

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

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No. 25 MAP 2016

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Pennsylvania State Police,

Appellant

v.

Michelle Grove,

Appellee

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**REPLY BRIEF OF APPELLANT**

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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  
Final Determination of the Office of Open Records  
Docket No. AP 2014-0828 dated June 17, 2014

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## SUMMARY OF ARGUMENT

Appellant, the Pennsylvania State Police, files this Reply Brief pursuant to Pa.R.A.P. 2113 to address arguments made by Appellee, Michelle Grove and *Amici Curiae*, the Pennsylvania NewsMedia Association (PNA) and Reporters Committee for Freedom of the Press (RCFP) (collectively “PNA”) and the Office of Open Records (OOR).

Section 708(b)(16) of the Right-To-Know Law (RTKL) and Section 9106(c)(4) of the Criminal History Record Information Act (“CHRIA”), *as amended*, 18 P.S. §9101 *et seq.*, provide independent grounds for exemption of a record under the RTKL and should not be read *in pari materia*. Because these provisions are independent, each statutory provision requires its own legal analysis and legal conclusion as to whether a record is exempt under its terms. Furthermore, the statutory language in Section 708(b)(16) and Section 9106(c)(4) is clear and Appellee’s and *Amicis*’ attempts to provide alternative interpretations of the statutory requirements for exemption create erroneous legal standards. Lastly, the Legislature, through the Wiretap Act, 18 Pa.C.S. § 5701 *et seq.*, has enacted a comprehensive scheme covering the use and disclosure of MVRs, which prevents disclosure, except in limited circumstances. The disclosure permitted by the Wiretap Act allows the media and the public to view MVRs of public interest, after disclosure is made pursuant to its terms.

## ARGUMENT

### **I. SECTION 708(b)(16) OF THE RIGHT-TO-KNOW LAW AND SECTION 9106(c)(4) OF THE CRIMINAL HISTORY RECORD INFORMATION ACT ARE UNAMBIGUOUS.**

In her brief, Appellee asserts that Section 708(b)(16) in the RTKL and Section 9106(c)(4) in CHRIA must be read *in pari materia*. (Grove Br. at 10-11). This assertion is incorrect. Reading these provisions in such a manner is contrary to the rules of statutory construction and would contravene the plain language of each statute.

Statutes may be read *in pari materia* where they “relate to the same persons or things or to the same class of persons or things.” 1 Pa.C.S. § 1932. However, there is no need to resort to such interpretation where a statute is clear on its face. *See Oliver v. City of Pittsburgh*, 11 A.3d 960, 965 (Pa. 2011) (citing, *O’Rourke v. Commonwealth*, 778 A.2d 1194, 1201 (Pa. 2001)).

Here, Section 708(b)(16) of the RTKL and Section 9106(c)(4) of CHRIA neither relate to the same persons or things, nor do they present any ambiguity. 65 P.S. § 708(b)(16); 18 Pa.C.S. § 9106(c)(4). As such, each provision stands on its own merits, and demonstrates that the requested records are exempt from access.

For example, the RTKL is an act

[p]roviding for access to public information, for a designated open-records officer in each Commonwealth agency, local agency, judicial agency and legislative agency, for procedure,

for appeal of agency determination, for judicial review and for the Office of Open Records; imposing penalties; providing for reporting by State-related institutions; requiring the posting of certain State contract information on the Internet; and making related repeals.

The Right-To-Know Law, Act of February 14, 2008 (P.L. 6, No.3,) (preamble).

In contrast, CHRIA was enacted to restrict criminal justice agencies' ability to store, disseminate and use particular information gained through their operations. Thus, the RTKL was specifically designed to provide access to a wide variety of public records, in the possession of *all* agencies; conversely, CHRIA was specifically designed to *limit* use and dissemination of information gained by *only* criminal justice agencies. *See*, 18 Pa.C.S. § 9104(e) (clarifying that information collected by "noncriminal justice agencies" is not "criminal history record information."); 18 Pa.C.S. § 9181 (providing penalties for improper disclosure).

As such, each statute relates to wholly different (in fact, inapposite) purposes, and classes of persons or things. Thus, the provisions are not *in pari materia*, and the Commonwealth Court erred in conflating them.<sup>1</sup>

Further, each statutory provision is clear on its face. For example, section 708(b)(16) of the RTKL exempts from disclosure records "relating to or result in a

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<sup>1</sup> For an example of a provision of CHRIA that may be *in pari materia* with the RTKL, *see* 18 Pa.C.S.A. § 9151 (providing exclusive means for individuals to access their own criminal history information).

criminal investigation”, including “Investigative materials, notes, correspondence, *videos* and reports.” 65 P.S. § 67.708(b)(16) (emphasis added). Further, section 9106(c)(4) of CHRIA *prohibits* disclosure of records that constitute “investigative information.” 18 Pa.C.S. § 9106(c)(4)<sup>2</sup>. Nothing about either provision is ambiguous or unclear. Furthermore, Appellee’s proposition that the Commonwealth Court was correct in conflating these provisions is erroneous. (*See, Grove Br.* at 11). Section 708(b)(16) of the RTKL and Section 9106(c)(4) of CHRIA are separate, independent grounds for non-disclosure of a record and each provision requires its own analysis and legal conclusion as to whether exemption under the RTKL applies. *See, e.g. Coley v. Philadelphia Dist. Attorney’s Office*, 77 A.3d 694, 697 (Pa. Cmwlth. 2013) (providing separate legal conclusions as to whether a witness statement is exempt under Section 708(b)(16) and Section 9106(c)(4)).

Moreover, in their briefs, Appellee and *Amici* impose non-existent conditions upon the RTKL and CHRIA in an attempt to find an ambiguity where none exists. For example, Appellee argues that MVRs “are not prepared or produced with the intent to be used in a criminal investigation.” (*Grove Br.* at 3). Of course, both the RTKL and CHRIA focus on the actual character of records,

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<sup>2</sup> “Investigative information” is “[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. § 9102.

rather than the “intent” of their creation. As such, Appellee’s assertion is without merit.

Likewise, the OOR argues that the video portions of the MVRs are a public record because the MVRs do not report on a criminal investigation, document evidence in a criminal investigation or show any steps carried out in a criminal investigation. (OOR Br. at 6). Again, such an argument imposes standards that were not enacted by the Legislature in the RTKL or CHRIA. Instead, as more fully argued in Appellant’s main brief, the correct inquiry is simple: 1) do the MVRs “relate” to a criminal investigation and, are they, therefore, exempt from disclosure under Section 708(b)(16); or 2) are the MVRs “investigative information” under CHRIA. Because the MVRs are exempt under either provision of the RTKL or CHRIA, they are exempt from public access and the Opinion and Order of the Commonwealth Court should be reversed.

**II. WHETHER THE MVR AND THE INFORMATION CONTAINED THEREIN IS A CRIMINAL INVESTIGATIVE RECORD MAY ONLY BE DETERMINED BY LAW ENFORCEMENT AGENCIES.**

In its brief, the OOR attempts to categorize some elements of MVRs as “investigative content” while presuming that other content is “non-investigative.” (OOR Br. at 6). In its view, investigative content is “witness and suspect interviews, interrogations, intoxication testing, measurements, collection of evidence, accident/crime scene analysis and other similar investigative activities.”

(OOR Br. at 6). Such a distinction does not exist under the RTKL, and the OOR's attempt to engraft such a requirement onto the statute's plain language should be disregarded.

Under Section 708(b)(16) of the RTKL a record is exempt from access if it "relates" to a criminal investigation. 65 P.S. § 708(b)(16). Thus, the determination as to whether an MVR is exempt rests solely upon whether it is related to a criminal investigation.

Here, all evidence of record established that the instant MVRs related to a criminal investigation. Thus, OOR's inquiry is both unnecessary and unfounded.

Likewise, an agency is prohibited from releasing information under CHRIA where such information was "assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident..." 18 Pa.C.S. § 9102. Again, all evidence of record established that the MVRs were assembled in such a manner.<sup>3</sup> Therefore, the OOR's argument in this regard is not compelling.

### **III. THE WIRETAP ACT SPECIFICALLY PROVIDES FOR LAW ENFORCEMENT'S USE AND DISCLOSURE OF MVRs.**

PNA incorrectly argues that the Wiretap Act does not apply to MVRs. (PNA Br. at 22). Section 5704(16) is a specific legislative grant of authority allowing law

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<sup>3</sup> Notably, in establishing the RTKL, the legislature appears to have recognized the potential impact of the RTKL on criminal justice agencies. *See*, 65 P.S. 67.503(d)(2)(requiring that appeals relating to access to criminal investigative records in possession of local agency to be handled by the local district attorney's office, which is empowered to review CHRIA information).

enforcement agencies to use MVR technology. 18 Pa.C.S § 5704(16). A review of the relevant statutory provisions makes this clear. Section 5704(16)(C) prescribes that the electronic, mechanical, or other devices that are being used to intercept and record an oral communication must be approved under 5706(b)(4). 18 Pa.C.S. § 5704(16)(C). Section 5706(b)(4) provides:

The Pennsylvania State Police shall annually establish equipment standards for any electronic, mechanical or other device which is to be used by law enforcement officers for purposes of interception as authorized under section 5704(16). The equipment standards shall be published annually in the Pennsylvania Bulletin.

18 Pa.C.S. § 5706(b)(4).

A review of the Pennsylvania Bulletin makes clear that Section 5704(16) is in specific reference to MVRs, and the Bulletin describes the type of MVR systems that may be used by Pennsylvania police departments. 45 Pa.B. 5482, August 29, 2015. Therefore, PNA's argument is factually and legally incorrect.

Furthermore, Appellee and *Amici* make inaccurate arguments that the video portion of the MVR are not subject to the provisions of the Wiretap Act. (Grove Br. at 12, PNA Br. at 22, OOR Br. at 17-18). While a non-MVR video may not constitute a communication under the Wiretap Act, MVRs are specifically provided for by Section 5704(16) of the Wiretap Act. 18 Pa.C.S. § 5704(16). Therefore, with regard to MVRs, both the audio and video components of the MVR are contemplated by and subject to the Act. *See* 18 Pa.C.S. § 5704(16)(C),

5706(b)(4).

In addition to providing for the circumstances in which MVRs may be used by law enforcement officers, and clarifying that the Pennsylvania State Police are responsible for establishing MVR equipment standards, the Act limits disclosure of MVR records. In this regard, section 5749 of the Wiretap Act provides that agencies may disclose MVRs only for evidentiary purposes, investigative purposes, or training purposes. 18 Pa.C.S. 5717, 5721.1, 5749(b), (b)(1) and (2).

Therefore, through provisions in the Wiretap Act, the Legislature has created a comprehensive statutory scheme governing the use and disclosure of MVRs. Such a statutory scheme constitutes an exception to the general rule of public access to governmental records, and, as set forth below, provides ample opportunity for disclosure of MVRs when necessary and appropriate.

In this regard, PNA contends that the media and the public must have access to MVRs for the purposes of oversight and transparency. (PNA Br. at 28). Such factors are contemplated and satisfied by current Pennsylvania law.

As stated, *supra*, Section 5749 of the Wiretap Act governs the disclosure of MVRs and provides for disclosure in certain circumstances. Notably, Section 5749 makes MVRs discoverable in both civil and criminal court proceedings as an evidentiary disclosure. 18 Pa. C.S. 5749(b). Indeed, an MVR may be disclosed to the media and the public by either party to these proceedings, subject to some

limitations. 18 Pa.C.S. § 5721.1(a)(2).

This process, as currently constructed, effectively preserves both the interests of the public, and the interests of law enforcement. For example, under these provisions, the Dauphin County District Attorney's Office recently released MVR footage of a Pennsylvania State Trooper who has been charged with simple assault, harassment, and official oppression for his interaction with a member of the public. Eric Veronikis, *Dash cam videos released in suspended trooper's assault case*, (May 9, 2016), *archived at* <https://perma.cc/8FZB-CVN2>. Similarly, the provisions permitted the release of a Taser video during the trial of a Hummelstown police officer charged with third degree murder. PennLive.com, *Police Officer Lisa Mearkle's Taser video: Do you agree with the jury?* (May 5, 2015), *archived at* <https://perma.cc/E63T-ATGM>.

Thus, in Pennsylvania, the media and public may view MVR footage in cases of public interest, when parties or the courts disclose them in related civil or criminal proceedings. As such, PNA's asserted fears are not borne out in practice, and their arguments are unsupported in law.<sup>8</sup>

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<sup>8</sup> Indeed, having considered and enacted legislation governing the disclosure of MVRs, the opportunity to alter such laws rests with the legislature, rather than this Honorable Court. *See*, 18 Pa.C.S. § 5749.

**CONCLUSION**

WHEREFORE, for all of the foregoing reasons, the Appellant, the Pennsylvania State Police, request that this Honorable Court reverse the decision of the Commonwealth Court and hold that the responsive MVRs are not public records.

Respectfully Submitted:

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