

ATTORNEY FOR PETITIONER

- Charles Raymond Troupe, date of death 5/9/2020
- Michael McCarraher, date of death 9/18/2017
- Kevin Johnson, date of death 12/26/2016
- Corey Lange, date of death 5/12/2016
- Michael Ferko, date of death 1/1/2016
- Jason Walling, date of death 12/22/2015
- Samuel Downs, date of death 6/18/2014
- Raemone Carter, date of death 3/16/2012
- Terry Saunders, date of death 9/14/2009
- Roderick Lloyd, date of death 9/17/2008
- Rebecca Haslip, date of death 8/4/2008
- Theodore Burley, date of death 6/3/2008
- Linda Vaughn, date of death 4/18/2008”

On July 1, 2022, County Coroner (hereinafter the “Coroner”), Sophia Garcia-Jackson, identified that she would require an additional thirty (30) days to respond due to bona fide staffing limitations and because the extent or nature of the request precluded a response within the required time period - with a response expected on or before August 5, 2022. Then on August 2, 2022, the Coroner issued a detailed denial of the request supported by an Affidavit of First Deputy Coroner Jesse Poole-Gulick.

The Respondent filed an immediate appeal on August 3, 2022, with briefing thereon due on or by August 12, 2022. The Coroner’s Office through its attorney sought additional time for briefing and this was granted by the Hearing Officer, extending the deadline until August 26, 2022.

On August 26, 2022, the Coroner’s Office filed its Memorandum of Law as did the Respondent. Thereafter, on September 30, 2022, the Office of Open Records (“OOR”) through its Appeal Officer, Lyle Hartranft, Esquire, issued the Final Determination granting the requests of the Respondent and Order that the information requested by supplied.

On September 28, 2022, Petitioner filed a timely Petition for Review in the Court of Common Pleas of Chester County which was assigned to the Honorable Jeffrey R. Sommer. Judge Sommer issued a Scheduling Order dated November 14, 2022, requiring that the Record be filed on or by December 9, 2022, and that briefing by the Coroner was due on or by December 16, 2022. This Brief is filed in accordance with Judge Sommer's scheduling Order.

II. Questions presented:

First Question: *Whether the Appeals Officer has misinterpreted the Coroner's Act and prior case law to improperly permit access under the RTKL to "autopsy reports" specifically exempted under the RTKL and to "toxicology reports" falling within the scope of an "autopsy record" that is exempt, or protected from release under the facts at issue based upon the 2018 amendments to the Coroner's Act?*

Suggested answer: Yes.

Second Question: *Whether the information in autopsy reports and toxicology reports held by the Coroner is privileged and protected under HIPAA and other authorities from release under the RTKL?*

Suggested answer: Yes.

III. Discussion:

A. The RTKL Exception found at Section 708 (b)(17)(20) applies and the requested information is either exempt or unavailable under the Coroner's Act.

In the Final Determination of the OOR as written by Appeals Officer, Lyle Hartranft, Esquire, the position of the Coroner in denying the request "seeking 'the complete autopsy and toxicology reports' for seventeen individuals" was rejected in reliance upon the authorities of Penn Jersey Advance, Inc. v. Grim, 963 A.2d 632-636-37 (Pa. 2009) and Hearst TV, Inc. v. Norris, 54 A. 3d 23, 32-33 ((Pa. 2012). See, Decision, p. 2 and p. 5. However, the Appeals

Officer has misinterpreted the Coroner's position and the cases the Appeals Officer has relied upon are inapposite and do not void the exemption found at Section 708 (b)(17)(20)¹ of the RTKL.

The Coroner does not dispute that under the RTKL information as to the "cause and manner of death" can be released. This information is currently referred to as the "Verification of Death Form" and was previously known as the "View of Form" as referenced in the Affidavit of First Deputy Coroner, Jesse Poole-Gulick. This, Verification of Death Form is filed annually with the Prothonotary in accordance with the Coroner's Act and provides cause and manner of death information. However, the Verification of Death Form is not what was being sought. Instead, the information sought (autopsy or toxicology reports) are specifically excluded under Section 708(b)(20) of the RTKL as properly asserted by the Coroner.

This Court addressed this same basic issue as to the exemption of an autopsy report in the case, County of Chester, Office of the Coroner vs. Jeffrey Thompson, GV-1145 SCI Camp Hill, CCP Chester Co. No. 2017-01383-CS. In Coroner v. Jeffrey Thompson, this Court reversed the Decision of the Office of the Open Records and confirmed the denial of Coroner's Office under similar facts and refuting similar legal theories espoused by the Office of Open Records.

In Coroner v. Jeffrey Thompson, this Court specifically noted that the request which sought a copy of the "medical examiner's Coroner's report regarding an identified individual"

¹ 65 P.S. §67.708(b)(20) specifies as exempt from the RTKL "An 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." (emphasis supplied).

ran directly into the exception at RTKL at Section 708(b)(20) prohibiting the release of an autopsy report. The exemption under the RTKL (which remains unchanged since 2017) was correctly noted by this Court to exempt 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...” This Court noted that this exemption also states that it shall not “limit the reporting of the name of the deceased individual and the cause and manner of death.”.

This Court, in Coroner v. Jeffrey Thompson, reviewed the same cases relied upon by the OOR in this case, Hearst Television, *supra*, and Penn Jersey Advance, *supra*, and reached an entirely different result than that argued for by the OOR. This Court explicitly found that supplying the “cause and manner of death information” complied with the requirement to supply “official records and papers” as referenced in Penn Jersey Advance. Thus, this Court has already determined that providing the “cause and manner of death information” is sufficient and that anything further would constitute an “autopsy report” exempt under Section 780(b)(20) of the RTKL.

In this case, the Respondent is going beyond the “cause and manner of death information” and is seeking the autopsy report. Thus, the Coroner correctly denied the request pursuant to the reasoning of this Court as set forth in Coroner v. Jeffrey Thompson, which is controlling. Additionally, it is asserted that the broad language of the “autopsy report” exemption at Section 780(b)(20) also includes a toxicology report that would be used by the party conducting the autopsy and would fall within the broadly worded category of “autopsy records” as identified in the exemption. *Id.*

To the extent that further analysis is required to address the status of a “toxicology report” it is noted that the underpinnings of Penn Jersey Advance are very different from those in the case at bar. Penn Jersey Advance, is improperly cited by the Appeals Officer as a controlling case in a RTKL context, alleged to establish that an autopsy report is an official record that must be released under Section 1236-B of the Coroner’s Act.

However, at the time Penn Jersey Advance, was issued, it did not address the competing interests between the Coroner’s Act and the RTKL. Thus, as was argued before the OOR, Penn Jersey Advance, is without precedential value in the RTKL context. This point is made by the Pennsylvania Supreme Court in Penn Jersey Advance, wherein it specifically observed that the RTKL “became effective on January 1, 2000... and thus has no application to the events underlying this case. Accordingly, we express no opinion at this time on the relationship between the Coroner’s Act and the Right-to-Know Law.” Id. at 633.

Additionally, Penn Jersey Advance, was based upon the prior Coroner’s Act which did not reflect the changes to the Coroner’s Act made by the state legislature in the 2018 amendments.

On this latter issue it is noted that at the time of Penn Jersey Advance, the courts were looking at the interplay between Sections 1251 and 1236.1 of the Coroner’s Code. Section 1251 addressed “Official records of coroner” and then stated:

“Every coroner, within thirty (30) days after the end of each year shall deposit all of his official records and papers for the preceding year in the office of the prothonotary for the inspection of all persons.”

Section 1236.1 at that time was then titled “Requests for examinations and reports” and stated as follows:

- (a) Requests for examinations or other professional services by other counties or persons may be accomplished with at the discretion of the coroner pursuant to guidelines established by the county commissioners.
- (b) A set of fees and charges for such examinations or professional services shall be established by the coroner, subject to approval by the county commissioners, and shall be accounted for and paid to the county treasurer pursuant to section 1760. Payments for examinations or professional services shall be the responsibility of the county or person requesting such services.
- (c) The coroner may charge and collect a fee of up to one hundred dollars (\$100) for each autopsy report, up to fifty dollars (\$50) for each toxicology report, up to fifty dollars (\$50 for each inquisition or coroner's report and such other fees as may be established from time to time for other reports and documents requested by nongovernmental agencies. The fees collected shall be accounted for and paid to the county treasurer pursuant to section 1760 and shall be used to defray expenses involved in the county complying with the provisions of the act of March 2, 1988 (P.L. 108, No. 22), referred to as the Coroner's' Education Board Law."

Id. (footnotes omitted).

These sections of the older Coroner's Act have been thoroughly changed by the 2018 amendments. Thus, Section 1251 is now found at Section 1236-B entitled "Records" and now states:

"In counties of the third, fourth, fifth, sixth, seventh and eighth classes, every coroner, within 30 days after the end of the year, shall deposit all official records and papers for the preceding year in the Office of the Prothonotary for the inspection of all persons interested therein."

With respect to Section 1236.1, this is separated into different sections. Thus, part of this subsection is now found at Section 1217-B entitled "Requests for examinations and reports" and states:

- (a) Requests. – A request for an examination or other professional service by another county or person may be complied with at the discretion of the coroner under guidelines established by the county commissioners.
- (b) Fees and charges. – A fee and charge for an examination or professional service shall be established by the coroner, subject to approval by the county commissioners, and shall be accounted for and paid to the county treasurer as provided under section 1769. Payment for an examination or professional service shall be their responsibility of the county or person requesting the service.

Former Section 1236.1 (c) is now found at section 1252-B entitled “Fees for reports” and 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**. The fees collected under this section shall be accounted for and paid to the county treasurer in accordance with section 1760 and shall be used to defray the expenses involved in the county complying with the training of coroners or coroner office personnel, as may be required or authorized by this or any other act.”

65 P.S. § 1252-B, (emphasis added with 2018 amendment underlined).

The new Section 1252-B notes that with respect to an “autopsy report” or “toxicology report”, that they are only available under the Coroner’s Act for a fee in limited circumstances — or at the discretion² of the coroner. However, Section 1252-B does not allow the release of an autopsy report or toxicology reports because the Respondent is not a “nongovernmental agency” seeking the information “in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased.” The request at issue by Terrence Keel does not meet these criteria.

As a result, prior decisional law discussing the interrelation between the former Section 1236.1 (c) and former Section 1251 cannot be relied upon. The circumstances have changed. Neither an “autopsy report” nor a “toxicology report” are accessible under the new Section 1252-B unless by a nongovernmental agency involved in the qualified investigation as referenced. See, Richard Cowen v. Centre County Coroner’s Office, Docket No.: AP 2022-0559, also reversing a decision authored by Lyle Hartranft, Esquire which dealt with a request for “the full autopsy report”.

² See, 65 P.S. §1217-B.

In Richard Cowen v. Centre County Coroner's Office, the Court of Common Pleas of Centre County reversed the decision of the OOR which, like the case at bar, had reversed a county determination not to supply an autopsy report. In reaching its decision in Richard Cowen v. Centre County Coroner's Office, the OOR relied upon a variety of OOR decisions, as well as Hearst Television and Section 1252-B of the Coroner's Act to require release of the information. On appeal, however, the Honorable Katherine V. Oliver, of the Court of Common Pleas of Centre County reversed the OOR asserting that "in light of the amendments³ to the Coroners Act, the requested records are exempt under §708 (b)(20) of the Right to Know Law". A true and correct copy of Judge Oliver's opinion is attached hereto as Exhibit "B". A review of the brief⁴ filed by Centre County - which is accessible at the OOR website - reveals that the amendment to the prior section 1236.1 (c), and now found at Section 1252-B. placed qualifications on the release of the information not previously present. Because these qualifications had not been met, the information was then not available to be released.

In summation, the Petition for Review should be granted and the decision of the OOR reversed. Further, to the extent that it is determined that a "toxicology report" is other than an

³ This case was docketed on October 4, 2022, and the OOR Records reflect that it was not appealed. The Brief in Support of Petition for Review filed by the County of Centre, provides some guidance as to the ruling by Judge Oliver. The County noted that in 2018, Section 1252-B of the Coroner's Act was amended to state the following:

"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.** The fees collected under this section shall be accounted for and paid to the county treasurer in accordance with section 1760 and shall be used to defray the expenses involved in the county complying with the training of coroners or coroner office personnel, as may be required or authorized by this or any other act. Id., (emphasis added by Centre County 2018 amendment underlined by this author).

⁴ A copy of the brief filed by Centre County is attached hereto as Exhibit "C".

“autopsy record” which is exempt under Section 708(b)(20) of the RTKL, a “toxicology report” would also not be available under the Coroner’s Act as a result of the 2018 amendments to Section 1252-B as noted previously.

B. Because the Coroner has discretion to release records - other than those specifically identified under Section 1252-B or required to be released under Section 1236-B – the Coroner is bound to protect the privacy rights involved including those protected by HIPAA.

Jesse Poole-Gulick, at Paragraphs 10-18 of her affidavit, identifies the procedures of the Coroner with respect to autopsy reports and toxicology reports and records.⁵ These records are only released at the discretion of the Coroner. See, generally, 16 P.S. §1217-B. See, Affidavit, ¶17.

Jesse Poole-Gulick’s affidavit also notes that autopsies are done by a forensic pathologist (a medical doctor); that medical examiners and toxicologists under contract with the County of Chester providing such services are bound by HIPAA; that reports for the County Coroner are prepared by a forensic pathologist (a medical doctor) under contract with the County and subject to HIPAA; that autopsy and toxicology reports are protected under the “Privacy Rule” of HIPAA and are “records made confidential by law.” See, Affidavit, ¶’s 14-16⁶.

In accordance with her authority under Section 1217-B of the Coroner’s Act, the Coroner recognizes that reports last referenced contain protected health information and constitute detailed private records which are highly sensitive and private.

⁵Excluding from this consideration the annual release of the “cause and manner of death” pursuant to 1236-B and those records subject to Section 1252-B.

⁶ Although there is reference to criminal and non-criminal exceptions under the RTKL, because no 3rd party has identified a concern, this is not at issue in this case. Additionally, it should be noted that the Coroner’s Office has identified that it has no records for John Patrick Deamics, Corey Lange, and Roderick Lloyd three of the 17 persons (mis-identified as 15 persons) on the list. See, Affidavit, ¶’s 12 (reference to criminal and non-criminal investigations) and 5 (reference to 3 persons for which the Coroner has no records).

Common sense establishes that the Coroner has access to very confidential information that should be protected from dissemination. Common sense also establishes that the protections of HIPAA should be afforded to the records of the medical pathologist that provides the autopsy report and autopsy records to the Coroner and is bound by HIPAA. See, §708 (b)(5) and HIPAA “privacy rule” (also identified in the Coroner’s denial and specifically noting that same does not fall within an exception pursuant to 45 CFR §164.512 or applicable state law and constitutes protected health information absent appropriate written authorization by an individual representing the deceased).

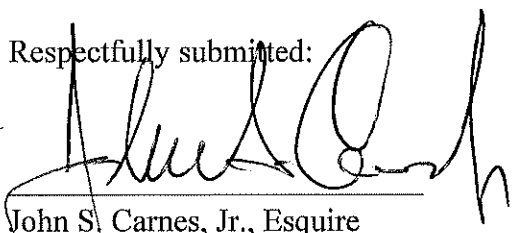
Additionally, the records involving toxicology (which would relate to substance abuse) are also protected and were referenced as such by the Coroner in her denial. See, Denial (referencing §708 (b)(17)(iv) of the RTKL)(protecting “a record made confidential by law” and referencing the fact that Pennsylvania State Law in the context of managed care plans - including HMOs and utilization review entities - must protect against the release of individually identifiable information). Such information also constitutes privileged communications by statutory and common law. The release of substance abuse information (toxicology) is specifically prohibited with respect to deceased patients without consent by a personal representative. See, 82 FR 6115, Jan. 18, 2017, as amended at 83 FR 251, Jan. 3, 2018. .

As noted in the Affidavit attached to the Coroner’s denial, the Coroner protects the information outside of the “cause and manner of death” such as an “autopsy report” or “toxicology report” to avoid disclosure of privileged, HIPAA protected medical information. The Coroner only makes the information available to next of kin and in response to a valid subpoena or in the exercise of her discretion when determined appropriate.

IV. Conclusion:

Based upon the reasoning as set forth in the Brief, it is respectfully requested that this Honorable Court grant the Petition for Review and reverse the Decision of the Appeals Officer for the OOR (reversing the Chester County Coroner's denial of the RTKL request at issue). It is respectfully requested that pursuant to the authority of the Court of Common Pleas to hear evidence and create a record, that the Court schedule a hearing after briefing by the Respondent to permit oral argument and the possibility of additional evidence.

Respectfully submitted:

12/16/22 
John S. Carnes, Jr., Esquire
Solicitor for the Coroner of Chester County
Law Offices of John S. Carnes, Jr.
101 W. Main Street
Parkesburg, PA 19365
(610) 857-5500
jcarnes@jcatty.com

COUNTY OF CHESTER, OFFICE
OF THE CORONER

vs.

JEFFREY THOMPSON, GV-1145
SCI CAMP HILL

Thomas L. Whiteman, Esquire and Kristen K. Mayock, Esquire, on behalf of
the Plaintiff/Petitioner
Jeffrey P. Thompson, Respondent

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 2017-01383-CS

CIVIL ACTION

APR 10 10 12 AM '17
CLERK OF COURT
JESSICA L. BROWN
CLERK OF COURT

ORDER

AND NOW, this 10th day of April, 2017, upon review and consideration of Plaintiff's Petition for Review/Appeal of Final Determination of the Pennsylvania Office of Open Records, Respondent's Answer thereto, and a hearing held on April 7, 2017, it is hereby ORDERED and DECREED the Petition is GRANTED.¹

The Decision of the Office of Open Records is hereby REVERSED and the denial of the Coroner's Office is AFFIRMED.

RECEIVED

APR 12 2017

SOLICITOR'S OFFICE

BY THE COURT:

Jeffrey R. Sommer
Jeffrey R. Sommer

J.

¹ Respondent submitted a request to the County of Chester, Office of the Coroner, seeking a copy of the "medical examiner's/Coroner's report regarding an identified individual." The Coroner's Office denied the request, citing an exemption under 65 P.S. §708(b)(20). Section §708(b)(20) 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...." 65 P.S. §708(b)(20). The section also states that it shall not "limit the reporting of the name of



the deceased individual and the cause and manner of death." *Id.* The Coroner's Office, however, provided a copy of the "View of Form", a public record which provided the name of the deceased individual along with the cause and manner of death.

Respondent appealed to the Office of Open Records ("OOR") in which he indicated he needed the documents for an appeal in federal court. The OOR granted the appeal, requiring the Coroner's Office to provide the report to Respondent. In doing so, the OOR relied upon the Coroner's Act, 16 P.S. §1251, which requires that "every coroner, within thirty (30) days at the end of each year, shall deposit all of his official records and papers for the preceding year on the office of the Prothonotary for the inspection of all persons interested therein." The Coroner's Office filed the instant Petition for Review, arguing that the OOR made errors of law when granting Respondent's appeal. The matter is now before this Court for review.

This Court's standard of review is limited to determining whether the reviewing authority abused its discretion, committed any error of law or violated any constitutional rights. See, *Behm v. Wilmington Area Sch. Dist.*, 996 A.2d 60, 64 n.6 (Pa. Cmwlth. Ct. 2010). Our scope of review for a question of law under the Right to Know Law is plenary. See, *Stein v. Plymouth Twp.*, 994 A.2d 1179, 1181 n.4 (Pa. Cmwlth. Ct. 2010).

The Coroner's Office notes that the OOR did not conduct a hearing pursuant to 65 P.S. §1101(b)(3); however, we observe that the decision of the OOR to hold a hearing is discretionary and non-appealable. See, *Guirintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Cmwlth. Ct. 2011). Additionally, the OOR indicated that neither party requested a hearing.

Under the Right to Know Law, 65 P.S. §67.302, records in possession of a local agency are presumed public unless exempt under the law or otherwise protected by a privilege, judicial order or decree. See 65 P.S. §67.305. An agency bears the burden of proving the applicability of any cited exemptions by a preponderance of the evidence. See 65 P.S. §67.708(a)(1) and (b). Preponderance of the evidence has been defined as "such proof as leads the fact-finder... to find that the existence of a contested fact is more probable than its nonexistence." See, *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Cmwlth. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Cmwlth. Ct. 2010)).

In its Decision, the OOR relied upon *Hearst Television, Inc. v. Norris*, 617 Pa. 602, 54 A.3d 23, 25 (2012) and *Penn Jersey Advance, Inc. v. Grim*, 599 Pa. 534, 536, 962 A.2d 632, 633 (2009). In *Hearst Television*, the Court held that the coroner's records are available under Section 1251 of the Coroner's Act when deposited with the Prothonotary. 54 A.3d at 25. In this case, the documents sought by Respondent were not deposited with the Chester County Prothonotary. Therefore, neither Section 1251 of the Coroner's Act nor *Hearst Television* are inapplicable here. Moreover, the *Hearst*

Television court limited access to information of the "cause and manner" death records, which have already been provided to Respondent. *Id.* at 33.

The Court in *Penn Jersey Advance* observed that the "official records and papers" that must be deposited annually are cause and manner of death records. 962 A.2d at 636. Here, the cause and manner of death information for the decedent is included in the "View of Form" which, as noted above, has already been provided to Respondent.

We, therefore, find that the cases upon which the OOR relied in granting Respondent's appeal were inapplicable, thereby constituting an error of law. Because we conclude that the exemption set forth in §67.708(b)(20) of the RTKL clear applies to the records sought by Respondent, we reverse the Final Determination of the OOR and affirm the denial of Respondent's request by the Coroner's Office.

As an aside, if there is ongoing litigation as Respondent represents, the requested information may be subpoenaed; however, it is unclear whether Respondent has a pending criminal appeal or whether any future appeals will be timely.

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

COUNTY OF CENTRE,
Plaintiff,
VS

RICHARD COWEN,
Defendant

: NO. 2022-1053 AP

:

RECEIVED

:

OCT 06 2022

OFFICE OF OPEN RECORDS

ORDER

AND NOW, this 19th day of September, 2022, for the reasons stated on the record in open court on today's date, the appeal filed by the County of Centre in this matter is hereby granted and the determination of the Office of Open Records issued April 21, 2022 is hereby reversed. The Court concludes that, in light of the amendments to the Coroners Act, the requested records are exempt under § 708(b)(20) of the Right to Know Law.

Any aggrieved party has the right to file an appeal to the Commonwealth Court within Thirty (30) Days of today's date.

BY THE COURT:



Katherine V. Oliver, Judge

NOTICE OF ENTRY OF
ORDER OR DECREE,
PURSUANT TO PA. R.C.P.
236 NOTIFICATION. THIS
DOCUMENT HAS BEEN
FILED IN THIS CASE.

PROTHONOTARY, CENTRE
COUNTY, PA.

DATE: 10-04-2022

FILED FOR RECORD
2022 SEP 29 PM 12:06
JEREMY S. BREON
PROTHONOTARY
CENTRE COUNTY, PA



IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION

COUNTY OF CENTRE, Petitioner,

v.

RICHARD COWEN, Respondent

: NO. AP 2022-1053
:
: Type of Case: Civil
:
: Type of Pleading: BRIEF IN SUPPORT
: OF PETITION FOR REVIEW
:
: Filed on Behalf of: Petitioner
:
: Counsel of Record for this Party:
:
: Elizabeth A. Dupuis, Esquire
: Attorney ID No. 80149
: Babst, Calland, Clements and Zomnir, PC
: 330 Innovation Boulevard, Suite 302
: State College, PA 16803
: (814) 867-8055
:

FILED FOR RECORD
2022 AUG 17 AM 10:22
JEREMY S. BREON
PROTHONOTARY
CENTRE COUNTY, PA



IN THE COURT OF COMMON PLEAS
CENTRE COUNTY, PENNSYLVANIA

COUNTY OF CENTRE, Petitioner, :
 :
v. :
 : Docket No. AP 2022-1053
RICHARD COWEN, Respondent. :
 : Statutory Appeal –
 : Right-to-Know Law

**BRIEF IN SUPPORT PETITION FOR REVIEW OF FINAL DETERMINATION
ISSUED BY PENNSYLVANIA OFFICE OF OPEN RECORDS**

AND NOW come the County of Centre, Petitioner, by and through the undersigned counsel, to file the following Brief in Support of Petition for Review, representing in support thereof the following:

INTRODUCTION

Petitioner appealed the Final Determination issued by the Pennsylvania Office of Open Records (OOR) Docket No. AP 2022-0559 filed on April 21, 2022 (attached as Exhibit "A" to the Petition for Review), which held that the County was required to provide responsive documents to an RTKL Request made by Respondent ("Determination"). As described in the Petition for Review, the Petitioner believes that the Determination requiring production of records is incorrect in light of the changes to the Coroner's Act which altered the rights of parties to request records directly from the coroner.

The OOR is not a "party" to this appeal. E. Stroudsburg Univ. Found. v. Office of Open Records, 995 A.2d 496, 507 (Pa. Cmwlth. 2010), *appeal denied* at 610 Pa. 602, 995 A.2d 496 (2010). Section 1310 of the RTKL does not give the OOR party standing to defend its determinations nor appear as a party in an appeal of an OOR determination to the Court of Common Pleas. Id. Although Section 1303(a) of the RTKL requires notice of an appeal to the Court of Common Pleas to be given to the OOR, notice is only given for the purpose of transmitting

the record to the Court of Common Pleas for review. Id. Per the Determination, the OOR is a quasi-judicial tribunal reviewing the matter and therefore is not a proper party to any appeal to the Court of Common Pleas. Padgett v. Pa. State Police, 73 A.3d 644, 648 n. 5 (Pa. Cmwlth. 2013).

This Court has jurisdiction over this proceeding pursuant to Section 1302 of the RTKL which allows a requester or local agency to file an appeal of a OOR final determination within thirty (30) days of the mailing date of the final determination. Under the RTKL, the Court shall act as the finder of fact, preparing findings of fact and conclusions of law, through a full *de novo* review of the decisions made by the OOR. See 65 P.S. §§ 67.1302 and Bowling v. Office of Open Records, 75 A.3d 4534, 474 (Pa. 2013).

ARGUMENT

On February 23, 2022, Respondent filed a Request with the County ("Request") for the following:

"Please provide the full autopsy report for Justine Gross conducted by the Centre County Coroner's Office." (Request attached to the original Petition for Review as Exhibit "B")

In its response, the Petitioner denied the Request on the basis that the Respondent had requested records which were exempt under Section 708(b)(20) of the RTKL (response of Petitioner is attached to the Petition for Review as Exhibit "C"). Section 708(b)(20) of the RTKL provides the following exemption from disclosure under the RTKL:

[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.

Respondent appealed the Petitioner's decision to the OOR asserting that the aforementioned exemption was not applicable as the Coroner's Act, as noted in a prior OOR appeal, *Barbara Miller and PennLive vs. Lancaster County* (AP 2018-0187), allows for

production of the requested records. In its Determination, the OOR adopted the same position as the *Miller* decision but failed to account for changes in the language of Section 1252-B of the Coroner's Act. In 2018, Section 1252-B of the Coroner's Act was amended to state the following (*emphasis added*):

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*. The fees collected under this section shall be accounted for and paid to the county treasurer in accordance with section 1760 and shall be used to defray the expenses involved in the county complying with the training of coroners or coroner office personnel, as may be required or authorized by this or any other act.

Further, the OOR failed to address the change in language of the Act which previously only included the first part of the highlighted phrase, "as requested by nongovernmental agencies." Under the amended statute, the Coroner's act removes any discretion from the coroner as to release of records by adding "*in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased*." (See also *Allegheny County v. Monica Fuentes et. al.*, SA-21-000180, December 2021, *appeal to Commonwealth Court pending*).

From the information available in the record before OOR, the Respondent does not appear to be associated with the deceased. The record before OOR likewise does not suggest that the Respondent is employed by an insurance company addressing a claim for insurance related to the deceased. Lastly, the Respondent filed his Request under the RTKL rather than making a direct request to the coroner for the records accompanied by the required fees for such reports as previously set by Order of this Court.

The OOR incorrectly determined that the Petitioner's denial to produce records under the RTKL was unlawful because other state law permitted release of the records. While

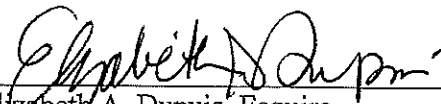
acknowledging the exemption under Section 708(b)(20), the OOR's Determination, however, did not review the amended language of the Coroner's Act which limited the persons eligible to receive such reports. The language inserted in 2018 included qualifiers for such agencies, or in this case the Respondent, to be permitted to receive the requested report. In limiting the release to persons who "*investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased,*" the legislature limited the circumstances under which a coroner can release such records. As noted aforesaid, Respondent does not meet these qualifiers based upon the information in the record.

In addition to the limits of the RTLK (specifically the applicable exemption) and the Coroner's Act, an autopsy is a medical record and should not be subject to release without consent of the decedent's estate. Current privacy rules around the release of medical records, including the requirements of the Health Insurance Portability and Accountability Act ("HIPAA"), limit the release of such information and create liability for parties that incorrectly release such information.

Like a living person's medical records and information, a person's autopsy or any forensic, pathological report would be subject to the limitations of HIPAA. Under HIPAA, such records are protected for up to fifty years after death unless released by written consent of the decedent's family. Even the release of death certificates by the Department of Vital Records requires the requesting party to meet eligibility requirements. Clearly, an autopsy report should be subject to even greater privacy for all persons involved and require authorization of the decedent's family or personal representative.

WHEREFORE, the County of Centre, Petitioner, respectfully requests that the Court reverse the Determination of the Office of Open Records Docket No. AP 2022-0559 issued on April 21, 2022, and order that the County is not required to issue any additional records in response to the Request by Respondent.

BABST CALLAND CLEMENTS AND ZOMNIR, P.C.

By: 
Elizabeth A. Dupuis, Esquire
PA ID # 80149
330 Innovation Boulevard, Suite 302
State College, PA 16803
(814) 867-8055

Counsel for County of Centre, Petitioner

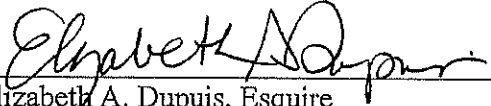
Date: August 17, 2022

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

BABST, CALLAND, CLEMENTS AND ZOMNIR, P.C.

Date: 8/12/2022

By: 
Elizabeth A. Dupuis, Esquire
PA ID # 80149
330 Innovation Boulevard, Suite 302
State College, PA 16803
(814) 867-8055

Counsel for County of Centre, Petitioner

IN THE COURT OF COMMON PLEAS
CENTRE COUNTY, PENNSYLVANIA

COUNTY OF CENTRE, Petitioner,	:	
	:	
v.	:	
	:	Docket No. AP 2022-1053
MICHAEL SHELIGA, Respondent.	:	
	:	Statutory Appeal –
	:	Right-to-Know Law

CERTIFICATE OF SERVICE

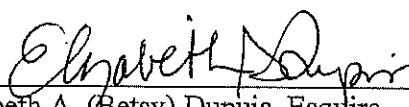
I hereby certify that a true and correct copy of the within pleading was served on the following as follows:

U.S. First-Class Mail, Postage Prepaid and Electronic Mail Addressed to:
Mr. Richard Cowen
NJ Advance Media
485 Route 1 South
Building E, Suite 300
Iselin, NJ 08830-3009
Rcowen@njadvancemedia.com

U.S. First-Class Mail, Postage Prepaid Addressed to:
Erik Arneson, Executive Director
Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

BABST, CALLAND, CLEMENTS AND
ZOMNIR, P.C.

By:


Elizabeth A. (Betsy) Dupuis, Esquire
Attorney I.D. No. 80149
Attorney for Petitioner
330 Innovation Boulevard, Suite 302
State College, PA 16803
(814) 867-8055

Date: August 17, 2022

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Law Offices of John S. Carnoy Jr.
Signature: [Signature]
Name: John S. Carnoy Jr.
Attorney No. if applicable: #47338

CHESTER COUNTY OFFICE OF
CORONER

Plaintiff

vs.

TERENCE KEEL and THE UNIVERSITY
OF CALIFORNIA-LOS ANGELES,
INSTITUTE FOR SOCIETY AND
GENETICS, BIOSTUDIES LAB,
Defendants

: IN THE COURT OF COMMON PLEAS
: CHESTER COUNTY, PENNSYLVANIA

:

: No. 2022-08612-CS

:

:

:

:

:

:

:

CERTIFICATE OF SERVICE

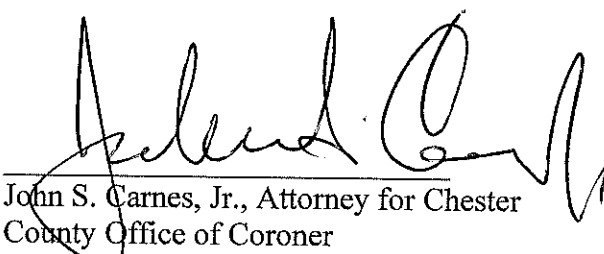
I hereby certify that a true and correct copy of the Brief In Opposition to Office of Open Record's Decision and Support of Chester County Coroner's Denial of Right to Know Request a copy of which has been sent via U.S. First Class mail, postage prepaid and via email to the following on the date below noted:

Dr. Terence Keel
The University of California-Los Angeles
621 Charles E. Young Dr., South
Box 957221, 3360 LSB
Los Angeles, CA 90095-7221

Lyle Hartranft, Esq., Appeals Officer
Penna. Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Date: _____

12/16/22


John S. Carnes, Jr., Attorney for Chester
County Office of Coroner