

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL DIVISION

HURUBIE MEKO and LNP MEDIA
GROUP, INC.,

Petitioners,

vs.

CITY OF LANCASTER

Respondents,

and

THE OFFICE OF THE DISTRICT
ATTORNEY OF LANCASTER COUNTY

Intervenor.

No. CI-21-00277

PROthonotary's OFFICE
LANCASTER, PA

2021 MAY -6 AM 11:33

ENTERED AND FILED

**JOINT BRIEF OF RESPONDENTS CITY OF LANCASTER AND INTERVENOR
OFFICE OF THE DISTRICT ATTORNEY OF LANCASTER COUNTY IN
OPPOSITION TO THE PETITION FOR REVIEW UNDER ACT 22 OF 2017**

Factual and Procedural History

The evening of September 13, through the early morning of September 14, 2020, a large number of protestors gathered outside of the Lancaster City Bureau of Police. During that time there were several acts of vandalism, disorderly conduct, and riotous behavior. As a result of the criminal actions occurring during the demonstrations, responding members of the Lancaster City Police Department activated the recording function of their body worn cameras.

Ultimately the unlawful activities occurring during the demonstrations led to criminal charges, and currently fourteen separate defendants have charges related to their actions during that unrest pending before the Court of Common Pleas.¹ To investigate and prepare the

¹ These charges are docketed at criminal numbers 3911; 3912; 4389; 4469; 4470; 4471; 4472; 4473; 4474; 4475; 4476; 4477; 4478; 4899; and 4916 of 2020.

prosecution for the criminal acts occurring during the demonstrations, the Lancaster City Bureau of Police compiled all of the body camera footage related to the events on the evening of September 13, 2020, as well as the early morning of September 14, 2020. These videos were compiled within a single digital folder in the evidence.com© data management system for investigation and viewing by the Office of District Attorney as part of the criminal prosecutions noted above.

On November 9, 2020, Petitioner Hurubie Meko filed an Act 22 of 2017 (Act 22) Request for Body Camera footage from 10:30 PM on September 13, 2020, to 7:00 AM on September 14, 2020. On December 14, 2020, Respondent, City of Lancaster, in consultation with the Office of the District Attorney denied Petitioner's request. As noted by Respondents, the footage contains "numerous incidents of unrest that are part and parcel of riot and other criminal charges currently pending before the Court of Common Pleas." As a result, the requested footage contains evidence in criminal matters, as well as information pertaining to investigations surrounding the events depicted therein. Further, there was no reasonable method for Respondents to redact the recordings in a way that would safeguard the right to a fair trial on the aforementioned criminal charges.

On January 13, 2021, Petitioners filed the instant petition for judicial review arguing that reliance on the language of Act 22 in denying the request was a boilerplate arbitrary and capricious denial because the event was occurring in public. On April 29, 2021, Petitioner's filed a brief in support of their petition arguing that Act 22 demands "reasonable redaction" and production of the requested footage. Petitioner's arguments are misplaced and ignore the limiting section of Act 22 of 2017, and the provisions of the Criminal History Record Information Act. 42 Pa. C.S.A. § 67A09; 18 Pa. C.S.A. §§ 9102; 9106(c)(4).

Argument

Criminal History Record Information Act

The Criminal History Record Information Act (CHRIA) “governs the collection, maintenance, dissemination, disclosure and receipt of criminal history record information. As a matter of law, CHRIA prohibits dissemination of ‘investigative information’ to any persons or entities other than criminal justice agents and agencies.” California Borough v. Rothery, 185 A.3d 456, 467 (Pa. Cmwlth. Ct. 2018) (citing 18 Pa. C.S.A. 9106(c)(4)). See also, Commonwealth v. Pennsylvania State Police, 146 A.3d 814 (Pa. Cmwlth. Ct. 2016). Under CHRIA, investigative information is all “[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 and may include modus operandi information.” 18 Pa. C.S.A. § 9102.

In Rothery, *supra*, a requestor sought law enforcement video related to an assault committed by a law enforcement officer. Rothery, 185 A.3d at 459. The requested video had been downloaded by the police chief and taken to the district attorney for evaluation of whether criminal conduct occurred. Rothery, 185 A.3d at 460. That review led to criminal charges filed against that officer. Id. The Commonwealth Court held that in downloading and taking the video to the district attorney for a determination on criminal charges, the chief “‘assembled’ the criminal investigation information.” Id. at 467. As such, the Commonwealth Court held that the requested video was investigative information that was exempt from disclosure under CHRIA. Id. at 467.

Similarly, in Pennsylvania State Police, a requestor sought video that the Pennsylvania State Police obtained from Mt. Airy Casino Resort’s surveillance system as part of its investigation into a criminal trespass incident. Pennsylvania State Police, 146 A.3d at 816. In reviewing a

petition for *in camera* review by the Office of Open Records (OOR), the Commonwealth Court noted that the surveillance video was clearly investigative information subject to CHRIA as it was collected as part of a criminal investigation. *Id.* at 818. As the OOR was not a criminal justice agency as defined by CHRIA, the Commonwealth Court held that pursuant to CHRIA the State Police were “barred from releasing investigative information, including the surveillance video[.]” *Id.* at 818.

Here, the footage sought by Petitioner includes audio and video footage from numerous body worn cameras. The audio/video recording function of those body worn cameras was activated in response to the illegal actions occurring during the demonstrations. The purpose of activating the cameras was to obtain evidence in the investigation and prosecution of the criminal acts occurring during the demonstrations. To that end, the footage from each of these cameras was downloaded and gathered into a single digital folder within the evidence.com© data management system. Access to those videos was given to the Office of the District Attorney for review in determining the appropriate criminal charges to proceed on, and for use in the prosecution of the criminal acts depicted in those videos. Stated another way, the requested audio and video footage was recorded and “assembled as a result of the performance of an[] inquiry . . . into a criminal incident or an allegation of criminal wrongdoing[.]” 18 Pa. C.S.A. § 9102. Therefore, the requested video footage is investigative information, and CHRIA bars its release to anyone other than another a criminal justice agency. 18 Pa. C.S.A. § 9106(c)(4); Rothey, 185 A.3d at 467; Pennsylvania State Police, 146 A.3d at 818.

Under CHRIA, a criminal justice agency is defined as:

Any court, including the minor judiciary, with criminal jurisdiction or any other governmental agency, or subunit thereof, created by

statute or by the State or Federal constitutions, specifically authorized to perform as its principal function the administration of criminal justice, and which allocates a substantial portion of its annual budget to such function. Criminal justice agencies include, but are not limited to: organized State and municipal police departments, local detention facilities, county, regional and State correctional facilities, probation agencies, district or prosecuting attorneys, parole boards, pardon boards, the facilities and administrative offices of the Department of Public Welfare that provide care, guidance and control to adjudicated delinquents, and such agencies or subunits thereof, as are declared by the Attorney General to be criminal justice agencies as determined by a review of applicable statutes and the State and Federal Constitutions or both.

18 Pa. C.S.A. §9102.

Petitioners, an investigative reporter and a news organization, are not criminal justice agencies as defined by CHRIA. Id. Therefore, pursuant to CHRIA Respondents are prohibited from releasing the requested video footage to Petitioners. 18 Pa. C.S.A. § 9106(c)(4); Rothey, 185 A.3d at 467; Pennsylvania State Police, 146 A.3d at 818.

Act 22 of 2017 specifically states that it does not apply to “an audio recording or video recording that is otherwise prohibited or protected from disclosure under any other Federal or State law.” 42 Pa. C.S.A. § 67A09. As noted above, the footage Petitioners request is investigative information under CHRIA. To that end, State law prohibits disclosure of the requested footage to anyone other than another a criminal justice agency, and Petitioners are not a criminal justice agency under CHRIA. 18 Pa. C.S.A. §§ 9102; 9106(c)(4). Therefore, because CHRIA prohibits the disclosure of the requested footage, Act 22 does not apply and Petitioner’s arguments for release under Act 22 are misplaced. 42 Pa. C.S.A. § 67A09.

Even assuming that Act 22 would apply to the footage requested by Petitioners, they have failed to establish that the denial was “arbitrary and capricious” or that the public interest in disclosure outweighs in Respondent’s interest in non-disclosure by a preponderance of the evidence. 42 PA. C.S.A. § 67A06.

Under Act 22, “if a law enforcement agency determines that an audio recording or video recording contains potential evidence in a criminal matter[] and the reasonable redaction of the audio or video recording would not safeguard potential evidence, information pertaining to an investigation[,]” Act 22 mandates that the agency deny the request and state specifically that reasonable redaction will not safeguard investigative information. 42 Pa. C.S.A. § 67A04. Here, Respondents determined, as noted above, that the requested footage contained evidence in pending criminal proceedings, as well as information being used in ongoing investigations. Respondents, and the Office of the District Attorney, determined that due to the nature and length of the charged conduct there is no reasonable method to redact the 28 hours and 32 seconds of footage that would safeguard the evidence in pending criminal cases and ongoing investigations such that all parties would receive fair trials.

Far from being arbitrary and capricious, Respondent’s denial seeks to safeguard not only evidence in criminal proceedings, but also the Due Process rights of the litigants. This is in keeping not only with the spirit of Act 22, but also similar legislation which strikes a balance between disclosure and the interests in the fair administration of justice. See, e.g., 65 P.S. § 67.708(16)(vi)(C) (Exempting from disclosure any record that would “[d]eprive a person of the right to a fair trial or an impartial adjudication.”).

As to the balancing of the public interest in disclosure and the Commonwealth's interest in non-disclosure, this Honorable Court may "consider the public's interest in understanding how law enforcement officers interact with the public, the interests of . . . law enforcement . . . and the resources available to review and disclose the audio recording or video recording." 42 Pa. C.S.A. §67A06(e)(2). The resources available to law enforcement are finite, and the Court should, despite Petitioner's protestations, consider the personnel and hours required to review, redact, and disclose the requested footage. Further, Commonwealth has a paramount interest in safeguarding evidence in criminal proceedings and the fundamental rights of its citizens. Few rights are more fundamental and important in our system of justice than the right to due process of law and the right to a fair and impartial jury. See, e.g., Murphy v. Florida, 421 U.S. 794, 798-800 (1975). While the public may have an interest in criminal events occurring in their community, that interest must yield to the constitutional rights of the accused to a fair trial. See, e.g., Irwin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966).

Based on the foregoing Act 22 is inapplicable to the footage requested by Petitioners as Respondents are prohibited from releasing it by the Criminal History Record Information Act. Further, even if the footage was subject to Act 22, Petitioners have failed to establish that the denial was arbitrary and capricious and that the public's interest in disclosure outweighs respondent's interest in non-disclosure.

Respectfully submitted,

OFFICE OF THE DISTRICT ATTORNEY



Andrew J. Gonzalez
Assistant District Attorney

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PROOF OF SERVICE

I hereby certify that I am this day serving one (1) copy of the foregoing, "Joint Brief of Respondents City of Lancaster and Intervenor Office of the District Attorney of Lancaster in Opposition to the Petition for review under Act 22 of 2017" upon the person(s) at the address(es) set forth below by via electronic mail:

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