

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CIVIL DIVISION

BUCKS COUNTY, :
Petitioner :
v. : No. 2020-05950
: :
BRETT SHOLTIS, :
Respondent :

RESPONDENT’S BRIEF

Introduction and History of the Case

This appeal stems from a request submitted to Bucks County (“County”) in July 2020 by Respondent Brett Sholtis, a health reporter for WITF,¹ under the Right to Know Law, 65 P.S. §§ 67.101 et seq., (the “RTKL”) Mr. Sholtis requested video recordings from inside the Bucks County Correctional Facility (the “Jail”) showing corrections officers pepper-spraying Kimberly Stringer, a mentally ill inmate. Mr. Sholtis has written extensively about families struggling to find appropriate care for loved ones with mental illness,² including a 2019 profile of Ms.

¹ WITF is a non-profit community-based organization licensed by the Federal Communications Commission to operate the non-commercial broadcasting frequencies WITF-TV, WITF-FM and WYPM-FM. WITF also provides Educational Services and operates witf.org, Pennsylvania Public Radio (a statewide public radio service) and Media Solutions, a production services division. WITF Enterprises, a wholly owned for-profit subsidiary of WITF, operates Radio Pennsylvania, a statewide news network for commercial radio stations.

² Brett Sholtis, ‘*She’s breaking down’: Inmates at Bucks County jail decry treatment of suicidal woman with severe mental illness*, WITF (June 15, 2020) <https://www.witf.org/2020/06/15/inmates-at-bucks-county-jail-allege-nightmare-conditions-for-suicidal-woman-with-severe-mental-illness/>

Brett Sholtis, *Five days after inmates speak out, woman with severe mental illness gets moved from Bucks County jail*, WITF (June 19, 2020) <https://www.witf.org/2020/06/19/five-days-after-inmates-speak-out-woman-with-severe-mental-illness-gets-moved-from-bucks-county-jail/>

Brett Sholtis, *Praying for involuntary commitment: One family struggles to help their bipolar daughter*, WITF (July 11, 2019)

Stringer. His reporting helped lead to Ms. Stringer's release from the Jail and subsequent placement at a psychiatric facility. That work was later recognized with a Radio Television Digital News Association Regional Edward R. Murrow Award. The video Mr. Sholtis seeks of corrections officers' treatment of Ms. Stringer at the Jail would further his ongoing reporting about how county jails respond to inmates in mental health crises, and better inform the public about this important issue. Mr. Sholtis is a 2021-2022 Rosalynn Carter investigative mental health fellow whose reporting focuses on how the interactions between the criminal justice system and those with mental illness can be more effective and humane.

Despite the significant public interest in the requested video recordings, the County denied Mr. Sholtis's request, arguing that the responsive videos were exempt from disclosure under the Right to Know Law. Following the County's denial, Respondent appealed to Pennsylvania's Office of Open Records ("OOR"). In October 2020, the OOR granted Respondent's appeal, requiring the County to provide the responsive records to Mr. Sholtis within 30 days. Instead, the County appealed to this Honorable Court, arguing that the requested videos are not public records and urging the Court to reverse the OOR's Final Determination.

For the reasons herein, Respondent respectfully requests that this Court adopt the findings and conclusions of the Appeals Officer and affirm the Final Determination of the OOR. Alternatively, Respondent requests that the Court conduct an *in camera* review of the requested

https://www.witf.org/2019/07/11/praying_for_involuntary_commitment_one_family_struggles_to_help_their_bipolar_daughter-2/

records and order disclosure subject to limited redaction of any specific information that the Court determines is exempt from public disclosure under the RTKL.

Argument

I. The exemptions cited by the County do not apply to the requested video.

A. The RTKL's non-criminal and criminal investigative exemptions are inapplicable and do not bar release of the video.

The County argues that it is barred from releasing the requested video by the criminal and non-criminal exemptions of the Right to Know Law, §§708(b)(16) and §708(b)(17), respectively. Neither section is applicable here.

In order for an agency to assert the non-criminal investigation exemption, Section 708(b)(17) of the Right-to-Know Law, 65 P.S. § 67.708(b)(17), it must demonstrate that “a systemic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a non-criminal matter. *Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810–11 (Pa. Commw. 2010). Further, the inquiry, examination or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814. An official probe only applies to non-criminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. 2012).

The non-criminal investigation exemption is inapplicable here for two independent reasons. First, the County has not asserted that an investigation took place at all, much less one that would be sufficiently “systemic or searching” to qualify as an official probe. *Pa. Dep’t of Health*, 4 A.3d at 811; *see* County Br. at 6-7 (describing what the County “sometimes” does without even asserting an investigation here). Records created in the normal course of work, including routine inspections for compliance with protocols, do not amount to investigations. *Pa.*

Dep't of Labor & Indus. v. Darlington, 234 A.3d 865, 876-877 (Pa. Commw. 2020). When an agency “has not demonstrated that it . . . acted in a way that surpassed its routine duties of collecting the inspection reports,” it has not met the standards for noncriminal investigations exemption to disclosure. *Id.* at 876-877; *see also Pa. Dept. of Health*, 4 A.3d at 813 (quoting *Wiley v. Woods*, 141 A.2d 844, 847-48 (Pa. 1958) to observe that “the courts focused on the nature of the particular documents involved and whether they were created during the course of an investigation”). Because routine safety inspections conducted pursuant to statute do not rise to the level of a noncriminal investigation, routine video recordings made here for administrative purposes without any express statutory authority also do not rise to the level of a noncriminal investigation.

The County’s brief does not assert a specific investigation, and is bolstered by the initial attestation it submitted in this case. The attestation of David Kratz, Deputy Director of the Jail (Ex. F of Petition for Review), lacks specific, detailed information establishing that the video recordings of this incident were part of a discrete investigation, rather than created in the normal course of events. Much like in *Darlington*, where the attestation was vague, Mr. Kratz’s attestation addresses video coverage in broad terms, not as applied to a specific, detailed investigation. *Id.* at 876 (“Mr. Kegg only lists what the safety inspection reports entail and gives a very general description of what the Department does in both investigations and inspections. Importantly, Mr. Kegg also does not distinguish between what a routine field **inspection** involves compared to an **investigation** of boiler-related incidents, notwithstanding that the statute distinguishes between the two activities[.]”) (emphasis in original). Kratz’s declaration instead reflects the routine nature of the video recordings, and their use to check compliance with protocol rather than “investigate” anything.

Second, even if the County did conduct a non-criminal investigation, and even if that investigation was sufficiently systemic or searching, the County has not established that it was acting within its legislatively granted fact-finding and investigative powers, as required for the exemption to apply. While the County argues that it records physical interactions between staff and inmates to document “use of force” incidents to potentially be used at a later time as evidence, this type of video recording is not within the scope of the Jail’s legislatively granted fact-finding and investigative powers. Where purported “investigatory” authority is merely incidental to an agency’s statutorily-defined powers, the exemption does not properly apply. *See Dep’t of Public Welfare v. Chawaga*, 91 A. 3d 257, 259 (Pa. Cmwlth 2014) (citing *Johnson v. Pennsylvania Convention Center Authority*, 49 A.3d 920, 925 (Pa. Commw. 2012)). Simply put, any investigation undertaken by the Jail is “ancillary” to its legislatively granted powers, which are detention of individuals pre-trial or post-conviction.

The County cannot invoke the criminal investigation exemption, Section 708(b)(16) of the Right-to-Know Law, 65 P.S. § 67.708(b)(16), for similar reasons. While the Bucks County District Attorney may at some point have reviewed the video, his office did not create the video or initiate any process. The Pennsylvania Supreme Court has long held that such incidental reviews are an insufficient basis to invoke the exemption because, were it otherwise, the exemption would swallow the Right to Know Law’s general rule of public disclosure. *See Pa. State Police v. Grove*, 161 A.3d 877, 992 (Pa. 2017) (“To 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, would significantly expand the criminal investigative exemption beyond our existing precedent.”). The OOR was correct to reject application of this exemption here in light of clear precedent.

Moreover, the OOR accurately described the nature of the request. Mr. Sholtis did not seek records from the Office of the District Attorney.

“The Request was originally submitted to the Bucks County Correctional Facility and was then sent to the County’s Office of Open Records, who responded to the Request. The Request seeks records in the possession of the County, not records in the possession of the District Attorney’s office. At no point did the Requester submit a request to the District Attorney’s Office. The County has its own Open Records Officer, distinct from the District Attorney’s Office. Nothing in the record before the OOR reflects that the County, including the correctional facility—the agency to whom the Request was submitted—has conducted any investigation relating to these records.”

The OOR correctly recognized that the Jail lacks prosecutorial authority and did not engage in a criminal investigation at all. The OOR’s determination that the criminal and non-criminal investigation exemptions cannot apply should be affirmed.

B. CHRIA does not apply to non-investigatory videos.

The County’s attempted reliance on the Criminal History Record Information Act (“CHRIA”), 18 Pa.C.S. §§ 9101-9183, fails for the same reasons that it cannot invoke the criminal or non-criminal investigative exemptions. As the County admits, to invoke this exemption it must establish that the requested video is “investigative information,” County Br. at 7, and the County does not argue that CHRIA’s definition sweeps more broadly than the exemptions for criminal and non-criminal investigative records. Nor could it. Dashcam videos, which are created in similar circumstances when police engage with individuals in an analogous manner to the corrections officers responding to a cell here, “are not automatically exempt from disclosure as criminal investigative records under Section 708 of the Right to Know Law or under CHRIA.” *Cal Borough v. Rothey*, 185 A.3d 456, 466 (Pa. Commw. 2018) (describing *Pa. State Police v. Grove*, 161 A.3d 877, 894 (Pa. 2017)).

In any event, the County's own characterization of the facts here belies its argument. The County describes CHRIA as barring dissemination of "investigative information," which is information resulting from "any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing." Br. at 7-8. But it then characterizes Ms. Stringer, as the time the video was recorded, as being "in the middle of a mental health episode," and "engaging in self-destructive behavior," *id.* at 8—none of which amounts to a criminal incident or criminal wrongdoing on her part. And as to the corrections officers, the County at no point suggests that they believe the officers engaged in criminal wrongdoing. To the contrary, the County describes the video recordings as having been "assembled routinely," *id.*, and later describing the videos as being maintained "to certify that correctional officers are following the proper protocol." *Id.* at 11. There is no evidence in the record to suggest that the use of pepper spray in this instance (or generally) was treated as a possible violation of criminal law, and indeed, its routine use at the Jail and other facilities across the Commonwealth suggests it is not viewed as such. Accordingly, CHRIA has no application here.

C. Disclosing the video will not threaten public safety.

To invoke the public safety exemption to the RTKL, as the County attempts to do here, an agency must show that the record relates to a law enforcement or public safety activity, and that disclosure would be reasonably likely to threaten public safety or a public protection activity. *Adams v. Pa. State Police*, 51 A.3d 322. (Pa. Commw. 2012). "Reasonably likely" requires "more than speculation." *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. 2013). "Speculative and conclusory" statements that do not explicitly connect the records to a reasonable likelihood of threatening public safety in a specific way cannot support

the exemption. *Id.* at 376. And the harms themselves cannot be speculative and must be reasonably connected to the potential release of the records.

Pennsylvania courts have rejected several of the County's proposed bases to invoke this exemption. Among them, the County's description of taking these videos as a matter of course "for use in investigations to certify that correctional officers are following the proper protocol" County Br. at 11, has been squarely rejected. Police dashcam videos, for example, are not automatically exempt from disclosure, "even when they relate to or result in a criminal investigation[,] because their primary purpose is to 'document troopers' performance of their duties in responding to emergencies. . . ." *Borough of Pottstown v. Suber-Aponte*, 202 A.2d 173, 185 (Pa. Cmwlth. Ct. 2019) (citing *Pa. State Police v. Grove*, 161 A.3d 877, 885 (Pa. 2017)). This includes, specifically, video of incidents in jail cells. *Borough of Pottstown*, 202 A.3d at 185-86 (describing "footage that captured Requester's detainment and subsequent processing").

Here, the County's attempt to rely on the public safety exemption fails for at least three reasons. First, most of the purported potential harms it asserts lack sufficient specificity. The County claims, for example, that release of the video would "reveal how prison staff respond to certain incidents," or "reveal measures regarding the custody and control of offenders," or "reveal[] the particulars of security protocols or procedures," while repeatedly reciting a vague, generalized concern about the "security of the correctional facility[.]" These proposed harms fall far short of the specificity the law requires for the public safety exemption to apply. Second, even if they were sufficiently specific, which they are not, the County fails to connect any of these purported harms to release of the requested video. That is, it has not explained how release of the video at issue would reveal tactics to inmates at the Jail, who (even assuming they would have the ability to view the video while there) have experience in the very tactics in question and

can observe their use against other people at the Jail. Simply put, the County has not explained how inmates at the Jail could learn something about “how prison staff responds to certain incidents” from a video they will not see while incarcerated, any more than by talking to a fellow detainee who had pepper spray used on them.

Beyond that, even if the harms asserted by the County were sufficiently specific, and even if the County could connect those purported harms to release of the video, the County’s proposed connection is simply too speculative. Indeed, the County’s proffer about what Mr. Kratz will testify is exactly the sort of “cascading sequence of events” that cannot qualify for the public safety exemption. *York Cnty v. Coyle*, 182 C.D. 2020, at *1 (Pa. Commw. Aug. 6, 2021). Proposing “a supposed increase” in an incarcerated person’s ability to act in a nefarious way, “triggering a security-related decision by Prison staff, which the inmate might be able to exploit at some point in the future” does not qualify for the exemption. *Id.* It makes even less sense in the context of the records request here, which seeks information about how the Jail handles detainees having involuntary mental health crises. The Jail does not—and cannot—assert that those individuals will rationally think back to knowledge they’ve gained through somehow watching this video, and rationally act accordingly during a crisis. Yet that speculative, cascading sequence of events is exactly what the County offers here. This matters particularly in light of the Right to Know Law exemptions, which “must be narrowly construed.” *Id.* (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commw. 2010)). For these reasons, the public safety exemption cannot apply.

II. Even if the Court finds that an exemption to disclosure applies, the proper remedy is limited redaction and release of the video recordings.

Even if the Court concludes that the County has carried its burden to show that one of the exemptions it cites applies here, that would not justify withholding the requested video in its

entirety. This owes partly to the nature of the Right to Know Law; because it is “remedial legislation” its “exceptions from disclosure must be narrowly construed.” *See, e.g. Governor’s Office of Admin. v. Purcell*, 35 A.3d 811 (Pa. Commw. 2011). But it also owes to binding precedent about video recording and the types of redactions that allow for disclosure despite public safety or other concerns.

The Commonwealth Court has required specificity from correctional defendants seeking to invoke the public safety exemption to prevent disclosure of video footage to allow for redaction and public release of such recordings to the greatest extent possible. When correctional defendants demonstrate tactical risks of release that might harm public safety—for example, that release would reveal blind spots or “the layout of the non-public areas” of a facility—the exemption has been found only to apply to those portions of the footage that cause those risks. *Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 184 (Pa. Commw. 2019). In such circumstances “the trial court [must] determine which parts of the footage do[es] so, and are thus exempt” while requiring disclosure of the rest. *Id.*

Similarly, the Pennsylvania Supreme Court has observed that even where videos relate to an investigation, the only parts that may be withheld are those that actually relate to the investigation—and the video aspect, without sound, generally does not. *Pa. State Police v. Grove*, 161 A.3d 877, 895 (Pa. 2017). Where a video is created by law enforcement even specifically while undertaking a stop or preparing to engage someone, they are not “*per se* protected investigative information.” *Id.* In such circumstances, the proper remedy is redacting the “investigative information,” which is typically only that “contained in the audio portion of witness interviews” as opposed to any video or indeed, other audio. *Id.* at 896. Accordingly, if this Court were to find that an investigation exemption applies here, redaction, not wholesale

withholding of the video, would be the appropriate remedy. The County has given no reason to believe that it could not redact portions or aspects of the video after an *in camera* review by this Court. *See Cent. Dauphin Sch. Dist. v. Hawkins*, 253 A.3d 820 at 834 (Pa. Commw. 2021) (quoting *Evans v. Federal Bureau of Prisons*, 951 F.3d 578 (D.C. Cir. 2020)) (discussing government ability to redact). If the Court believes that an exemption applies, it should undertake such a review and order redaction and release.

III. Conclusion

For the foregoing reasons, Respondent respectfully requests that this Court adopt the findings and conclusions of the Appeals Officer and affirm the Final Determination of the OOR. Alternatively, Respondent requests that the Court conduct an *in camera* review of the requested records and order disclosure subject to limited redaction of any specific information that the Court determines is exempt from public disclosure under the RTKL

Date: Sept. 7, 2021

/s/Paula Knudsen Burke
Paula Knudsen Burke
REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS
Supreme Court ID No. 87607
PO Box 1328
Lancaster, PA 17608
pknudsen@rcfp.org

Jim Davy
PA Bar ID #321631
ALL RISE TRIAL & APPELLATE
P.O. Box 15216
Philadelphia, PA 19125
(215) 792-3579
jimdavy@allriselaw.org

CERTIFICATE OF SERVICE

I, Paula Knudsen Burke, hereby certify that on Sept. 7, 2021, I served a true and correct copy of the foregoing Brief, via email, upon the following individuals:

Robbie Cain, Esq.
Assistant County Solicitor
Law Department – County of Bucks
55 E. Court St., 5th Floor
Doylestown, PA 18901
rlcain@buckscounty.org

Kyle Applegate, Esquire
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
kyapplegat@pa.gov

Dated: Sept. 7, 2021

/s/ Paula Knudsen Burke
Paula Knudsen Burke
pknudsen@rcfp.org