

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION**

ALLEGHENY COUNTY,)	
)	
Petitioner,)	Docket No: SA-21-000108
)	
vs.)	
)	
MONICA FUENTES, and)	
)	
BRITTANY HAILER and)	
PITTSBURGH CURRENT,)	
)	
Respondents.)	

BRIEF IN SUPPORT OF PETITION FOR REVIEW

AND NOW, comes the Petitioner, Allegheny County, by and through its attorneys, Andrew F. Szefi, Allegheny County Solicitor, and Maggie Shiels, Assistant County Solicitor, and submits the following Brief in Support of its Petition for Judicial Review:

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Petitioner Allegheny County (“The County”) filed two petitions for review of decisions by the Pennsylvania Office of Open Records (“OOR”). The decisions involved requests made by Respondents Monica Fuentes and Brittany Hailer pursuant to the Right to Know Law (“RTKL”), 65 P.S. §67.101 et. seq. The requests at issue were for records created by the Allegheny County Medical Examiner (“ACOME”). Upon the County’s Motion, this Court consolidated the two cases on June 4, 2021.

The parties have filed two Stipulated Statements of Facts reflecting the procedural history of both cases. The Stipulated Statements of Facts set forth the content of the RTKL requests at issue, the County’s responses, and the OOR’s decisions.

STANDARD OF REVIEW

Reviewing courts apply a *de novo* standard of review to the OOR's decisions. *See Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013). The scope of review is broad and plenary. *See id.*

ARGUMENT

The primary issue in this case is whether the County must provide autopsy reports, for a fee, to RTKL requesters, despite the fact that the RTKL explicitly provides that autopsy reports are exempt from disclosure. The OOR determined that despite the plain language of the RTKL, the County must disclose autopsy reports. This conclusion was based on a misinterpretation of the governing law. Additionally, the records at issue in these cases are exempt from under the RTKL because they are related to a noncriminal investigation.

A. Autopsy Reports from Allegheny County are Exempt from Disclosure Under the RTKL.

1. The Evolution of the Coroner's Act.

The ACOME performs the duties that have been traditionally performed by coroners in Pennsylvania. *See* 16 P.S. §1202-B (defining the term "coroner" as "an elected or appointed coroner or an elected or appointed medical examiner"). The ACOME is governed by the Coroner's Act, 16 P.S. §1201-B et. seq. The Coroner's Act was repealed and replaced in 2018, but the case law the OOR relied upon when making its decisions in the instant cases was decided before that legislative action occurred. An examination of the changes to the Coroner's Act reveals that, under the current version of the Act, the OOR's rationale does not apply.

a. The Original Coroner's Act.

When the County Code was enacted in 1955, it included a section titled "Article XII. Sheriff and Coroner" ("Original Coroner's Act"). The Original Coroner's Act included a

provision titled “[o]fficial records of coroner,” which stated: “[e]very coroner, within thirty (30) days after the end of each year, shall deposit all of his official records and papers for the proceeding year in the office of the prothonotary for the inspection of all persons interested therein.” 16 P.S. §1251 (repealed 2018). This provision applied to all counties except counties of the first class. *See id.* Our Supreme Court decided that a coroner’s “official records and papers” included autopsy reports, materials used by the coroner in concluding that a death was a homicide, and billing records for a pathologist’s services. *See In re Martin T. Dillon*, 674 A.2d 735 (Pa. 1996).

The original Coroner’s Act also included a provision titled “[r]equests for examination and reports,” which authorized coroners to charge and collect fees for autopsy reports, toxicology reports, and inquisition reports “requested by nongovernmental agencies.” 16 P.S. §1236.1(c) (repealed 2018). Our Supreme Court held, in *Penn Jersey Advance, Inc. v. Grim*, 962 A.2d 632, 637 (Pa. 2009), that this section “provides a rapid means of procuring an autopsy report for those who do not wish to wait until after the end of the year, and who are also willing to pay the charges associated with procuring it.” In other words, the Original Coroners Act required coroners, other than those from counties of the first class, to deposit autopsy reports and other official papers with the prothonotary for public inspection annually, and also required coroners to make autopsy reports instantly available for the specified fees.

b. The New Coroner’s Act.

In October 2018, the General Assembly passed Act 154 of 2018, which extensively revised the County Code. This Act repealed Article XII in its entirety and replaced it with two separate new articles governing sheriffs and coroners. The Code section that now governs coroners and medical examiners is 16 P.S. §1201-B et. seq. (“New Coroner’s Act”). The New Coroner’s Act contains two substantial changes that affect the resolution of this case.

First, the New Coroner's Act provides that the requirement that coroners deposit their official records and papers with the prothonotary does not apply to counties of the first or second class. *See* 16 P.S. §1236-B. Since Allegheny County is a county of the second class, the ACOME is not required to make its official papers available for public inspection. This removes the ACOME's records from the certainty of becoming public.

Second, the New Coroner's Act amended the language of the provision allowing coroners to charge and collect fees for certain reports. As stated above, the Original Coroner's Act authorized coroners to charge and collect fees for autopsy reports, toxicology reports, and inquisition reports "*requested by nongovernmental agencies.*" 16 P.S. §1236.1(c) (repealed 2018) (emphasis added). The New Coroner's Act both raised the amount of the permissible fees and restricted the purposes for which people can request and receive reports for a fee.

The New Coroner's Act states:

The coroner shall charge and collect a fee of \$500 for an autopsy report, \$100 for a toxicology report, \$100 for an inquisition or coroner's report, \$50 for a cremation or disposition authorization and other fees as may be established from time to time for other reports or documents requested by nongovernmental agencies *in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased.*

16 P.S. §1252-B (emphasis added). The addition of the language "in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased" fundamentally alters the implications of this section. Where the Original Coroner's Act stated that coroners could charge fees for reports, it did not limit the type of request that coroners could respond to. In other words, the Original Coroner's Act indicated that anyone could request and obtain reports for the fees set forth in the Act, but the New Coroner's Act restricts those who can request and obtain reports to nongovernmental entities investigating an insurance claim or determining liability for a death.

2. The *Hearst Television v. Norris* Case.

The County denied Ms. Fuentes and Ms. Hailer's requests for autopsy reports pursuant to RTKL Section 708(b)(20), which exempts from disclosure:

[a]n autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmortem examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner. This exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death.

65 P.S. §67.708(b)(20). This exemption conflicts with the provision of the Coroner's Act, both original and new, requiring some coroners to make their official papers available for public access.

In 2012, before the New Coroner's Act was enacted, our Supreme Court examined the conflict between Section 708(b)(20) of the RTKL and the Original Coroner's Act provisions regarding access to reports. *Hearst Television, Inc. v. Norris* concerned a RTKL request to the Cumberland County coroner for records reflecting an individual's manner of death. 54 A.3d 23 (Pa. 2012). The coroner denied the request, asserting that records showing the manner of death did not become public records, subject to disclosure, until they were deposited with the prothonotary, as required by the Original Coroner's Act. *See id.* at 27.

Hearst Television is immediately distinguishable from the Fuentes and Hailer cases for two reasons. First, the requester in *Hearst Television* did not use the RTKL to request autopsy reports. The requester only sought the manner of death, which is explicitly excluded from the autopsy records exemption, which states "[t]his exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death." 65 P.S. §67.708(b)(20).

Second, the Cumberland County Coroner was, and remains, subject to the Coroner's Act provision requiring coroners in certain counties to deposit their official papers with the prothonotary for public access. Therefore, the coroner's records, including autopsy reports, were legally required to become public eventually.

The parties in *Hearst Television* "agree[d] that cause and manner of death records are public records that must be disclosed to the public; they disagree[d] about the timing of this obligation." 54 A.3d at 29. The case ultimately concerned whether someone could use the RTKL process to request coroner's records, for the fees specified in the Original Coroner's Act, that were not yet deposited with the prothonotary. Our Supreme Court held that the types of records specified in the fees section of the Original Coroner's Act must be immediately released, and that "the RTKL provides the procedure of accessing those records that are available for immediate release for a fee pursuant to Section 1236.1(c)." *Id.* at 33.

The outcome of *Hearst Television* was based on a critical holding: that the Original Coroner's Act did not vest coroners with any discretion to decide when and for whom they could charge fees for reports, as authorized by Section 1236.1(c). *Id.* at 32. The court held that "[t]here is no mention in Section 1236.1(c) of discretion. By its plain terms, therefore, ... Section 1236.1(c) allows the coroner to charge fees for records, but does not afford the coroner any discretion with regard to releasing such records." *Id.* Essentially, our Supreme Court held that since the Original Coroner's Act did not provide the coroner with discretion about when and to whom the autopsy, toxicology, and coroner's reports could be provided, any citizen can use the RTKL process for immediate access to those reports at any time, for the fees set forth in the Act.

Hearst Television was a case about the timing of a coroner's duty to release records. It was not about whether the records were public in the first place. The Cumberland County coroner acknowledged that "an autopsy report is either available at the end of the year upon

deposit with the prothonotary ... or may be procured sooner, for a fee.” *Id.* at 31. In his argument to the court, the Cumberland County coroner did not even address the autopsy records exemption to the RTKL, presumably because he understood that the Original Coroner’s Act superseded it. *See id.* In contrast, the ACOME is not required to make an annual deposit of its records and is not required to provide reports to anyone who will pay. The ACOME is only required to provide the name, manner, and cause of death to an RTKL requester.

3. The OOR’s Decisions Regarding the Fuentes and Hailer Requests.

The OOR’s final determinations in Ms. Fuentes and Ms. Hailer’s cases demonstrate a failure to consider the impact of the changes to the Coroner’s Act and a misinterpretation of *Hearst Television*. The OOR states that the New Coroner’s Act provides the public with two ways to access coroner’s records. (*See Fuentes* C.R. Ex. 10 at 3-4 and *Hailer* C.R. Ex. 6 at 4-5.) The OOR acknowledges that the first method, reviewing records that are deposited with the prothonotary, is not applicable to the ACOME records, since Allegheny County is a county of the second class. (*See Fuentes* C.R. Ex. 10 at 5 and *Hailer* C.R. Ex. 6 at 4.) Next, the OOR states “there is a second means of accessing records under the Coroner’s Act directly from the coroner under Section 1252-B,” which is the provision authorizing coroners to charge fees for autopsy, toxicology, and coroner’s reports. (*See Hailer* C.R. Ex. 6 at 4.)

To justify this outcome, the OOR cites to *Hearst Television*, stating:

[*Hearst Television* found that] ‘the RTKL provides the procedure for accessing those records that are available for immediate release for a fee pursuant to Section [1252-B]’. The Court further noted that there was no mention of discretion when charging or collecting these fees; as a result, Section 1252-B ‘allows the coroner to charge fees for records but does not afford the coroner any discretion with regard to releasing such records.’

(*See Fuentes* C.R. Ex. 10 at 5 and *Hailer* C.R. Ex. 6 at 5)(internal citations omitted). Later, the OOR explains:

[e]ven though *Hearst Television* was decided under the former version of the Coroner's Act, the rationale regarding the interplay between the former Coroner's Act and the RTKL still applies to the interplay between the current Coroner's Act and the RTKL... Therefore, a requester is not limited to only accessing records that may have been filed with the Prothonotary. Rather, any Coroner's records responsive to the Request identified in Section 1252-B of the Coroner's Act are available through the RTKL for the fees set for the in the Coroner's Act.

(See *Fuentes* C.R. Ex. 10 at 6 and *Hailer* C.R. Ex. 6 at 5-6)(internal citations omitted).

The O.O.R.'s interpretation about the application of *Hearst Television* to these cases is wrong. *Hearst Television* was decided under the Original Coroner's Act, concerned a county that had to provide its official papers for public access, and did not concern autopsy records. It does not directly apply to this case. Just because *Hearst Television* found that Cumberland County had to provide manner of death reports to a requester in 2012 does not mean that Allegheny County has to provide autopsy reports today.

The fact that *Hearst Television* was decided under the Original Coroner's Act is critical and should not be disregarded. When the New Coroner's Act was enacted, two important changes were made. First, the General Assembly exempted Allegheny County from the requirement that coroners deposit their official records and papers with the prothonotary. Second, the General Assembly added new language to Section 1252-B to limit the types of requesters that coroners could charge for autopsy, toxicology, and coroner's reports. See 16 P.S. §1252-B (adding the language "in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased"). These changes obviate the Supreme Court's reasoning in *Hearst Television* for two reasons.

First, *Hearst Television* examined the impact of the RTKL and the Original Coroner's Act on a coroner who was subject to the requirement to deposit his papers with the prothonotary. That coroner was required to make all of his official papers, including autopsy reports, public at the end of each year. Because of this fact, *Hearst Television* was essentially a case about the

timing of a request and whether the RTKL was an appropriate vehicle for access. When the RTKL conflicts with other laws, the other laws shall apply. *See* 65 P.S. §3101.1. Therefore, even though the RTKL exempts autopsy reports from disclosure, those coroners who are subject to the requirement about depositing papers with the prothonotary must still do so and cannot rely on the RTKL to withhold autopsy reports. But Allegheny County is *not* subject to that requirement. The ACOME's official papers, therefore, do not become available for public access on an annual basis. This deliberate act of the General Assembly removes the conflict between the RTKL and the New Coroner's Act as applied to Allegheny County.

Next, the new language in the provision about fees negates *Hearst Television's* holding that coroners have no discretion regarding whether they can release records. *Hearst Television* found that "there is no mention of discretion" in the Original Coroner's Act provision about fees. 54 A.3d at 32. But the New Coroner's Act inserts the very discretion that the Original Coroner's Act was lacking. The ACOME need only provide reports for a fee if the requester is investigating an insurance claim or determining liability for a death. *See* 16 P.S. §1252-B.

If *Hearst Television* were before the court today, and the ACOME was the responding agency, it is not clear that the outcome would be the same. Since the ACOME does not deposit its papers for public access, and since the New Coroner's Act provides some discretion as to when coroners can release reports immediately, the rationale behind *Hearst Television* no longer makes sense in this context. Autopsy reports from Allegheny County are not public records. They are not bound to be deposited with the prothonotary. They are not available to anyone who is willing to pay for them. There are no conflicts with the New Coroner's Act, so the autopsy records exemption in the RTKL controls.

**B. ACOME Reports are Exempt Because
they are Related to a Noncriminal Investigation**

Even if this Court determines that the OOR was correct in its analysis of the autopsy exemption to the RTKL, another RTKL exemption applies to the ACOME reports that the County withheld in the Fuentes case: the noncriminal records exemption. That exemption exempts “[a] record of an agency relating to a noncriminal investigation, including: Investigative materials, notes, correspondence and reports.” 65 P.S. §708(b)(17)(ii). A noncriminal investigation is “a systematic or searching inquiry, a detailed examination, or an official probe.” *Dept. of Health v. OOR*, 4 A.3d 803, 811 (Pa.Cmwlt. 2010). The inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814. An agency’s official duties “involve an agency’s legislatively granted fact-finding powers.” *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920, 924 (Pa.Cmwlt. 2012). All of the records in the ACOME’s files about decedents, including autopsy and toxicology reports, meet the criteria to qualify for this exemption.

Ms. Fuentes requested more than an autopsy report from the ACOME. Her RTKL request also sought “copies of public records from the [ACOME] that include any document related to, including but not limited to police¹ and autopsy reports related to Elijah Jamal Brewer (DOB: 10.29.1994, DOD: 3.5.2020) from the time period of March 1, 2020 to present.” The record below does not contain detailed information about which records the ACOME possesses that are responsive to this request. To clarify that issue, The County submits an affidavit from Mandy Tinkey, the Laboratory Director of the ACOME, attached hereto as Exhibit A.

¹ The County denied Ms. Fuentes’ request for police reports pursuant to the criminal investigation exemption to the RTKL. *See* 65 P.S. §708(b)(16). The OOR held that it does not have jurisdiction over denials under this exemption and transferred the issue to the District Attorney’s Office. The denial of the police reports is not part of this appeal.

Ms. Tinkey's affidavit includes a list of items contained in the ACOME's file for the decedent about whom Ms. Fuentes inquired, Elijah Brewer. In addition to the autopsy report and toxicology report, which are specifically named in the Coroner's Act as items the ACOME can release for a fee, the file contains several other records regarding Mr. Brewer. Ms. Tinkey attests that "[t]hese reports reflect the investigative work that ACOME personnel performed upon receiving Mr. Brewer's remains. A full investigation was required to ascertain the cause and manner of Mr. Brewer's death." *See* Exhibit A. at p. 2.

The reports that the ACOME generates while performing a death investigation are related to a systematic or searching inquiry performed as part of the ACOME's official duties using the ACOME's legislatively granted fact-finding powers. The ACOME's duties and responsibilities are enumerated in the Coroner's Act, and when an investigation proceeds pursuant to those duties and responsibilities, it qualifies as a noncriminal investigation.

The Coroner's Act provides that the ACOME must determine the cause and manner of certain deaths within the County. *See* 16 P.S. §1218-B(b). The ACOME is also responsible for determining whether an autopsy or inquest is necessary in 11 different types of cases, which are enumerated and described in the statute. *See* 16 P.S. §1218-B(a). In order to make these important determinations, the ACOME must "investigate the facts and circumstances concerning a death." *Id.* There can be no question, therefore, that the ACOME has legislatively granted fact-finding powers, and that performing death investigations is part of the ACOME's official duties.

The Commonwealth Court has consistently ruled that when agencies are performing factfinding investigations pursuant to their legislative mandates, records related to those investigations are exempt from disclosure under the RTKL. *See, e.g., Dept. of Environmental Protection v. Delaware Riverkeeper Network*, 113 A.3d 869 (Pa.Cmwlt. 2015) (D.E.P. study of potential radiation exposure resulting from oil and gas production was a noncriminal

investigation); *Coulter v. Dept. of Public Welfare*, 65 A.3d 1085 (Pa.Cmwlth. 2013) (Dept. of Public Welfare investigation into actions of the Butler County Children and Youth Services was a noncriminal investigation); *Heavens v. Pa. Dept. of Environmental Protection*, 65 A.3d 1069 (Pa. Cmwlth. 2013) (D.E.P. investigation of an accident at a gas well was a noncriminal investigation); *Dept. of Health v. OOR*, 4 A.3d 803 (Health Dept. inspections of nursing homes to ascertain compliance with statutes and regulations are noncriminal investigations).

Ms. Tinkey's Affidavit demonstrates that the ACOME's records regarding Mr. Brewer are related to a noncriminal investigation. Since the ACOME is not required to deposit its papers with the prothonotary for public access, there is no conflict between the RTKL and the Coroner's Act for this Court to examine. Autopsy and toxicology reports are also related to a noncriminal investigation, since they are created as part of the ACOME's legislatively-mandated inquiry into a death. Despite the fact that the ACOME can release these reports for a fee in certain circumstances, the ACOME may choose whether to do so. Therefore, there is no conflict between the RTKL and the Coroner's Act regarding autopsy reports and toxicology reports from the ACOME. Aside from information about the name of a decedent and the cause and manner of death, all of the ACOME's records related to a death investigation are exempt from disclosure under the RTKL.

CONCLUSION

Autopsy records are explicitly exempt from disclosure under the RTKL, and the Coroner's Act does not conflict with the RTKL as applied to death investigation records in Allegheny County. Therefore, Allegheny County respectfully requests that this Honorable Court reverse the OOR's decisions regarding ACOME records in these cases, and any other relief this Court deems just and proper.

Respectfully submitted,

Andrew F. Szefi
Allegheny County Solicitor
Pa. I.D. No. 83747

/s/ Maggie Shiels
Assistant County Solicitor
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CERTIFICATE OF COMPLIANCE

I certify that 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.

Signature: /s/ Maggie Shiels

Attorney No.: 321614

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the within Brief in Support of Petition for Review was served on the following attorneys, by electronic mail to the addresses noted below, on the 2nd day of July 2021:

Justin Romano
Counsel for Monica Fuentes
Service by electronic mail to: justin@arlawpitt.com

Paula Knudsen Burke
Counsel for Brittany Hailer and Pittsburgh Current
Service by electronic mail to: pknudsen@rcfp.org

By: /s/ Maggie Shiels
Attorney No.: 321614

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

ALLEGHENY COUNTY,)	
)	
Petitioner,)	Docket No: SA-21-108
)	
vs.)	
)	
MONICA FUENTES,)	
)	
Respondent.)	

AFFIDAVIT OF MANDY TINKEY

I, Mandy Tinkey, hereby declare under the penalty of perjury, pursuant to 18 Pa. C. S. A. § 4904, that the following statements are true and correct based upon my personal knowledge, information and belief:

1. My name is Mandy Tinkey. I am the Laboratory Director of the Allegheny County Office of the Medical Examiner (“ACOME”). One of my job responsibilities is to communicate with the County Department of Administrative Services and the County Law Department about Right To Know Law (“RTKL”) requests that the County receives for records in the possession of the ACOME.

2. In November 2020, I received notice of a request from Monica Fuentes for “public records from the Alleghany County Medical Examiner that include any document related to, including but not limited to police and autopsy reports related to Elijah Jamal Brewer (DOB: 10.29.1994, DOD: 3.5.2020) from the time period of March 1, 2020 to present.”

3. The ACOME performed an investigation into the death of Elijah Jamal Brewer. Our office has a file containing reports regarding this death.

4. The ACOME recommended that the County Department of Administrative Services deny this request for records pursuant to RTKL Section 708(b)(20).

5. The ACOME provided the County Department of Administrative Services with the cause and manner of Mr. Brewer’s death so that this information could be provided to Ms. Fuentes.

6. Documents related to the investigation of Mr. Brewer’s death are contained in a hard file in the Allegheny County morgue. The following is a list of the contents of the file:

- Release of human remains form
- Toxicology report

- Final autopsy report
- Autopsy report draft
- Autopsy room pathology notes
- Investigations report
- Release form
- Intake photograph
- Autopsy results request form
- Body receiving record (yellow copy)
- Autopsy information worksheet
- Autopsy evidence recovery log
- Draft death certificate
- Autopsy room death certificate
- Body receiving record
- Receipt for evidence (from hospital transfer)
- Scene notes
- GSR information sheet
- Autopsy report form CORE FORM D-33
- Fax receipt from Autopsy report form CORE FORM D-33
- Release receipt (COC)

7. These reports reflect the investigative work that ACOME personnel performed upon receiving Mr. Brewer's remains. A full investigation was required to ascertain the cause and manner of Mr. Brewer's death.

Mandy Tinkey

Date