

IN THE  
Supreme Court of Pennsylvania

No. 25 MAP 2016

Pennsylvania State Police,

Appellant

v.

Michelle Grove,

Appellee

*Appeal from the Commonwealth Court's Opinion of July 7, 2015, at Docket  
No. 1146 CD 2014 affirming in part and reversing in part the June 17, 2014  
Final Determination of the Office of Open Records Docket No. AP 2014-0828*

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**BRIEF OF APPELLEE**

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## **SUMMARY OF ARGUMENT**

The Right to Know Law (RTKL) provides citizens a means to be aware of the activities of public officials and agencies in order to prohibit secrets, permit scrutiny, and improve accountability for public officials. Therefore, public policy and statutory provisions require that exemptions from disclosure are to be narrowly construed. In this case, the recordings requested of the state police are public records because they depict routine police activity- troopers responding to a traffic accident and interacting with the motorists and witnesses. This is not a criminal investigative record for purposes of the RTKL or the Criminal History Records Information Act (CHRIA).

The motor vehicle recordings (MVRs, commonly referred to as dash cams) have a number of purposes: they allow for monitoring and review of police contact with citizens, and they document the events of a traffic stop. They are not prepared or produced with the intent to be used in a criminal investigation. The video was not created to document the scene, it merely recorded what appeared in its scope as a method to monitor police activity, the discovery of which is at the core purpose of the RTKL. In this case, it recorded activities in the public view, and the release of these videos cannot be said to compromise any criminal or other investigation.

The Wiretapping Act does not apply to the audio recordings under these circumstances because there was no expectation of privacy, based on the description of the contents of the recording by PSP. A reasonable person is aware that police may employ audio and video systems to record their activities in public view, and those who interact with the police should be aware that those statements could be preserved on recordings made by the police through use of MVRs, body cams, written notes, etc. There is simply no expectation of privacy on behalf of the motorists or others present in this case.

In this day and age, to hold that the redaction of digital media would constitute the creation of a record would be to eviscerate the purpose and existence of the RTKL. It is reasonable to expect that more and more of the information sought under the act will be stored digitally. Redaction of digital media should not be considered the creation of a record, any more than using a pen to black out information on a public document, like social security number, which are routinely redacted. As this Court is well aware, its decisions have a lasting impact, and a ruling excusing an agency from redacting digital media may survive the expected improvements in technology which will make the current burden of redaction, which is minimal and reasonable, even less onerous.

Denying this citizen's request for records seriously limits the ability of the public to inquire into the actions of its public servants and to hold them

accountable. One of the primary purposes of these videos is oversight, and that oversight should not be limited to state officials. Public policy concerns and statutory law demand that access be granted. The appeal should be denied.

## ARGUMENT

### I. Introduction

Under the Right to Know Law (RCTL), all records are presumed public unless they are exempt (under the RCTL or other provision of law), or privileged. 65 Pa. Stat. Ann. § 67.708(a)(1). If an agency denies access to a record as being exempt, the burden is on the agency to establish the exemption by a preponderance of the evidence. *Pennsylvania State Police v. McGill*, 83 A.3d 476, 479 (Pa. Cmwlth 2014)(en banc). The purpose of the RCTL is to promote access to government information in order to prohibit secrets, permit scrutiny of the actions of public officials, and make public officials accountable for their actions. *Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Cmwlth. 2010). Exemptions from disclosure must be narrowly construed in favor of the requester. *McGill*, 83 A.3d at 479; *Carey v. Pennsylvania Department of Corrections*, 61 A.3d 367, 371 (Pa. Cmwlth. 2013); *Department of Environmental Protection v. Cole*, 52 A.3d 541 (Pa. Cmwlth 2012).

Appellee concurs with the position set forth in the amicus brief of the Pennsylvania NewsMedia Association, which provides a detailed history of the use and development of dash- and body- cams, and the public policy concerns regarding the same. While this Court's decisions must center on the relevant

statutory and case law, the public policy concerns are also paramount because of the statutory presumption in favor of disclosure and the narrow construction of exemptions.

**II. A video and audio recording of state police responding to a motor vehicle accident is not a record “related to a criminal investigation” for purposes of the RTKL.**

While mandating the release of public records, Pennsylvania’s RTKL sets forth certain exemptions from the definition of a public record which allow an agency to deny, or partially deny, a request for information. 65 P.S. §67.708. In this case, the exemption set forth by the Pennsylvania State Police (PSP) is found in subsection (b)(16), which exempts “a record of an agency relating to or resulting in a criminal investigation”, including investigative materials, notes, correspondence, videos and reports. 65 P.S. § 67.708(b)(16)(ii). In this case, the Commonwealth Court addressed the nature and purpose of such recordings by stating “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.” *Pennsylvania State Police v. Grove*, 119 A.3d 1102, 1108 (Pa. Commw. Ct. 2015).

The videos in question depict the troopers’ response to a vehicle accident, which resulted in the filing of summary offenses. While the Commonwealth Court

has held in this case that certain portions of the video (the interviews of witnesses) are investigative in nature, and that certain portions of the videos are exempt from release, *Grove*, supra at 1110., Ms. Grove asserts that the routine response to a traffic does not constitute a criminal investigation, and the video depicting that response is not an investigative record.

First of all, the Vanorden MVR includes no audio portion (R. 29a). The content of that video, as described by the PSP, depicts the trooper talking to the drivers of the respective vehicles and telling them where to park. In no way can this be considered an investigative record- it is the same information a passerby might obtain if driving by the scene of the accident. As the Commonwealth Court noted in its opinion, “PSP has therefore not shown that this MVR contains any investigative information that it could be entitled to redact.”

The Thomas MVR includes audio, which the Commonwealth Court addressed by indicating that portions of the audio could be redacted if they included witness statements or other investigative matters.<sup>1</sup>

While the contents of the video may include some information that may be useful by either the prosecution or defense in a summary traffic prosecution, that

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<sup>1</sup> Ms. Grove has not appealed the Commonwealth Court’s ruling insofar as it permits redaction of the “actual investigative information”, such as witness interviews. However, she does not concede that the routine response and questioning of individuals during a traffic stop or response to an accident constitutes criminal investigative material, as a summary traffic offense is not a crime under 18 Pa.C.S. §106. See *Locklear v. Sun Life Assur. Co.*, No. 4:14-CV-00401, 2015 U.S. Dist. LEXIS 57276 (M.D. Pa. May 1, 2015) for a persuasive discussion on the issue of whether a summary traffic offense is a crime in Pennsylvania.

potential use alone does not make the MVR an investigative record. Rather, it incidentally records events transpiring on or adjacent to a public roadway which can be viewed and heard by passersby.

In this day and age, a great deal of public life is recorded on video through security surveillance in businesses, public buildings, and even on public streets. While these videos may contain information that could be used in a criminal investigation, they are not criminal investigative materials because they merely serve as a scribe – recording what occurs in the camera’s view without a specific purpose other than general security.

This recording can be distinguished from, for example, a video of an accident scene taken for purposes of an accident reconstruction, or a witness interrogation taken on video tape. Those records would arguably be made for the purpose of an investigation and constitute information “related to a criminal investigation”. The Vanorden MVR is tangentially related to summary criminal offenses, but is not a criminal investigative record.

Taken to its logical extent, the position espoused by the State Police would suggest that any time the State Police pull over a motorist under suspicion of a traffic violation, a criminal investigation is being undertaken, and the MVR recording in each of those instances is exempt under the Right to Know Act. Such a position seriously diminishes the ability of the public to scrutinize the activities

of public officials and particularly, law enforcement considering its significant power and responsibility to the community at large. While the investigative activities may be exempt from disclosure, the video activities of the police discharging their routine duties are not exempt as investigative, and must be released to the requester, particularly when the court construes the claimed exemption narrowly. *McGill*, supra, at 479

**III. Video of PSP responding to a motor vehicle accident is not “investigative information assembled as a result of an inquiry into criminal offenses or wrongdoing” for purposes of the Criminal History Records Information Act.**

Appellant suggests that the Commonwealth Court has conflated the terms “criminal investigation” in the RTKL and “investigative information” which may not be disseminated under the CHRIA, 18 Pa.C.S. §9101 et seq., creating one standard that applies to both statutes. While these terms are not identical, principles of statutory construction require that they should be considered *in pari materia*, and construed as one statute if possible. 1 Pa.C.S.A. §1932.

For example, the Sunshine Act and the RTKL are to be read *in pari materia* because they relate to the same classes of things- public information. *Schenck v. Township of Center*, 893 A.2d 849 (Pa. Cmwlth. 2006).

Another example is found in *Rosen v. Bureau of Professional & Occupational Affairs*, 763 A.2d 962 (Pa. Cmwlth. 2000), in which the Court held

that the Pennsylvania Architects Licensure Law and the Pennsylvania Engineer, Land Surveyor, and Geologist Registration Law govern overlapping activities, and therefore must be read *in pari materia*.

Similarly, in the instant case a reading of the RTKL and the CHRIA mandate the result arrived at by the Commonwealth Court, which held that the mere fact that a record has some connection to a criminal proceeding does not automatically exempt it under the RTKL 708(b)(16) or the CHRIA. *Grove*, supra, at 1110. The types of records that have been protected from disclosure under both statutes are records created to report on a criminal investigation or to document evidence in a criminal investigation.

The discussion of these terms together in its opinion, therefore, is not a flaw of the Commonwealth Court's ruling- rather it reflects the court's effort to interpret the RTKL and the CHRIA *in pari materia*.

Under the specific language of the CHRIA, in order to be exempt, a record must be "assembled" as a result of an investigation into criminal or other wrongdoing. 18 Pa. C.S.A. § 9102. The MVR recording does not "assemble" investigative information; rather it documents police activity. The argument above regarding investigative information for purposes of the RTKL applies equally to the CHRIA, and the Commonwealth Court did not err in considering these statutes consistently.

**IV. The Wiretap Act does not prohibit the release of the MVR recording because there was no expectation of privacy on behalf of the motorists and witnesses who were being questioned.**

The Wiretap Act prevents the interception of “oral communication” without the knowledge of the individual being recorded. Oral communication is defined as “any oral communication 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. Protection under the Wiretap Act is in place when the individual being recorded is unaware of, and has not consented to the recording. However, in order for the Wiretap Act to provide protection, it is not enough to establish that the recording was made without the knowledge of the person, but also that the person had a reasonable expectation of privacy in that communication – that is, an actual expectation of privacy in their communication that society would accept as reasonable. *Agnew v. Dupler*, 553 Pa.33, 717 A.2d 519 (Pa. 1998).

First of all, it is clear that the video portion of the MVR is not subject to the Wiretap Act, as was conceded by appellant. Secondly, the statements made by those troopers are not protected by the Wiretap Act because they were aware, or should have been aware, that recordings were being made. Finally, the troopers

had no reasonable expectation of privacy while performing their duties in public. *Grove*, supra at 1110-1111.

Therefore, the Requester argues that under the circumstances of this case, it is unreasonable to believe that one's interactions with police are not being recorded. These recordings were made on or alongside a public roadway. The individuals at the scene knew that they were interacting with State Police, and had no reasonable expectation of privacy, particularly given the pervasiveness of devices which capture audio and sound.

In support of its assertion that the recording constitutes a wiretap, Appellant cites *Dance v. Pennsylvania State Police*, 726 A. 2d 4 (Pa. Cmwlth 1999), in which the recording at issue was a surreptitiously recorded phone call. *Dance* is distinguishable from the instant case because the declarant in that case clearly had an expectation of privacy in a telephone conversation, and was not advised of the recording.

The question of whether the Wiretap Act prevents the nonconsensual recording of an individual's conversation outside of one's home was discussed in *Commonwealth v. Bender*, 811 A.2d 1016 (Pa.Super. 2002), in which a criminal defendant moved to suppress statements made to an informant, in the informant's vehicle. While *Bender* did not rely on the Wiretap Act as a basis for suppression, the Court provided a detailed analysis of the expectation of privacy, which is a

statutory element of the Wiretap Act. The Superior Court concluded that there was no expectation of privacy, because the defendant had no reasonable expectation that the statement would not be intercepted electronically. Therefore, the Superior Court allowed the Commonwealth to use such evidence against the defendant.

Here, an individual speaking with a police officer or State Trooper would have no expectation that the conversation would remain private – particularly in light of the location of the conversation – alongside a public roadway, in the view and potentially the earshot of passersby.

Additionally, there is no expectation of non-interception, considering the prevalence of recording equipment on most electronic devices and in police vehicles. Those speaking to the police during the encounter would not have a reasonable expectation that their voices were not being recorded.<sup>2</sup>

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<sup>2</sup> The Wiretap Act, under 18 Pa. C.S. 5704(16), provides for use of electronic interception by law enforcement under the following circumstances:

A law enforcement officer, whether or not certified under section 5724 (relating to training), acting in the performance of his official duties to intercept and record an oral communication between individuals in accordance with the following:

(i) At the time of the interception, the oral communication does not occur inside the residence of any of the individuals.

(ii) At the time of the interception, the law enforcement officer:

(A) is in uniform or otherwise clearly identifiable as a law enforcement officer;

(B) is in close proximity to the individuals' oral communication;

(C) is using an electronic, mechanical or other device which has been approved under section 5706(b)(4) (relating to exceptions to prohibitions in possession, sale, distribution, manufacture or advertisement of electronic, mechanical or other devices) to intercept the oral communication; and

(D) informs, as soon as reasonably practicable, the individuals identifiably present that he has intercepted and recorded the oral communication.

Appellant argues that it is inconsistent for the State Police to assert that the contents of the audio and video recordings should not be subject to disclosure under the Wiretap Act, given that a similar recording would be disclosed in criminal proceedings on behalf of the Commonwealth if it included a confession or other inculpatory evidence. The Commonwealth has defended this type of use in criminal court, but is heard here to prevent its release to the public on the basis of an expectation of nondisclosure, and the privacy rights of third parties.

**V. The burden of redaction does not exempt PSP from disclosing the video.**

Amicus counsel for the appellant has argued that the impact of this decision would be to create a burden on the municipalities and counties in the Commonwealth. However, “there is simply nothing in the RTKL that authorizes an agency to refuse to search for and produce documents based on the contention it would be too burdensome to do so.” *Department of Environmental Protection. v. Legere*, 50 A.3d 260, 266 (Pa. Cmwlth. 2012)

Requiring the Department to provide records does not violate 65 P.S. § 67.705, which excuses an agency from creating a new record or reorganizing existing records. An agency need only provide the information in the manner in which it currently exists. However, drawing information from a database does not

constitute the creation of a record under the Right-to-Know Law. *Commonwealth v. Cole*, 52 A.3d 541, 547 (Pa. Cmwlth. 2012)

As the Commonwealth Court cited in its opinion: “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.” Section 706 of the RTKL, 65 P.S. § 67.706; *Advancement Project v. Pennsylvania Department of Transportation*, 60 A.3d 891, 894 (Pa. Cmwlth. 2013). *Grove*, supra at 1109.

Considering the evolving nature of the records and the digital form which they have taken, the PSP objection that redaction would be burdensome defeats the purpose of the RTKL. Removing some portions of the audio does not constitute the “creation” of a record any more than using a marker to obscure certain text from a document. As noted in the amicus brief submitted by the Pennsylvania NewsMedia Association, the digital nature of records may make compliance with RTKL requests easier, not more burdensome. While the resulting document differs from the original in that some portion is removed, it cannot be considered the creation of a record not already in existence.

The amicus brief filed on behalf of the appellant, which speaks of the burden to law enforcement and municipalities, overstates the potential ramifications. This court is not being asked to determine whether voice alteration or facial blurring

would be required in a given case – or parsing through footage to create a piecemeal result. There is nothing that suggests this would be needed in the instant situation due to the fact that the videos are taken in public places, and there has been no assertion of concern for the safety or privacy of the subjects within the video.

While court's ruling will have a lasting effect on RTKL cases, Appellee urges the court to consider this case on its limited factual basis, and not consider the factual scenarios mentioned in the amicus brief, which greatly exaggerate the potential need for and burden of redaction that could hypothetically occur in future cases.

Appellee urges caution in deciding whether the burden of redaction is too onerous. Ramifications of a decision that significantly limits the duty to redact in light of its burden could have a lasting effect as the trend toward digital records continues. It is concerning that amicus counsel cites the fact that affirming the Commonwealth Court's opinion would result in a greater number of requests for information and cites the burden on Commonwealth and municipal agencies. The burden of disclosure is not a permissible consideration; and the purpose of the RTKL would be defeated if these types of records are exempt from disclosure.

## CONCLUSION

WHEREFORE, the decision of the Commonwealth Court should be affirmed.

Respectfully submitted,



06/30/2016  
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