

IN THE COMMONWELATH COURT
OF PENNSYLVANIA

No. 447 C.D. 2022

BUCKS COUNTY,
Appellee,

v.

BRETT SOLTIS,
Appellant

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

BUCKS COUNTY LAW DEPARTMENT

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to hear this appeal from a decision of the Court of Common Pleas of Bucks County in the matter of *County of Bucks v. Sholtis*, pursuant to 65 P.S. § 67.1302(a) and 42 Pa. C.S. § 762(a)(4).

COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW

In local agency appeals, the standard of review from the trial is “limited to determining whether findings of fact are supported by competent evidence or whether the trial court committed an error of law, or an abuse of discretion in reaching its decision.” *Allegheny Cty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 342 (Pa. Commw. Ct. 2013) (internal citations omitted). Additionally, the scope of review under the Right to Know Law (“RTKL”) is plenary. *Bowling v. Office of Open Records*, 621 Pa. 133, 171, 75 A.3d 453, 475 (Pa. 2013).

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Does the evidence presented support the Court's conclusion that the Use of Force video in question is a "record of an agency relating to or resulting in a criminal investigation" exempt from disclosure under 65 P.S. § 67.708(b)(16)?

Suggested Answer: **Yes.**

2. Does the evidence presented support the Court's conclusion that the Use of Force video in question is exempt under the security related exemptions of 65 P.S. § 67.708(b)(1), (2), and (3)?

Suggested Answer: **Yes.**

3. Should the lower court's decision recognizing the Use of Force video in question video is not a public record and should be withheld in its entirety under multiple RTKL exemptions be upheld?

Suggested Answer: **Yes.**

COUNTERSTATEMENT OF THE CASE

On July 17, 2020, Appellee, County of Bucks Board of Commissioners and Administration (“the Agency”), received a request from Appellant, Brett Sholtis, pursuant to the Right to Know Law (“RTKL”). Through his Right to Know (“RTK”) Request, Mr. Sholtis sought videos showing a use of force (“UOF”) event from May 2020, involving an incarcerated woman at the Bucks County Confinement Facility (“BCCF”) at that time. T.C.R. 096.¹ The video depicts, *inter alia*, a female inmate in severe mental distress while at least partially nude. On July 23, 2020, the Agency denied the underlying request arguing it was an exempt record relating to a criminal investigation, a noncriminal investigation, and investigated information unable to be disclosed under the Criminal History Record Information Act (“CHRIA”). T.C.R. 098; *See* 18 Pa.C.S. § 9106(c)(4).

On August 6, 2020, Mr. Sholtis appealed the denial to the Pennsylvania Office of Open Records (“OOR”). T.C.R. 102. On August 14, 2020, the Agency submitted its response to the appeal reiterating its grounds for denial. T.C.R. 141. The Agency attached to its response the Affidavit of Matthew Weintraub, Esq. the District Attorney of Bucks County. T.C.R. 142, 459. On October 16, 2020, the

¹ The Agency has discovered that the Reproduced Record submitted by Mr. Sholtis contains errors such as missing pages from the original Court of Common Pleas Petition for Review. Therefore, the Agency has Bates numbered the Trial Court Record and will be citing to that record for accuracy.

OOR issued a Final Determination requiring the video's disclosure. T.C.R. 145.

The OOR erroneously 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 video from disclosure. *Id.*

The Agency timely appealed the Final Determination to the Court of Common Pleas of Bucks County on November 13, 2020. T.C.R.003. Mr. Sholtis filed a response to the Petition for Review of the October 16, 2020, Final Determination on December 21, 2020. T.C.R. 231, 462.

An evidentiary hearing was originally scheduled for October 25, 2021. T.C.R. 250. The hearing was then rescheduled for December 16, 2021. T.C.R. 278. On that date, Director of the Bucks County Correctional Facility (then Deputy Director of the Bucks County Correctional Facility) Director David Kratz² testified. T.C.R. 366, 476. After this hearing, the Honorable Denise M. Bowman reviewed the disputed UOF video *in camera* and requested closing briefs from each party. On January 14, 2022, the Agency submitted its closing brief arguing the video constitutes both criminal and non-criminal investigative material and would have safety implications if released, therefore the video was exempt pursuant to 65 P.A. § 67.708(b)(1)(ii), (2), (3), (16), and (17). The Agency furthered the need to balance the inmate's privacy interests against the public

² Appellant erroneously refers to Director Kratz as, "Warden Kratz."

interest promoted by disclosure of the UOF Video. Finally, the Agency argued that the UOF Video is exempt from disclosure because it is a record protected under CHRIA, 18 Pa. C.S. §9106(c)(4). T.C.R. 283, 289-290. Mr. Sholtis submitted his Reply Brief on January 27, 2022, arguing the video is unrelated to any investigation, criminal or non-criminal, because no charges were filed following the District Attorney's review. T.C.R. 297.

On April 4, 2022, Judge Denise Bowman issued a decision reversing the decision of the OOR. Judge Bowman ruled the UOF Video is exempt from disclosure pursuant to § 708(b)(16) (exempting records relating to or resulting from criminal investigations) and §§708(b)(1)-(3), (2) and (3) (exempting records impacting safety, physical security, and personal security).³ T.C.R. 306, 571. This appeal was filed on May 3, 2022. The decision is attached hereto as Exhibit A.

SUMMARY OF THE ARGUMENT

The Court of Common Pleas correctly determined that the OOR decision should be reversed and the requested UOF video should not be released pursuant to several exemptions applicable under the RTKL. The Court concluded that the Agency met its burden of demonstrating, by a preponderance of the evidence, that the UOF Video was exempt from disclosure pursuant to numerous RTKL

³ Given the Court's conclusion that the UOF Video is exempt under the foregoing exemptions, the Court did not include a legal analysis as to the other arguments raised by the Agency. However, the Court did include findings of fact relevant to the Agency's additional arguments.

exemptions. The Trial Court clearly, thoroughly considered and applied all the relevant law and evidence presented in making its detailed decision. Additionally, the trial court did not commit an error of law or abuse of discretion in deciding the entirety of the record was exempt under various RTKL exemptions.

The trial court did not erroneously apply the RTKL criminal and non-criminal investigation exemption. As evidenced numerous times and determined by the trial court, UOF events are recorded specifically to be investigated. Additionally, the trial court determined the Agency's evidence was more than mere conclusory statements as to the safety implications of releasing a UOF video. In fact, Director Kratz's testimony specifically references personal experiences he has had with security breaches.

The trial court properly found, after *in camera* review, that there is no way to redact the UOF video and completely remove the exempt information. Therefore, it is not considered a public record and not subject to release in redacted or unredacted form.

ARGUMENT

I. The Court correctly applied Section 67.708(b)(16) as well as Sections 67.708(b)(1)-(3) in finding the UOF video was exempt from disclosure

The Trial Court properly applied the relevant Right-to-Know Law exemptions based upon evidence and testimony presented. The Agency was found

to have met its burden of demonstrating the UOF video was exempt from disclosure by a preponderance of the evidence. 65 P.S. § 67.708(a). Absent a determination that the below decision was not supported by competent evidence, was an error of law, or was an abuse of discretion, the ruling should not be overturned. *See Parsons*, 61 A.3d 336.

A. The RTKL’s Criminal Investigative exemption applies to bar the release of the UOF video

Appellee argues that the Trial Court misapplied the criminal investigative exemption of the RTKL, 65 P.S. § 67.708(b)(16), by ruling that it applies to the underlying UOF video. However, they fail to offer any conclusive evidence that this is the case. As Section 67.708(b)(16) states, the exemption applies to “record[s] 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 argument that the UOF videos may simply lead to an investigation of some sort and are not the actual purpose of creating the videos completely ignores evidence presented at the Trial Court below. As the Trial Court states, “[t]he 187 Findings of Fact and Conclusions of Law included therein reveal that this Court very carefully considered all of the evidence, including that relating to the purpose(s) for which the UOF Video was created.” Exhibit A (emphasis in original). As Director David Kratz testified, the UOF events are recorded to be

used as “an investigative and training tool.” T.C.R. 375, 382, 390, 394, 396, 485.

Additionally, Director Kratz testified that most of the time, these UOF events lead to some sort of investigation. T.C.R. 379, 489. Beyond Director Kratz’s testimony, the Affidavit of District Attorney Weintraub specifically attests to the fact that this particular UOF video was used to investigate allegations of mistreatment of the inmate in the video. T.C.R. 059, 459. It is well established that “[t]estimonial 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) (quoting *Heavens v. Dep’t of Env’tl. Prot.*, 65 A.3d 1069, 1073 (Pa. Commw. Ct. 2013)). Courts have explained “[t]he affidavits must be detailed, nonconclusory, and submitted in good faith. . . . Absent evidence of bad faith, the veracity of an agency’s submissions explaining reasons for nondisclosure should not be questioned.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (citing *Manchester v. Drug Enforcement Administration*, U.S. Department of Justice, 823 F. Supp. 1259, 1265 (E.D. Pa. 1993)). Therefore, it was not just a hypothetical question of whether the video could be used, but it was in fact used in a criminal investigation.

To the extent Mr. Sholtis is arguing that simply because a record exists prior to an investigation, it therefore cannot be subject to the criminal investigative exemption, case law says differently. In fact, the case cited by Mr. Sholtis to

support their argument explicitly states that recordings must be considered on a case-by-case basis as to whether investigatory exemptions apply. *See Pa. State Police v. Grove*, 640 Pa. 1, 27, 161 A.3d 877, 894 (Pa. 2017) (“Accordingly, we hold whether an MVR contains criminal investigative material must be determined on a case-by-case basis.”) A record does not need to be created specifically for an investigative purpose (although here, testimony establishes that is exactly the intention behind UOF videos). *See Port Auth. of Allegheny Cty. v. Towne*, 174 A.3d 1167, 1172 (Pa. Commw. Ct. 2017). Courts in this Commonwealth have consistently rejected the idea that simply because a record is created prior to and independent of an investigation, it therefore cannot be considered investigative material. *See, e.g., California Borough v. Rothey*, 185 A.3d 456, 465 (Pa. Commw. Ct. 2018) (holding that video taken by surveillance camera in holding cell which recorded commission of a crime related to criminal investigation even though video was not created for an investigative purpose); *Towne*, 174 A.3d 1167, 1172 (Pa. Commw. Ct. 2017) (rejecting reasoning that a video could not relate to investigation merely because it was made before and independent of the investigation).

By reviewing the video *in camera*, in addition to considering the evidence produced, the Trial Court found that this UOF video was exempted from public disclosure under several RTKL exemptions including the criminal investigative

exemption. Appellant grossly mischaracterizes the testimony of Director Kratz, cherry-picking comments made on the record in an attempt to persuade this Court that the criminal investigation exemption should not apply. As Director Kratz's testimony and District Attorney Weintraub's affidavits explain, the video was requested by the District Attorney pursuant to an investigation into whether criminal misconduct occurred warranting criminal charges. T.C.R. 059, 073, 459. Just because the investigation concluded that charges were not warranted does not mean an investigation did not occur.

Mr. Sholtis then goes on to make a circuitous argument that by using the plain definition of terms in the RTKL exemption as defined by the dictionary, which traditionally gives the most common definition of the terms, the Trial Court somehow ignored the requirement by the Pennsylvania Supreme Court that courts are to use the plain text of the RTKL in interpreting the statute. *See Bowling*, 75 A.3d 453, 466 (Pa. 2013 ("the plain language of each section of a statute must be read in conjunction with one another, construed with reference to the entire statute. . ."). There is no logic in the argument that using a plain definition of a word goes against reading the "plain language" of a statute.

B. The RTKL’s security and public safety exemptions apply to bar the release of the UOF video

Mr. Sholtis next argues that the safety exemptions in the RTKL do not apply to bar public disclosure of the video and makes the rather broad assertion that the Agency and its witnesses failed to introduce any evidence to suggest threats to the safety or security of the facility and its staff. This assertion not only fails to recognize the testimony and affidavits submitted by the Agency, but also the *in camera* review of the video performed by the Trial Court.

In order to apply the security related exemptions, the agency asserting the exemption must show, by a preponderance of the evidence, that the record “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); the record is maintained by a law enforcement or public safety activity and if disclosed would be reasonably likely to jeopardize public safety, preparedness, or the public protection activity, 65 P.S. §67.708(b)(2); or the record’s disclosure creates a reasonable likelihood of “endangering the safety or the physical security of a building. . .,” 65 P.S. §67.708(b)(3). When looking to the “reasonably likely” requirement of all three exemptions, the Court should “look to the likelihood that disclosure would cause the alleged harm, requiring more than speculation.” *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375 (Pa. Commw. Ct. 2013). To satisfy the “reasonably likely” requirement, “the agency must submit specific evidence, and it

may satisfy its burden by affidavit.” *ACLU of Pa. v. Pa. State Police*, 659 Pa. 504, 510, 232 A.3d 654, 658 (Pa. 2020). Specifically, for requests that seek video footage, the content of the video at issue in the request is what controls the application of the exemption. *Gregg Township v. Grove*, 2018 Pa. Commw. Unpub. LEXIS 343 (Pa. Commw. 2018).

As Director Kratz’s affidavit and testimony reflects, based on his own knowledge and experience, disclosure of this UOF video would create a safety risk to the security of staff, providers, and offenders at Bucks County Correctional Facility. R.015a. In his testimony, Director Kratz reiterates the safety implications by explaining this UOF video shows secured areas of the facility including, but not limited to, access points (doors and sally ports⁴), the Special Response Team (“SRT”) ready room, the path from the SRT room to the cell, the location of cameras, blind spots, areas of the facility not open to the public, and areas of the facility the inmates cannot access. T.C.R. 383-385, 422-425, 494, 533, 534; *See* Trial Court opinion at 16. Additionally, throughout the video, the viewer can hear not only the names of the corrections officers involved, but the directions being given, in real-time, pursuant to UOF policies and procedures. T.C.R. 411, 412,

⁴ A “sally port” is defined as “1: a gate or passage in a fortified place for use by troops making a sortie; 2: a secure entryway (as at a prison) that consists of a series of doors or gates.” *Sally port*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/sally%20port>, (last visited December 14, 2022).

440, 550, 521. Despite what Mr. Sholtis suggests, Director Kratz’s articulated descriptions of the safety concerns raised in public disclosure of this video go far beyond mere speculation or conclusory statements. Director Kratz specifically testified “[i]t can be used...[and] has been used historically in corrections to create diversions in aiding in escapes and things like that.” T.C.R. 383, 538. In response to a question whether Director Kratz had personally ever experienced an incident in which a prisoner used information obtained from witnessing a UOF even to avoid a future UOF event, he stated “Oh, absolutely. Offenders, repeat offenders know through experience some of the things that will happen.” T.C.R. 385, 540. He goes on to explain specific circumstances that have arisen. Clearly, the assertions that release of UOF videos constitutes safety risks is well beyond mere speculation.

Beyond specificity, Mr. Sholtis argues the Agency has failed to establish by preponderance of the evidence that there is a reasonable connection of the security risks to the public release of the UOF video. However, the fact that Director Kratz gave concrete examples of not only how viewing UOF events can be used to circumvent future UOF event procedures, but also how they have specifically been used in the past to circumvent the procedures certainly establishes a reasonable connection to the security risks. Mr. Sholtis cites to *York Cty. v. Coyle*, 2021 Pa. Commw. Unpub. LEXIS 426 (Pa. Commw. Ct. 2021) for his contention that the

Agency has failed to establish an appropriate “line of causation” between release of the video and the articulated security risks. However, the witness in that case used substantially similar language to that of Director Kratz to describe the apparent security risks from specifically releasing UOF policies and the Court found the “explanation of the concern relating to the use of force was not speculative, and that he detailed a "real and apparent" risk to the safety of staff members.” *Id.* at 20 (citing *Carey*, 61 A.3d at 373). Therefore, contrary to Mr. Sholtis’s contentions, *Coyle* squarely supports the Agency’s position that it established security risks beyond a reasonable likelihood.

Despite Mr. Sholtis’s assertions to the contrary, the UOF video in dispute is not simply localized to one individual cell. Instead, as testimony from Director Kratz, as well as the Trial Court opinion, establish several rooms, hallways, ingresses, egresses, etc. are documented by the video. T.C.R. 383-385, 422-425, 494, 533, 534. Furthermore, Mr. Sholtis argues, that someone in a mental health crisis would not have the agency or control to exploit information learned through the UOF video. Beyond the fact that no support is offered for this proposition, public disclosure of the UOF video makes it available to *the public*, not just those individuals in a mental health crisis.

Given that application of both the criminal investigative material exemption, as well as the three security related exemptions were supported by ample evidence

and that there has been no clear error of law or abuse of discretion, this Court must uphold the Trial Court decision.

II. The Court correctly ruled that redaction is not appropriate as the entirety of the UOF video is exempt from Public Disclosure

Next, Mr. Sholtis argues the Trial Court committed reversible error in not ordering the Agency to release the UOF video with redactions. However, Mr. Sholtis ignores the fact that given the Trial Court found the entirety of the video to be exempt under multiple exemptions covering the whole recording, the Trial Court had no obligation to make any factual findings as to redactions.

The RTKL defines a public record as “A record. . .of a Commonwealth or local agency that: (1) *is not exempt under section 708.*” 65 P.S. §67.102 (emphasis added). Relying on *Grove*, Mr. Sholtis argues that there must be some part of the UOF video in question that is releasable after redaction. However, in *Grove*, the Court determined that the investigative portion of one video included only the audio portion and therefore could be released with the audio redacted. *Grove*, 161 A.3d 877 (Pa. 2017). While the Supreme Court affirmed the decision, it notably explained that this decision was distinguishable from previous case law that has held that records found to be exempt in their entirety do not constitute public records. *Id.* at FN18 (citing *Saunders v. Dep’t of Corrections*, 48 A.3d 540 (Pa. Commw. Ct. 2012)). In relevant part, in *Saunders*, the records in question were found to be subject to five separate RTKL exemptions and therefore were no

longer considered a public record. *See Id.* at 543 (“Thus, a record that falls within one of the exemptions set forth in Section 708 does not constitute a “public record.””) In the instant matter, it is not simply one portion or aspect of the UOF video that is exempt. Footage and audio throughout the video fall under multiple exemptions such that there is no portion of the video that is not exempt under the RTKL. Therefore, pursuant to 65 P.S. § 67.102, it is not subject to disclosure.

III. The UOF Video at issue is protected under additional exemptions not discussed by the Trial Court in its Conclusions of Law

Although the Trial Court did not address the non-criminal investigative exemption, the Criminal History Record Information Act (“CHRIA”) and the need to balance an inmate’s privacy interests, given that it found the UOF video fully exempt under the previously discussed exemptions, the Agency will briefly discuss them here.

A. The noncriminal investigative power inherent to the investigators are a part of their official duties and the UOF video is a noncriminal investigative record that is exempt from the RTKL.

Section 708(b)(17) exempts from disclosure “[a] record of an agency relating to a noncriminal investigation, including ... (ii) Investigative materials, notes, correspondence and reports . . . (iv) A record that includes information made confidential by law.” 65 P.S. § 67.708(b)(17)(ii), (iv). A “noncriminal” investigation is one not intended to consider prosecution, and in this context, “investigation” means “a systematic or searching inquiry, a detailed examination,

or an official probe.” *Department of Health v. Office of Open Records*, 4 A.3d 803, 811 (Pa. Commw. Ct. 2010). The inquiry, examination, or probe must be conducted as “part of the agency’s official duties.” *Id.* at 814.

Director Kratz testified that there are two investigators and a Chief Investigator within the Department of Corrections (“DOC”). T.C.R. 376. They investigate internal affairs issues and criminal behavior. Additionally, they review any UOF events to make sure they are compliant with the policies and procedures of the DOC. *Id.* Director Kratz testified that this authority stems from Title 37. T.C.R. 378, 488. Pursuant to 37 Pa. Code. § 95.220b, the County Prisons are allowed to set the requirements deemed essential to the safety and security of the county prison, prison staff, inmates, and the public. Additionally, section 95.241 sets out the minimum requirements that the written local policy of a county prison must contain regarding UOF events. 37 Pa. Code. § 95.241. The UOF video constitutes investigative materials used for a noncriminal investigation because, in addition to investigations into potential criminal conduct, the videos are created by the Bucks County Correctional Facility (“BCCF”) to document and review UOF events for purposes of training and other noncriminal investigations. Director Kratz states:

In a planned use of force, we do record with a hand-held camera. We record for the safety of the offender and the safety of the staff. It’s always good to have a record of what occurred and why. It’s for the protection of everybody. It’s also used as an investigative and training

tool that we can look at those films and we can learn from them and improve upon our policies and procedures and, again, to make sure we follow our policies and procedures.

T.C.R. 374-375, 484-485.

Creating a safe environment for inmates and correctional officers is squarely within the BCCF's official duties and having the ability to investigate for compliance with its internal policies is a necessary function of safety and security within the prison.

B. CHRIA prohibits dissemination of investigative information to entities that are not criminal justice agencies.

The UOF video is exempt from public disclosure because it is a record protected under CHRIA, 18 Pa.C.S. § 9106(c)(4). Section 3101.1 of the RTKL provides that, “[i]f the provisions of this act regarding access to records conflict with any other federal or state law, the provisions of this act shall not apply.” 65 P.S. § 67.3101.1. To further bolster the RTKL's deference to other law, Section 708 reiterates that a record is exempt from disclosure if it “includes information made confidential by law or court order.” 65 P.S. §§ 67.708(b)(16)(iv), (17)(iv). CHRIA prohibits disseminating “investigative information” to any persons or entities other than criminal justice agents and agencies. 18 Pa.C.S. §9106(c)(4). Specifically, Section 9106(c)(4) states:

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

request is based upon a name, fingerprints, modus operandi, genetic typing, voice print or other identifying characteristic.

18 Pa.C.S. §9106(c)(4).

“Investigative information” is defined under CHRIA as “[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing” 18 Pa.C.S. §9102. The operative word in the above definition is “assembled,” which means to “bring or gather together into a group or whole.” *Pennsylvania State Police v. Kim*, 150 A.3d 155, 160 (Pa. Commw. Ct. 2016) (citing *Am. Heritage Dictionary* 134 (2nd Coll. ed. 1985)). In his testimony, Director Kratz explained that the DOC is responsible for CHRIA protected information such as rap sheets, fingerprints, and arrest photos. T.C.R. 387-388, 496-497. Simply having an inmate identified in a correctional facility is protected. *Id.* at 389, 498. Criminal Justice Agencies include police departments, sheriff offices, other correctional facilities, and probation and parole departments. *Id.* at 390, 499. Requester is not a Criminal Justice Agency. *Id.* at 390-391, 499-500. In the case at hand, the video constitutes investigative information because it is assembled routinely to review inmate and correctional officer behavior and whether it amounts to criminal behavior. The video shows a UOF incident that was recorded by BCCF and reviewed by investigators of both the BCCF and the District Attorney’s office. Requester is not a criminal justice

agency and therefore his access to this video would be improper and illegal under CHRIA.

C. The Constitutional right to privacy is not outweighed by any public interest in this case.

When a record implicates personal information not expressly exempt from disclosure, the Pennsylvania Supreme Court has held that an individual still possesses a constitutional right to privacy in certain ways. *Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). In discussing the Pennsylvania Constitutional right to privacy, the Court defined the term “right of informational privacy” as “the right of the individual to control access to, or the dissemination of, personal information about himself or herself.” *Id.* at 350-51, 150 (2016) (citing Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. Ill. U. L. Rev. 479, 519-20 (1990)). In order to evaluate this right to privacy, the court “must “apply a balancing test, weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure.”” *Pa. State Educ. Ass'n* at 356, 153 (quoting *Times Publ'g Co. v. Michel*, 159 Pa. Commw. 398, 633 A.2d 1233 (1993)). Certain factors are constant when evaluating a privacy interest:

One is an individual’s reasonable expectation that the information is of a personal nature.... When information is public as a matter of statute, it is unreasonable for a person to expect that it is of a personal nature.... Another

factor is how the agency obtained the information; when an individual voluntarily submits information, it may be disclosed...; whereas, information obtained by an agency premised on statutory confidentiality is protected.... Also, the context holds additional significance, as does whether the information is an essential component of a public record.

Butler Area Sch. Dist. v. Pennsylvanians for Union Reform, 172 A.3d 1173, 1185 (Pa. Commw. Ct. 2017)

Mr. Sholtis's stated public interest of "further[ing] his ongoing reporting" does not outweigh the privacy interest in this UOF video. In the UOF video, the inmate is having a mental health episode and despite officers' attempts at modesty by using blankets and towels during movement, the inmate is documented as being wholly or partially nude throughout the video, as she refused to wear the offered safety smock.⁵ T.C.R. 573. Inside her cell, the inmate can be seen bending and stooping while naked, as well as forcefully banging her head against a window. The UOF video also shows the correctional physically stopping the inmate her from hurting herself. The UOF video goes on to show the shower and medical exam. T.C.R. 402, 405. Inmates in general have a reasonable expectation of privacy to not have such a distressful incident exposed to the public. While there is some limitation on individual constitutional rights while incarcerated, there is still a reasonable expectation of privacy. Increasing Mr. Sholtis's number of awards

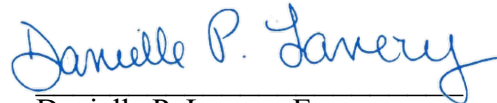
⁵ The inmate was being housed in the mental health wing of BCCF where "safety smocks," (a garment that provides full body coverage, but is specially designed so that it cannot be used as an aid to death by suicide) are issued to each inmate in lieu of confinement clothes. T.C.R. 034.

and accolades from news associations should not be the public interest that outweighs this inmate's privacy rights.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests this Honorable Court uphold the decision of the Bucks County Court of Common Pleas reversing the Final Determination of the OOR and requiring no further action on the part of the Agency with respect to release of the records at issue.

Date: December 16, 2022



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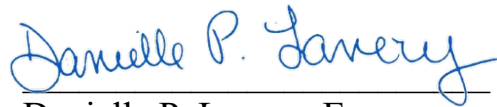
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Date: December 16, 2022



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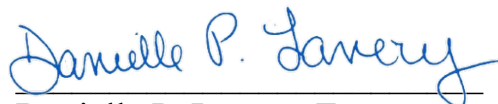
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**EXHIBIT A: APRIL 4, 2022 DECISION OF THE BUCKS COUNTY
COURT OF COMMON PLEAS**

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 though 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., Rothery*, 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/egresses, 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.