

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. ____ MD 2015

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

Petitioners,

v.

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.

**BRIEF IN SUPPORT OF APPLICATION FOR SPECIAL AND
PRELIMINARY INJUNCTION**

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In one of his first official acts, Governor Tom Wolf eliminated an explicit and necessary separation between the Executive Branch and the Office of Open Records, the quasi-judicial watchdog agency that shines the sanitizing light of public scrutiny on the records of government agencies. Indeed, by letter signed seemingly within hours of his inauguration, Governor Wolf purported to “terminate” the rightfully appointed Executive Director of the Office of Open Records, Erik Arneson, without cause. The Governor’s assault on the independence of the Executive Director offends separation of powers principles in the Pennsylvania Constitution and violates the express statutory independence of the Executive Director.

As such, Petitioners Erik Arneson and the Senate Majority Caucus file this brief in support of their application under Pa.R.A.P. 123 and 1532(a) for special and preliminary injunctive relief.

I. BACKGROUND

Act 3 of 2008 marked a total and necessary overhaul of the existing open records laws, resulting in the Right-to-Know Law (RTKL). 65 P.S. §§ 67.101-67.3104. For the first time, government agencies and officials bore the burden to show that a record was not subject to access, as opposed to a requester having to prove that it was. 65 P.S. § 67.305. As part of the overhaul, the Legislature created an independent, quasi-judicial watchdog agency administratively housed in the

Department of Community and Economic Development to both guide and oversee implementation of the law: the Office of Open Records (OOR). 65 P.S. § 67.1310. Among the many responsibilities of the office, the OOR serves as an independent, adjudicatory body, hearing open records appeals from citizens denied access to records by local and Commonwealth agencies. 65 P.S. §§ 67.503(a), 67.1101, 67.1102. Among the Commonwealth agencies whose appeals are heard by the OOR is the Governor's Office. 65 P.S. § 67.102 (“COMMONWEALTH AGENCY.’ Any of the following: ... (i) The Governor’s Office.”).

By statute, the independent OOR is headed by an Executive Director. 65 P.S. § 67.1310(b). The Executive Director is appointed by the Governor and is entitled to serve a fixed six-year term, which is conspicuously not coterminous with the four-year term of the appointing Governor. 65 P.S. § 67.1310(b). A second fixed six-year term is also permitted. 65 P.S. § 67.1310(b). The Executive Director has a number of exclusive duties under the law, both judicial and administrative. Judicially, the Executive Director is required to (1) appoint the appeals officers, who effectively serve as the judges in RTKL appeals, and (2) monitor cases appealed to the OOR. 65 P.S. § 67.1310(d)-(e). Further, the Executive Director monitors all draft outgoing Final Determinations of the OOR, exercising independent judgment on the drafts prepared by the appeals officers, free from pressures by the parties or other officials within the Executive Branch.

The Executive Director then responds to the appeals officers with edits and/or direction to be implemented before the Final Determinations are issued, which edits and/or direction are sometimes based on legal principles not previously considered and sometimes contrary to the draft Final Determinations as originally prepared by the appeals officers. On the administrative side, the Executive Director has the duty to ensure that the obligations of the OOR are carried out and the duty to control the appropriation of the OOR, which appropriation “shall be under the jurisdiction of the executive director.” 65 P.S. § 67.1310(d)-(f).

On January 13, 2015, then-Governor Tom Corbett appointed Petitioner Erik Arneson as the second ever Executive Director of the OOR. *See* Jan. 13, 2015 letter (attached as Exhibit A). Executive Director Arneson received his fixed six-year commission on the same date, designating his term as January 13, 2015 through January 13, 2021. *See* Commission (attached as Exhibit B). Executive Director Arneson took the oath of office on January 16, 2015. *See* Oath (attached as Exhibit C). Since his lawful appointment, Executive Director Arneson has fulfilled the duties of the post, including through the date of this application.

Despite Executive Director Arneson’s six-year appointment, newly inaugurated Governor Tom Wolf purported to “terminate” Arneson’s appointment, “effective immediately,” by letter dated January 20, 2015, which was delivered to Arneson by messenger on January 22 at approximately 2:10 PM. *See* Jan. 20, 2015

letter (attached as Exhibit D). Governor Wolf did not cite any displeasure with Executive Director Arneson's performance or cite to any "cause" for his removal. Instead, despite Governor Corbett's lawful use of his appointment power to fill an empty seat at the OOR, Governor Wolf baldly stated that the lawful process "lacked transparency, was of questionable timing and appears to have been rushed through." *See id.* In a twist of irony, Governor Wolf removed the head of the independent, quasi-judicial agency that oversees his office due to his purported concern about the trust of Pennsylvania's citizens in state government. *See id.*

In spite of Governor Wolf's unlawful power grab, and in spite of being unceremoniously stripped of his ID/access card, office key, parking pass, and computer, as well as his pay and benefits, Executive Director Arneson reported to work on Friday, January 23. Unless this Court directs otherwise, he will continue to do so to fulfill his quasi-judicial and administrative duties, which are statutorily committed to him under the RTKL for a fixed six-year term.

In light of the above abuses, Petitioners filed a petition for review with this Court seeking a writ of mandamus as well as declaratory relief. *See Gernert v. Lindsay*, 2 Pa. Commw. 576, 579-80 (1971) (holding mandamus is proper remedy to seek reinstatement to office properly held); 42 Pa.C.S. § 7532. In addition to Executive Director Arneson, Petitioners include the Senate Majority Caucus. The

Caucus seeks relief to, among other things, restore the three-way balance of power commanded by the Pennsylvania Constitution.

II. ARGUMENT

Under Pennsylvania law, a petitioner should be granted a preliminary injunction upon a showing of the following six elements:

(1) a clear right to relief; (2) immediate and irreparable harm in the absence of an injunction; (3) restoration of the status quo; (4) no adequate remedy at law exists and the injunction is appropriate to abate the alleged harm; (5) greater injury will result by not granting than by granting the injunction; and (6) the preliminary injunction will not adversely affect the public interest.

Wyland v. West Shore Sch. Dist., 52 A.3d 572, 582 (Pa. Cmwlth. 2012) (citing *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 828 A.2d 995 (Pa. 2003)). Although each of these elements are treated as “essential prerequisites” to the grant of an injunction, *John G. Bryant Co., Inc. v. Sling Testing & Repair, Inc.*, 369 A.2d 1164, 1167 (Pa. 1977), a court need not be persuaded to the same degree by each element. *See Pa. Public Util. Comm’n v. Process Gas Consumer Group*, 467 A.2d 805 (Pa. 1983). Each of these elements are satisfied here.

A. Clear right to relief: Because the Executive Director oversees the quasi-judicial function of the OOR and because the Legislature expressed a clear intent to insulate the Executive Director from removal, the Governor is forbidden from removing the Executive Director without cause.

A “clear right” to relief is synonymous with the requirement that a party be able to show that it is “likely to prevail on the merits.” *See Dragani v. Borough of*

Ambler, 37 A.3d 27, 30 n.5 (Pa. Cmwlth. 2012) (citing *Summit Towne Ctr.*, 828 A.2d at 1000-01). To satisfy this factor, “the party seeking an injunction need not prove the merits of the underlying claim, but need only show that substantial legal questions must be resolved to determine the rights of the parties.” *Com. ex rel. Corbett v. Snyder*, 977 A.2d 28, 43 (Pa. Cmwlth. 2009) (citing *Fischer v. Dep’t of Pub. Welfare*, 439 A.2d 1172 (Pa. 1982)). Substantial legal questions exist here.

1. The Executive Director can only be removed for cause.

The crux of the present application, and the petition for review, is the answer to the following question: Can the Governor remove the Executive Director of the OOR without cause? Under the Pennsylvania Constitution, and under the RTKL itself, the answer is no.

Material to this answer is Article VI of the Pennsylvania Constitution, which concerns public officers such as the Executive Director.¹ Section 1 of Article VI discusses the appointment of officers not provided for in the Constitution, stating: “All officers, whose selection is not provided for in this Constitution, shall be elected or appointed as may be directed by law.” Pa. Const. art. VI, § 1. This section applies to the matter at bar since the RTKL provides as follows regarding the Executive Director: “Within 90 days of the effective date of this section, the

¹ A person is a “public officer” if the person “is appointed or elected to perform duties of a grave and important character, and which involve some of the functions of government, for a definite term.” *Werner v. Zazyczny*, 681 A.2d 1331, 1337 (Pa. 1996). It is not anticipated that any party will meaningfully challenge that the Executive Director of the OOR readily meets this test.

Governor shall appoint an executive director of the office who shall serve for a term of six years. The executive director may serve no more than two terms.”

65 P.S. § 67.1310(b). Further, in addition to appointment powers, Article VI also supplies guidance on the removal of public officers, stating in relevant part:

All civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed civil officers, other than judges of the courts of record, may be removed at the pleasure of the power by which they shall have been appointed.

Pa. Const. art. VI, § 7.

Despite the apparently limitless authority to remove appointed civil officers at the pleasure of the appointing authority, the Supreme Court has held that the Governor’s authority under Article VI, Section 7 is circumscribed in at least two situations: (1) when the appointee is “to an administrative board or commission which, as authorized by law, is invested with judicial powers and duties”; and (2) when the Legislature, by statute, has expressed its intent that the incumbent cannot be removed absent cause. *See Bowers v. Pa. Labor Relations Bd.*, 167 A.2d 480, 485 (Pa. 1961); *Watson v. Pa. Turnpike Comm’n*, 125 A.2d 354, 357 (Pa. 1956). Both of those limitations apply to the matter at bar.

(a) The Executive Director has direct duties in the quasi-judicial function of the OOR, and thus cannot be removed absent cause.

In *Bowers v. Pennsylvania Labor Relations Board*, the Supreme Court was asked to decide whether a member of the Pennsylvania Labor Relations Board (PLRB) who had been appointed by a prior Governor could be removed without cause by the next Governor. *See* 167 A.2d at 480. The Governor in *Bowers* argued he had an absolute right under the Pennsylvania Constitution to remove the appointed member under the then-text of Article IV, Section 4 (which text is identical to current Article IV, Section 7), which gave him the power to remove appointed officers at his pleasure. *Id.* The majority of the Court rejected that argument on two grounds, the first of which is discussed below, the second of which is explored at length here.

The *Bowers* majority found it a “compelling reason” to deny the Governor the power to remove at will the appointed member of the PLRB because the PLRB was an administrative board that was “invested with judicial powers and duties.” *See* 167 A.2d at 484-85. The Court reasoned that because the Pennsylvania Constitution is predicated on a government formed by three coordinate branches of government, none which has the right to “impinge on the province of another,” to allow the Governor to remove the PLRB member without cause “would plainly offend against this basic constitutional concept.” *Id.* at 484. The Court noted the

importance of the “division of powers among equal and independent legislative, executive and judicial departments,” and noted that the division was one of the “salutary checks and balances” that “inheres in” the State Constitution. *See id.* at 585. The Court went on to explain that if a person in the position of the PLRB member (with his quasi-judicial power) was entitled to his position only at the pleasure of the Governor, he could not be “depended upon to maintain an attitude of independence against the latter’s will.” *Id.* In the end, the *Bowers* majority rejected the Governor’s claimed power to remove at will because to adopt his position would have been to “preclude a quasi-judicial board from employing that degree of fairness, impartiality and objectivity which should and, in good conscience, must attend the exercise of judicial power.” *Id.* at 486.

Applying the principles of *Bowers* to the matter at bar, Governor Wolf’s attempted exercise of power is also an assault on the separation of powers principles in the Pennsylvania Constitution. The OOR unquestionably performs quasi-judicial functions, and is a “quasi-judicial tribunal.” *Com. v. Donahue*, 98 A.3d 1223, 1233 (Pa. 2014) (citing *PSEA ex. rel. Wilson v. Pa. Office of Open Records*, 50 A.3d 1263, 1277 (Pa. 2012)); *see also* 65 P.S. § 67.1101(a)-(b). The Executive Director, in turn, has a direct role in these judicial functions. For instance, the Executive Director alone is authorized to appoint the attorneys who will act as the appeals officers in RTKL appeals, which officers effectively fill the

role of judges in such appeals. *See* 65 P.S. § 67.1310(d) (“The executive director shall appoint attorneys to act as appeals officers...”); *see also* 65 P.S. § 67.1101(b) (describing adjudicatory role of appeals officers). Further, the Executive Director alone is statutorily required to monitor all cases appealed to the OOR and he is the only person given the power of the purse over the OOR’s operations, which include its appellate review activities. *See* 65 P.S. § 67.1310(e)-(f). He also monitors all draft outgoing Final Determinations of the ORR, exercising independent judgment on the drafts prepared by the appeals officers. *See* Petition for Review ¶ 18. His review may and does include edits and/or directions to the appeals officers to be implemented before the Final Determinations are issued, which edits and/or direction are sometimes based on legal principles not previously considered and sometimes contrary to the draft Final Determinations as originally prepared by the appeals officers. *See id.*

In light of these direct roles in the judicial function of the OOR, the Executive Director of the OOR is substantively indistinguishable from the PLRB member in *Bowers*. *Cf. Bowers*, 167 A.2d at 487 (“The determinant, so far as the constitutional inhibition on the appointer’s power of removal at his pleasure is concerned depends upon *the character of the powers* exercisable by the appointed.” (emphasis in original)). The quasi-judicial power of the Executive Director, as with the PLRB member, must be preserved to prevent the perception

(or the reality) that the Executive Branch, through the Governor, is gaining an inappropriate advantage in our tripartite government. It must not be lost that the OOR has direct oversight over the Office of Governor in that the OOR—and the OOR alone—is tasked with hearing direct appeals from the Governor’s RTKL decisions. 65 P.S. §§ 67.102, 67.503(a), 67.1101, 67.1102. The opportunity for inappropriate control of the OOR by making its leader (and the appointer of its judges) subject to the whims of the Governor is distinctly real, which is precisely what *Bowers* forecloses. *See* 167 A.2d at 485. Indeed, it is not hard to imagine that were a Governor consistently displeased with decisions of the OOR, *see, e.g., Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Cmwlth. 2013), and were he imbued with the power to change its leader at will, he would overmaster the OOR and also defeat the RTKL’s purpose of “promoting access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.” *Levy v. Senate*, 65 A.3d 361, 381 (Pa. 2013) (quotations removed). But as *Bowers* explains, the principle of separation of powers in the Pennsylvania Constitution prevents this overmastering and interference.

Accordingly, in this matter, Governor Wolf did not and does not have the power to remove Executive Director Arneson absent cause. And as such, Petitioner Arneson is entitled to a writ of mandamus to restore him to his office, *see Gernert*

v. Lindsay, 2 Pa. Commw. 576 (1971), and all Petitioners are entitled to declaratory and injunctive relief to prevent ongoing and future violations. *See* 42 Pa.C.S. § 7532.

(b) The Legislature in the RTKL has expressed its intent that the Governor cannot remove the incumbent Executive Director absent cause.

In *Watson v. Pennsylvania Turnpike Commission*, the Supreme Court held that the Legislature, in creating a public office, has the absolute right to “impose such terms and limitations with reference to the tenure or removal of an incumbent as it sees fit.” 125 A.2d at 356. The Court reasoned that the removal power of public officers in the Pennsylvania Constitution could be appropriately tempered by the appointment power in the Constitution, *if* the Legislature so provided by law in creating an office. *See id.* (citing former provisions Article XII, Section 1 and Article VI, Section 4). The question of whether the Legislature conditioned the tenure of an officer and limited removal by the Governor is “one of intent to be gleaned from the statute creating or regulating the office.” *Id.* at 357.

In *Watson* and in multiple subsequent decisions, including *Bowers* described above, courts have found an express legislative intent to limit an officer’s removal where the Legislature created boards or commissions with members serving staggered terms. *See, e.g., Watson*, 125 A.2d at 357; *Bowers*, 167 A.2d at 484; *Com. ex. rel. Sortino v. Singley*, 392 A.2d 1337, 1340 (Pa. 1978). As this Court has

succinctly described the staggered terms rule: “In cases where the language is not clear, the Pennsylvania Supreme Court has determined that statutory language setting fixed terms of office with staggered expiration dates demonstrates the legislature’s intent that the office not be subject to removal by the appointing authority.” *See Venesky v. Ridge*, 789 A.2d 862, 864 (Pa. Cmwlth. 2002). Notably, in *Venesky*, this Court did not find staggered terms or other indicia of legislative intent to limit removal, and therefore held that an appointee to the Game Commission could be removed without cause. *See id.* at 865.

According to a news report on Friday, Governor Wolf intends to defend his unlawful actions here under the purported authority of *Venesky*. *See* Charles Thompson, *Pennsylvania Governor Tom Wolf Points to Tom Ridge-Era Case as Setting Precedent for Dismissal of State’s Open Records Officer*, PennLive.com (Jan. 23, 2015), available at: http://www.pennlive.com/politics/index.ssf/2015/01/gov_tom_wolf_points_to_tom_rid.html (last visited Jan. 25, 2015). But the anticipated reliance on *Venesky* is misplaced for several reasons.

As an initial matter, for the reasons set forth above regarding *Bowers*, separation of powers principles absolutely forbids Governor Wolf’s actions. Indeed, on that basis alone, this Court can rule in favor of Petitioners (and if the Court so chooses, the analysis below is unnecessary to disposition in Petitioners’ favor).

Yet beyond this reason, *Venesky* absolutely does *not* say that the *only* test for legislative intent is staggered terms. In fact, the Court in that matter was clear to state that it could not find a limitation on removal only because there was an “absence of statutory language governing the removal of game commissioners *or from which we might infer legislative intent to limit the power of removal*[.]” *Id.* at 866 (emphasis added). This Court was perhaps chary to adopt a rule saying that staggered terms is the only way to show legislative intent because in *Watson* our Supreme Court made abundantly clear that it is legislative intent that controls the inquiry, not just a finding staggered terms. *See Watson*, 125 A.2d at 357.

Here is why that is material. While in the RTKL there are admittedly no staggered terms in the way that such staggered terms have been found in *Watson* and progeny, a constellation of factors taken together demonstrate a clear legislative intent to keep the Executive Director independent from the whims of the Governor.

To begin, the Executive Director serves for a fixed six-year term, which noticeably exceeds the four-year term of any appointing Governor. While in *Venesky* the terms at issue were eight-year terms, that was in the context of a multi-member commission. Here there is but one Executive Director, and the Legislature made sure that with a fixed six-year term the one Director would outlast any one term of a Governor. Significantly, the contemporaneous legislative history of the

RTKL makes plain that the Legislature intended the Executive Director to be above the whims of the Governor: “[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> (last visited Jan. 25, 2015). The Executive Director’s intended statutory independence is also attested to by Senator Dominic Pileggi, the prime sponsor of the bill. *See* Pileggi affid. ¶¶ 3, 5-8 (attached as Exhibit E); *see also* Washington State Attorney General’s Office and Washington State Auditor’s Office, Open Government Task Force Report, at 4 (Nov. 2009) (summary of presentation by Terry Mutchler regarding Pennsylvania’s RTKL), available at [http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Open_Government/Open_Government_Task_Force/OG_Task_Force_Report\(1\).pdf](http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Open_Government/Open_Government_Task_Force/OG_Task_Force_Report(1).pdf) (last visited Jan. 25, 2014).²

² “A Task Force member asked about the independence of her office. Ms. Mutchler answered that the Pennsylvania Right to Know Law provides a six-year term for her position, and she may only be removed for cause. It is very critical for the board to be independent.” *See* Task Force Report, at 4.

Next, the OOR has jurisdiction over appeals from nearly every public agency and department in the Commonwealth, including the Office of the Governor. *See* 65 P.S. §§ 67.102, 67.503(a), 67.1101, 67.1102. Because of this oversight role of such a wide-swath of the government, independence is absolutely vital to the functioning of the office. *See supra*. To find that the Legislature at once gave vast oversight to the OOR but at the same time gave one entity the power to take immediate retaliatory action against the OOR if it so chooses is a finding that ignores the overall structure of the law. *See* Pileggi affid. ¶ 7. Indeed, the credibility of OOR’s judicial decisions could be and would be quickly called into question were the agency not above Governor’s at-will reach.

Further, the Legislature gave the Executive Director the exclusive power to expend the appropriation of the OOR, even though the OOR is within a cabinet office of the Governor (the Department of Community and Economic Development). *See* 65 P.S. § 67.1310(f). This spending power signals a clear intent by the Legislature that it wanted the Executive Director to be above the reach of even the usual organizational structure of the Executive Branch, including its head, the Governor. *See* Pileggi affid. ¶ 9.

Finally, the overall purpose of the RTKL must be taken into account. As noted above, the RTKL is intended to “promot[e] access to official government information in order to prohibit secrets, scrutinize actions of public officials, and

make public officials accountable for their actions.” *Levy*, 65 A.3d at 381 (quotations removed). Promoting access to government records and information is best and most efficiently done when the leader of the OOR cannot be removed when one government official is displeased with his actions or the actions of the office. Only through this independence is appropriate scrutiny given to the government through its public records. *See* Statement of Terry Mutchler, Information Policy, Census, and National Archives Subcommittee, at 4 (Sept. 17, 2008), available at <https://www.dced.state.pa.us/public/oor/testimony.pdf> (last visited Jan. 25, 2014).³

In sum, while this case does not fit into the staggered terms rule, it absolutely does fit within the principles of *Watson* and *Venesky*, which provide that if a statute reveals legislative intent to put a public official above the Governor’s power of removal, then that legislative intent must be honored. As shown, such legislative intent exists here and the Governor’s overreach cannot be countenanced.

³ “Illinois’ Public Access Counselor was created within the Office of Attorney General and while I had autonomy – that autonomy was a result of that particular Attorney General’s approach and is not guaranteed in the future. I am currently implementing a very similar law and ombudsman-like office in Pennsylvania. I was appointed by Governor Ed Rendell as Executive Director of the newly created Office of Open Records. Instead of leaving the concept of independence and autonomy to the discretion of any particular Administration, the Pennsylvania Legislature established the Office as an independent office within an existing state agency. The law required the Governor to make a six-year appointment of the Executive Director. Further, the law provides that the Executive Director has hiring authority and also jurisdiction over the budget. This component of independence is critical in ensuring that the system isn’t stacked in favor of government agencies, and more importantly so that the public knows and believes that it has an independent referee when battling bureaucracy to obtain records of government. Having an assured independence is the only way that OGIS will be able to fairly and evenly apply the law to ensure compliance.” *See* Statement of Terry Mutchler, at 4.

2. All Petitioners have standing to pursue their claims for relief.

With the present matter, Petitioners anticipate that Respondents may challenge standing of some of the parties before the Court. And so, in an effort to make plain all Petitioners' right to relief and to facilitate expedited relief, a brief analysis on standing is set forth here, which demonstrates that all parties are rightly before the Court.

A litigant satisfies the requirements of standing when it can demonstrate a substantial, direct, and immediate interest in the outcome of the litigation. *See McCord v. Pa. Gaming Control Bd.*, 9 A.3d 1216, 1219 (Pa. Cmwlth. 2010).

As to Executive Director Arneson, his substantial, direct, and immediate interest in the outcome here is patent: the claims he files seek to restore him to his duly appointed office and restore the rights that inure to him in his capacity as the lawfully appointed Executive Director. *Cf. Gernert*, 2 Pa. Commw. at 582-83.

The Caucus likewise has a substantial, direct, and immediate interest in the outcome here for at least three reasons.

First, the Governor's unlawful removal of the Executive Director in the middle of an appointed, fixed six-year term stands to create a vacancy in that office (if the removal is allowed to stand), which will lead to the unnecessary expenditure of Senate time and resources. Indeed, under the Pennsylvania Constitution and Title 65 of the Pennsylvania Statutes, this in-term vacancy means that the Senate

now has the right to receive nominations from the Governor and the duty to act upon those nominations. *See* Pa. Const. art. IV, § 8(b); 65 P.S. § 92. But these efforts are needless, and will be wasteful, given that the Governor did not have the authority to remove the lawful incumbent. The Caucus, which is a “integral constituent of the Senate,” *see Precision Mktg. v. Com.*, 78 A.3d 667, 675 (Pa. Cmwlth. 2013), has a substantial, direct, and immediate interest in avoiding this waste of Senate time and resources.

Second, as this Court recently articulated, when a legislator is given certain rights under a statute (such as a right to notice of proposed expenditures), the legislator has standing to pursue a claim to protect those rights. *See Corman v. NCAA*, 74 A.3d 1149, 1161 (Pa. Cmwlth. 2013). Here, the Petitioner is the Caucus, which is a collective group of legislators. Those legislators all have rights under the RTKL in that it commands that the OOR shall provide an annual report to the General Assembly. 65 P.S. § 67.1310(a)(9). The RTKL also provides that it is the Executive Director who “shall ensure that the duties of the Office of Open Records are carried out,” 65 P.S. § 67.1310(e), which means that it is the Executive Director who is ultimately responsible for providing the report to the General Assembly. With Governor Wolf unlawfully removing the duly appointed Executive Director, the Caucus is being deprived of its statutory right as a constituent part of the Senate to receive a proper report.

Third and finally, the Governor’s attempt to commandeer to himself greater control over a quasi-judicial agency offends constitutional separation of powers principles. *See supra* (discussing *Bowers*). The Caucus as a constituent part of the Senate has an unqualified interest in protecting the power of the Legislative Branch against the encroachment of the Executive Branch into areas beyond its constitutional boundaries, lest the Legislature’s powers under the Pennsylvania Constitution be irreparably diminished. *See, e.g., Jefferson County Court Appointed Empl. Ass’n v. Pa. Labor Rels. Bd.*, 985 A.2d 697, 706-707 (Pa. 2009)⁴; *Shapp v. Sloan*, 391 A.2d 595, 604 (Pa. 1978) (admonishing Executive Branch’s attempt to usurp General Assembly’s appropriation power).

B. Immediate and irreparable harm: The removal of Executive Director Arneson violates his statutory right to the office, and violates the separation of powers principles of the Pennsylvania Constitution. These violations are ongoing, irreparable harms.

“[W]henver a violation of a statute is found, such violation constitutes irreparable harm per se, and injunctive relief is appropriate[.]” *Com. v. Burns*, 663 A.2d 308, 312 (Pa. Cmwlth.1995) (citing *Pa. Pub. Utility Comm. v. Israel*, 52 A.2d

⁴ “[T]o maintain the independence of the three branches of government, our system embodies a separation of powers. This separation depends on two distinct concepts, as embraced by the framers of both the federal and Pennsylvania constitutions: (1) no branch may usurp a function belonging to another and each must operate within its own separate sphere of power; and (2) a system of checks and balances exists, which prevents one branch from acting unchecked. The allocation of these powers among the three branches of government serves to avert the danger inherent in the concentration of power in any single branch or body because [t]he accumulation of all powers, legislative, executive, and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” *Jefferson County Court Appointed Empl. Ass’n v. Pa. Labor Rels. Bd.*, 985 A.2d 697, 706-07 (Pa. 2009) (internal citations omitted).

317 (Pa. 1947)). This axiom applies with equal, if not greater force, in the context of constitutional violations. *See Stilp v. Com.*, 910 A.2d 775, 787 (Pa. Cmwlth. 2006), *aff'd*, 974 A.2d 491 (Pa. 2009). Respondents here are violating at least one statute and the Pennsylvania Constitution.

For instance, Erik Arneson's statutory right to occupy and exercise the rights of the Executive Director have been summarily violated by his unlawful ouster. *See* 65 P.S. § 67.1310(b)-(f). This constitutes immediate and irreparable harm *per se*.

As to the Caucus, the Governor's actions violate the inherent principles of separation of powers in the Pennsylvania Constitution. *See Bowers*, 167 A.2d at 484-85; *see also Jefferson County Court*, 985 A.2d at 706-07 (discussing separation of powers). This injury is present and ongoing until remedied by the restoration of Executive Director Arneson.

C. Status quo: Restoring Executive Director Arneson to his office will preserve the status quo that existed before Governor Wolf's unlawful activities.

Before Governor Wolf hastily and unlawfully acted, Erik Arneson was the duly appointed Executive Director of the OOR and was competently fulfilling his statutory duties. Governor Wolf did not in his letter, or in any public accounts, raise any question of Arneson's competence to fulfill the role. Hence no reason

exists to not restore the status quo while the substantial legal questions before this Court are resolved.

D. No adequate remedy at law and reasonably suited: Special and preliminary injunctive relief are the only remedies available under the circumstances and the relief requested will resolve the injury.

Absent injunctive relief, Petitioners have no other remedy available to them to resolve the daily, irreparable harm that is being inflicted. Further, as set forth in the attached proposed orders, the relief requested is narrowly tailored to abate the existing injuries. Indeed, Petitioners simply request that the Court do three things: (1) provide that Erik Arneson shall remain as the Executive Director of the Office of Open Records pending further order of the Court; (2) enjoin the Department of Community and Economic Development from interfering with timely payment of Arneson's salary, including back pay, his full access to benefits, and his exercise of the Office of Executive Director of the OOR; and (3) enjoin Governor Wolf from making any further attempts to remove Erik Arneson as Executive Director.

E. Balance of harms: Greater injury will occur to Petitioners by denying the injunction than by granting it.

As explained above, the injury presently being suffered by Petitioners is daily, ongoing, and irreparable. By restoring Erik Arneson to his duly appointed role, no harm will fall to the Respondents, while the irreparable injury will abate.

Granting the injunction merely restores the status quo as it existed before the offending acts.

F. Public interest: The public interest favors granting injunctive relief to Petitioners.

Finally, the public interest is best served here by granting the injunction. Allowing Executive Director Arneson to fulfill his duties will ensure that the OOR's operations continue uninterrupted, and ensures that the public will receive all services to which they are entitled under the RTKL. Leaving the post empty, meanwhile, impairs the statute's success.

III. CONCLUSION

One of Governor Wolf's first official acts as Governor was to tear down the wall of independence between the Office of Governor and the OOR. Yet the RTKL, the Pennsylvania Constitution, and settled legal principles plainly forbid this abuse of power. While this breach of the appropriate governmental balance is fully examined by the Court, Petitioners respectfully request that the Court immediately grant special and preliminary injunctive relief for each of the reasons set forth above. Such relief is necessary to eliminate the ongoing irreparable harm being suffered by Petitioners and is necessary to restore the appropriate status quo.

Respectfully submitted,

CONRAD O'BRIEN PC


By: _____

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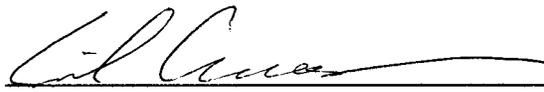
Dated: January 26, 2015

Attorneys for Senate Majority Caucus

VERIFICATION

I, Erik Arneson, verify that the statements in the foregoing Application for Special and Preliminary Injunction are true and correct to the best of my knowledge, information and belief. I make this verification subject to 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: 26 Jan 2015

A handwritten signature in black ink, appearing to read "Erik Arneson", written over a horizontal line.

Erik Arneson

Exhibit A



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR
HARRISBURG

THE GOVERNOR

January 13, 2015

Mr. Erik Arneson
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120

Dear Mr. Arneson:

It is with great pleasure that I appoint you to serve as the Executive Director of the Office of Open Records (OOR). This appointment is made pursuant to section 1310(b) of the Right-to-Know Law (RTKL), 65 P.S. § 67.1301(b). The term of office prescribed by the RTKL is six (6) years and until a successor is appointed and qualified, which shall compute from the date of this letter of appointment.

A commission reflecting your appointment will soon be issued and delivered to you, along with instructions for the administration of the constitutional oath of office and the filing of the written oath of office with the Department of State as required by law.

After years of distinguished service to the Senate of Pennsylvania and the people of this Commonwealth, I am confident that you will perform your new responsibilities as the Executive Director of the OOR both honorably and admirably. Best wishes as you embark on a position of public service that is vital to the people of Pennsylvania and the continued success of the Commonwealth's democratic form of government.

Sincerely,

A handwritten signature in black ink that reads "Tom Corbett".

TOM CORBETT
Governor

Exhibit B

Commonwealth of Pennsylvania



Governor's Office

Erik Arneson

of the County of

Lebanon

in the Commonwealth of Pennsylvania

Greetings:

Reposing especial trust and confidence in your prudence, integrity and ability, and under authority of the Constitution and Laws of the said Commonwealth, in such case made and provided, I have appointed and do by these presents commission you to be an

Executive Director for the Office of Open Records

To Have and To Hold the said office, together with all the rights, powers and privileges thereunto belonging, or by law in anywise appertaining, to serve until until January 13, 2021 and until your successor is appointed and qualified, if you shall so long behave yourself well.

This appointment to compute from January 13, 2015.

Given under my hand and the Great Seal of the State, at the City of Harrisburg, this thirteenth day of January in the year of our Lord, two thousand and fifteen and of our Commonwealth the two hundred and thirty-ninth.



Tom Corbett

Governor

Casey A. Riddle

Secretary of the Commonwealth

Exhibit C

COMMONWEALTH OF PENNSYLVANIA



RECEIVED

2015 JAN 16 PM 1:43

Department of State
Bureau of C.E.L.

CONSTITUTIONAL OATH OF OFFICE

COMMONWEALTH OF PENNSYLVANIA)

) SS:

County of Dauphin)

I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity.

Erik Arneson

SIGNATURE OF OFFICER

Erik Arneson

NAME OF OFFICER

Executive Director for the Office of Open Records

OFFICER TITLE

Taken, sworn and subscribed before me this 16 day of January A.D. 20 15.

William J. ...
Signature of Person Administering Oath
Judge, Superior Court

(Seal)

NOTE: The foregoing oath shall be administered by some person authorized to administer oaths.

The oaths of STATE OFFICERS, JUSTICES OF THE SUPREME COURT and JUDGES OF THE SUPERIOR AND COMMONWEALTH COURTS shall be filed in the office of the Secretary of the Commonwealth.

The oaths of other judicial and county officers shall be filed with the Prothonotary of the county in which the oath is taken.

Exhibit D



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR
HARRISBURG

THE GOVERNOR

January 20, 2015

Mr. Erik Arneson
Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Re: Executive Director Position, Office of Open Records

Dear Mr. Arneson:

Section 1310(a) of the Pennsylvania Right to Know Law establishes an Office of Open Records ("OOR") in the Department of Community and Economic Development, an Executive Department of the Commonwealth falling within the jurisdiction of the Governor. Further, Section 1310(b) of the Pennsylvania Right to Know Law empowers the Governor to appoint the OOR's Executive Director See 65 P.S. §§ 67.1310(a) and 1310(b).

As you are aware from my office's communications with you last week, I have serious concerns regarding your recent appointment to the OOR Executive Director position by former Governor Corbett. The process leading to your appointment lacked transparency, was of questionable timing and appears to have been rushed through. It is precisely this style of governing that causes Pennsylvania's citizens to become skeptical and lose trust that their state government is acting in their best interest.

Accordingly, I am terminating your employment as the OOR Executive Director – *effectively immediately*. My Administration will engage in a comprehensive and fully transparent executive search process that is open to all interested applicants.

Thank you again for your years of dedicated service to the citizens of the Commonwealth of Pennsylvania.

Respectfully,

A handwritten signature in blue ink that reads "Tom Wolf".

Tom Wolf
Governor

Exhibit E

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ERIK ARNESON, individually and in his official capacity as Executive Director of the Office of Open Records, and SENATE MAJORITY CAUCUS,	:	
	:	
	:	
	:	
	:	
Petitioners,	:	No. ___ MD 2015
	:	
v.	:	
	:	
	:	
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.	:	

AFFIDAVIT OF SENATOR DOMINIC PILEGGI

I, Dominic Pileggi, hereby attest to the following:

1. I am a Pennsylvania State Senator representing the 9th Senatorial District of the Commonwealth of Pennsylvania. I reside in Delaware County, Pennsylvania.

2. I make this affidavit in support of the Petition for Review and Application for Special and Preliminary Injunctive Relief filed in the above matter.

3. I was the prime sponsor of the legislation (Senate Bill 1 of the 2007-08 Regular Session) that came to be Act 3 of 2008, the Right-to-Know Law. Specifically, I was the prime sponsor and principal drafter of the language in Act 3 that, *inter alia*, created the Office of Open Records (OOR) and established the position of Executive Director of OOR.

4. As such, I am intimately familiar with the legislative intent of all of the provisions of Act 3, and with respect to the instant matter, the legislative intent as to the independence of OOR.

5. It was the clear and unquestioned intent of Act 3 to establish OOR as an agency independent of the Executive Branch, *i.e.*, the Governor.

6. Further, it was the legislative intent of Act 3 to establish that the Executive Director of OOR be appointed for a 6-year term and not to be subject to removal at the pleasure of the Governor.

7. Establishing OOR as an agency independent of the Executive Branch is necessary because OOR hears and decides appeals filed by citizens denied records by the Executive Branch. OOR cannot possibly do that job in an impartial manner if the Executive Director is subject to immediate removal by the Governor for a decision with which the Governor disagrees.

8. By establishing the Executive Director's term as 6 years, and thereby preventing the possibility of the Executive Director's removal by the Governor, the legislative intent underpinning Act 3 – that OOR was to be an independent office not subject to political influence – was fulfilled.

9. Further demonstration of this legislative intent can be found elsewhere in Act 3's language. For instance, Act 3 provides that the annual appropriation for OOR shall be in a separate line item and under the jurisdiction and control of the Executive Director. *See* 65 P.S. § 67.1310(b)(f). Vesting this total control of OOR's funding with the Executive Director furthered the legislative intent of Act 3 by insulating OOR, and its Executive Director, from any attempt by the Executive Branch to exert undue influence by withholding funds.

I make these statements subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Dated: 1-26-15



Senator Dominic Pileggi

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Via Hand Delivery:
Governor Thomas W. Wolf
225 Main Capitol Bldg.
Harrisburg, PA 17120

Via Hand Delivery:
Department of Community and
Economic Development
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Via Hand Delivery:
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Via Hand Delivery
Kathleen Kane, Esq.
Attorney General
15th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

Dated: January 26, 2015


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