

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CIVIL DIVISION

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

RESPONDENT’S REPLY BRIEF TO PETITIONER’S SUPPLEMENTAL BRIEFING

INTRODUCTION AND PROCEDURAL HISTORY

The instant Right to Know Law appeal stems from a request submitted to Bucks County (the “County”) in July 2020 by Brett Sholtis (“Respondent”), a health reporter for WITF/Transforming Health. Respondent sought a video recording from inside the Bucks County Correctional Facility showing corrections officers pepper-spraying Kimberly Stringer, a woman experiencing a mental health crisis while detained pretrial. The County denied the Request on July 23, 2020, arguing that the responsive video was exempt under the criminal investigation and noncriminal investigation exemptions the Right to Know Law (“RTKL”), 65 P.S. § 67.708(b)(16), (17), and that the record was otherwise exempt under the Criminal History Record Information Act (“CHRIA”), 18 Pa.C.S. § 9106(c)(4).

Respondent appealed to the Office of Open Records (“OOR”), which overturned the County’s denial and directed it to provide the video to Respondent. Instead of doing so, the County appealed the OOR’s Final Determination to this Honorable Court on November 13, 2020. Both parties submitted their principal briefs to this Court last year. However, on December 16, 2021, during in-court proceedings, the County argued for the first time that the release of the video was barred not only by the RTKL, but also under Act 22 of 2017 (“Act 22”). The County’s invocation of Act 22 at this late state in the litigation is untimely and should be barred.

If this Court considers the merits of the County’s Act 22 argument, it is unavailing. Under Act 22, members of the public are permitted to request and review *law enforcement* video footage. *See generally* 42 Pa.C.S.A. §§ 67A01, *et seq.* Act 22 is distinct from the RTKL. As became clear at the hearing, the County Jail does not meet the definition of “law enforcement” and, therefore, Act 22 does not apply to the record sought in this case. Second, even if Act 22 were to apply, the statute incorporates a balancing test, weighted in favor of those requesting records—and applying the balancing test here demonstrates a compelling basis for release.¹

SUMMARY OF ARGUMENT

The County has failed to establish any exception to the RTKL because it has not shown by a preponderance of the evidence that it conducted the systematic or searching inquiry necessary to invoke the non-criminal investigation exemption, nor that the requested video is linked to a criminal investigation. The County cannot mount successful challenges to release of the video under CHRIA or Act 22, even if the Court considers the untimely addition of that argument. Therefore, this Court should affirm the OOR and order the County to release the video.

ARGUMENT

I. The County’s Use of Force videos are routine and unrelated to any non-criminal or criminal investigation.

A. The videos were not part of a systemic or searching inquiry.

For an agency to assert the non-criminal investigation exemption, 65 P.S. § 67.708(b)(17), it must demonstrate that the records sought relate to “a systemic or searching inquiry, a detailed examination, or an official probe” 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

¹ To the extent that the County reiterates arguments from its initial briefing, Mr. Sholtis incorporates his response to the County’s Petition for Review, as well as the arguments set forth in his September 7, 2021 brief to this Court.

probe must be “conducted as part of an agency’s official duties,” *id.* at 814, and pursuant to an agency’s legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. 2012).

At the hearing, the testimony of Director David Kratz of the Bucks County Correctional Facility established that the requested force incident video is not part of a “systematic or searching inquiry” because it is routine in nature. N.T. 8, lines 22-24.² Indeed, planned force incidents—such as the one at issue here—are *all* recorded with a hand-held camera to assure “compliance with policies.” N.T. 29, lines 12-13; *see also id.*, lines 24-25; *id.*, lines 1-5. Doing so does not serve any investigation purposes, but is instead intended to “keep[]everybody in line and in check.” N.T. 35, line 24; *see also id.* lines 17-19. Accordingly, the requested footage was created as a matter of policy, predating any investigation.

B. No criminal investigation relates to the requested video.

Section 708(b)(16) of the RTKL protects “a record of an agency relating to or resulting in a criminal investigation, including: (ii) investigative materials, notes, correspondence, videos and reports.” 65 P.S. § 67.708(b)(16). “The litmus test for analyzing the criminal investigation exception is our Supreme Court’s decision in [*Pa. State Police v. Grove*,” *Bentley v. Allegheny Cty. Police Dep’t*, 258 A.3d 1163, *4 (unpublished) (Pa. Commw. Ct. 2021) (citing 161 A.3d 877 (Pa. 2017))]. The Supreme Court in *Grove* explained that when a law enforcement agency reviews a record, it is not transformed into a “criminal” record, and therefore, footage must be analyzed on a case-by-case basis. *Grove* at 893-894.

² “So use-of-force in a jail or prison is something that occurs when something is not going the way it should be. It could be for any reasons. It could be for a violent outburst. It could be for noncompliance with an order. It could be to prevent someone from harming themselves.” *Id.*

There is no evidence that the requested video relates to a criminal investigation. Even though the Correctional Facility provided the video to the District Attorney's office ("DA"), no criminal charges were filed. N.T. 13, lines 6-24. And there is no evidence that the Correctional Facility sought criminal charges – indeed, a Memorandum of Understanding specifies that the Department of Corrections lacks “independent authority or authorization to file a Criminal Complaint.” *See* Exhibit E, Jan. 13, 2022 Brief of County. Moreover, Mr. Kratz testified that he does not believe that he has seen criminal conduct on *any* recorded video, much less the one at issue here. N.T. 35, lines 12-15. Thus, to the extent the video was referred to the DA's office, it was not for criminal investigation. N.T. 32, lines 20 – 25; N.T. 35, lines 12-20.

To the extent this Court has any doubt about the nature or context of the video, it may review it *in camera* and make detailed, case-specific findings about the footage. *Bentley*, 258 A.3d at *6 (instructing courts to consider how video “differs from what a bystander may observe,” and to provide, “[a]s in *Grove*, [] additional explanation of how the MVRs at issue are investigative.”).

II. The County's late reliance on Act 22 as a basis for denial is time-barred.

The County has waited far too long to raise this argument. The Supreme Court of Pennsylvania last year rejected a government agency's similar attempt to submit supplemental argument it did not raise at the OOR. *McKelvey v. Pennsylvania Dep't of Health*, 255 A.3d 385, 404 (Pa. 2021). There, the Supreme Court rejected the Department of Health's request to submit additional arguments and evidence that it had not offered at the OOR level, affirming the unanimous, *en banc* Commonwealth Court opinion barring it. *Id.* As the Court explained, “allowing the submission of additional evidence at the judicial review stage would undermine the presumption of openness attendant to the RTKL, as doing so would permit agencies to withhold records, without legal ground to do so, until reaching a court.” *Id.* at 393.

Here, the County had ample opportunity in August 2020 to present all evidence and argument to the OOR, as it is required to do. *See Levy v. Senate of Pennsylvania*, 94 A.3d 436, 441–42 (Pa. Commw. Ct. 2014) (“an agency must raise all its challenges before the fact-finder closes the record” to “allow efficient receipt of evidence ... at the appeals officer stage.”). Now, more than a year after the OOR process, the County raises an Act 22 argument for the first time. If anything, the County’s untimely argument is more egregious than that in *McKelvey* because the County failed to even raise the argument in its opening brief to this Court. Under the circumstances, this Court should bar the County from the “proverbial [third] bite at the apple.” *Mission Pennsylvania, LLC v. McKelvey*, 212 A.3d 119, 130 (Pa. Commw. Ct. 2019), *aff’d in part, vacated in part sub nom., McKelvey* 255 A.3d (quoting *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017)). Accordingly, the Court should reject the County’s request to submit a new argument.

III. Even if the Court allows the County to argue Act 22, that statute is inapplicable and does not bar release of the requested footage

Even if this Court considers the County’s argument on the merits, it fails. First, prison staff are not “law enforcement officers” as defined by Act 22. Act 22 defines “Law enforcement officer” as “An officer ... who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter or an equivalent crime in another jurisdiction.” 42 Pa.C.S.A. § 67A01. The Department of Corrections explicitly lacks such authority. Exhibit E, MOU, Brief of County (“The Department of Corrections shall have no independent authority or authorization to file a criminal complaint, or use the ORI [Originating Agency Identification Number] of the Bucks County Office of District Attorney Detectives without prior review or approval by an attorney from the Office of District Attorney.”). No provision of Title 37 allows a correctional officer to independently file criminal charges. *See also* N.T. 12, lines 21-25, 13, lines 1-2. To the contrary, state law concerning county correctional facilities clearly requires law enforcement officials, rather than prison staff, to investigate incidents. *E.g.*, 37 Pa.C.S.A. § 95.246 (requiring

correctional officers to contact appropriate “law enforcement agency” to investigate “deaths and sexual assaults/allegations”).

Second, even if this Court concludes that Act 22 applies (and it does not), the video should still be released under the Act’s balancing test. That test is generally weighted in favor of the requesters, and calls for release where the requester has established two things by a preponderance of the evidence: (1) that the request was not denied pursuant to section 67A04 or, if it was, a court determined such denial was arbitrary and capricious; and (2) that “the public interest in disclosure of the audio recording or video recording or the interest of the petitioner outweighs the interests of the Commonwealth, the law enforcement agency or an individual’s interest in nondisclosure.” 42 Pa.C.S.A. § 67A06(e).

Here, Mr. Sholtis easily satisfies his burden. First, his request is not exempt for non-criminal or criminal investigative or evidentiary purposes. *See supra* § I. Second, he meets the public interest prong for the reasons discussed at length in his opening brief, including the importance of shedding light on pretrial detention conditions—an area often opaque to the public eye, as well as strong public interest in the treatment of people experiencing mental health crises. *See* Respondent’s Opening Brief at 1-2. Furthermore, the significant public interest in the requested video is reflected by the extensive feedback Mr. Sholtis has received related to Ms. Stringer’s story. Families in similar situations have contacted him to report on their experiences with jails and people with mental illness who are incarcerated. In contrast, Mr. Kratz conceded that *all* of his public safety concerns were immaterial to the relevant portion of the video—which could be properly redacted. N.T. page 59, lines 14 – 25, page 60, lines 1-24. Accordingly, barring full disclosure of the video, which Mr. Sholtis is entitled to as a matter of law, this Court should order its release with limited redactions after *in camera* review.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court 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: January 27, 2022

/s/ Paula Knudsen Burke

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CERTIFICATE OF SERVICE

I, Paula Knudsen Burke, hereby certify that on January 27, 2022, I served a true and correct copy of the foregoing Reply Brief, via email, upon the following individuals:

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Paula Knudsen Burke
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January 27, 2022