

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA
NO. 447 C.D. 2022

BUCKS COUNTY,
Appellee,

v.

BRETT SHOLTIS,
Appellant.

PRINCIPAL BRIEF OF APPELLANT
ON APPEAL FROM THE APRIL 4, 2022 DECISION OF THE COURT OF COMMON PLEAS
OF BUCKS COUNTY

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the instant appeal, which is taken from the April 4, 2022 Decision of the Court of Common Pleas of Bucks County in the matter of *County of Bucks v. Brett Sholtis*, pursuant to 65 P.S. § 67.1302(a) and 42 Pa. C.S. § 762(a)(4).

DECISION UNDER REVIEW

Appellant seeks review of an April 4, 2022 Decision of the Bucks County Court of Common Pleas, attached hereto as Exhibit A. The text of the relevant Decision is as follows:

The Final Determination of the OOR is REVERSED.

BY THE COURT:

DENISE M. BOWMAN

(FULL DECISION APPENDED AS EXHIBIT A)

SCOPE AND STANDARD OF REVIEW

The standard of review when this Court reviews an order of a Court of Common Pleas regarding a public records request is *de novo* as to legal determinations made by the Court of Common Pleas. *See SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1037 (Pa. 2012). This Court also reviews whether the decision is supported by competent evidence. *Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 178 n.8 (Pa. Commw. Ct. 2019) (citation omitted). The scope of review as to legal questions arising from the Court of Common Pleas decision is plenary. *See Hearst Television, Inc. v. Norris*, 54 A.3d 23, 29 (Pa. 2012).

QUESTIONS INVOLVED

1. Did the trial court err as a matter of law in finding that the UOF video is a “record of an agency relating to or resulting in a criminal investigation” exempt from disclosure under Section 67.708(b)(16)?

Suggested answer: Yes.

2. Did the trial court err in finding that the UOF video implicates the security-related exemptions under Sections 67.708(b)(1), (2), and (3)?

Suggested answer: Yes.

3. Did the trial court err in its decision that the UOF video should be withheld in its entirety rather than released with limited redactions?

Suggested answer: Yes.

STATEMENT OF THE CASE

On July 14, 2020, investigative reporter Brett Sholtis submitted a records request to the Bucks County Correctional Facility. R.001a. The request sought disclosure of a video recorded by the facility of a Use-of-Force (“UOF”) incident in which corrections officers pepper-sprayed Kimberly Stringer, who was then incarcerated at the facility, as she experienced a mental health crisis. Mr. Sholtis sought the record in his role as an investigative journalist with WITF.¹ *Id.* At WITF, Mr. Sholtis had written extensively about families struggling to find appropriate care for loved ones with mental illness and, in 2019, he specifically profiled Ms. Stringer and efforts to treat her mental illness.² His reporting helped lead to Ms. Stringer’s release from Bucks County Jail and subsequent placement at a psychiatric facility. Mr. Sholtis’s public records request came in the context of his overall reporting to inform the public about interactions between the criminal

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 news networks.

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://perma.cc/4YAN-ZHWU>; Brett Sholtis, *Five days after inmates speak out, woman with severe mental illness gets moved from Bucks County jail*, WITF (June 19, 2020), <https://perma.cc/J5GD-BKEB>; Brett Sholtis, *Praying for involuntary commitment: One family struggles to help their bipolar daughter*, WITF (July 11, 2019), <https://perma.cc/G465-3L2E>.

justice system and people with mental illness. The public interest advanced by his reporting was affirmed when Mr. Sholtis's work was recognized with a Radio Television Digital News Association Regional Edward R. Murrow Award. *Reveal and Carter Center award Brett Sholtis the Benjamin von Sternenfels Rosenthal Grant for Mental Health Investigative Journalism*, Reveal News (July 15, 2021), <https://perma.cc/VT9Y-KX79>. He is also a 2021-2022 Reveal Benjamin von Sternenfels Rosenthal Grantee for Mental Health Investigative Journalism with the Rosalynn Carter Fellowships for Mental Health Journalism. *Id.* As Mr. Sholtis explained in his request to the Office of Open Records ("OOR"), the video in question (the "UOF Video") would further his ongoing reporting about how county jails respond to people amidst mental health crises, and thereby better inform the public about this important issue.³

In a letter dated July 23, 2020, a Bucks County Right to Know officer denied Mr. Sholtis's request for the UOF Video. R.002a. Mr. Sholtis timely appealed to the OOR, and on October 16, 2020, the OOR issued a final determination requiring the video's disclosure. R.006a. On November 13, 2020, Bucks County sought review of the final determination in the Bucks Court of Common Pleas (the "Trial Court"). R.018a. At the Trial Court, Judge Denise M. Bowman held an

³ Brett Sholtis, *In Pa. county jails, people with mental illness are routinely met with pepper spray and stun guns*, WITF (Oct. 12, 2022), <https://perma.cc/DF56-LE9E>.

evidentiary hearing, reviewed the disputed record *in camera*, and had the Parties submit subsequent briefing. R.132a, 218a, 219a, 233a. On April 4, 2022, Judge Bowman issued a decision reversing the determination of the OOR, preventing Mr. Sholtis and the public from accessing the UOF Video. Ex. A. The instant appeal followed on May 3, 2022. R.243a.

SUMMARY OF THE ARGUMENT

The OOR's final determination was correct and the Court of Common Pleas erred in reversing the administrative appeal officer's final determination. The OOR decision reflected the purposes of the Commonwealth's Right to Know Law ("RTKL"), which provides access to exactly this type of information, and allows the public to "scrutinize the actions of public officials[] and make public officials accountable for their actions." *ACLU of Pa. v. Pa. State Police*, 232 A.3d 654, 656 (Pa. 2020) (citation omitted). As the OOR recognized, the RTKL's exceptions to disclosure must be construed narrowly, and case law from this Court and the Pennsylvania Supreme Court makes clear that the invoked exceptions are not so expansive as to encompass the video at issue here. But even if they were, the law also requires that even where an exception properly applies to part of a record, an agency like the Bucks County Jail still must release a redacted version of the record. In holding that the entire UOF Video was exempt from disclosure here, the Trial Court made three key legal errors.

First, the Trial Court erred in applying the RTKL exemption for criminal investigative materials, 65 P.S. § 67.708(b)(16), to the UOF Video. The Pennsylvania Supreme Court has held that law enforcement videos taken as a matter of course do not qualify as investigative materials for purposes of that exception, and the facts here are nearly indistinguishable from the facts of that case. *Pa. State Police v. Grove*, 161 A.3d 877, 892 (Pa. 2017). Routine recording that predates—and in fact, never even results in—criminal charges is not criminal investigative material for purposes of the RTKL exemption. The Trial Court’s holding to the contrary runs afoul of clear precedent and undermines the legislative intent of the RTKL. This Court could—and should—reverse on that basis.

Second, the Trial Court erred in alternatively applying three RTKL security-related exemptions, 65 P.S. §§ 67.708(b)(1)–(3), to the UOF Video. The Trial Court’s acceptance of the County’s conclusory arguments that disclosure of the video would jeopardize the safety of the Jail runs counter to other recent RTKL case law from this Court holding that an agency must offer more than mere speculation or conjecture that disclosure would endanger a facility or its operations. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374–75 (Pa. Commw. Ct. 2013). Indeed, in light of the testimony elicited at the evidentiary hearing below, releasing the video—at least the relevant part of it—would not impact public safety, physical security, or personal security at the Jail.

And *third*, even if this Court does not agree with the foregoing points, it should still reverse on the basis that the Trial Court erred in deciding the UOF Video should be withheld in its entirety rather than disclosed with limited redactions. Not only did the Trial Court commit reversible error by failing to release the UOF Video with redactions that the County's own witness acknowledged would mitigate alleged security concerns, it also erred by apparently declining to even consider the issue of redaction at all. *Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 184 (Pa. Commw. Ct. 2019).

Under the circumstances, this Court should reverse and order the release of the entire UOF Video per the final determination of the OOR, or, alternatively, reverse and order the release of the video with redactions.

ARGUMENT

I. In determining that the UOF Video was exempt from disclosure, the Trial Court misapplied Section 67.708(b)(16) and Sections 67.708(b)(1)–(3) of the RTKL.

The Trial Court misapplied the law by taking an unduly expansive view of RTKL exemptions, which runs counter to the purpose of the law and to established precedent of this Court and the Pennsylvania Supreme Court. The Right to Know Law, 65 P.S. §§ 67.101–67.3104, is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions.” *Pa. State Educ.*

Ass'n v. Commonwealth, Dep't of Cmty. & Econ. Dev., 148 A.3d 142, 155 (Pa. 2016).

As the Pennsylvania Supreme Court has explained, the RTKL “empower[s] citizens by affording them access to information concerning the activities of their government.” *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). In light of the RTKL’s transparency goals, the statute must be interpreted to provide maximal access to public records. *See Levy v. Senate of Pa.*, 65 A.3d 361, 380–81 (Pa. 2013). The starting point in any RTKL case is that records are presumed public. 65 P.S. § 67.305(a). Agencies bear the burden of proving an exemption to full access applies by a preponderance of the evidence. *Id.* § 67.708(a)(1).

The Trial Court’s expansive view and misapplication of Section 67.708(b)(16) and Sections 67.708(b)(1)–(3) is inconsistent with the widely acknowledged remedial purpose of the RTKL. *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d*, 75 A.3d 453 (Pa. 2013) (the RTKL “is remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions”); *Pa. State Police v. McGill*, 83 A.3d 476, 479 (Pa. Commw. Ct. 2014) (en banc); *Rendell v. Pa. State Ethics Comm’n*, 983 A.2d 708, 716 (Pa. 2009) (holding that a liberal construction

of the RTKL “aligns with the [statute’s] status as remedial legislation designed to promote public trust in government”). In enacting the RTKL in 2008, the legislature sought to increase public access and government transparency across all branches of Pennsylvania government. *Levy*, 65 A.3d at 368 (the RTKL “replaced the Right to Know Act and significantly expanded public access to governmental records . . . with the goal of promoting government transparency”). The Trial Court’s expansive view of the Section 67.708(b)(16) and 67.708(b)(1)–(3) exemptions therefore runs counter to established legislative intent.

Records held by agencies subject to the RTKL, like the video at issue in this case, are presumed to be public and subject to disclosure unless they fall within a clearly outlined exception. Those exceptions to disclosure are construed narrowly. *ACLU of Pa.*, 232 A.3d at 656. The RTKL is not a confidentiality law, it is a public access statute, and the purpose of the law is disclosure, not withholding records to forestall embarrassment or bad press for government officials. Here, a proper application of the expansive, remedial nature of the law should result in a conclusion that the stated exemptions do not apply.

A. The RTKL’s criminal investigative exemption does not apply to bar release of the UOF Video.

The criminal investigative exemption does not apply in this case because the UOF Video was not made as part of, or even in connection with, a criminal investigation. Section 67.708(b)(16) of the RTKL applies only to “record[s] of an

agency relating to or resulting in a criminal investigation, including: . . . (ii) [i]nvestigative materials, notes, correspondence, videos and reports.” 65 P.S. § 67.708(b)(16). As the Pennsylvania Supreme Court has held, mere review of a previously existing record does not transform that record into a “criminal investigative” record subject to the exemption, and video footage must be reviewed on a case-by-case basis to assess applicability of the exemption. *Grove*, 161 A.3d at 893–94. This Court has explicitly recognized that *Grove* is “[t]he litmus test for analyzing the criminal investigation exception,” *Bentley v. Allegheny Cnty. Police Dep’t*, No. 936 C.D. 2020, 2021 WL 2589800, at *4 (Pa. Commw. Ct. June 24, 2021) (citing *Grove*), and has actually applied *Grove* in the correctional context in similar circumstances to support release of a video record.

Crucially, the videos at issue in *Grove* are virtually identical in nature to the UOF Video record at issue in this case. In *Grove*, the Pennsylvania Supreme Court considered the application of the criminal investigative exemption to dash cam videos taken by Pennsylvania state troopers as a matter of course every time they undertook a car stop and an officer approached a vehicle. The Court recognized that while of course the events captured in *some* of those videos might eventually lead to a criminal investigation, the criminal investigative exemption did not apply because investigation was not the purpose of taking the videos. This Court itself characterized the holding of *Grove*, correctly, as not automatically exempting law

enforcement videos “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.’” *Suber-Aponte*, 202 A.3d at 185 (characterizing *Grove*, 161 A.3d at 885). And in that same case, this Court confirmed that the *Grove* holding applies similarly within correctional settings. *Id.* at 185–86 (discussing *Grove* in the context of “footage [that] captured Requester’s detainment and subsequent processing”).

The criminal investigation exemption does not apply here for the same reasons. First, as the County and its witnesses acknowledged, the purpose of taking the video was exactly that in *Grove*—performance documentation. R.140a–141a, 159a–161a. Mr. Kratz, the warden of the Jail, testified that he has not seen criminal conduct on *any* video recorded during a UOF incident, including the routine recording of UOF in this instance. R.162a, 166a. As he testified, the Jail routinely reviews UOF videos for performance assessment and for other non-investigative reasons, whether or not it believes that a criminal incident has taken place. R.159a–161a. And second, not only does the Bucks County Jail not review the videos for investigative purposes generally, the facility administrators did not review the footage of the UOF Video sought in this case, either, until and in preparation for the instant litigation. R.188a.

Notwithstanding these facts, in testimony and in its briefing, the County suggested that Bucks County District Attorney (“DA”) Matthew Weintraub’s mere *pro forma* review of the UOF Video here would exempt it from disclosure despite the fact that no criminal charges were filed. R.004a. But that argument is foreclosed by *Grove*, 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, would significantly expand the criminal investigative exemption beyond our existing precedent.” *Sholtis v. Bucks County*, No. AP 2020-1317, 2020 WL 6157116, at *5 (Pa. Off. Open Recs. Oct. 16, 2020) (citing *Grove*, 161 A.3d at 892); *see also* R.012a. And indeed, even given the opportunity to submit new evidence at the Trial Court, the County introduced no evidence that it sought or even considered criminal charges in connection with the events underlying the video. R.004a–005a, 165a–167a.

The Trial Court erred because it turned to other interpretative tools, instead of applying *Grove* and its progeny or even simply giving effect to the intent of the RTKL. In its opinion, the Trial Court consulted the Merriam-Webster’s and Black’s Law Dictionaries to interpret terms from the criminal investigative exemption’s text, as if no precedent applied at all. Ex. A at 19. The Trial Court considered definitions it found in those dictionaries to determine that the UOF Video was semantically “related to” a criminal investigation. *Id.* In the Trial

Court's eyes, the criminal investigative exemption could apply anywhere a record is "connected with . . . , stand[s] in some relation to . . . , pertain[s] to . . . , and . . . ha[s] some bearing on [a] criminal investigation." *Id.* It then applied that manufactured standard to its view of an affidavit that the Bucks County DA's office had reviewed the video as part of an "investigation" into the corrections officers depicted in the video. *Id.* at 19–21.

As discussed, that reasoning defies the Pennsylvania Supreme Court, this Court, and the text and purpose of the RTKL. It also ignored the requirement that courts first turn to the plain text of the RTKL before supplanting the legislature's definitions with their own. *See Bowling v. Office of Open Records*, 75 A.3d 453, 466 (Pa. 2013) (holding that in RTKL cases, "the plain language of each section of a statute must be read in conjunction with one another, construed with reference to the entire statute . . . [including] the circumstances under which the statute was enacted [and] the object to be attained"). The UOF Video cannot be exempted from disclosure "merely because it was reviewed at some point during an investigation conducted by a different agency," *Sholtis*, 2020 WL 6157116, at *5 (citing *Grove*, 161 A.3d at 892); *see also* R.012a, and there was no need to turn to a dictionary to hold otherwise. This Court must reverse the Trial Court because its holding, if allowed to stand, "would significantly expand the criminal investigative exemption," *id.*, ignores cases like *Grove* and *Suber-Aponte*, and undercuts the

RTKL itself. Moreover, the Trial Court’s reasoning would specifically incentivize law enforcement agencies to conduct *pro forma* reviews of any video that would embarrass them if released, to ensure that the criminal investigation exemption would apply to bar release of the video. Such an interpretation cannot be squared with remedial legislation designed to increase transparency and accountability.

Bowling, 990 A.2d at 824; *see also Levy*, 65 A.3d at 368.

B. The RTKL’s security-related exemptions do not apply because disclosing the video will not threaten safety or security.

The RTKL’s security-related exemptions do not apply to the entire video because the County and its witnesses introduced no evidence to suggest that release of the relevant part of the video would threaten safety or security of the Jail or its staff. To invoke the security-related exemptions in 65 P.S. §§ 67.708(b)(1), (2) and (3), 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. Ct. 2012). “Reasonably likely” requires “more than speculation,” *Carey*, 61 A.3d at 374–75, and “speculation and conclusory statements” that do not explicitly connect the records to specific threats to public safety cannot support the exemption, *id.* at 376. Applying the public safety exemption thus requires concrete, non-speculative harms, and a reasonable, non-speculative connection of those harms to the potential release of records. Where,

as here, both the alleged harms *and* the connection to release of the UOF Video are speculative and conclusory, the security-related exemption does not apply.

First, the exemption does not apply because the potential purported harms the County Jail asserted lack sufficient specificity. The County's argument and its evidence in support of the exemption was never more specific than generalized assertions that releasing the video would "reveal how prison staff responds to certain incidents," or "reveal measures . . . regarding the custody and control of offenders," or "[r]eveal[] the particulars of security protocols and procedures." R.015a–016a. These offered harms fall far short of the specificity the law requires for the public safety exemption to apply. *Compare Carey*, 61 A.3d at 374–76 (describing as insufficient a conclusory assertion that disclosure of documents related even to a specific incarcerated person's facility transfer would enable retaliation and "jeopardize the security of future transfers"), *with Pa. State Educ. Ass'n ex rel. Wilson v. Commonwealth*, 981 A.2d 383 (Pa. Commw. Ct. 2009), *aff'd*, 2 A.3d 558 (Pa. 2010) (holding that clearly articulated safety concerns over disclosure of the discrete home addresses of several named public officials met the security-related exemption).

Second, regardless of the specificity of the purported harms, the County failed to establish—at all, let alone by a preponderance of the evidence—that the purported security harms had a reasonable connection to the video's release. This

Court very recently rejected application of the public safety exemption to records in the correctional context based upon a public agency offering a “cascading sequence of events” that starts with release and ends with some hypothetical harm to public safety. *York Cnty. v. Coyle*, No. 182 C.D. 2020, 2021 WL 3439685, at *9 (Pa. Commw. Ct. Aug. 6, 2021). As this Court observed, of course a correctional agency can construct a parade of horrors that starts with “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.” *Id.* But such a chain of events does not qualify for a security-related exemption from release under the RTKL. *Id.* The line of causation between disclosure and the risk to safety or security must be direct and concrete. *E.g., Wilson*, 981 A.2d 383 (disclosure of public officials’ personal home addresses, and the danger of retaliation against those officials at their homes).

The Trial Court erred here by accepting just such an attenuated chain of causation offered by the County. The Trial Court’s opinion engages in exactly the type of speculation rejected by this Court, with the Trial Court opining that “anyone who wished to actually study the footage of this particular use of force event for some illicit purpose could easily do so . . . to protect themselves from an attack . . . [or] as part of a plan to escape[.]” Ex. A at 25. The chain of causation adopted by the Trial Court thus requires not only release of the record, but a)

someone studying the video; b) learning something—not specified—from that study; c) subsequently becoming incarcerated at the Bucks County Jail; and d) applying that study of correctional tactics to ward off a hypothetical attack from a non-specified person, or e) engage in an ill-advised escape as a pre-trial detainee, notwithstanding the fact that a pre-trial detainee lacks incentive to escape because they have not been convicted of anything. The Trial Court’s leap from release of video of a single UOF incident to a prison break is exactly the unbounded speculation that this Court has rejected.

The error becomes even plainer when considering the evidence that did and did not come out in the proceedings. Neither the County nor the Trial Court’s opinion accounts for how release of the video at issue would reveal tactics to incarcerated people at the Jail—assuming they could even access the video, which is unlikely—any more so than what inmates themselves could learn about such tactics through first-hand experience or observation. R.194a. Indeed, Warden Kratz acknowledged that people at the facility obtain information about their surroundings and correctional officer tactics through mere observation and word of mouth. R.179a–181a. Moreover, neither the County nor the Trial Court’s opinion explains how an inmate would gain added insight into “camera layout, ingresses/egresses, doors, [and] exits and location of certain areas with respect to others” from the UOF Video, which was localized to an incident within an

individual cell at the facility. Ex. A at 25. Furthermore, neither the County nor the Court’s opinion explains how a person detained at the Jail with similar issues as Ms. Stringer—that is, someone experiencing a mental health crisis—would be able to act with the agency and control necessary to weaponize the knowledge to be purportedly gleaned from the UOF Video. *Id.* at 21–26.

Because the County has offered nothing more than a speculative series of harms and a speculative, attenuated chain of events by which the release of the UOF Video would cause such harms, the security-related exemptions are inapplicable. In applying them anyway, the Court of Common Pleas decision runs counter to established precedent and undermines the requirement that RTKL exemptions be “narrowly construed.” *Coyle*, 2021 WL 3439685, at *9 (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commw. Ct. 2013)). This Court must reverse.

II. Even if any exemption applied, the Court of Common Pleas should have ordered release of the UOF Video with limited redactions.

Even if the Court of Common Pleas correctly determined that one of the foregoing exemptions applied to parts of the UOF Video—and it did not—the Trial Court further erred by declining to order—or apparently even consider—limited release with redactions for exempt material. The Pennsylvania Supreme Court has long required such an analysis, and this Court itself has applied that precedent to require redaction and release of responsive video in the correctional context.

Suber-Aponte, 202 A.3d at 184. Considering redactions matters especially when a correctional agency invokes the public safety exemption, including when, as here, the video in question may contain material on either end that could be easily redacted to satisfy any alleged safety concerns. The RTKL requires a close analysis of the record for redaction, and the Trial Court erred by not even engaging in that process.

First, the Pennsylvania Supreme Court has held that even where videos may relate to an investigation, the entire video likely does not fall within the invoked exemption. In fact, in the *Grove* case involving factually similar videos taken by law enforcement, the Court held that the visual aspect of a video, without sound, generally does not qualify for an exemption at all. *Grove*, 161 A.3d at 896. To be clear—the audio aspects of a video do not even necessarily relate to an investigation. *Id.* But even if a video record itself relates to an investigation, the part of the video record that does is the part “contained in the audio portion of witness interviews” as opposed to any visual aspect of the video or indeed, other unrelated audio. *Id.* Therefore, if the agency could simply release the video with the sound redacted—a comparatively easy task—it is required to do so even where an exemption might apply to the sound itself. *Id.*

Second, as to the public safety exemption specifically, the law requires redaction. Even if the Jail here had carried its burden to demonstrate that release

would harm public safety in concrete, non-speculative ways—for example, if it had shown that release would reveal blind spots or “the layout of the non-public areas” of a facility—this Court has made clear that the exemption only applies to the limited portions of the footage that pose those risks. *Suber-Aponte*, 202 A.3d at 184. Even in a correctional video that reveals blind spots at discrete points, “the trial court [must] determine which parts of the footage do so, and are thus exempt,” while requiring disclosure of the rest of the video. *Id.*

Here, the Trial Court apparently did not even engage in that analysis. It failed to do so despite having reviewed the video *in camera*, and despite Warden Kratz acknowledging in his testimony that the security risks he offered—speculatively connected to release as they were—were posed by the limited portions of the video where officers walked *to* the cell, rather than the portions of the video taken of officers pepper-spraying Ms. Stringer within the cell itself. R.175a–179a. Of course, release of a video, like the one here, taken by a handheld camera would not and could not reveal the blind spots of stationary camera coverage that a person might be able to infer by receiving videos from all the stationary cameras in a facility. *Id.* But the part of the video taken in the cell does not even reveal the *location* of stationary cameras, to say nothing of non-public doors or other information. *Id.* Accordingly, even if this Court believes that the

criminal investigative or public safety exemptions apply here, the appropriate next step is release with redaction rather than withholding the video in its entirety.

Release with redaction is especially appropriate in light of the nature of the video record in question, and the lack of any evidence that such redaction imposes a burden. Indeed, this Court recently observed that the ease of applying redactions to video cuts in favor of requiring redactions when necessary. *See Cent. Dauphin Sch. Dist. v. Hawkins*, 253 A.3d 820, 834 (Pa. Commw. Ct. 2021) (citing *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578 (D.C. Cir. 2020)) (discussing government ability to redact). When government agencies rely on technology to create records such as the one here, they have a concomitant duty to understand that technology to facilitate public access to the records created. Allowing agencies to claim they cannot use ubiquitous technology to redact from an electronic record would be the same as allowing them to claim they cannot figure out how to use a black marker to redact content from a paper record. If the agency is comfortable enough with technology to use it to create a record, it must likewise be able to facilitate public access in accordance with the law. If this Court believes that an exemption applies to some parts of the video record, it should undertake the review and analysis that the Trial Court did not, and it should order redaction and release.

CONCLUSION

For these reasons, Appellant respectfully requests that this Court reverse the decision of the Bucks County Court of Common Pleas and affirm the Final Determination of the OOR. Alternatively, Appellant requests that this Court conduct an *in camera* review of the requested record and order disclosure subject to limited redaction of any specific information that this Court determines is exempt from public disclosure under the RTKL.

Dated: November 16, 2022

/s/ Paula Knudsen Burke

Paula Knudsen Burke

Pa. I.D.: 87607

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CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This filing complies with the word count limit set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Based on the word-count function of Microsoft Word, the filing contains 6013 words.

2. This filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 16, 2022

/s/ Paula Knudsen Burke

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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

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EXHIBIT A:
APRIL 4, 2022 DECISION OF THE BUCKS COUNTY COURT OF
COMMON PLEAS

E-Filed

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

COUNTY OF BUCKS

:

No. 2020 – 05950

v.

:

:

:

BRETT SHOLTIS

:

DECISION

This matter comes to this Court via an appeal taken by the County of Bucks (“County”) from an October 16, 2020 decision by the Office of Open Records (“OOR”) relating to the request of Brett Sholtis (“Mr. Sholtis”) under the Right to Know Law (“RTKL”) for disclosure of a video depicting a use of force event at the Bucks County Correctional Facility (“BCCF”). A hearing having been held on December 16, 2021, and the parties having submitted closing briefs thereafter, the Court sets forth below its findings of fact and conclusions of law as follows:

I. FINDINGS OF FACT:

A. Procedural History

- 1) On July 17, 2020, the County received a request pursuant to the RTKL (“RTK Request”) from Mr. Sholtis, a health reporter for WITF/Transforming Health.
- 2) By virtue of his RTK Request, Mr. Sholtis sought disclosure of video footage of a use of force event involving Kimberly Stringer (“Ms. Stringer”) which occurred in May 2020 while Ms. Stringer was incarcerated at BCCF (“UOF Video”).
- 3) On July 23, 2020, the County denied the RTK Request on the grounds that it was exempt from disclosure pursuant to the criminal and the non-criminal investigation exemptions of the RTKL and also because disclosure was precluded by the Criminal History Record Information Act (“CHRIA”).

4) On August 6, 2020, Mr. Sholtis appealed the County's decision to the OOR.

5) The OOR invited the parties to supplement the record, and the County submitted a position statement reiterating the grounds for its denial as well as the Affidavit of the Honorable Matthew D. Weintraub, Bucks County District Attorney ("Weintraub Affidavit").

6) On October 16, 2020, the OOR issued its Final Determination ("Final Determination") concluding that the County had not established that the UOF Video related to a criminal investigation. Final Determination at 5-8.

7) The OOR concluded that because the District Attorney's Office performed the investigation rather than the County, the criminal investigation exemption under the RTKL did not apply to exempt the UOF Video from disclosure. Final Determination at 7-8.

8) The OOR cited to and relied upon the matter of *Hayes v. Pa Dep't of Pub. Welfare*, OOR Dkt. AP 2012-0415, 2012 PA O.O.R.D. LEXIS 530 for the proposition that the investigative exemption applies only to records of the agency performing the investigation. Final Determination at 7-8.

9) On November 13, 2020, the County filed a Petition for Review of the October 16, 2020, Final Determination of the Pennsylvania Office of Open Records ("Petition for Review") with this Court.

10) The County annexed to its Petition for Review the Affidavit of David Kratz, Deputy Director of the Bucks County Department of Corrections ("Kratz Affidavit").¹

11) On December 21, 2020, Mr. Sholtis filed a Response to Petition for Review of the October 16, 2020 Final Determination of the Office of Open Records.

¹ Thereafter, Mr. Kratz became the Director of the Bucks County Department of Corrections.

12) Thereafter, the parties agreed that the record would be supplemented with the live testimony of Mr. Kratz at a hearing before the undersigned.

13) On July 21, 2021, the Court entered an Order for Hearing scheduling an evidentiary hearing for October 25, 2021.

14) That hearing was continued and rescheduled for December 16, 2021.

15) The hearing went forward on December 16, 2021 and Mr. Kratz testified at the hearing.

16) Subsequent to the hearing, the Court did perform an *in-camera* review of the UOF Video without objection by either party.

17) Additionally, the parties submitted closing briefs to the Court.

18) The County submitted the County of Bucks Closing Brief ("County's Closing Brief") on January 14, 2022.

19) In the County's Closing Brief, the County argues that the UOF Video constitutes criminal investigative material and is therefore exempt from disclosure pursuant to §708(b)(16) of the RTKL. County's Closing Brief at 4-6.

20) The County further argues that the UOF Video is a non-criminal investigative record and is therefore exempt pursuant to §708(b)(17). County's Closing Brief at 6-7.

21) Additionally, the County argues that release of the UOF Video to the public would jeopardize or threaten public safety, physical security, and/or personal security and is therefore exempt from disclosure pursuant to §§708(b)(1), (2), and (3). County's Closing Brief at 8-11.

22) The County also raises arguments relating to Act 22 and the need to balance Ms. Stringer's privacy interests against the public interest promoted by disclosure of the UOF Video.² County's Closing Brief at 11-13.

23) The County further argues that the UOF Video is exempt from disclosure because it is a record protected under CHRIA, 18 Pa. C.S. §9106(c)(4). County's Closing Brief at 7-8.

24) On January 27, 2022, Mr. Sholtis filed Respondent's Reply Brief to Petitioner's Supplemental Briefing ("Sholtis Closing Brief").

25) In the Sholtis Closing Brief, Mr. Sholtis argues that the UOF Video is routine and unrelated to any criminal or non-criminal investigations. Sholtis Closing Brief at 2-3.

26) With respect to the criminal investigation exemption in particular, Mr. Sholtis argues that there was no criminal investigation relating to the UOF Video. Sholtis Closing Brief at 3-4.

27) Mr. Sholtis argues that even through the UOF video was provided to the District Attorney's Office, no criminal charges were ever filed and Mr. Kratz testified that he did not see any criminal conduct on the video. Based upon this, Mr. Sholtis argues that "to the extent the video was referred to the DA's office, it was not for criminal investigation." Sholtis Closing Brief at 4.

28) In addition to making argument with respect to the non-criminal and criminal investigation exemptions, Mr. Sholtis argues that the County's position with respect to the applicability of Act 22 should be rejected as time barred. Sholtis Closing Brief at 4-5.

² The County notes that the UOF Video depicts Ms. Stringer having a mental health episode and that she is not fully dressed at the time and argues that while there are limitations on a person's individual Constitutional rights while incarcerated, Ms. Stringer retains a reasonable expectation of privacy not to have this distressful incident disclosed to the general public. County's Closing Brief at 12.

29) Mr. Sholtis did not offer any argument in the Sholtis Closing Brief as to the applicability of CHRIA.

30) Mr. Sholtis did not offer any argument in the Sholtis Closing Brief regarding the applicability of the safety exemptions pursuant to §§708(b)(1), (2) and (3) of the RTKL.

B. Evidence in the Record

31) Mr. Kratz is the Director of the Bucks County Department of Corrections. N.T. 12/16/21, p. 6.

32) Mr. Kratz has served as Director since August 2021. N.T. 12/16/21, p. 6.

33) Prior to serving as Director, Mr. Kratz served as Deputy Director of the Bucks County Department of Corrections. Kratz Aff., ¶ 1.

34) Mr. Kratz has worked for the Bucks County Department of Corrections for 18 years. N.T. 12/16/21, p. 7.

35) Mr. Kratz started as an officer, and later served as a sergeant and then lieutenant prior to serving as Deputy Director. N.T. 12/16/21, pp. 6-7.

36) BCCF is a part of the Bucks County Department of Corrections. Kratz Aff., ¶ 3.

37) As Director, Mr. Kratz has complete oversight of the Department of Corrections and BCCF. N.T. 12/16/21, p. 7.

38) This includes oversight of finances, training, and security. N.T. 12/16/21, p. 7.

39) The two superintendents from the community corrections center and the superintendent from the BCCF report to Mr. Kratz directly. N.T. 12/16/21, p. 7

40) The Department of Corrections has its own law enforcement authority and power. N.T. 12/16/21, pp. 12, 66.

41) The Department of Corrections has its own independent investigatory power. N.T. 12/16/21, p. 66.

42) The Department of Corrections has its own investigators. N.T. 12/16/21, p. 11.

43) Those investigators can file criminal complaints for escapes and crimes committed within BCCF. N.T. 12/16/21, p. 11.

44) The investigators also perform internal investigations, including relating to internal affairs issues and criminal behavior such as bringing drugs into BCCF. N.T. 12/16/21, p. 11.

45) The Department of Corrections investigators can file criminal charges for offenses that occur within the prison. N.T. 12/16/21, p. 55.

46) Those investigators also would review use of force events to confirm compliance with policies and procedures. N.T. 12/16/21, p. 11.

47) In addition to its own law enforcement authority, the Department of Corrections partners with the District Attorney's Office and County Detectives pursuant to a Memorandum of Understanding. N.T. 12/16/21, p. 13; Exhibit 1.

48) Mr. Kratz has indirect oversight of correctional officers as it relates to any use of force events. N.T. 12/16/21, p. 7.

49) A use of force event is something that occurs in a jail or prison when the staff is required to physically respond with force due to the actions and/or behaviors of an offender. Kratz Aff., ¶ 5.

50) Use of force events can occur for a number of reasons, including in response to a violent outburst, to gain noncompliance with an order, and/or to prevent someone from harming themselves. N.T. 12/16/21, pp. 8, 14-15.

51) Some use of force events are planned and others are spontaneous. N.T. 12/16/21, pp. 8-9.

52) A spontaneous use of force event would occur where an offender attacks, and the staff must respond. N.T. 12/16/21, pp. 8-9.

53) When there is a planned use of force event, there is time to suit up teams in protective gear. N.T. 12/16/21, pp. 9, 15.

54) For a planned use of force event, the BCCF assembles a team of officers, a supervisor, and also attempts to have medical personnel present. N.T. 12/16/21, p. 11.

55) The staff is equipped with a handheld camera to document the event. Kratz Aff. , ¶ 6; N.T. 12/16/21, pp. 9-10, 28-29.

56) There are processes and procedures that take place in the Special Response Team ready room ("SRT") to prepare for a use of force event. N.T. 12/16/21, pp. 15-16.

57) The SRT is a secure location. N.T. 12/16/21, p. 16.

58) A team of 4-5 officers suit up in protective gear and receive instructions, including information about the offender, the circumstances occurring, and the objective. The officers are also given their assignments while in the SRT as to the specific role each will play during the planned use of force event. N.T. 12/16/21, pp. 15-16, 70.

59) No offender would observe what is happening in the SRT when the officers are getting suited up and being provided instructions and directions. N.T. 12/16/21, pp. 47-48.

60) The specifics provided to the officers are security sensitive and include procedures of BCCF relating to cell extractions. N.T. 12/16/21, pp. 15-16.

61) The procedures direct how a corrections officer should handle cell extractions and how staff are to respond to use of force events. N.T. 12/16/21, pp. 16-18.

62) The procedures are in place to assure uniformity and best practices so that neither staff nor an offender becomes injured during a use of force event. N.T. 12/16/21, p. 17.

63) Throughout the facility, there are static view cameras which would include wall or ceiling-mounted cameras and concealed mounted cameras. N.T. 12/16/21, pp. 68-69.

64) The static cameras run constantly and feed to a DVR system which is part of the safety system. N.T. 12/16/21, p. 69.

65) The handheld cameras used in planned use of force events are GoPro cameras. N.T. 12/16/21, p. 69.

66) The video footage from a use of force event is created and maintained by the BCCF for the purpose of documenting “use of force” events. Kratz Aff., ¶ 7.

67) The footage is maintained and catalogued by BCCF staff. Kratz Aff., ¶ 7.

68) The event is recorded for the safety of the offender and the safety of the staff. N.T. 12/16/21, pp. 9-10.

69) Additionally, the recording is used as an investigative and training tool. N.T. 12/16/21, p. 10.

70) The footage also is used as an evidentiary record in conjunction with investigations, both criminal and non-criminal. Kratz Aff., ¶ 7.

71) BCCF would not create and maintain the footage absent a need to preserve a documentary record to be used in a possible investigation. Kratz Aff., ¶ 10.

72) Mr. Kratz has reviewed other use of force videos. N.T. 12/16/21, p. 30.

73) Mr. Kratz reviewed the UOF Video at issue in this matter. N.T. 12/16/21, p. 56.

74) The UOF Video depicts a planned use of force event involving the deployment of pepper spray against an inmate in May 2020. Kratz Aff., ¶ 8.³

75) The footage at issue was taken from a handheld recording device operated by prison staff. Kratz Aff., ¶ 9.

76) This particular use of force event occurred on H-module at the BCCF. N.T. 12/16/21, p. 15.

77) The process started in the SRT. N.T. 12/16/21, pp. 15-16.

78) The footage at issue depicts areas of BCCF that are not open to the public. Kratz Aff., ¶ 11.

79) The footage shows egresses/exits generally and also entrances and exits of the SRT. N.T. 12/16/21, pp. 70-71, 74-75.

80) The UOF Video shows access points and entries into areas that are not otherwise accessible to inmates. N.T. 12/16/21, p. 18.

81) These access points include doors, hallways and areas that are not part of the general housing unit. N.T. 12/16/21, p. 59.

82) The UOF Video reveals the location of static cameras in the area where the event occurred. N.T. 12/16/21, p. 19, 44, 75

83) Some cameras in the prison are obvious, others are not. N.T. 12/16/21, p. 44.

84) The footage also reveals spots that are not covered by static cameras in the area. N.T. 12/16/21, p. 71.

³ The Court notes that it had difficulty viewing the actual deployment of pepper spray in the UOF Video.

85) The UOF Video shows the correctional officers involved in this use of force event. N.T. 12/16/21, pp. 18, 70, 72, 75.

86) The UOF Video **shows the corrections officers executing** and carrying out the policies and procedures for cell entries/cell extractions. N.T. 12/16/21, p. 73.

87) The UOF Video reveals the specific commands being given to the officers during the use of force event. N.T. 12/16/21, p. 75.

88) The footage reveals protocols, procedures and actions utilized in situations where “pepper spray” is used by prison staff. Kratz Aff., ¶¶ 14-15.

89) The footage at issue reveals how prison staff respond to certain types of events and attendant procedures and protocols accompanying those responses. Kratz Aff., ¶ 14.

90) The footage from a hand-held camera in a planned use of force event illustrates for the viewer the policies and procedures used in a use of force event from start to finish. N.T. 12/16/21, p. 46.

91) Mr. Kratz explained that in viewing footage from a planned use of force event, you are getting to see the Department of Corrections’ policies and procedures actually “come to life.” N.T. 12/16/21, p. 59.

92) Mr. Kratz explained that the footage of the UOF Video reveals secure areas of BCCF. N.T. 12/16/21, p. 59.

93) Mr. Kratz opined that information about the layout of the building, including the location of cameras and points of ingress and egress, and the number of doors it takes to get to the outside, is all the type of information that should be kept confidential. N.T. 12/16/21, p. 20.

94) Mr. Kratz opined that the prison's camera layout is the type of information that is security sensitive and the location of cameras in the facility should not be shared with the general public. N.T. 12/16/21, p. 44.

95) Mr. Kratz explained how this type of information could be exploited and promote illicit conduct in the prison. He gave the example that if a couple of offenders wanted to engage in illicit conduct in the prison, then having this camera layout could be used by them to identify an area where there is a blind spot or an obstructed view. N.T. 12/16/21, p. 45.

96) Mr. Kratz also opined that the disclosure of policies and procedures to the general public could create a very unsafe environment. N.T. 12/16/21, p. 16.

97) Mr. Kratz opined that knowledge of how prison staff and/or third-party providers can be expected to act in a use of force event could be exploited by offenders thereby creating a risk to the personal security of individual staff members and third-party providers that could endanger their lives and/or physical well-being. Kratz Aff., ¶ 17.

98) Mr. Kratz opined that revealing the particulars of security protocols or procedures used in connection with use of force events – including the deployment of pepper spray – poses a threat to the security and personal safety of staff, offenders, third-party providers, and the general public because such information could be exploited. Kratz Aff., ¶ 20.

99) Mr. Kratz opined that knowledge on the part of an offender as to the specific manner in which prison staff will respond to a use of force event would enable an offender to subvert the objectives of prison staff or third-party providers regarding security of the correctional facility and protection of offenders, staff, third-party providers and the general public and/or formulate plans to do so. Kratz Aff., ¶ 21; N.T. 12/16/21, p. 44.

100) Mr. Kratz opined that the information revealed by the footage in this case could easily be used to facilitate a security breach, including an attack on another offender, staff or a third-party provider. Kratz. Aff., ¶ 22.

101) Mr. Kratz explained that corrections officers are actually trained to expect that people will use their policies and procedures to create diversions to facilitate escapes. N.T. 12/16/21, p. 63.

102) Mr. Kratz testified as to his own personal knowledge of incidents where a prisoner witnessed a use of force event and then used the information that he or she learned therefrom to avoid another use of force event. N.T. 12/16/21, pp. 20-21.

103) Mr. Kratz also testified that such information has been used in the past to create diversions and aid in the escape of offenders. N.T. 12/16/21, p. 18.

104) Mr. Kratz further testified that the Bucks County Department of Corrections has had incidents where offenders who knew information from having offended previously have used that information to create a diversion. N.T. 12/16/21, p. 62.

105) Mr. Kratz testified that offenders have created diversions during medical emergencies. N.T. 12/16/21, p. 63.

106) In June 2020, the Bucks County District Attorney's Office was made aware of allegations that Ms. Stringer was being mistreated by corrections officers at BCCF. Weintraub Aff., ¶ 2.

107) As of that time, Ms. Stringer was incarcerated as a result of bail having been set on her pending criminal case which involved allegations that she assaulted a neighbor and threatened to assault and kill another neighbor. Weintraub Aff., ¶ 2.

108) Assistant District Attorney Colin Jenei brought the allegations to the attention of District Attorney Matthew Weintraub and a Bucks County Detective was assigned to investigate the allegations. Weintraub Aff., ¶ 3.

109) The allegations originally had been made by three inmates at BCCF. Weintraub Aff., ¶ 3.

110) The primary purpose of the investigation of these allegations was to ascertain whether any corrections officer had committed any criminal conduct in connection with his or her treatment of Ms. Stringer and/or engaged in any retaliatory conduct toward the inmates who had made the allegations, and thus, whether the filing of any criminal charges against any such officer(s) was warranted. Weintraub Aff., ¶ 3.

111) The UOF Video was requested by and provided to the Bucks County District Attorney's Office to conduct a criminal investigation surrounding the use of force event depicted therein. Kratz Aff., ¶ 9; Weintraub Aff., ¶ 4.

112) District Attorney Weintraub reviewed the footage along with other materials obtained by the District Attorney's Office during the investigation. Weintraub Aff., ¶ 4.

113) The Bucks County District Attorney's Office only obtained and possessed the UOF Video as part of its investigation into whether criminal charges should be filed against one or more corrections officers. Weintraub Aff., ¶ 5.

114) At the conclusion of its investigation, District Attorney Weintraub determined that criminal charges were not warranted against any BCCF corrections officer. Weintraub Aff., ¶ 5.

115) In addition to the investigation performed by the District Attorney's Office, the Department of Corrections performed its own review of this use of force incident. N.T.

12/16/21, pp. 13-14.

116) After every use of force event there are procedures that follow, including preparation of certain paperwork, medical exams to assure that offenders and/or staff are not injured, and measures to address any mental health issues, if applicable. N.T. 12/16/21, p. 9.

117) A use of force report is compiled after each such an event. N.T. 12/16/21, p. 19.

118) The officers involved each write up a detailed memo of what occurred in connection with the use of force event and their role in connection therewith. N.T. 12/16/21, p. 19.

119) The documentation associated with use of force events goes through a review process. N.T. 12/16/21, p. 14.

120) Those memos are gathered, and the use of force report is reviewed by the shift sergeant and forwarded to the shift lieutenant who reviews it. N.T. 12/16/21, p. 19.

121) The next day the use of force report goes to the operations department and the captain thoroughly reviews it. N.T. 12/16/21, p. 19.

122) The report then makes its way to the Warden/Superintendent who does a final review and then signs off on the use of force. N.T. 12/16/21, p. 19.

123) The review of the use of force event then would be closed out by the chief investigator. N.T. 12/16/21, p. 19.

124) The Department of Corrections did review this particular use of force event. N.T. 12/15/21, p. 14.

II. CONCLUSIONS OF LAW:

A. Applicable Scope and Standard of Review

125) Decisions of the OOR appeals officers are reviewable upon petitions for review - - to the Commonwealth Court when the matter arises from a determination made by a Commonwealth agency, or to the court of common pleas for the county where the local agency is

located when the matter arises from a determination made by a local agency. 65 P.S. §§67.1301-1302.

126) The RTKL requires both the Commonwealth Court and the court of common pleas for the county where the local agency is located to render decisions that “contain findings of fact and conclusions of law based upon the evidence as a whole. [S]uch decision[s] shall clearly and concisely explain the rationale for the decision.” 65 P.S. §§67.1301(a); 67.1302(a).

127) Courts reviewing decisions of the OOR have the authority to expand their record to fulfill their statutory role and thus are entitled to the broadest scope of review. *See Bowling v. Office of Open Records*, 75 A.3d 453, 475-77 (Pa. 2013).

128) This scope of review includes an *in-camera* review of the record and supplementing the record through a hearing or even a remand of this matter to the OOR, if the Court so decides. *See Bowling v. Office of Open Records*, 990 A.2d 813, 820 (Pa. Commw. Ct. 2010).

129) The applicable standard of review is akin to a *de novo* review. *See id.*

130) A *de novo* standard of review permits the Court to determine the case anew, including matters relating to testimony and other evidence. *See Bowling*, 75 A.3d at 466 n. 14.

B. The Right to Know Law and Applicable Burden of Proof

131) The RTKL is the statute providing for access to public records in Pennsylvania. 65 P.S. §§67.101-3104.

132) Under the RTKL, agency records are presumed to be public record, accessible for inspection and copying by anyone requesting them, and must be made available to a requester unless they are: (1) exempt under §708 of the RTKL; (2) protected by privilege; or, (3) exempt

under any other federal or state law or regulation or judicial order or decree. *See Pennsylvania State Police v. Kim*, 150 A.3d 155, 157 (Pa. Commw. Ct. 2016) (quoting §305 of the RTKL).⁴

133) If the requested information is exempt under §708(b) of the RTKL, the information is not a “public record” and is exempt from disclosure in its entirety. *Commonwealth v. Simpson*, 151 A.3d 678, 684 (Pa. Commw. Ct. 2016).

134) In seeking to prove that a record is exempt from disclosure, the agency claiming the exemption bears the burden of proving it by a preponderance of the evidence. 65 P.S. §67.708(a); *see also Pennsylvania Office of Inspector Gen. v. Brown*, 152 A.3d 369, 372 (Pa. Commw. Ct. 2016).

135) “A preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry.” *Delaware County v. Schaefer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012); *see also Pennsylvania State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (explaining that by the preponderance of the evidence standard, “the existence of a contested fact must be more probable than its nonexistence”).

136) It is also well settled in this Commonwealth that testimonial affidavits found to be relevant and credible may provide sufficient evidence in support of a claimed exemption. *See McGowan v. Pennsylvania Dep’t of Env’tl. Prot.*, 103 A.3d 374, 381 (Pa. Commw. Ct. 2014); *Heavens v. Dep’t of Env’tl. Prot.*, 65 A.3d 1069, 1073 (Pa. Commw. Ct. 2013).

137) Such affidavits must be detailed, nonconclusory and submitted in good faith. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013). Absent

⁴ The RTKL identifies four types of public agencies: Commonwealth agencies, local agencies, legislative agencies, and judicial agencies. 65 P.S. §§67.301-304.

evidence of bad faith, however, the veracity of an agency's submissions explaining its reasons for nondisclosure should not be questioned. *Id.*

138) Although the purpose of the RTKL is to promote access to official government information to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions, where an agency proves by a preponderance of the evidence that an exemption set forth in §708(b) applies, the Court will be constrained by the applicable law to conclude that the record is exempt from public disclosure. *See Askew v. Pennsylvania Office of the Governor*, 65 A.3d 989, 991 (Pa. Commw. Ct. 2013) (citation omitted); *see, e.g., California Borough v. Rothey*, 185 A.3d 456, 465 (Pa. Commw. Ct. 2018) (holding that video taken by surveillance camera in a holding cell which recorded commission of a crime related to criminal investigation and thus was exempt from disclosure pursuant to §708(b)(16) of RTKL).

C. Analysis of Facts and Applicable Law

1. The UOF Video is Exempt From Disclosure Pursuant to §708(b)(16)

139) Section 708(b)(16) of the RTKL exempts from disclosure records of an agency which "relate to or result in a criminal investigation." 65 P.S. §67.708(b)(16).

140) Such records include:

- (i) Complaints of potential criminal conduct other than a private criminal complaint;
- (ii) *Investigative materials, notes, correspondence, videos, and reports*;
- (iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised;
- (iv) A record that includes information made confidential by law or court order;
- (v) Victim information, including any information that would jeopardize the safety of the victim;
- (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.
- (C) Impair the ability to locate a defendant or codefendant.
- (D) Hinder an agency's ability to secure an arrest, prosecution or conviction.
- (E) Endanger the life or physical safety of an individual.

65 P.S. §67.708(b)(16) (emphasis added).

141) Based upon the evidence presented, the undersigned finds that the County has demonstrated, by a preponderance of the evidence, that the UOF Video relates to a criminal investigation, and thus, is exempt from disclosure.⁵

142) The RTKL does not define the term “criminal investigation,” however, our Supreme Court has stated that it “clearly and obviously refers to an official inquiry into *a possible crime*.” *Pennsylvania State Police v. Grove*, 161 A.3d 877, 892-93 (Pa. 2017) (emphasis added).

143) In this matter, the County demonstrated by a preponderance of the evidence that there was an “official inquiry” by a law enforcement agency into whether a possible crime occurred regarding what is depicted in the UOF Video.

144) Indeed, it was the Bucks County District Attorney's Office who investigated the allegations that Ms. Stringer was being mistreated by correctional officers. Weintraub Aff., ¶ 2.

145) A Bucks County Detective was assigned to investigate these allegations for the specific purpose of determining whether criminal charges should be filed against any corrections officer(s). Weintraub Aff., ¶ 3.

⁵ The Court finds that the Affidavits of Mr. Weintraub and Mr. Kratz are detailed and nonconclusory and submitted by the County in good faith. The Court finds no basis to doubt the accuracy and/or veracity of their contents. Additionally, the Court finds that the testimony offered by Mr. Kratz at the hearing on December 16, 2021 was credible.

146) District Attorney Weintraub reviewed the footage himself along with other materials obtained by the District Attorney's Office during the investigation for the purpose of determining whether any criminal charges were warranted. Weintraub Aff., ¶ 4.

147) Furthermore, in the Weintraub Affidavit, District Attorney Weintraub makes clear that the Bucks County District Attorney's Office did not obtain or possess the UOF Video for any purpose other than to conduct a criminal investigation into whether criminal charges should be filed against one or more corrections officers. Weintraub Aff., ¶ 5.

148) The County also proved by a preponderance of the evidence that the UOF Video "relates to" this criminal investigation.

149) Merriam-Webster's Dictionary defines "related to; relating to; relates to" in relevant part, as: 1) to connect (something) with (something else); and 2) to be connected with (someone or something): to be about (someone or something). *Relate to*, Merriam-Webster's Dictionary, merriam-webster.com/dictionary/related%20to (last visited March 30, 2022).

150) Black's Law Dictionary defines the term to mean: "To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with; with "to." *Relate*, BLACK'S LAW DICTIONARY (6th ed. 1990).

151) Here, the record reflects that that the UOF Video was connected with the criminal investigation, did stand in some relation to the criminal investigation, did pertain to the criminal investigation, and did have some bearing on the criminal investigation. Weintraub Aff., ¶¶ 2-5.

152) And in fact, the evidence was that the UOF Video was at the very center of this criminal investigation.

153) Mr. Sholtis argues §708(b)(16) should not apply because “to the extent the video was referred to the DA’s office, it was not for criminal investigation;” however, there is no evidence in the record to support such a conclusion. Sholtis Closing Brief at 4.

154) Similarly, Mr. Sholtis’ arguments that §708(b)(16) does not apply because the County itself did not request a criminal investigation and because no criminal charges were ever filed are without merit. Sholtis Closing Brief at 4.

155) Notably, Mr. Sholtis does not cite to any specific legal authority in support of either proposition in the Sholtis Closing Brief.

156) Furthermore, there is nothing in the RTKL which requires that for the criminal investigation exemption to apply, the agency performing the investigation must be the same agency whose record is at issue. 65 P.S. §67.101, *et seq.*

157) To the contrary, the relevant language in §708(b)(16) is that “[a] record of an agency relating to or resulting in a criminal investigation” not “a record of the agency” 65 P.S. §67.708(b)(16) (emphasis added).

158) Indeed, the OOR’s interpretation would effectively eliminate the criminal investigation exemption for any agency who could not perform its own criminal investigation and needed to rely upon the District Attorney’s Office to do so.

159) Moreover, the Courts of this Commonwealth previously have rejected the notion that merely because a record was made before and independent of any investigation that it cannot somehow relate to an investigation. *See, e.g., Rothey*, 185 A.3d at 465 (holding that video taken by surveillance camera in a holding cell which recorded commission of a crime related to criminal investigation even though the video was not created for an investigative purpose); *see also Port Auth. of Allegheny Cty. v. Towne*, 174 A.3d 1167, 1172 (Pa. Commw. Ct. 2017)

(rejecting rationale that a video could not relate to an investigation merely because it was made before and independent of the investigation).⁶

160) Thus, in this regard, the OOR erred when it concluded that the UOF Video was not related to a criminal investigation because it was a record in the possession of the County and not the agency that had actually conducted this investigation. Final Determination at 7.

161) There also is nothing in the RTKL which requires the ultimate filing of criminal charges to trigger the criminal investigation exemption. 65 P.S. §67.708(b)(16).

162) To the contrary, in the context of these types of cases in which the criminal investigation exemption is at issue, our Supreme Court has made clear that the focus is on whether there was a *possible* crime. *Grove*, 161 A.3d at 892-93.

163) Similarly, there is nothing in the RTKL which requires the agency whose record is at issue to actually request a criminal investigation. 65 P.S. §67.101, *et seq.*

164) For all the foregoing reasons, the Court finds that the UOF Video is exempt from disclosure pursuant to §708(b)(16) of the RTKL.

2. The UOF Video is Exempt From Disclosure Pursuant to §§708(b)(1), (2) and (3)

165) Sections 708(b)(1)-(3) of the RTKL exempt from public disclosure records impacting public safety, physical security, and personal security. 65 P.S. §§67.708(b)(1)-(3).

⁶ Also, the facts in *Hayes v. Pennsylvania Dep't Public Welfare*, OOR Dkt. AP 2012-0415, 2012 PA O.O.R.D. LEXIS 530, are distinguishable from those in this case. In *Hayes*, the entity performing the investigation was the federal government. The definition of "agency" under the RTKL plainly excludes the federal government. 65 P.S. §67.102. Accordingly, in that case, the exemption could not possibly apply to an investigation by an entity who is not included as an "agency" under the RTKL.

166) Section 708(b)(1)(ii) exempts from public disclosure a record which “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).

167) 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.” 65 P.S. §67.708(b)(2).

168) Section 708(b)(3) of the RTKL exempts from disclosure any “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.” 65 P.S. §67.708(b)(3).

169) In interpreting the “reasonably likely” part of the test associated with each of the security-related exemptions, the Court is to consider the likelihood that disclosure would cause the alleged harm. *See Carey v. Pennsylvania Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013).

170) This requires the agency to offer more than mere speculation or conjecture. *See id.*

171) In cases involving correctional institutions, however, the Courts have repeatedly recognized that the prison setting requires that personal security and public safety issues be given serious consideration where a RTKL request seeks records relating to such settings. *See, e.g., id.* (holding that records identifying individuals who authorized transfers of inmates were exempt where Department of Corrections demonstrated that disclosure would create risk of inmate retaliation against the staff who authorized the transfers).

172) The Court finds that the County has demonstrated by a preponderance of the evidence that the security-related exemptions in §§67.708(b)(1), (2) and (3) apply and that the UOF Video is not a public record subject to disclosure.

173) The UOF Video reveals a significant amount of information relating to the security of the physical structure of BCCF, the procedures and processes associated with a planned use of force event, and the specific individuals involved in this particular use of force event, including, but not limited to:

- a. Directions and instructions provided to corrections officers involved in a use of force event;
- b. Procedures and protocols to be utilized in connection with a use of force event;
- c. Make-up of the use of force team;
- d. Equipment to be worn and/or used by corrections officers involved in a use of force event;
- e. Generally how corrections officers would be expected to respond to various aspects of a use of force event;
- f. Information regarding conduct to be expected of different members of the use of force team in responding to a use of force event;
- g. Specific actions and order of actions to be expected taken by corrections officers involved in use of force event generally and in response to particular types of conduct;
- h. Information relating to procedures used by BCCF relating to cell extractions;
- i. Areas of BCCF that are not open to the general public;
- j. View of a secured area of the BCCF;
- k. Exits and entrance of the SRT;
- l. Details of the SRT;
- m. Information regarding BCCF's camera layout;
- n. Location of static cameras in the facility, including those which are not otherwise obvious;
- o. Location of doors, ingresses and egresses within the BCCF;
- p. Location of access points and entries into areas that are not otherwise accessible to inmates; and
- q. Physical appearance and other identifying information of corrections officers involved in this use of force event.

174) As Mr. Kratz explained at the hearing, via this footage, one gets to see the Department of Corrections' policies and procedures "come to life" by viewing how a planned use of force event plays out from beginning to end. N.T. 12/16/21, p. 59.

175) The Court credits the opinion of Mr. Kratz that disclosure to the general public of the Department of Corrections' policies and procedures relating to use of force events and layout of the building, including location (or absence) of cameras and points of ingress and egress creates an unsafe environment.

176) The Court credits the opinion of Mr. Kratz that that knowledge on the part of inmates and other members of the public of expected conduct on the part of prison staff during a use of force event can be, and has been, exploited by offenders, including at BCCF, thereby creating a greater risk and opportunity of (or even facilitating), a security breach, escape, damages to the physical structure and/or an attack on a corrections officer, offender or third-party provider.

177) The Court found the testimony of Mr. Kratz and the information contained within the Kratz Affidavit which supports these conclusions goes well beyond speculation and/or conjecture.

178) Rather, the Court finds that the evidence presented through Mr. Kratz to be relevant, material, credible, accurate, detailed, and based upon many years of experience working in a prison setting.

179) Additionally, the Court finds such evidence to be based upon actual personal knowledge of how the disclosure of certain types of information to the general public can be exploited to facilitate escapes, security breaches, building damage (i.e., destruction of cameras),

physical harm to inmates, corrections officers and third-party providers, and other illicit conduct in the prison setting.

180) The Court also notes that the record at issue in this case is video footage. Thus, anyone who wished to actually study the footage of this particular use of force event for some illicit purpose could easily do so.

181) For example, one could study the policies and protocols provided to the corrections officers in the SRT and the type of gear and equipment used during this use of force event to better know and understand what conduct to expect from a corrections officer, any possible weaknesses in their gear, and the tools they would have (or not have) on them to protect themselves from an attack.

182) Similarly, one could study the area of the building depicted in the UOF Video, including camera layout, ingress/egress, doors, exits and location of certain areas with respect to others as part of a plan to escape, cause a diversion, and/or engage in other illicit conduct.

183) Based upon the foregoing, the Court finds by a preponderance of the evidence that disclosure of the UOF Video is reasonably likely to result in a substantial and demonstrable risk of physical harm to, or personal security of, an individual, and specifically, to corrections officers, inmates, and/or third-party providers at BCCF.

184) The Court also finds by a preponderance of the evidence that disclosure of the UOF Video is reasonably likely to jeopardize or threaten public safety or preparedness or a public protection activity, including the ability of corrections officers at BCCF to prevent escapes and/or other illicit conduct and/or to keep themselves, inmates and third-party providers safe and protected from and during attacks within the BCCF.

185) The Court further finds by a preponderance of the evidence that disclosure of the UOF Video is reasonably likely to endanger the safety or physical security of the BCCF given the information on the UOF Video regarding the location of ingresses, egresses, doors, secured areas, as well as information regarding areas of the building which are not covered with static cameras.

186) For all the foregoing reasons, the Court finds that the UOF Video also is exempt from disclosure pursuant to §§708(b)(1), (2) and (3) of the RTKL.⁷

187) The Final Determination of the OOR is **REVERSED**.

BY THE COURT:

4-4-22
Date


DENISE M. BOWMAN

*N.B. It is your responsibility
to notify all interested parties
of the above action.*

⁷ The Court acknowledges that the County has raised additional bases for its position that the UOF Video is exempt from disclosure. The Court has included findings of fact relevant to certain of those other arguments. However, given its conclusion that the UOF Video is exempt from disclosure pursuant to §§708(b)(1),(2),(3), and (16) of the RTKL, the Court does not include herein its legal analysis as to those other arguments.