COMMONWEALTH COURT OF PENNSYLVANIA

No. 396 MD 2009

THE PENNSYLVANIA STATE EDUCATION ASSOCIATION, *et al.*,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents,

and

PENNSYLVANIA ASSOCIATION OF SCHOOL RETIREES, *et al.*,

Intervenors

BRIEF OF *AMICUS CURIAE*, PENNSYLVANIA FREEDOM OF INFORMATION COALITION, IN SUPPORT OF RESPONDENTS' MOTION FOR SUMMARY ACTION

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INTEREST OF *AMICUS CURIAE*

The Pennsylvania Freedom of Information Coalition (the "Coalition") is a Pennsylvania non-profit corporation that is headquartered in Harrisburg, Pennsylvania, founded in 2005. The Coalition consists of journalists, librarians, attorneys, educators, community and business leaders and is dedicated to protecting the right of all Pennsylvania citizens to open and unfettered access to all levels of Commonwealth, county and local government. Access to public records guaranteed by the Pennsylvania Right-to-Know Law ("RTKL"), 65 P.S. § 67.101, *et seq*., is of particular concern to the Coalition.

This case raises serious and important questions regarding the RTKL and access to public records of government agencies throughout the Commonwealth. If the permanent injunction sought in this case is granted, the result will be (a) to rewrite the RTKL in a way that undermines its core provision that agency records are presumptively public; and (b) to expand Pennsylvania's right to privacy to dimensions unsupported by existing precedent under either our Constitution or the RTKL. The Coalition feels compelled to participate in the current proceeding to defend what it considers the proper scope of Pennsylvania's right to privacy and to protect the RTKL from being undermined.

STATEMENT OF QUESTIONS INVOLVED

I. Whether the RTKL should be construed to contain a blanket exemption for the home addresses of public school employees, where no such exemption is found in the RTKL and where such a blanket exemption would be contrary to the spirit and letter of the RTKL?

SUGGESTED ANSWER: No.

II. Whether there is a constitutional right to privacy in home address information, despite the general availability of such information and the clear holding of *Commonwealth v. Duncan*, 572 Pa. 438, 817 A.2d 455 (Pa. 2003)?

SUGGESTED ANSWER: No.

STATEMENT OF THE CASE

This case began in 2009, when the Pennsylvania State Education Association ("PSEA") and related parties (collectively referred to herein as "petitioners") filed this action against the Office of Open Records and other related parties. Petitioners seek a permanent injunction barring release pursuant to the RTKL of the home addresses of any public school employees. In July 2009, Judge Friedman entered an order granting petitioners' application for a preliminary injunction and ordering the following:

- that the release of home addresses for all public school employees be stayed;
- that the Office of Open Records be enjoined from directing the release of home addresses of any public school employees pursuant to the RTKL; and
- that the Office of Open Records take reasonable steps to notify school districts of the existence of this litigation and of the injunction staying release of home address information for public school employees.

See Preliminary Injunction Order, attached hereto as Exhibit A. In August 2009, Judge Friedman authored a supporting opinion, relying on cases under the predecessor to the current version of the RTKL to support the relief granted. *See Pa. State Educ. Assoc. v. Commonwealth*, 981 A.2d 383, 385-86 (Pa. Commw. 2009) ("*PSEA I*") (citing cases). The Supreme Court subsequently affirmed Judge Friedman's order "without prejudice to any party's right to appeal the

Commonwealth Court's final disposition of these proceedings." *Pa. State Educ. Assoc. ex rel. Wilson v. Pa. Office of Open Records*, 2 A.3d 558, 559 (2010) (*per curium*).

On remand from the Supreme Court, the respondents filed preliminary objections asserting multiple dismissal grounds. In September 2010, this Court, sitting *en banc*, sustained those preliminary objections, holding that the Office of Open Records was not the proper party for this lawsuit. *Pa. State Educ. Assoc. v. Commonwealth*, 4 A.3d 1156, 1165-66 (Pa. Commw. 2010) (*en banc*) ("*PSEA II*"). Judges Pellegrini and McCullough dissented, with President Judge Pellegrini stating that he would have granted respondents' preliminary objections on the substantive grounds that neither the RTKL nor the Pennsylvania Constitution supports the relief petitioners are seeking. *See id.* at 1171 (Pellegrini, J., dissenting).

Petitioners appealed to the Supreme Court, which held that the Office of Open Records is a proper party to this suit, and remanded the case back to this Court for proceedings on the merits. *Pa. State Educ. Assoc. v. Commonwealth*, 50 A.3d 1263 (Pa. 2012) ("*PSEA III*"). In February of this year, respondents filed the motion for summary judgment presently before this Court. In support of their motion, respondents argue that (a) under binding precedent, there is no

constitutional right to privacy in home address information; (b) petitioners have voluntarily disclosed their home addresses, rendering their request for relief moot and/or waived; and (c) there is no general privacy right in home address information under the RTKL.

SUMMARY OF THE ARGUMENT

In this lawsuit, petitioners contend that the home addresses of the public school employees they represent are categorically exempt from disclosure under the RTKL, based on both the RTKL's own statutory exemptions and a purported constitutional right to privacy in home address information. Accordingly, petitioners seek a blanket injunction that would, in essence, short circuit the exemption process mandated by the RTKL by implementing a *per se* bar to the release of any of their constituents' home addresses.

Petitioners are simply wrong on the law. Moreover, beyond this single case, the permanent injunction they seek would seriously undermine the effectiveness and viability of the RTKL.

First, the RTKL contains a presumption of disclosure that can be overcome only if an exception or privilege is applicable to the information sought.

Second, there is no blanket exception to the disclosure of home addresses under the RTKL. To the extent that privacy interests are protected by the statute, they are protected by its specific disclosure exceptions, such as the physical security exception, which, subject to a small number of exceptions not implicated here, must be applied on a case-by-case basis. Accordingly, the blanket injunction sought here is wholly inappropriate and contrary to the RTKL.

Third, both our Supreme Court and this Court have explicitly held that the constitutional right to privacy does not extend to home addresses because the pervasive public availability of such information renders unreasonable any corresponding subjective expectation of privacy that petitioners may have. Accordingly, the Pennsylvania Constitution provides no separate basis for the relief petitioners seek.

Because the relief petitioners seek is not available as a matter of law, this lawsuit should be dismissed and the preliminary injunction previously granted to petitioners dissolved.

ARGUMENT

I. THE PERMANENT INJUNCTION PETITIONERS SEEK IS CONTRARY TO, AND WOULD SIGNIFICANTLY UNDERMINE, THE RTKL.

The RTKL provides no support for the broad permanent injunction petitioners seek. The law creates a general presumption that, subject to a relatively small number of specific exceptions, "all records held by an agency are public records," *PSEA II*, 4 A.3d at 1162, a presumption that requires an agency to put forward proof to show that it has been overcome in any particular case, *see Pa. State Troopers Assoc. v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. 2011). The amorphous "privacy exception" petitioners assert here does not exist in the RTKL

in any fashion and, thus, they are not exempt from the requirement that they show individualized proof.[1]

This is clear from this Court's decision in *Delaware County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. 2012) (*en banc*). There, the Court rejected the view that either the RTKL's "personal identification" exception, 65 P.S. § 67.708(b)(6), or its "personal security" exception, *id.* at 67.708(b)(1)(ii), provides general

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[1] The statute itself does not contain any specific mention of, or protections for, privacy, and it is open question whether the RTKL continues to contain even an implied privacy exception. Under the old law, an agency seeking to withhold records on privacy grounds could do so only by showing that the "reputation and personal security exception," which was interpreted "as creating a privacy exception to the [law's] general disclosure rule," applied. *Pa. State Univ. v. State Emps' Retirement Bd.*, 594 Pa. 244, 258, 935 A.2d 530, 538 (2007). However, because the General Assembly, in amending the law to expand disclosure, eliminated "reputation" as an interest specifically protected by the statute's exceptions, it is not clear whether the law still includes an implied privacy exception. *Compare Governor's Office of Admin. v. Purcell*, 35 A.3d 811, 819-820 (Pa. Commw. 2011) (elimination of reputation exception removed privacyinterest from statute's purview) *with Del. Cnty. v. Schaefer*, 45 A.3d 1149, 1156 n.10 (Pa. Commw. 2012) (*en banc*) ("Because the 'personal security exception' historically encompassed, among other things, a right to privacy, the Legislature's continued use of the 'personal security' language strongly indicates the Legislature intended to preserve the right to privacy under the RTKL."). What is clear, however, is that, if there is still a privacy-based balancing test under the RTKL, there still must be a showing and the balance has tipped substantially in favor of requesters. Under the existing law, the government can no longer deny access to records that "*potentially* impair" personal security, 65 P.S. § 66.1 (repealed) (emphasis added); it can only refuse to disclose information that "would be *reasonably likely* to result in a *substantial and demonstrable risk*" to personal security. 65 P.S. § 67.708(b)(1)(ii) (emphasis added).

protection to home address information. 45 A.3d at 1153-59. Of particular relevance here, the Court explained that, under the "personal security" exception, home addresses are exempt from disclosure only where there is "*actual evidence of the likelihood of a demonstrable risk to the individuals involved.*" 45 A.3d at 1158 (emphasis added) (remanding case for additional fact-finding where agency purported to withhold home address information based on purely general considerations).

In other words, the Court in *Schaefer* held that – apart from the home addresses of law enforcement officers, judges and minors, who, as noted below, receive special protection under the law – individualized proof is necessary in order to establish that a particular person's home address is exempt from disclosure. *Id.* at 1158-59. Indeed, as President Judge Pellegrini noted in his dissent from this Court's last decision in this case, such individualized proof is required in part because the ubiquitous "disclosure of home addresses extremely rarely results in a risk of physical harm to the person whose address has been disclosed," and "[e]xtreme rarity, which is the opposite of reasonable likelihood, does not justify a blanket exemption on home addresses." *PSEA II*, 4 A.3d at 1168-69 (Pellegrini, J., dissenting).

Yet the preliminary injunction issued by this Court, which the petitioners would have the Court now convert to a permanent injunction, entirely eliminates this need for individualized proof, barring access to *all* public school employees' addresses in *all* cases, regardless of whether or not there is any proof at all of a risk to personal security. *See* Preliminary Injunction Order ("[t]he release of the home addresses of all public school employees is hereby stayed" and "[t]he Office of Open Records is enjoined from directing the release of the home addresses of public school employees pursuant to the Right-to-Know Law").[2] That is plainly contrary to the law as currently interpreted.

In addition, even apart from this Court's *Schaefer* decision, it is obvious that the General Assembly did not intend to recognize a general exception for home address information. The statute specifically singles out as categorically exempt from disclosure only the home addresses of "law enforcement officer[s,] judge[s],"

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[2] After the Court entered the Preliminary Injunction, the Office of Open Records issued an advisory stating that "the Office of Open Records will issue no final determinations ordering the release of public employee home addresses." Terry Mutchler, Executive Director, Pa. Office of Open Records, *Advisory Regarding Home Addresses of Public Employees* (July 30, 2009), *available at* https://www.dced.state.pa.us/public/oor/20090730_OOR_Advisory.pdf. Given the nature of petitioners' request, the breadth of the relief they seek, and the OOR's response to the Court's preliminary injunction, it is fair to assume that if the Court permanently enjoins access to school employees' addresses, agencies throughout the Commonwealth will apply that ruling to all government employees in all situations.

65 P.S. § 67.708(b)(6)(i)(C), and persons "17 years of age or younger," *id.* at § 67.708(b)(30). While this Court has rejected the view that this means that only the home addresses of persons who fall within those narrow categories can ever be immune from disclosure, *see Schaefer*, 45 A.3d at 1153-54, there can be no doubt that the legislature's intent was that an *automatic* exception for home addresses only apply in such cases. Indeed, "[t]hese sections would be superfluous if all home addresses of public employees were exempt from disclosure." *PSEA II*, 4 A.3d at 1169 (Pellegrini, J., dissenting); *cf. Purcell*, 25 A.3d at 820 (noting that "statutory structure" of RTKL "strongly indicates that the General Assembly" considered and rejected extending protection of birth date information to persons beyond those specifically mentioned in statute).[3]

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[3] Even under the old law, which provided for substantially less disclosure, there was no blanket protection for home addresses. Rather, there was a case-by-case assessment to determine whether, in any given case, disclosure of home address information was warranted under the facts of that case. *See Goppelt v. Philadelphia Revenue Dep't*, 841 A.2d 599, 604-05 (Pa. Commw. Ct. 2004) ("whether home addresses are discoverable is dependent upon whether the benefit of disclosure outweighs the privacy interests in non-disclosure"); *see also, e.g., Sapp Roofing Co. v. Sheet Metal Workers' Int'l Ass'n*, 552 Pa. 105, 111, 713 A.2d 627, 630 (1998) (plurality opinion) (affirming denial of union's request for address information of contractor's employees "after balancing this weak public interest in disclosure of the information . . . against the individual's right to privacy and personal security"); *Hartman v. Dep't of Conservation and Natural Resources*, 892 A.2d 897, 907(Pa. Commw. 2006) (affirming denial of request of publisher of snowmobiling magazine for addresses of all registered snowmobile owners since "the benefit asserted by Hartman is not to the public at all . . . [t]hus, because there

To be sure, residents of the Commonwealth may in some instances have "some nontrivial interest" in nondisclosure of their home addresses. *Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999). But those interests should be considered under the process authorized by the RTKL, which requires the assertion by the agency of specific reasons why those particular records are exempt from disclosure.[4] What the Petitioners are asking for here is, essentially, that this Court

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are nominal public benefits against to weigh the privacy interest of the snowmobile registrants, the balance tips easily in favor of non-disclosure of the requested information"); *Rowland v. PSERS*, 885 A.2d 621, 629-30 (Pa. Commw. 2005) (affirming denial of association's request for addresses of all PSERS annuitants "because there are no public benefits against which to balance the privacy interest of PSERS' members, the balance tips easily in favor of non-disclosure of the requested information"); *Goppelt*, 841 A.2d at 606 (holding that disclosure of addresses, including home addresses, of delinquent taxpayers "benefits the public"); *Cypress Media, Inc. v. Hazelton Area Sch. Dist.*, 708 A.2d 866, 870 (Pa. Commw. 1998) (affirming denial of request for addresses in teachers' applications where the requester "does not argue that disclosure of this information would be beneficial. There is nothing, therefore, to weigh against the applicants' privacy interests in this information, and the balance necessarily tips in favor of nondisclosure."); *Times Publ'g Co. v. Michel*, 159 Pa. Commw. 398, 411, 633 A.2d 1233, 1239 (1993) (affirming denial of request for gun licensees' addresses where individual's "personal privacy" "outweigh[ed] any public benefit derived from disclosure").

[4] To the extent that petitioners' concern is that, at the ground level, the open records officers receiving requests for public school employees' addresses are ill equipped to assert exceptions based on the particular circumstances of the employees whose addresses are being sought, that is practical problem to be addressed at the agency level. The school districts, like any other agency, can and should make their employees aware that their address information is potentially subject to disclosure under the RTKL and seek specific information from those

read into the RTKL an additional categorical exception for the home addresses of public school employees, even though the General Assembly unambiguously declined to include one.

Finally, granting a permanent injunction in this case also would set a dangerous precedent that could undermine the procedure for litigating issues under the RTKL. The General Assembly established an administrative and judicial appeals process to efficiently resolve disputes regarding record requests and to address legal issues such as those raised in this case. *See* 65 P.S. §§ 67.1101, 1102, 1301, 1302. When an agency denies a request, the law requires requesters to

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employees who may have particular reasons to avoid disclosure. *See, e.g.*, *Commonwealth v. Cole*, 52 A.3d 541, 552 (Pa. Commw. 2012) (privacy concerns relating to home addresses of participants in solar-power program were dispelled by notice to participants by the agency that their addresses were potentially subject to disclosure). While the issue of third-party notice was raised by the Supreme Court in this case, *PSEA III*, 50 A.3d at 1278-79, the answer cannot be simply to create a global exemption for third-party records. The Generally Assembly made a clear choice, in making sweeping amendments to the law, to err on the side of disclosure. If petitioners wish to see that balance recalibrated, they should seek that relief in the legislature. Indeed, the House of Representatives is presently considering a bill – House Bill 441 – that would amend the RTKL to exempt from access the home addresses of public school employees. *See* http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2013&sessInd=0&billBody=H&billTyp=B&billNbr=0441&pn=0450. Until the RTKL has been amended to include this exemption, if that comes to pass, it is not the requester's obligation to notify the public employees, or any other third party, of its request. *See, e.g., E. Stroudsburg Univ. Found. v. OOR*, 995 A.2d 496, 499 n.2 (2010) (affected third parties have rights to intervene in RTKL dispute on appeal); 65 P.S. § 67.1101(c) (same).

seek final determinations by the Office of Open Records or other intermediate agencies and then permits agencies and requesters alike to seek judicial review of those determinations. *Id.* at § 67.1101(a) (agency review), 67.1301 (a) (judicial review). Intervenors have also been given the right to appeal. *See, e.g., E. Stroudsburg Univ. Found. v. OOR*, 995 A.2d 496, 499 n.2 (2010); 65 P.S. § 67.1101(c). These injunction proceedings, however, evade that procedure by seeking the Court's intervention in the absence of any request and any record. If the Court permits Petitioners to bypass the RTKL's appeal procedure – and, indeed, to file suit without a concrete request at issue – it may open the door to similar lawsuits, in which agencies, associations, and individuals may come to this court prematurely, seeking to enjoin the production of records where no request has yet been made and where neither the agency nor the intermediate appellate agency (usually the OOR), which possesses the requisite expertise under the RTKL, has yet opined on whether those records should be released.[5]

In short, the RTKL provides no basis for the particular relief Petitioners seek here, and the relief, if granted, would significantly undermine the RTKL.

[5] An appeal from a decision of an appeals officer to a court automatically stays the appeals officer's ruling. 65 P.S. § 67.1301(b) (same).

II. PETITIONERS' REQUEST FOR A PERMANENT INJUNCTION IS NOT SUPPORTED BY THE PENNSYLVANIA CONSTITUTION.

In addition, there is no constitutional right to privacy that would support the broad-based relief petitioners seek here. Indeed, in *Commonwealth v. Duncan*, 572 Pa. 438, 817 A.2d 455 (2003), our Supreme Court flatly rejected the notion that there is a "right of privacy" in home address information under the Pennsylvania Constitution, adopting the majority view that "a person's name and address is not information about which a person can have a reasonable expectation of privacy." *Id.* at 451, 456, 817 A.2d at 463, 466-67. Although *Duncan* was a case dealing with the status of home address information in the context of an attempt by law enforcement to obtain such information without a warrant, its holding is equally applicable here.

The test the Court applied in *Duncan* for determining the scope of the constitutional right to privacy is the same test that applies in the civil context, and, indeed, the same test this Court applied in this case in initially granting petitioners' application for a preliminary injunction. *See PSEA I*, 981 A.2d at 385. Under that test, the party asserting the privacy right must show (1) that he or she "has exhibited an actual (subjective) expectation of privacy; and (2) [that] society is prepared to recognize the expectation of privacy as reasonable." *Id.* (citing *Duncan*). What the *Duncan* Court concluded in applying this test was that, even if,

in some particular case, an individual might have an actual, subjective expectation of privacy in his or her home address information, that is simply not "an expectation which society would be willing to recognize as objectively reasonable in light of the realities of our modern age." *Duncan*, 572 Pa. at 465, 817 A.2d at 455.

In other words, there is nothing about the Court's reasoning in *Duncan* that applies exclusively to the criminal context in which that case arose. Rather, the Court based its conclusion on general and inescapable facts about our modern age, such as that "people routinely disclose their names and addresses to all manner of public and private entities," that such "information often appears in government records, telephone directories and numerous other documents that are readily accessible to the public," and that "customer lists are regularly sold to marketing firms and other businesses." *Id.* at 456, 817 A.2d at 466; *see also Marin v. Sec. of Commonwealth*, 41 A.3d 913, 915 (Pa. Commw. 2012) (*per curiam*), *aff'd at* --- A.3d ---, 2013 WL 600229 (Pa. 2013) (*Duncan* "explained the absurdity of the argument" that home addresses are protected by a constitutional right to privacy "given our present society and the various means available to obtain an individual's home address").

Although a panel of this Court has suggested that *Duncan*, as a criminal case, "is not applicable to a civil proceeding arising under the Right-to-Know Law." *Hartman v. Dep't of Conservation and Natural Resources*, 892 A.2d 897, 905 n.19 (Pa. Commw. 2006), that fleeting reference was *dicta*, as nothing in that case hinged on whether home addresses are protected by a constitutional right to privacy. *See id.* at 905-07 (deciding the case under statutory exceptions to disclosure); *see also PSEA II*, 4 A.3d at 1170 n.6 (Pellegrini, J., dissenting) (describing *Hartman*'s conclusion about the limited scope of *Duncan* as both "dicta" and "clearly in error"). As such, *Hartman*'s attempt to cabin *Duncan* to the criminal context is not binding on this Court. *See Rendell v. Pa. State Ethics Com'm*, 603 Pa. 292, 302, 983 A.2d 708, 714 (2009) (language in decision that is "unnecessary to the resolution of the controversy" at issue leaves the question that language addresses "open"). At any rate, any confusion over whether *Duncan*'s seemingly general holding applies outside of the criminal context was decisively dispelled in *Marin*, a civil case in which this Court adopted in full *Duncan*'s holding that "there is no constitutional right to privacy in one's home address under the Pennsylvania Constitution." 41 A.3d at 915 (citing *Duncan*).

In short, under *Duncan*, as adopted in *Marin*, there is no constitutional privacy right in home address information. Accordingly, petitioners' constitutional argument in favor of the relief they seek fails as well.

CONCLUSION

For the reasons set forth above, the Coalition respectfully requests that this Court grant Respondents' motion for summary judgment .

Date: April 22, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 22nd day of April, 2013, I caused true and correct copies of the foregoing Brief in Support of Respondents to be served on counsel of record via Federal Express, postage prepaid, addressed as follows:

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Exhibit A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.	:	No. 396 M.D. 2009
Commonwealth of Pennsylvania, Department of Community and Economic Development, Office of Open Records, and Terry Mutchler, Executive Director of the Office of Open Records, Respondents	:	

ORDER

AND NOW, this 28th day of July, 2009, Petitioner's request for a preliminary injunction is granted.

1. The release of the home addresses of all public school employees is hereby stayed until further order of this court.

2. The Office of Open Records is enjoined from directing the release of the home addresses of public school employees pursuant to the Right-to-Know Law until further order of this court.

3. The Office of Open Records is directed to take all reasonable steps necessary to notify public school districts of the Commonwealth of the existence of this litigation and that the release of employee home addresses is stayed until further order of this court.

Opinion to follow.

Rochelle S. Friedman

ROCHELLE S. FRIEDMAN, Senior Judge