

**IN THE SUPREME COURT OF PENNSYLVANIA,
MIDDLE DISTRICT**

NO. 25 MAP 2016

**PENNSYLVANIA STATE POLICE,
Appellant,**

v.

**MICHELLE GROVE,
Appellee.**

Brief of *Amicus Curiae* Office of Open Records

On appeal to the Pennsylvania Supreme Court from the July 7, 2015
Order and Opinion of the Commonwealth Court, Docket No. 1146 C.D. 2014,
affirming in part and reversing in part the June 17, 2014 Final Order of the Office
of Open Records, Docket No. AP 2014-0828

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Dated: June 30, 2016

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Your *amicus curiae*, the Office of Open Records (“OOR”), is an independent, quasi-judicial agency charged with, among other duties, implementation of the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”), including issuing final determinations of appeals within its jurisdiction and conducting training on the RTKL. *See* 65 P.S. § 67.1101; 65 P.S. § 67.1310(a); *Arneson v. Wolf*, 124 A.3d 1225, 1227 (Pa. 2015); *Office of Open Records v. Center Twp.*, 95 A.3d 354, 363-64 (Pa. Commw. Ct. 2014); *see also* 42 Pa.C.S. § 102 (defining “tribunal”).

Since its establishment in 2009, the OOR has adjudicated more than 14,000 appeals, participated in or monitored more than 1,000 cases in the Supreme Court, Commonwealth Court and courts of common pleas, conducted more than 800 trainings, fielded tens of thousands of inquiries from citizens, public officials and the media and has conducted hearings and mediations.

In the instant matter, your *amicus curiae* participates in this case in order to clarify that video footage generated by the police is generally subject to public access and that the RTKL contemplates the redaction of video records.

II. COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

A. Whether the Commonwealth Court properly held that MVRs are public records?

SUGGESTED ANSWER: Yes.

B. Whether the Right-to-Know Law and the Criminal History Records Information Act permit the release of MVRs?

SUGGESTED ANSWER: Yes.

C. Whether the Commonwealth Court correctly interpreted the Wiretapping and Electronic Surveillance Act?

SUGGESTED ANSWER: Yes.

D. Whether MVRs, like all other records subject to public access, may be redacted in accordance with Section 706 of the Right-to-Know Law?

SUGGESTED ANSWER: Yes.

III. COUNTER-STATEMENT OF THE CASE

On March 24, 2014, Appellee Michelle Grove (“Requester”) filed a request (“Request”) with Appellant Pennsylvania State Police (“PSP”) pursuant to the RTKL seeking “[a] copy of the police report and any video/audio taken by the officers at Crash Sr 144 Potters Mill Incident #G07-1359421...” *See Grove v. Pa. State Police*, OOR Dkt. AP 2014-0828, 2014 PA O.O.R.D. LEXIS 670. The PSP denied the Request, arguing that the audio/video recordings are exempt from public disclosure under 65 P.S. § 67.708(b)(18)(i). *Id.* According to the PSP, a trooper issued citations in the incident referenced in the Request: one driver was issued a citation for failing to wear his seatbelt; and the other was issued a citation for failing to yield. *See* Brief of Appellant PSP at 18.

The Requester appealed to the OOR, and an OOR Appeals Officer invited the Requester and PSP to supplement the record before the OOR with relevant evidence and/or legal argument. *Id.* Before the OOR, the PSP reiterated that the requested recording was exempt under 65 P.S. § 67.708(b)(18), but, for the first time, also argued that the recording was exempt under 65 P.S. § 67.708(b)(16) (exempting records related to a criminal investigation). *Id.* Based on the evidence offered by PSP, the OOR held that the PSP did not overcome the statutory presumption that the requested records were subject to public access. *See id.*; *see*

also 65 P.S. § 67.305(a) (“A record in the possession of a Commonwealth agency ... shall be presumed to be a public record”).

The PSP appealed to the Commonwealth Court. *See Pa. State Police v. Grove*, 119 A.3d 1102, 1104 (Pa. Commw. Ct. 2015). On July 7, 2015, Senior Judge Colins issued an opinion and order affirming the OOR, holding “that the requested video and audio recordings at issue are public records” with respect to a recording made by Trooper Vanorden. *See Pa. State Police*, 119 A.3d at 1111. Although the Commonwealth Court agreed that the video component of a recording made by Trooper Thomas was subject to public access, the Court reversed and remanded the matter to the OOR with respect to the audio portion of this recording. *Id.* In support of its holding, the Court reasoned:

PSP argues that both [mobile video recordings (“MVRs”)] ... are criminal investigative records because the motor vehicle accident to which they relate resulted in traffic citations, which are summary criminal offenses, and because one of the troopers investigated the accident before issuing the citations. We do not agree that these facts make the recordings investigative or exempt them as records “relating to or resulting in a criminal investigation.” The mere fact that a record has some connection to a criminal proceeding does not automatically exempt it under Section 708(b)(16) of the RTKL or CHRIA.... The types of records that we have held protected from RTKL disclosure under Section 708(b)(16) and CHRIA as investigative are records created to report on a criminal investigation or set forth or document evidence in a criminal investigation or steps carried out in a criminal investigation....

In contrast, PSP’s evidence demonstrates that the MVRs are created to document troopers’ performance of their duties in responding to emergencies and in their interactions with members of the public, not

merely or primarily to document, assemble or report on evidence of a crime or possible crime.... MVRs themselves are therefore not investigative material or videos, investigative information, or records relating or resulting in a criminal investigation exempt from disclosure under Section 708(b)(16) of the RTKL or CHRIA. Indeed, as documentation of law enforcement officers' conduct in carrying out their duties, MVRs are records at the core to the RTKL's purpose of enabling the public to "scrutinize the actions of public officials, and make public officials accountable for their actions." *McGill*, 83 A.3d at 479.

PSP has shown that MVRs can contain witness interviews, interrogations, intoxication testing and other investigative work, and that a portion of one of the two MVRs here, the Thomas MVR, includes witness interviews... We agree that such portions of an MVR are investigative information exempt from disclosure by Section 708(b)(16) of the RTKL and CHRIA. The fact that parts of a public record contain exempt information does not, however, immunize the non-exempt portions from disclosure; rather, in such circumstances, the agency must produce the record with the exempt information redacted.

Id. at 1108-09.

PSP subsequently sought permission to appeal to this Court, which this Court granted. *See Pa. State Police v. Grove*, No. 595 MAL 2015, 2016 Pa. LEXIS 448 (Pa. March 15, 2016).

IV. SUMMARY OF ARGUMENT

MVRs are not inherently investigative records that are exempt from disclosure under the RTKL or confidential under CHRIA. The decision of whether an MVR is a public record should be made on a case by case basis. MVRs are created for the primary purpose of documenting the performance of PSP Troopers duties, are recorded in a public place, and are not primarily intended to document evidence of a crime or possible crime. Here, the video portion of the MVR is a public record subject to access under the RTKL because it does not report on a criminal investigation, nor does it document evidence in a criminal investigation or show any steps carried out in an investigation.

Foundational to the RTKL's purpose of allowing the public to scrutinize the actions of public officials and employees, MVRs documenting the activities of police officers should be generally subject to public access in the absence of any actual investigative content or content that would hinder the ability of the police to efficiently investigate criminal activity. Investigative content includes witness and suspect interviews, interrogations, intoxication testing, measurements, collection of evidence, accident/crime scene analysis and other similar investigative activities.

Should an MVR contain investigative content, the RTKL permits agencies to release all public, non-exempt portions of the MVR by redacting any exempt investigative content. To the extent that audio portions of recordings need to be

removed from MVR footage, the redaction of audio is permitted by the RTKL and does not require the creation of any records.

V. ARGUMENT

MVRs are primarily used to document police interaction with members of the public and are presumptively subject to public access. The RTKL and CHRIA only allow the withholding of MVRs that document an investigation, not all MVRs that have been made by law enforcement personnel. Further, as the RTKL permits the redaction of records in order to separate exempt content from otherwise public records, the redaction or removal of portions of video or audio records is already contemplated by the RTKL and does not require the creation of a new record. Also, the Wiretap Act does not prevent access to video recordings. Finally, the public is generally entitled to receive recordings of public employees interacting with the public in a public setting.

A. Generally, neither the RTKL nor CHRIA prevent the release of mobile video recordings

The Commonwealth Court correctly held that the MVRs in this case are public records. The Court correctly interpreted exemptions for criminal investigative records in holding that the MVRs documenting a police officer's interaction with the public are subject to public access.

Section 708(b)(16) of the RTKL provides that agencies may withhold the following specific types of records:

(16) A record of an agency relating to or resulting in a criminal investigation, including:

- (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). Similarly, CHRIA provides, in relevant part, that “Information assembled as a result of the performance of any inquiry ... into a criminal incident or an allegation of criminal wrongdoing ...” “shall not be disseminated to any ... individual unless the ... individual requesting the information is a criminal justice agency ...” 18 Pa.C.S. § 9102 (defining “investigative information”); 18 Pa.C.S. § 9106.

As this Court has stated, “The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees, LLC v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this remedial statute is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013). In light of this purpose, the Commonwealth Court has repeatedly held that “[e]xemptions from disclosure must be narrowly construed due to the RTKL’s remedial nature.” *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commw. Ct. 2013); *see also Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38, *16 (Pa. Commw. Ct. 2012) (unreported) (“The RTKL must be construed to maximize access to government records”).¹ A broad interpretation of 65 P.S. § 67.708(b)(16) that would require the withholding of all recordings of a police officer’s interaction with a member of the public “would craft a gaping exemption, under which any governmental information-gathering could be shielded from disclosure.” *See Pa. Dept. of Pub. Welfare v. Chawaga*, 91 A.3d 257, 259 (Pa. Commw. Ct. 2014). Further, an overly broad interpretation of “investigative content” effectively transforms every

¹ This case is being cited for its persuasive value only. *See* Pa.R.A.P. 3716(b).

action of a law enforcement official or employee into an “investigation” and exempts every record held by a law enforcement agency. This Court should avoid such a result and narrowly construe any investigative exemption that would allow an agency to withhold records.

The Commonwealth Court correctly noted the purpose of MVRs:

the MVRs are created to document troopers’ performance of their duties in responding to emergencies and in their interactions with members of the public, not merely or primarily to document, assemble or report on evidence of a crime or possible crime. The MVR equipment is activated when an officer’s siren or emergency lights are turned on, a non-investigative event. (Rozier Affidavit ¶14.) Moreover, PSP uses MVRs to document the entire interaction and actions of the trooper, including actions which have no investigative content, such as directions to motorists in a traffic stop or at an accident scene, police pursuits, and prisoner transports. (Id. ¶¶10, 16.). MVRs themselves are therefore not investigative material or videos, investigative information, or records relating or resulting in a criminal investigation exempt from disclosure under Section 708(b)(16) of the RTKL or CHRIA. Indeed, as documentation of law enforcement officers’ conduct in carrying out their duties, MVRs are records at the core to the RTKL’s purpose of enabling the public to “scrutinize the actions of public officials, and make public officials accountable for their actions.”

Grove, 119 A.3d at 1108-09.

While there will be instances in which a police video is a record of a criminal investigation, *e.g.*, a police video created for the purpose of documenting the sale of illegal drugs, the MVRs at issue in this case — recordings following an accident in which one driver was issued a citation for failing to wear his seatbelt and the other was issued a citation for failing to yield — are public records, as the

MVRs were not created for the purpose of documenting a criminal investigation, and, therefore, are not investigative records under either the RTKL or CHRIA. Both the RTKL and CHRIA establish that only records constituting actual investigative content may be withheld from public access. Investigative content includes “records created to report on a criminal investigation or set forth or document evidence in a criminal investigation or steps carried out in a criminal investigation.” *Id.* at 1108.

The MVRs at issue in this matter were not created to report on a criminal investigation, document evidence in a criminal investigation or record steps in a criminal investigation. Instead, the MVRs were created here merely to document police officers’ dealings with members of the public — the MVRs themselves cannot be considered exempt investigative content. The fact that these MVRs may have some tangential connection to an infraction or crime does not automatically transform these records into exempt criminal investigative records.

Although the MVRs at issue in this matter should be subject to public access, some MVRs may contain investigative information (recordings that “report on a criminal investigation, document evidence in a criminal investigation or record steps in a criminal investigation”) that may be exempt either in its entirety or in part under either the RTKL or CHRIA. Based on a different set of facts, PSP may be able to establish that a particular MVR should be withheld from public

access in whole or in part. In this matter, however, the PSP did not establish before either the OOR or the Commonwealth Court that the requested MVRs are exempt from public access under RTKL or CHRIA. *See generally Levy v. Senate of Pa.*, 94 A.3d 436, 442 (Pa. Commw. Ct. 2014) (noting that “an agency must raise all its challenges before the close of evidence before the court” when, as here, the Commonwealth Court “acts as a fact-finder”). Accordingly, the Commonwealth Court properly held that the MVRs in this matter are subject to public access and remanded the matter to the OOR for consideration of the audio portions of the MVR.

B. Removing audio or other portions of a video does not require the creation of a record

MVRs can be redacted to allow for the release of public content when they contain both public and exempt investigative content. Specifically, the RTKL permits agencies to separate “public” from “non-public” information from all records and does not make any distinction between the format of the record at issue. *See* 65 P.S. § 67.706; 65 P.S. § 67.102 (broadly defining a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency”). In fact, under the plain language of 65 P.S. § 67.706, agencies are

required to redact public records, even if the exempt portion of the record “is an integral part” of the record. *See* 65 P.S. § 67.706.

PSP claims that, in order to redact the recordings, it would have to, instead, “create” a new record.² Quite simply, redacting portions of a record, whether the record is in writing or on video, is explicitly required by the RTKL. In an unpublished decision,³ the Commonwealth Court examined the interplay between 65 P.S. § 67.706 and 65 P.S. § 67.705 in terms of whether electronic records must be redacted:

This case illustrates the tension between § 705 of the RTKL, 65 P.S. § 67.705, which provides that an agency shall not be required to “compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record,” and § 706, 65 P.S. § 67.706, which mandates that if, “information which is not subject to access is an integral part of [a public record] . . . and cannot be separated, the agency shall redact from the record the information which is not subject to access,” but grant access to the remainder. Our court has not had occasion to attempt to define the parameters of the terms “compile, format, maintain or organize,”

Fort Cherry School District v. Acton, 38 A.3d 1092 (Pa. Commw. Ct. 2012) (unreported), *petition for allowance of appeal denied* 57 A.3d 72 (Pa. 2012).

² *Amici curiae* Pennsylvania State Association of Township Supervisors and the County Commissioners Association of Pennsylvania suggest that faces on video footage may need to be blurred and that voices may need to be altered. Such practices go beyond merely redacting frames of video footage or segments of audio footage and need not be considered here. To the extent that such practices are not required by the RTKL, the OOR notes that “an agency may create a record in order to ease review of requested information.” *Grine v. Cnty. of Centre*, No. 854 C.D. 2015, 2016 Pa. Commw. LEXIS 169, *22 (Pa. Commw. Ct. April 13, 2016).

³ The case is being cited for its persuasive value only. *See* Pa.R.A.P. 3716(b).

As a matter of statutory construction, the redaction of records can never require the “creation” of a record within the meaning of 65 P.S. § 67.705. Although, in *Pa. State Police v. McGill*, the Commonwealth Court held that an agency was not required to redact the names of police officers performing undercover operations when the agency would have to “contact[] every police department in the Commonwealth in order to make that determination,” the Court recognized that *McGill* constituted “a unique situation in which the request compasses information that is clearly protected from disclosure, but the agency has no way of discerning which information is protected.” 83 A.3d 476, 481 (Pa. Commw. Ct. 2014). Judge Mary Hannah Leavitt issued a dissent in *McGill* stating that, regardless of the unique scenario in *McGill*, she disagrees that “an agency’s redaction of an existing document is, as a matter of law, the creation of a document.” *Id.* at 482-84 (Levitt, J., dissenting). In determining the legislative intent behind the RTKL, the law commands that “[e]very statute shall be construed, if possible, to give effect to all its provisions.” 1 Pa.C.S. § 1921(a); *see also* 1 Pa.C.S. § 1922(2) (stating that it is presumed “[t]hat the General Assembly intends the entire statute to be effective and certain”).

There is no conflict between the provisions of 65 P.S. § 67.705 and 65 P.S. § 67.706, as both provisions can be given meaning as the General Assembly intended. While 65 P.S. § 67.705 states that agencies are not required to create

new records in order to respond to a request, 65 P.S. § 67.706 requires the redaction of non-public material from *existing* records. This is the only interpretation of these provisions that gives meaning to both of them. If Section 705 was interpreted as meaning that the redaction of records, instead, constitutes the creation of a new record, Section 706 would be rendered meaningless, as agencies would never be required to redact records.

As this Court has implicitly held in the past, the redaction of records does not require the creation of a record. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013) (upholding certain redactions to legal invoices). So, too, has the Commonwealth Court held that pulling information from an electronic database and exporting the data to a document does not require the creation of a record for purposes of Section 705. *See, e.g., Commonwealth v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012) (“[D]rawing information from a database does not constitute creating a record under the Right-to-Know Law”); *Acton*, 38 A.3d at *23-24 (noting that provision of data from an electronic database was “the electronic equivalent of opening a file cabinet and retrieving specific folders” and “A query of the District’s electronic database and the subsequent redaction does not require a reformatting, conversion, or creation of any new data”).⁴ As the Commonwealth Court’s holding in this matter properly held that redaction does not impermissibly

⁴ The case is being cited for its persuasive value only. *See Pa.R.A.P.* 3716(b).

require the creation of a record in interpreting 65 P.S. § 67.705 and 65 P.S. § 67.706, the Commonwealth Court should be affirmed.

C. The Wiretapping and Electronic Surveillance Control Act does not preclude the release of video footage

The Wiretapping and Electronic Surveillance Control Act (“Wiretap Act”), 18 Pa.C.S. §§ 5701-49, does not automatically prevent access to both audio *and video* portions of recordings.

The Wiretap Act states that a person commits a crime when he or she

- (1) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication;
- (2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or
- (3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

18 Pa.C.S. § 5703. The Wiretap Act defines an “oral communication” as an auditory communication, other than an electronic communication,⁵ that is “uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation.” 18 Pa.C.S. § 5702. Because the plain text of the Wiretap Act only restricts various uses of oral

⁵ PSP does not argue or allege that a video recording constitutes an “electronic communication” under the Wiretap Act.

communications, the Commonwealth Court properly held that the Wiretap Act does not prevent access to the video portion of recordings. Likewise, the Commonwealth Court properly remanded the instant matter to the OOR for consideration of issues related to the audio portions of the MVR.

