL requests to be presented on the specified form? The majority does not squarely answer this question. Instead, the majority states the Gaming Board should have notified Mr. Schneller that his request needed to be filled out on the proper form.<sup>121</sup> Not only does the majority not specifically answer the above question, it states that "the legislature also made it clear that a requester's failure to follow an agency's policy on the format of a request does not allow the

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<sup>116</sup> *See id.* at 511.

<sup>117</sup> *Id.* (quoting *Koken v. Reliance Ins. Co.*, 893 A.2d 70, 82 (Pa. 2006)).

<sup>118</sup> *See* tit. 65, § 67.703.

<sup>119</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 512.

<sup>120</sup> tit. 65, § 67.505(a).

<sup>121</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 509.

agency to ignore the request," however it cites no authority for this proposition.<sup>122</sup> The language of section 505(a) not only references a form by Open Records, it also mentions forms used by the agency.<sup>123</sup> The statute provides that Open Records' form is to be used in conjunction with any agency forms – this is clear.<sup>124</sup>

Overall, the majority's broad holding with respect to its interpretation of section 703 of the RTKL is troubling. The long-term impact of this case has yet to be seen, but one can theorize that agencies will only experience an immense increase in RTKL requests. In fact, agencies might have experienced this increase without even knowing it because a valid RTKL request does not need to be addressed to the open records officer, it only has to be "directed" to the officer. The average employee is not going to be able to recognize a RTKL request unless the request is either: (1) filled out on the pre-specified form under section 505(a);<sup>125</sup> or (2) is addressed to the open records officer or has some other indication that the request is being made pursuant to the RTKL.<sup>126</sup> Therefore, Judge Pellegrini's characterization of the majority's holding that "an unaddressed request written on the back of a brown paper bag and given to a PennDot plow driver by the side of the road on a snowy winter night [would be] a valid right-to-know law request"<sup>127</sup> appears to be correct.

## V. CONCLUSION

A divided Commonwealth Court of Pennsylvania held in *Pennsylvania Gaming Control Board* that a valid RTKL request does not need to be addressed to the open records officer, does not need to make any reference to the RTKL, and does not need to be presented on the specified statutory form.<sup>128</sup> The statutory language is not in the majority's favor, however. Section 703 states "[a] written request must be addressed to the open-records

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<sup>122</sup> *Id.*

<sup>123</sup> tit. 65, § 67.505(a).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* § 67.703.

<sup>127</sup> *Pa. Gaming Control Bd.*, 48 A.3d at 516 (Pellegrini, J., dissenting).

<sup>128</sup> *Id.* at 508-10.

officer."<sup>129</sup> Further, that section states that when a request does not go directly to the open records officer, but instead goes to another employee, that employee must "forward requests for records to the open-records officer."<sup>130</sup> Logically viewing these two sentences in conjunction, a written request must make some reference to the open records officer or have sufficient information to allow an employee who is unfamiliar with the RTKL to recognize that the request needs to be forwarded to the open records officer. Further, section 505(a) requires "[t]he Office of Open Records [to] develop a uniform form which shall be accepted by all Commonwealth and local agencies in addition to any form used by the agency."<sup>131</sup> Again, just reading the plain language of the statute, in order for a RTKL request to be valid, it must be presented on the pre-specified form made by Open Records and also any other forms required by the agency.

Therefore, while the majority's policy rationale for its decision is admirable, the broad interpretation of the statute will unduly burden agencies and cause more confusion in an area that is already confusing enough.

*Kate Nixon*\*

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<sup>129</sup> tit. 65, § 67.703.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* § 67.505(a).

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