

IN THE BUCKS COUNTY COURT OF COMMON PLEAS
CIVIL ACTION

County of Bucks	:	
55 East Court Street	:	
Doylestown, PA	:	NO.: 2020-05950
	:	
Petitioner,	:	
v.	:	
	:	
BRETT SHOLTIS	:	
4801 Lindle Road	:	
Harrisburg, PA 17111	:	
	:	
Respondent.	:	

BRIEF IN SUPPORT OF THE COUNTY’S PETITION FOR REVIEW

BY:

BUCKS COUNTY LAW DEPARTMENT
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I. INTRODUCTION

The Bucks County Office of Open Records (“County”) is appealing a Pennsylvania Office of Open Records (“OOR”) decision which granted Mr. Brett Sholtis’ (“Respondent”) appeal of the County’s denial of his Right-to-Know request pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.* Respondent’s request sought a video in possession of the Department of Corrections (“DOC”) which depicted “Inmate Kimberly Stringer [being] hit with pepper spray by correction officers.” The County denied Respondent’s request because the video is exempt from public access because it constitutes a record relating to a criminal investigation, § 708(b)(16), a record relating to a noncriminal investigation, § 708(b)(17), investigative information which cannot be disclosed pursuant to the Criminal History Record Information Act (“CHRIA”), 18 Pa.C.S. § 9106(c)(4), and jeopardize public safety, physical security, and personal security, §§ 708(b)(1)(ii), 708(b)(2), and 708(b)(3) of the RTKL. Respondent appealed to the OOR and the OOR subsequently granted his appeal which required the County produce the video within 30 days.

The County respectfully requests that this Honorable Court reverse the OOR’s decision. The County maintains that the video is exempt from public access pursuant to Sections 708(b)(16), 708(b)(17), 708(b)(1)(ii), 708(b)(2), 708(b)(3) of the RTKL and Section 9106(c)(4) of CHRIA.

II. PROCEDURAL HISTORY

On July 17, 2020, the County received Respondent’s Right-to-Know request which sought video footage of an inmate being detained by Correctional Officers in the Bucks County Correctional Facility.

On July 23, 2020, the County denied Respondent’s request. In its denial, the County cited to Section 708 of the RTKL and Section 9106(c)(4) of CHRIA.

On August 6, 2020, Respondent appealed to the OOR and challenged the County's denial and its grounds for disclosure. The OOR invited both parties to supplement the record.

On August 14, 2020, the County submitted a position statement restating its grounds for denial. In support of its position, the County submitted the affidavit of Matthew Weintraub, Esquire, the District Attorney of Bucks County.

On October 16, 2020, the OOR issued its Final Determination which granted Respondent's appeal and required that the County provide the video within thirty days of the date of the determination. The OOR determined that the County failed to establish that the requested video footage related to a criminal investigation.

On November 13, 2020, the County filed a Petition for Review of the OOR's Final Determination with the Court of Common Pleas of Bucks County.¹ In support of its appeal, the County submitted the affidavit of David Kratz, Director of the Bucks County Correctional Facility.

On December 21, 2020, Respondent replied to the County's Petition for Review.

On July 21, 2021, the Honorable Denise M. Bowman ordered that an Evidentiary Hearing take place on October 25, 2021. In preparation for the Evidentiary Hearing, the parties agreed to submit briefs to narrow the issues of merit and provide argument in advance of the hearing.

III. ARGUMENT

a. *Standard of Review*

In the instant matter, this Honorable Court functions as fact finder and exercises a standard of review akin to de nova review. See Bowling v. Office of Open Records, 990 A.2d 813, 818 (Pa.

¹ This Honorable Court has jurisdiction over this Petition for Review pursuant to Section 1302(a) of the RTKL. 65 P.S. § 67.1302(a) ("Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a local agency issued under section 1101(b) . . . a requester or local agency may file a petition for review . . . with the court of common pleas for the county where the local agency is located.").

Commw. Ct. 2010). This Honorable Court “may substitute its own findings of fact for that of the [OOR].” Id. This Honorable Court, when reviewing an appeal from the OOR, is “entitled to the broadest scope of review.” Bowling, 990 A.2d at 820. The RTKL does not prohibit the court's supplementation of the record. Id.

When a local agency such as the County² seeks to prove a record is exempt from public access, the burden of proving so is on the County by a preponderance of the evidence. By this standard of proof, “the existence of a contested fact must be more probable than its nonexistence.” Pennsylvania State Troopers Association v. Scolforo, 18 A.3d 435, 439 (Pa. Cmwlth. 2011).

b. *The video is exempt from public disclosure because it relates to a criminal investigation.*

The County respectfully requests that this Honorable Court find that this video relates to a criminal investigation. The RTKL exempts the following records that relate to a criminal investigation from public disclosure:

- (ii) Investigative materials, notes, correspondence, videos and reports.

- (iv) a record that includes information made confidential by law or court order

- (vi) A record that, if disclosed, would do any of the following:
 - (A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.
 - (B) Deprive a person of the right to a fair trial or an impartial adjudication.

§ 708(b)(16). As noted in Cal. Borough v. Rothey, 185 A.3d 456 (Pa. Commw. Ct. 2018), the RTKL does not define “criminal investigation” but our Supreme Court has stated that it “clearly and obviously refers to an official inquiry into a possible crime.” A.3d at 465 (quoting Pa. State Police v. Grove (Grove II), 161 A.3d 877, 893 (Pa. 2017)).

² Section 102 of the RTKL defines local agency as “[a]ny local, intergovernmental, regional, or municipal agency.”

In support of this appeal, the County will present the testimony of Mr. David Kratz, Director of the Bucks County Correctional Facility. Mr. Kratz will explain that the video was requested by and provided to the Bucks County District Attorney's Office to conduct a criminal investigation surrounding the event in question. Further, the Bucks County Correctional Facility creates and maintains the footage to preserve a documentary record to be used in a possible investigation.

Additionally, the County has already presented an affidavit of Matthew Weintraub, Esquire, the District Attorney of Bucks County. He explains the criminal investigation that took place regarding the video in question. The District Attorney's Office became aware of allegations that an inmate of the Bucks County Correctional Facility was being mistreated by correctional officers at the jail.” Because of these allegations, a Bucks County Detective was assigned to investigate whether any corrections officer had engaged in criminal conduct with respect to their treatment of the above-mentioned inmate, and/or engaged in illegal retaliatory conduct toward the inmate “whistleblowers.”

Mr. Weintraub reviewed the video along with other materials obtained during the criminal investigation. Ultimately, it was determined that criminal charges were not warranted in this case against any BCCF corrections officer. In the case at hand, if this video is made available to the public, it may deprive the above-mentioned inmate of fairness in any upcoming criminal matter whether they be a witness, defendant, or victim.

The above argument, that this video was provided to the Bucks County DA to pursue criminal charges, was unavailing to the OOR. In its Final Determination, the OOR held that the video was not exempt because “[t]o hold that a record sought from an agency is exempt merely because it was reviewed at some point during an investigation conducted by a different agency

[the District Attorney's office], would significantly expand the criminal investigative exemption beyond our existing precedent." OOR Fin. Determ., p. 7.

The County respectfully requests that this Honorable Court find that this video relates to a criminal investigation and is therefore exempt from public disclosure. Further, the County respectfully requests that this Honorable Court substitute its judgment for that of the OOR, as it is apparent that the OOR did not sufficiently comprehend that the County of Bucks is a cohesive unit in which the BCCF works closely and sometimes in tandem with the DA's office.

c. The video is exempt from public disclosure because it constitutes noncriminal investigative material.

The County respectfully requests that this Honorable Court find that this video relates to a noncriminal investigation. Section 708(b)(17)(ii) exempts from disclosure "[a] record of an agency relating to a noncriminal investigation, including ... (ii) Investigative materials, notes, correspondence and reports . . . (iv) A record that includes information made confidential by law." 65 P.S. § 67.708(b)(17)(ii), (iv). A "noncriminal" investigation is one not intended to consider prosecution and, in this context, "investigation" means "a systematic or searching inquiry, a detailed examination, or an official probe." Department of Health v. Office of Open Records, 4 A.3d 803, 811 (Pa. Cmwlth. 2010). The inquiry, examination, or probe must be conducted as "part of the agency's official duties." Id. at 814.

Regarding whether the video constitutes noncriminal investigative material, the County will have Mr. Kratz testify and explain that the BCCF and its staff are sometimes required to physically respond with force due to the actions and/or behaviors of an inmate. These interactions are known as "use of force" ("UOF") events. Sometimes UOF events require the deployment of OC spray. During UOF events, prison staff utilize handheld recording devices to document the events. Specifically, a member of prison staff is equipped with the recording device to create

documentary evidence of the interaction. UOF events are created and maintained by the BCCF to document “UOF” events and are used exclusively as an evidentiary record to be used in conjunction with noncriminal and criminal investigations. The UOF videos are maintained and catalogued by prison staff.

The County argues that this video constitutes investigative materials used for a non-criminal investigation. This video was created by the BCCF to document and review UOF events in conjunction with noncriminal and/or criminal investigations. Creating a safe environment for inmates and correctional officers is squarely within the BCCF’s official duties. Therefore, the County respectfully requests that this Honorable Court find that this video relates to a noncriminal investigation and is therefore exempt from public disclosure.

d. *The video is exempt from public disclosure because it constitutes a record protected under CHRIA.*

The County respectfully requests that this Honorable Court find that this video is exempt from public disclosure because it is a record protected under CHRIA, 18 Pa.C.S. § 9106(c)(4). Section 3101.1 of the RTKL provides that, “[i]f the provisions of this act regarding access to records conflict with any other federal or state law, the provisions of this act shall not apply.” 65 P.S. § 67.3101.1. To further bolster the RTKL’s deference to other law, Section 708 reiterates that a record is exempt from disclosure if it “includes information made confidential by law or court order.” 65 P.S. §§ 67.708(b)(16)(iv), 67.708(b)(17)(iv).

CHRIA prohibits disseminating “investigative information” to any persons or entities other than criminal justice agents and agencies. 18 Pa.C.S. §9106(c)(4). Specifically, Section 9106(c)(4) states:

Investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency which requests the

information in connection with its duties, and the request is based upon a name, fingerprints, modus operandi, genetic typing, voice print or other identifying characteristic.

18 Pa.C.S. §9106(c)(4). “Investigative information” is defined under CHRIA as “[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing” 18 Pa.C.S. §9102. The operative word in the above definition is “assembled,” which means to “bring or gather together into a group or whole.” Pennsylvania State Police v. Kim, 150 A.3d 155, 160 (Pa. Cmwlth. 2016) (citing Am. Heritage Dictionary 134 (2nd Coll. ed. 1985)).

In the case at hand, the video constitutes investigative information because it is assembled routinely to review inmate and correctional officer behavior and whether it amounts to criminal and noncriminal behavior. The video shows a UOF incident that was filmed pursuant BCCF’s internal processes and subsequently reviewed by the Bucks DA’s office as part of a criminal investigation into alleged correctional officers’ conduct. As attested to by Mr. Weintraub, it also shows a woman in the middle of a mental health episode, specifically engaging in self-destructive behavior and repeatedly refusing to comply with directions. Respondent does not qualify as a criminal justice agency and therefore his access to this video would be improper under CHRIA.

The County respectfully requests that this Honorable Court find that this video is exempt from public disclosure because it is a record protected under CHRIA.

e. The video is exempt from public disclosure Sections 708(b)(1)(ii), 708(b)(2), and 708(b)(3) of the RTKL.

Section 708(b)(1)(ii) of the RTKL exempts from public disclosure:

A record, the disclosure of which:

(ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.

65 P.S. § 67.708(b)(1)(ii). To apply this exemption, the County must show “by a preponderance of the evidence, “(1) a ‘reasonable likelihood’ of (2) a ‘substantial and demonstrable risk’ to a person’s personal security.” Rothey, 185 A.3d at 468 (citing Delaware County v. Schaefer ex rel. Philadelphia Inquirer, 45 A.3d 1149, 1156 (Pa. Cmwlth. 2012)). Section 708(b)(2) exempts from disclosure:

A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity.

§ 67.708(b)(2). To raise this exemption, the County must show “by a preponderance of the evidence, that (1) the record at issue relates to a law enforcement or public safety activity; and (2) disclosure of the record would be ‘reasonably likely’ to threaten public safety or a public protection activity.” Rothey, 185 A.3d at 468 (citing Carey v. Department of Corrections, 61 A.3d 367, 374-75 (Pa. Cmwlth. 2013)). Section 708(b)(3) exempts from disclosure: “[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system.” § 67.708(b)(3).

As the Rothey Court notes, all of the above RTKL exceptions use a “reasonable likelihood” standard. Further, the Rothey Court interpreted “reasonably likely” part of the test to mean “the likelihood that disclosure would cause the alleged harm, requiring more than speculation.” Id. The Rothey Court ultimately found that the police department in that case did not meet the reasonable likelihood test because it did not offer more than speculation or conjecture. To demonstrate that the video in Rothey had a reasonable likelihood to of endangering public safety, physical security, and personal security, the police department proffered that someone could determine blind spots

from the video and subsequently sneak in a weapon if they happen to be detained. Rothey, 185 A.3d at 468.

The case at hand is distinguishable from Rothey. Mr. Kratz has upwards of seventeen years of experience with the Bucks County Department of Corrections and in corrections in general. At the evidentiary hearing, he will testify to his opinion and belief that the release of this video will constitute an undue and improper risk to the personal security of staff, providers, and offenders at the BCCF and would threaten the safety and security of the BCCF. Mr. Kratz believes the public disclosure of the video will do the following:

1. reveal how prison staff responds to certain incidents;
2. reveal the attendant procedures and protocols accompanying those responses;
3. reveal to offenders the protocols, procedures, and actions utilized by prison staff in responding to situations;
4. reveal knowledge of expected prison staff and/or third-party provider behavior in specific situations which can be exploited by offenders and jeopardize the safety of individuals within the prison facility, as well as compromise the security of the facility itself;
5. show inmates how to exploit the information learned from the video and create a risk to the personal security of individual staff members and third-party providers that could endanger their life and physical well-being;
6. reveal measures regarding:
 - a. the custody and control of offenders,
 - b. regarding the protection of prison staff, offenders, third-party providers, and the public, and
 - c. designed to maintain the security of the Bucks County Correctional Facility and protect those within the facility;
7. revealing the particulars of security protocols or procedures, which poses a threat to staff, offenders, third-party providers, and the general public, including:
 - a. those related to movements and interactions between staff, providers,
 - b. OC spray deployment;
8. give knowledge to an offender of the particulars of prison staff responses which would enable an offender to develop countermeasures and subvert the objectives of prison staff or providers regarding:
 - a. the custody and control of offenders,

- b. the security of the correctional facility, and
- c. the protection of the public, staff, third-party providers, and offenders.

Unlike the police department in Rothy, Mr. Kratz will explain what will actually be shown in the videos and how release of such footage would jeopardize public safety, physical security, and personal security. Mr. Kratz is not merely speculating; based on his extensive history at the BCCF, he is familiar with the procedures and protocols of correctional officers responding to UOF incidents. He maintains these UOF videos for use in investigations to certify that correctional officers are following the proper protocol. It is therefore reasonably likely that the procedures and protocols seen on this video will reveal information that threatens personal security, public safety, preparedness, or public protection activity as well as endanger the safety of a building.

For the foregoing reasons, the County respectfully requests that this Honorable Court find that the video is exempt from public disclosure pursuant to Sections 708(b)(1)(ii), 708(b)(2), and 708(b)(3) of the RTKL.


IV. CONCLUSION

Based on the above argument, the County respectfully requests this Honorable Court enter an Order reversing the October 16, 2020, Final Determination of the OOR; declaring that the requested records are not public records and exempt from disclosure pursuant to Sections 708(b)(16), 708(b)(17), 708(b)(1)(ii), 708(b)(2), 708(b)(3) of the RTKL and Section 9106(c)(4) of CHRIA; and declaring that the County is not required to take any further action on Requester's July 17, 2020, request for records.

Respectfully submitted,

JOSEPH J. KHAN
County Solicitor

Date: 8/17/21


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CERTIFICATE OF SERVICE

I, Robbie L. Cain, do hereby certify that on or about the August 17, 2021, I am serving the foregoing document upon the following person(s), in accordance with the Pennsylvania Rules of Civil Procedure, by emailing the same as follows:

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