

ERIK ARNISON, individually and in his official capacity as Executive Director of the Office of Open Records, and SENATE MAJORITY CAUCUS,

No. 35 MD 2015

THOMAS W. WOLF, in his official capacity as
Governor of the Commonwealth of Pennsylvania,
DEPARTMENT OF COMMUNITY AND
ECONOMIC DEVELOPMENT, and OFFICE OF
OPEN RECORDS,

Respondents

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national network of more than 50 similar organizations that work to promote government transparency.

Among other things, the PaFOIC educates people throughout the Commonwealth about how to use the Right-to-Know Law (“RTKL”). The PaFOIC believes that independence of the Office of Open Records, which implements the RTKL, is vital to the law’s success and that the Governor’s action at issue in this case threatens that independence.

II. THE PAFOIC POSITION

The executive director of the Office of Open Records is not a position that can be terminated at will. Certainly the executive director can be removed for cause as that phrase has been legally determined by the Pennsylvania courts. But to advocate for an interpretation that the head of an agency charged with ruling on the public nature of executive branch records serves at the pleasure of the Governor subverts the critical independent nature of that office.

While some have criticized the timing of Governor Tom Corbett’s appointment of that director and questioned the motives of Governor Wolf’s

attempt to undo it, the PaFOIC assumes both actions were made in good faith.

Yet, no matter how pure the governors' motivations, Governor Wolf's action puts the independence of the Office at risk. Even if unintentional, he has compromised that fundamental principle. The independence of the OOR's director is the very foundation on which its function is based.

The PaFOIC's objection here is not about the individuals who have been or might be the Office's director. The PaFOIC believes that the Office's former director, Terry Mutchler; the director appointed by Gov. Corbett, Erik Arneson; and the current acting director, Nathan Byerly, all possess the experience, skill, and judgment to hold the position.

Governor Corbett's legal, but poorly timed, 11th-hour appointment does not provide justification for Governor Wolf's first-hour firing of an admittedly competent director, an action that threatens the vital independence of the Office of Open Records.

Turning the director into another at-will political position will transform the OOR from an independent arbiter of the Right-to-Know law into an adjunct agency of the governor's office. It will become a political football with no real authority. If the OOR executive director can be removed for any reason at any time, what will stop the next governor (or even this one

later in his term) from removing him or her on the basis of a ruling of that office?

In a democracy, people's faith in government is founded on transparency. That faith is shaken whenever it seems transparency becomes just another political chit to be played. Pennsylvanians must have faith that the Right to Know law is being interpreted fairly and impartially.

In the past six years since passage of the new Right-to-Know law, Pennsylvania has taken strides to bring its government out of the dark and into the light. But we still have a long way to go and a strong and independent Office of Open Records is vital to fulfill the promise of truly transparent government. Governor Wolf's termination of Erik Arneson without cause threatens to take us back to a darker day.

The PaFOIC is deeply concerned about the long-term and negative impact that the Governor's attempt to change the process will have on the integrity of the Office of Open Records, and by extension, on Pennsylvanians' right to access the records of their government.

III. ARGUMENT

The PaFOIC joins in the arguments made by Petitioners in Section IV of their brief at pp 13 – 30.

In addition, the PaFOIC wishes to highlight for the Court two specific points.

The first was made by Petitioner in footnote 6 on page 14 of its brief but is worth specific mention in this *amicus* brief. The contemporaneous legislative history of the RTKL makes clear that the Legislature intended this six-year term to be a sign of the Executive Director's independence from the Governor.

Namely, in remarks on the record on the floor of the Pennsylvania House of Representatives, Representative Josh Shapiro, a strong supporter of then-Senate Bill 1 and a highly visible “point man” in the Right-to-Know reform efforts underway in 2007, said the following:

“[W]hat we do as it relates to the executive director and what we have tried to do to accomplish greater independence for the executive director is to vest that executive director with a 6-year term, a term that does not necessarily run concurrent with one Governor or another, to create more independence for that office[.]”

See Pa. Legislative Journal, Session of 2007, 191st of the General Assembly, No. 112, at 2852 (Dec. 10, 2007) (Representative Josh

Shapiro), available at

<http://www.legis.state.pa.us/WU01/LI/HJ/2007/0/20071210.pdf>

While statements of individual legislators are “not dispositive of legislative intent,” they “may properly be considered as part of the contemporaneous legislative history.” See *Com. v. Wilson*, 602 A.2d 1290, 1294 n.4 (Pa. 1992) (citing 1 Pa.C.S. § 1921(c)(7)); see also *Bd. of Revision of Taxes v. City of Philadelphia*, 4 A.3d 610, 624 n.10 (Pa. 2010) (citing *Wilson*).

The PaFOIC’s second and final specific point is that the placement of the Office of Open Records within the structure of the Department of Community and Economic Development should be seen as a matter of administrative efficiency undertaken collectively by the stakeholders, legislators and the negotiators from the then-Governor’s office in 2007 and not as a signal of its subordination to the Governor’s Office.

As Petitioners say on page 17 of their brief, the Office of Open Records was created as a creature unto itself, a *sui generis* independent administrative agency, unlike any other agency in the Commonwealth. But it had to “live” somewhere and presumably there was hesitation to create an entirely new and administratively separate agency, one that would cost

more to launch and gain no economies of scale from joint operation than one simply “housed” within an existing bureaucratic framework.

In the new Right-to-Know law, the Legislature took the unprecedented step of transferring quasi-judicial powers and authority away from various agencies and departments and *to* the Office of Open Records. This Court should consider the *totality* of the circumstances and factors surrounding the creation not only of the Office itself but more broadly, the unique citizen-oriented remedial tool that is the Right-to-Know law.

The mere placement of the OOR within the executive branch was a gesture of fiscal practicality, not subordination to executive authority. The housing of the OOR within the structure of the Department of Community and Economic Development does not signal that its executive director serves as an at will employee and at the pleasure of the Governor.

The Respondents in the matter even appear to acknowledge the unique nature of the Office of Open Records in footnote 2 on page 2 of its brief in this matter. They acknowledge the OOR’s independence by saying “acting chief counsel of the OOR is responsible to provide legal counsel to OOR in this case and has announced that the OOR intends to take no position on the merits of the issues presented in this case and its ultimate


disposition.” It is inconceivable that a similar paragraph would be written about the Pennsylvania Department of Corrections or PennDOT or any other executive branch agency.

IV. CONCLUSION

For each of these reasons, *amicus curiae* Pennsylvania Freedom of Information Coalition asks the Court to rule in favor of Petitioners and grant their application for summary relief and enter judgment in their favor on all counts in the petition for review, finding the executive director of the Office of Open Records cannot be removed without cause.

Respectfully submitted,

Dated: Mar 10, 15, 11:19 AM



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CERTIFICATE OF SERVICE

I hereby certify that this 10th day of March, 2015, I have served the attached documents to the persons on the dates and in the manner stated below, which service satisfies the requirements of Pa. R.C.P. 121:

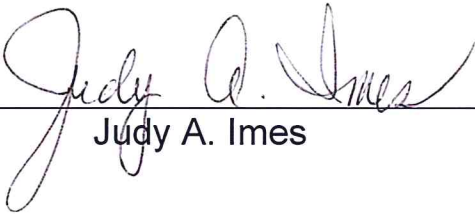
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