

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CHESTER COUNTY OFFICE OF THE
CORONER

Appellant

vs.

TERENCE KEEL AND THE UNIVERSITY
OF CALIFORNIA – LOS ANGELES,
INSTITUTE FOR SOCIETY AND
GENETICS, BIOSYSTEMS LAB

Appellee

NO. 242 C.D. 2023

BRIEF OF APPELLANT, CHESTER COUNTY CORONER

*Appeal from the Order dated March 1, 2023, by the
Honorable Jeffrey R. Sommer, Judge of the Court of Common Pleas of
Chester County, Docket No. 2022-08612-CS, Denying the Petition for
Review by the Coroner of Chester County dated October 28, 2022 and
affirming the final Determination of the Office of Open Records dated
September 30, 2022, issued by Appeals Officer, Lyle Hartranft*

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II. STATEMENT OF JURISDICTION

The Commonwealth Court has jurisdiction over this appeal pursuant to the Commonwealth Court's Appellate jurisdiction found at 42 Pa.C.S.A. §762(a) from a Final Decision of the Office of Open Records on appeal before the Court of Common Pleas.

II. ORDER IN QUESTION

ORDER

AND NOW, this 1st day of March, 2023, upon review and consideration of the Coroner of Chester County's Petition for Review/Appeal of Final Determination of the Pennsylvania Office of Open Records, Respondents Answer thereto, and argument held on February 13, 2023, it is hereby ORDERED and DECREED the Petition is DENIED.

The Final Determination of the Office of Open Records is hereby AFFIRMED.

BY THE COURT:

/s/Jeffrey R. Sommer
J.

III. SCOPE AND STANDARD OF REVIEW

On appeal the Commonwealth Court is entitled to the “broadest scope of review” which is *de novo* and its scope and review is broad or plenary when it hears appeals from determinations made by appeals officers under the Right to Know Law. Bowling v. Office of Open Records, 75 A.3d 453 (Pa. 2023).

Further, the scope and standard of review which involve the interpretation of a statute (in this case the Right to Know Law and the Coroner’s Act) and where the issues are purely legal ones, the court exercises a plenary scope of review and a *de novo* standard of review. See, Holt’s Cigar Co., Inc. v. City of Philadelphia, 10 A.3d 902, 906 (Pa. 2011). Questions of statutory construction present the court with a “pure question of law, meaning ...[the court’s] review is plenary and non-deferential.” Commonwealth v. Zortman, 23 A.3d 519, 522-23 (Pa. 2011)(citation omitted), *cert den’d*, Zortman v. Pennsylvania, 565 U.S.1108 (2012) .

IV. STATEMENT OF QUESTIONS INVOLVED

1. Question: Whether Judge Sommer erred when he rejected the Chester County Coroner's position - that the Coroner's annual filing of a single page "verification of death form" with the Prothonotary complied with the Coroner's Act at § 1236-B, and that the Coroner's Act did not require the release of "autopsy reports and toxicology reports" and that such reports are exempt from disclosure under the Right to Know Law ("RTKL") at § 708 (b)(20) (specifically exempting "an autopsy record of a coroner or medical examiner"), § 708(b)(5) (specifically exempting "[a] record of an individual's medical ...history...") and § 708(b)(17)(iv) (exempting records "made confidential by law").

Answer: The Court below disagreed with this question as presented, concluding that the Coroner's Act was to be interpreted to require the release of autopsy reports and toxicology reports.

- 2 Question: Whether Judge Sommer erred in disregarding the 2018 amendments to the Coroner's Act, finding them not to be "significant or dispositive" when in fact they not only increase the fees that may be charged, but also specifically restrict the reports to be released by the Coroner (to those requested by "nongovernmental agencies in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased.") 16 P.S. § 1252-B (emphasis supplied with respect to new language)

Answer: The Court disagreed with this question as presented, finding the 2018 amendments to the Coroner's Act to be insignificant and not dispositive.

3. Question. Whether Judge Sommer erred in relying upon Penn Jersey Advance, Inc. v. Grim, 962 A.2d 632 (2009) and Hearst Television, Inc v. Norris, 54 A. 3d (Pa. 2012), decisions which pre-date the 2018 amendments to the Coroner's Act and which are inapposite and contrary to the statute as now written and developing decisions on this issue.

Answer. The Court found the prior cases to still be authoritative and did not address the developing court of common pleas decisions identified.

V. STATEMENT OF THE CASE

A. Statement of the form of action.

This case involves a request pursuant to the Right to Know Law (hereinafter the “RTKL”) found at 65 P.S. §67.101. et seq. seeking “autopsy reports” and “toxicology reports” from the Chester County Coroner. The Chester County Coroner refused to supply this information based upon her interpretation of the Coroner’s Act found at 16 P.S. § 1201-B et seq. and her duties thereunder and the exemptions as provided under the RTKL.

The Coroner, in support of her position argued that she does provide and has on an annual basis filed a single page “verification of death form” with the Prothonotary to comply with the Coroner’s Act at 16 P.S. § 1236-B. However, the detailed records of the Coroner including autopsy reports and toxicology reports were believed to contain privileged and protected information under the Coroner’s Act released only under specific circumstances when appropriate pursuant to recent amendments to the Coroner’s Act to “nongovernmental agencies in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased.” See, 16 P.S. § 1252-B.

Additionally, the Coroner asserted that a variety of exemptions under the RTKL including, *inter alia*: the “Privacy Rule” of HIPAA - as records made “confidential by law” and exempted under Section 708(b)(17)(i) of the RTKL; the

“autopsy” exemption found at Section 708 (b)(20) of the RTKL which exempts “an autopsy record of a coroner or medical examiner”; and, the “medical records” exemption found at Section 708(b)(5) of the RTKL. See, 65 P.S. § 67.708 (b)(17)(i), (b)(20) and(b)(5).

The Appeals Officer for the Office of Open Records, Lyle Hartranft, disagreed with the Coroner and ordered that the autopsy reports and toxicology reports in the possession of the Coroner to be released to the Appellee. On appeal, the Honorable Jeffrey R. Sommer agreed with the Office of the Open Records (hereinafter “OOR”). This matter is now on appeal before the Commonwealth Court.

B. Brief Procedural History.

On June 27, 2022, the Office of the Chester County Coroner received an emailed request for information from Terence Keel and the University of California – Los Angeles, Institute for Society and Genetics, Biostudies Lab (hereinafter “Appellee”) pursuant to the aforementioned RTKL 65 P.S. §§67.101 et seq., requesting “the complete autopsy and toxicology reports” for 17 identified decedents with dates of death ranging from 2008 to 2021.

On July 1, 2022, County Coroner, Sophia Garcia-Jackson (hereinafter the “Coroner”) 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.

On August 2, 2022, the Coroner issued a detailed denial of the request supported by an Affidavit of Deputy Coroner of Chester County, Jesse Poole-Gulick citing as grounds for denial, exemptions under the RTK Law including: § 708 (b)(5) which exempts from disclosure “medical records”; § 708 (b)(20) which specifically exempts “an autopsy record of a coroner or medical examiner” other than the “name of the individual and the cause and manner of death” (noting that the latter information was not requested but is publicly disclosed by the Coroner’s Office on an annual basis and filed of record with Chester County Prothonotary’s Office or can be obtained by “next of kin” by specific request); and, §708 (b)(17)(iv) “a record made confidential by law”.

The denial also noted that with respect to the records made “confidential by law”, that the autopsy and toxicology records constitute records protected under the “Privacy Rule” of HIPAA and do not fall within an exception under 45 CFR §164.512 or applicable state law and that these records constitute protected health information absent appropriate written authorization by an individual representing the deceased . The denial, as per the attached affidavit, also noted that three (3) of the records sought were not in the possession of the Coroner.

On August 3, 2022, Appellee filed an immediate appeal to the Court of Common Pleas of Chester County with briefing thereon due on or by August 12, 2022, which deadline was extended by request of the Coroner's Office, until August 26, 2022.

On September 30, 2022, after timely briefing by the parties, the OOR through its Appeals Officer, Lyle Hartranft, issued the Final Determination granting the requests of the Appellee and Ordering that all autopsy reports and toxicology reports that had been requested be provided to the Appellee.

On October 28, 2023, the Appellant filed a Petition for Judicial Review of a Final Determination of the Pennsylvania Office of Open Records dated September 30, 2022. In response to the filing of the Petition for Judicial Review, the Honorable Jeffrey R. Sommer, on November 14, 2022, entered an Administrative Scheduling Order requiring the Appellant to file the certified Record and serve all parties by December 9, 2022, and setting forth a briefing schedule.

The Appellant complied with the Administrative Order filing the record as certified by the Executive Director of the Office of Open Records. Thereafter, on December 16, 2022, Appellant filed its brief in support of the Petition for Review.

The Appellee, although requesting additional time to file its brief, did timely file Appellee's brief on December 23, 2023. This was supplemented by a correction filed by the Appellee to its brief on January 5, 2023.

The Court scheduled a hearing to be held on February 13, 2023, by Court Order dated January 20, 2023.

On February 9, 2023, Appellee filed a Motion for Continuance of the hearing which was denied by Judge Sommer on February 10, 2023. The hearing then went forward on February 13, 2023, in Courtroom 8, before Judge Sommer without the participation of the Appellee.

On March 1, 2023, Judge Sommer entered a Decision and Order sustaining the Final Determination of the OOR Appeals Officer. On March 1, 2023, Appellant filed a timely Notice of Appeal.

On March 14, 2023, the Honorable Judge Jeffery R. Sommer issued an Order Pursuant to Pa. R. App. P. 1925 (b) directing the Appellant to file and serve a concise statement of errors complained of on appeal.

On March 31, 2023, Appellant filed and served the required Concise Statement of Errors Complained of on Appeal in Accordance with Pa. R. App. P. 1925 (B)(1). Judge Sommer then issued his further Opinion on April 27, 2023, addressing the issues identified in Appellants Statement of Errors Complained of on Appeal.

On April 27, 2023, the Record was transferred to the Commonwealth Court. and the Commonwealth Court then issued a briefing schedule setting for a deadline of June 12, 2023, for Appellant's Brief and Reproduced Record.

Appellant filed an unopposed request for a thirty (30) day extension of time in which to file the appellate brief and reproduced record. The Commonwealth Court pursuant to a *per curiam* Order dated June 7, 2023, granted Appellant's request and required that the Appellant file four copies of the appellate brief and four copies of the record on or before July 12, 2023, and serve once copy of same upon the Appellees.

C. The names of the Judges or other officials whose determinations are to be reviewed.

Appeals Officer Lyle Hartnraft of the Office of Open Records is the author of the Final Determination of September 30, 2023, reversing the denial of the Chester County Coroner with respect to the requested autopsy reports and toxicology reports. The Honorable Jeffrey R. Sommer of the Court of Common Pleas of Chester County, confirmed the Final Determination by Appeals Officer Lyle Hartnraft by Order dated March 21, 2023, and restated his position in the Court's 1925 (b) Order dated April 27, 2023. These determinations are subject to review on appeal.

D. Short chronological statement in narrative form of all facts necessary to be known in order to determine the points in controversy with reference to the record.

The issues presented in this appeal are mostly legal in nature. However, there are certain facts of record as set forth in the Affidavit supporting the Coroner's initial denial dated August 2, 2022, which are relevant. Additionally, at the hearing held on February 13, 2023 before Judge Sommer, there were certain factual understandings presented that were accepted "as the position of the Coroner" by the Court which are also relevant to address the controversy regarding the requested release of autopsy reports and toxicology reports under the RTKL.

When the Coroner denied the request for autopsy reports and toxicology reports by means of the RTKL - without any fee or compliance with procedures of the Coroner's Act – this position was supported by a detailed affidavit of the First Deputy Coroner of Chester County, Jesse Poole-Gulick dated August 26, 2023. (R. 56a-57a).

This Affidavit explained that three (3) of the decedents were not people that the Coroner's Office could identify. (R. 56a) (Affidavit ¶ 6.).

The Affidavit noted that the requests "exceed the information that the Coroner's Office makes available to the public or interested parties in accordance with the County Code, Coroner's Act as found at 16 P.S. § 1201-B et seq. (R. 56a) (Affidavit ¶ 8).

The Affidavit specified that under the Coroner's Act (applicable to the County of Chester a Third Class County), the Coroner within 30 days after the end of the year supplies to the Prothonotary a document previously known as a "view of form" and currently known as a "verification of death form" setting forth the cause and manner of death of all deaths addressed by the Coroner during the year preceding. This information is available at the Office of the Prothonotary of Chester County where it can be reviewed and copied. (R.56a)(Affidavit ¶ 9).

The Affidavit identified that the Coroner's records include autopsy reports and toxicology reports which are detailed private records of the decedent and highly sensitive and private information. The Affidavit further asserted that the Coroner's Office does release information to the next of kin and will supply information in response to a lawfully issued subpoena in a legal case in circumstances where it has determined that the interests of the decedent are being represented and there is no basis to file a motion to quash the subpoena. (R. 56a) (Affidavit ¶'s 10 and 11).

The Affidavit noted that the RTKL at Section 708 (b)(20) explicitly excludes the release of "an autopsy record of a coroner or medical examiner" and that the autopsy is done by a forensic pathologist (a medical doctor) and that medical examiners and toxicologists under contract with the County of Chester to provide services for the Coroner's Office are bound by HIPAA and that Autopsy

and Toxicology records are protected under the “privacy rule” under HIPAA and are “records made confidential by law”. (R. 57a)(Affidavit, ¶’s 13-16).

The Affidavit also specifically referenced that the recent amendments of 2018 to the Coroner’s Act and the discretion provided to the Coroner regarding the release of information which prohibited the release of information as follows:

“The recent amendment of 2018 to the Coroner’s Act found in the County Code at § 1252-B “Fees for Reports” establishes procedures for obtaining fees for collecting reports. This amendment does not provide authority requiring the creation of reports as it does not expand duties of the Coroner to release information - other than the customary release of the annual “verification of death” under Section 1236-B and release of information to “next of kin” or in response to a lawful subpoena and as determined appropriate at the discretion of the Coroner. See, generally, 16 P.S. § 1217-B.”

(R. 57a) (Affidavit ¶ 17).

At the hearing held on February 13, 2023 (R 364a-482a), the Solicitor for the Coroner discussed the 2018 amendments to the Coroner’s Act (including the amendment to supply a definition of “autopsy” and state court of common pleas decisions supporting the denial of the release of such requested information based upon the 2018 amendments). At that hearing, the position was also put forth that the Coroner, consistent with the affidavit accompanying the denial, would only provide a simple one page “view [of] form” identifying the “cause and manner of death” on an annual basis with the Prothonotary as the “official records” and that

this would not include autopsy reports or toxicology reports which were not to be released under the Coroner's Act or the RTKL. (R. 367a-368a 374a).

Although, Judge Sommer did not take direct testimony of the Coroner - who was present to testify - he did accept the proffer of the Solicitor and the general factual position advanced by the Coroner. Judge Sommer stated: "I appreciate that the Coroner has taken time to come and I accept what you have proffered as the offer of proof as to what the coroner would say..." (R. 381a) (Testimony of the Court).

The foregoing established that the Appellant had raised and preserved the issues of the 2018 amendments to the Coroner's Act affecting the interpretation of the Coroner's Act and its interrelationship with the RTKL and the Coroner's position that the autopsy reports and toxicology reports were exempt from release and that the only public information to be provided is the one page verification of death or view of form annually filed with the Prothonotary.

VI. SUMMARY OF THE ARGUMENT:

The Honorable Jeffrey R. Sommer disregarded currently developing case law based upon the 2018 amendments to the Coroner's Act. Judge Sommer improperly required the Coroner to supply autopsy reports and toxicology reports to Appellee under the theory that the Coroner's Act required the release of this information. This faulty premise thereby created an alleged conflict with the RTKL. To resolve this conflict required an immediate release of the requested information pursuant to procedures provided by the RTKL – despite the fact that the RTKL exemptions would otherwise prohibit such a release.

Judge Sommer did not properly consider the 2018 amendments to the Coroner's Act¹. Instead, Judge Sommer relied upon case law addressing the earlier version of the Coroner's Act. This constituted reversible error as these cases are no longer reliable² and the 2018 amendments to the Coroner's Act are significant and directly impact the prior decisions referenced and require, to the extent necessary, a new statutory analysis regarding the interplay between the Coroner's Act and the RTKL.

¹ These amendments include a new definition of an "autopsy" at Section 1202-B of the Coroner's Act. The 2018 amendments also revised Section 1236.1 of the Coroner's Act into two (2) new sections, Section 1217-B and 1252-B (with different functions and with restrictions imposed regarding the release of 1252-B reports). Further changes, among others, included additional new provisions establishing that the coroner is authorized to retain DNA samples for diagnostic, evidentiary or confirmatory purposes. See, 16 P. S. § 1219-B (d).

² The amendments to the Coroner's Act undermine and render inapposite the cases relied upon by Judge Sommer: Penn Jersey Advance, Inc. v. Grim, 963 A.2d 632 (Pa 2009) and Hearst Television Inc v. Norris, 54 A.3d 23 (Pa. 2012).

VII. ARGUMENT:

A. Contrary to Judge Sommer's position, the 2018 Amendments to the Coroner's Act were "substantial" and are "dispositive" and prohibit the release of autopsy reports and toxicology reports.

Judge Sommer in affirming the Final Determination of the OOR as written by Appeals Officer, Lyle Hartranft, Esquire, reversed the Coroner's denial of a RTKL request "seeking 'the complete autopsy and toxicology reports'" for various decedents without subpoena or payment through procedures provided by the RTKL and an analysis based upon the authorities of Penn Jersey Advance, Inc. v. Grim, 963 A.2d 632 (Pa. 2009) and Hearst Television, Inc v. Norris, 54 A. 3d 23, 32-33 (Pa. 2012).

This brief establishes that Judge Sommer failed to understand the Coroner's correct position, consistent with the 2018 amendments to the Coroner's Act, that the Coroner's Act does not support the release of autopsy reports and toxicology reports. Further, this brief establishes that under the circumstances as are before the Court on review, the Supreme Court decisions relied upon by Judge Sommer are no longer reliable to address the revised Coroner's Act.

The affidavit of the First Deputy Coroner of Chester County, Jesse Poole-Gulick and the transcript of the hearing before Judge Sommer set forth the factual background under which the Coroner has interpreted the Coroner's Act and the basis by which she provides only the "verification of death form" as the "official

records” of the Coroner (establishing the cause and manner of death) provided to the Prothonotary on an annual basis pursuant to Section 1236-B of the Coroner’s Act. 16 P.S. § 1236-B.

The Coroner does not interpret the Coroner’s Act as authorizing the release of “autopsy reports” or “toxicology reports” under Section 1236-B of the Coroner’s Act as amended. Instead, the Coroner views “autopsy reports” and “toxicology reports” as records subject to protections to protect privacy concerns such as HIPAA and the protections afforded to the privacy of medical records and drug records as protected from disclosure by exemptions set forth in the RTKL and released only based upon specific provisions for such release under the Coroner’s Act. See, Affidavit of First Deputy Coroner attached to the Coroner’s denial of the RTKL request at issue. (R. 56a-57a).

- 1. The 2018 Amendments expand the records maintained by the coroner for use by the coroner and distinguish between 1236-B records (released annually) and 1252-B reports (which would include autopsy reports and toxicology reports subject to restricted releases for fees).**

The 2018 Amendments to the Coroner’s Act significantly change the Coroner’s Act. The 2018 amendments constituted a major overhaul of the Coroner’s Act, by the General Assembly pursuant to P.L. 931 enacted October 24, 2018, effective in 60 days (December 24, 2018). It is noteworthy that the

amendments created a new section of the Coroner's Act containing "definitions" at Section 1202-B which establishes a definition of an "Autopsy" as follows:

"The external and internal examination of the body of a deceased person, including, but not limited to:

(1) Gross visual inspection and dissection of the body and its internal organs.

(2) Photographic or narrative documentation of findings, including microscopic, radiological, toxicological, chemical, magnetic resonance imaging or other laboratory analysis performed upon tissues, organs, blood, other bodily fluids, gases or other specimens.

(3) The retention for diagnostic and documentary purposes of the following which are necessary to establish and defend against challenges to the cause and manner of death of the deceased person:

(i) Tissues, organs, blood, other bodily fluids or gases.

(ii) Any other specimen."

Id.

The above quoted language establishes that an "autopsy report" would also include a "toxicology report" as subsection (2) above references "documentation of findings" including "toxicological" information. See, § 1202-B (2) *supra*.

Of related significance with respect to the records subject to control of the coroner and affected by the 2018 amendments is the addition of a new subsection (d) to Section 1219-B of the Coroner's Act (formerly 16 P.S. §1238). This new section (d) expressly authorizes the coroner to retain DNA samples for diagnostic, evidentiary, or confirmatory purposes. See, 16 P.S. § 1219-B (d).

In addition to these changes dealing with the records of the coroner, the prior sections of the Coroner's Act dealing with requests for examinations and reports at § 1236.1 ("Requests for examinations and reports") has been broken into (2) two

new sections of the Coroner's Act at Sections 1217-B and 1252-B. Section 1217-B entitled "Request of examinations and reports" references the discretionary release of information by the coroner. The new section 1252-B is entitled "Fee for reports" which sets fees for reproducing reports and places restrictions on the release of information to "nongovernmental agencies in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased." Id. (new language underlined). See, 16 P. S. §§ 1217-B and 1252-B.

These amendments to the Coroner's Act change the prior understanding of the Coroner's Act, and are consistent with the interpretation thereof by the Coroner. It is the Coroner's position that Section 1252-B restricts the release of reports. Based upon these restrictions the Appellee is not entitled to the requested autopsy reports or toxicology reports as Appellee is not a qualified "nongovernmental agency" requesting information "in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased." See, 16 P. S. § 1252-B.

Further, the Coroner takes the position that Section 1236-B "records" do not include "autopsy reports" or "toxicology reports". Instead, 1236-B records are properly limited to the verification of death form setting forth public information as to the cause and manner of death. A fair reading of the 2018 amendments to the Coroner's Act leads to the conclusion that Section 1236-B "records" are different

from Section 1252-B “reports” and the release of this information is treated differently.

- 2. Judge Sommer refused to recognize the authority of a prior ruling he had made which was consistent with the Coroner’s position or to acknowledge the authority of newly developing court of common pleas decisions dealing with the 2018 amendments and restricting the release of Section 1252-B reports.**

Judge Sommer had previously ruled in a manner consistent with the Coroner’s position relative to release of “autopsy reports” 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, a copy of which is attached hereto as Exhibit “D”. In Coroner v. Jeffrey Thompson, Judge Sommer had reversed the Decision of the OOR and confirmed Coroner’s denial of an autopsy report under similar facts presented in this case, and in so doing refuted similar legal theories espoused by the OOR in the case at bar.

In Coroner v. Jeffrey Thompson, Judge Sommer specifically noted that the request which sought a copy of the “medical examiner’s/Coroner’s report regarding an identified individual” ran directly into the exception at RTKL at Section 708(b)(20) which prohibited the release of an autopsy report. The exemption under the RTKL was correctly noted by Judge Sommer 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....” See, Exhibit “D” Decision, p.1.

Judge Sommer favorably noted the existence of this exemption at Section 708(b)(20) of the RTKL and noted that the exemption also states that it shall not “limit the reporting of the name of the deceased individual and the cause and manner of death.” See, Exhibit “D” (Decision, pp. 1-2).

Thus, in his prior opinion, Judge Sommer correctly noted how this exemption under the RTKL dovetailed with the language of the Coroner’s Act which has provisions for an annual report at 16 P.S. § 1261 (now under Section 1236-B involving “records”) which is now known as the “verification of death form” but was at the time was referred to as the “view of form”. See, Exhibit “D” (Decision, p. 2).

Further, in Coroner v. Jeffrey Thompson, Judge Sommer had 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, Judge Sommer’s prior decision in Jeffrey Thompson, was consistent with the Coroner’s position in this case, a position made even stronger since the enactment of the 2018 amendments to the Coroner’s Act.

Judge Sommer in his ruling in this case has inexplicably sidestepped his earlier position in Coroner v. Jeffrey Thompson, even though it addressed the same

cases relied upon by the OOR , i.e., Hearst Television, supra, and Penn Jersey Advance, supra. Judge Sommer's position in Coroner v. Jeffrey Thompson, reached an entirely different result than his analysis in this case - the result which the Coroner believes is correct.

In the case on appeal, Judge Sommer also refused to consider the recent court of common pleas decision in Centre County, County of Centre v. Richard Cowen, CCP Centre County, No. 2022-1053-AP which addressed a request for an "autopsy report" from the County Coroner. In County of Centre. v. Richard Cowen, the Court had reversed the OOR's final determination (forcing release of this information) by concluding that this information was exempt from release under Section 708(b)(20) of the RTKL. See, Order of the Honorable Katherine V. Oliver of the Court of Common Pleas of Centre County Judge attached hereto as Exhibit "E" . Judge Oliver makes it clear that this decision is based "in light of the amendments to the Coroners Act".

The Brief in Support of the Petition for Review attached to the Coroner's Brief and presented to Judge Sommer (R 261a-270a) and attached hereto as Exhibit "F" establishes that Centre County took the same position as the Coroner in this case, asserting that the coroner was prohibited from releasing "autopsy reports" pursuant to the 2018 amendment found at Section 1252-B which the Court concluded limited the release "to nongovernmental agencies" who

“investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased.” The County in Centre County also argued that the privacy rights as set forth in the Health Insurance Portability and Accountability Act (“HIPPA”) prohibited the release of an autopsy as a “medical record” that should not be released without the consent of the decedent’s estate. See Exhibit “F”.

Faced with these arguments, Judge Sommer, joined with the OOR in disregarding as insignificant the 2018 amendments to the Coroner’s Act and relying upon Penn Jersey Advance, Inc. v. Grim, 963 A.2d 632 (Pa. 2009) and Hearst Television, Inc v. Norris, 54 A. 3d 23, 32-33 ((Pa. 2012) which decisions were based upon the law prior to the 2018 amendments to the Coroner’s Act.

3. Judge Sommer disregarded the Coroner’s position that the 2018 amendments to the Coroner’s Act were significant and prohibited the release of autopsy reports and toxicology reports and instead improperly relied upon now-irrelevant cases interpreting the interrelationships between the Coroner’s Act and the RTKL – reaching an absurd result.

As was explained to Judge Sommer, and as has already been identified in this brief, the 2018 amendments to the Coroner’s Act are significant and they change the legal analysis that must be applied. It is asserted that the cases which pre-date the amendments relating to the interplay between the RTKL and the Coroner’s Act are no longer applicable or controlling.

Initially, it should be noted that the Pennsylvania Supreme Court decisions at issue are themselves built upon a strained, if not faulty, analysis. Penn Jersey Advance, was improperly cited by the Appeals Officer as a controlling case in a RTKL context and has been accepted as such by Judge Sommer. 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 and before Judge Sommer, Penn Jersey Advance, is without precedential value in the RTKL context.

The Pennsylvania Supreme Court, in Penn Jersey Advance, identified that it did not address the interplay between the RTKL and the Coroner's Act. The Court observed that the RTKL "became effective on January 1, 2009... 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.

Similarly, Hearst Television Inc. v. Norris, has shaky underpinnings as identified in the strong dissent by Justice Eakin as referenced hereafter. However, and most importantly, both of these decisions are based upon the earlier version of the Coroner's Act which has been substantially reworked under the 2018 amendments rendering these cases without direct relevance.

Judge Sommer in his Decision notes the mandatory requirement of depositing official records and papers under Section 1236-B “records” and the fees for “reports” as set forth under Section 1252-B (Decision p. 5). Judge Sommer then relies upon Penn Jersey Advance, supra, (which dealt with the Coroner’s Act prior to the 2018 amendments) to assert that a “coroner’s autopsy report is considered an official record of the coroner that is required to be deposited with the Office of the Prothonotary at the end of each year in accordance with 16 P.S. 1236-B.

This becomes the lynchpin of Judge Sommer’s position. Judge Sommer then frames the issue as a conflict³ between the RTKL which would prohibit disclosure of an autopsy report or toxicology report and the Coroner’s Act which requires disclosure of these reports under Section 1236-B. Judge Sommer frames the conflict as follows:

“...the Coroner’s Act permits the disclosure of autopsy reports and toxicology reports for a fee and as official records of the coroner and the RTKL does not”.

Decision, p. 6.

Judge Sommer then relies upon Hearst Television, Inc. v. Norris, referenced previously as Pennsylvania Supreme Court authority (also based upon the Coroner’s

³ Previously Judge Sommer had quoted from Section 67.3101.1 of the RTKL which states:
“[i]f the provisions of this act regarding access to records conflict with any other Federal or State Law, the provisions of this act shall not apply.

Decision p. 3. See, 65 P.S. § 67.3101.1 (“Relation to other laws”).

Act prior to the 2018 Amendments) as having addressed the Coroner's argument that the predecessor to Section 1252-B was discretionary. Judge Sommer notes that under Hearst, "the Coroner's Act provides two (2) methods for public access to certain documents: (1) a year end archiving of all "official records and papers " with the Prothonotary or 2) rapid access for those who do not wish to wait and are willing to pay a fee". Decision pp 6-7.

Following this conclusion, Judge Sommer states that the 2018 amendments are neither "significant" nor "dispositive". (Decision P. 7).

However, Judge Sommer never addresses in any significant detail the language change in Section 1252-B restricting the release of information only to a "nongovernmental agency" requesting information "in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased." Instead Judge Sommer states that a "fair reading" does not change "the public nature of autopsy reports (Section 1236-B) or create discretion on the Coroner where the Supreme Court has already determined there is none." Decision p. 8.

The problem with this analysis is that it fails to review Section 1236-B and Section 1252-B in light of the 2018 amendments (and other related amendments) that were part of the Coroner's Act re-write.

Judge Sommers failed to recognize that Section 1252-B was different than prior to the 2018 amendments to the Coroner's Act. The predecessor Section 1261.1 of the Coroner's Act had been broken into separate sections and that Section 1261.1(c) had become Section 1252-B entitled "fees for reports" and was modified to restrict the release of information and is not the equivalent of the public records provided in Section 1236-B.

This position is further strengthened by the other 2018 amendments. As has been identified previously, the new definition of an autopsy found at Section 1202-B establishes that an autopsy (which by definition extends to include a toxicology report) constitutes a record retained by the coroner - similar to the samples that are retained for diagnostic and documentary purposes and identified as being "...necessary to establish and defend against challenges to the cause and manner of death of the deceased person". 16 P. S. § 1202-B(2) and (3).

The autopsy or toxicology reports are not records that the Coroner's Act requires to be provided to the public under Section 1236-B. Further, Section 1219-B of the Coroner's Act added a new subsection (d) which expressly authorizes the coroner to retain DNA samples for diagnostic, evidentiary, or confirmatory purposes. Id. Again, this sort of confidential information is not appropriate under any common sense analysis to be provided to the public under Section 1236-B.

As the newly developing case law is establishing, an “autopsy report” (and likewise a “toxicology report”) is not 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, which dealt with a request for “the full autopsy report”.

Judge Sommer in his Decision did review the procedural history of the amendments to the Coroner’s Act and cites to Comments made by the Local Government Commission relative to the amendments to Section 1252-B of the Coroner’s Act. These comments provide with respect to this particular subsection of the amended Coroner’s Act as follows:

“This section is analogous to County Code Section 1236.1 (c) and SCCC Section 1235.1(c), except that the fees for reports have been increased.”

The footnote to this comment then from the Government Commission as quoted by Judge Sommer goes on to state:

“ Amendment A07290 removes a new subsection which would have specified that the section should not be construed as authorizing disclosure of a record exempt from public access under Act 3 of 2008, known as the Right -to-Know Law.”

Decision at pp. 7-8.

Judge Sommer’s citation to the commentary is not challenged. However, this commentary is not determinative of the issue as Judge Sommer asserts.

The General Assembly in its re-write of the Coroner's Act chose not to supply language specifying that coroner's record provisions favor exemptions provided in the RTKL. However, such a procedure was never necessary. Such a convoluted procedure would be the "tail wagging the dog".

The General Assembly in passing the 2018 Amendments to the Coroner's Act committed to a significant change in the prior statute. The General Assembly knew that this would be viewed as new legislation created to make changes in the functioning of the Coroner's Act. It would have been difficult and possibly a self-defeating task to engraft language into the amended Coroner's Act challenging the specific treatment of the revised Coroner's Act as addressed by the RTKL. This was not necessary.

The amendments to the Coroner's Act made it clear that the Coroner's Act does not support the release of an "autopsy report" or "toxicology report" as a 1236-B report. This is not public information provided in 1236-B records.

As noted in this brief, the 2018 amendments remove the purported "conflict" between the Coroner's Act and the RTKL. The assumption that the Coroner's Act requires the release of an "autopsy report" (under the theory that an autopsy report falls within the category of "official records or papers" under Section 1236-B) was never on solid ground. The amendments remove this foundation. The amendments also remove the conundrum that the RTKL contains specific

exemptions custom tailored to the Coroner's Act to exclude from release an "autopsy" and yet is being used to obtain this information. See, 65 P.S. § 708(b)(20).

Judge Sommer, however, disregards these arguments - and the common sense understanding that sensitive medical information such as autopsy reports, toxicology reports, DNA records et cetera should not be released under HIPAA and other authorities. Instead, Judge Sommer concludes that the amendatory language with respect to Section 1252-B (which is clearly restricted against release and by the statutory organization is different from the information provided at Section 1236-B) does not change "the public nature of autopsy reports (Section 1236-B)". Decision pp. 8- 9.

At oral argument, the Coroner's position on these issues was clearly developed and this was also explicitly addressed in Appellant's statement of errors complained of on appeal. However, Judge Sommer in his Opinion Pursuant to P. R. A. P. 1925(a) doubles down on his theory that prior case law is controlling and that the "Coroner's Act prevails."

This is a fundamentally flawed position as it contradicts Judge Sommer's prior position in Coroner v. Jeffrey Thompson as noted previously, and is directly contrary to common sense. It makes no sense given the existence of strong and valid HIPAA and privacy concerns, that the General Assembly would expand upon

the definitions of an “autopsy” to include “medical analysis” and identify that DNA records are retained for defending a determination of the coroner but allow all of this information to be released under Section 1252-B.

The unfortunate and absurd result of this decision - if it is left to stand - is that despite the amendments to the Coroner’s Act which restrict 1252-B reports, Judge Sommer’s reliance upon prior decisional law interpreting the old Coroner’s Act will result in the immediate release of Coroner’s records to the public. The coroner becomes a conduit for access to all sorts of private information and the exemptions put in place in the RTKL to protect against this are swept aside.

B. The substantial 2018 amendments to the Coroner’s Act require the reversal of prior Supreme Court decisions interpreting the interplay between the RTKL and the Coroner’s Act and interpreted by Judge Sommer to require the release of an autopsy report and toxicology report despite the fact that the RTKL has exemptions which would prohibit the release of this information.

This Court has full authority to review the statutory interplay between the amended Coroner’s Act and the RTKL. See, Commonwealth v. Zortman, 23 A.3d 519, 522-23 (Pa. 2011)(citation omitted), *cert den’d*, Zortman v. Pennsylvania, 565 U.S.1108 (2012) (questions of statutory construction present the court with a “pure question of law, meaning ...[the court’s] review is plenary and non-deferential).

It is asserted that the 2018 amendments to the Coroner's Act clearly separated the 1236-B information from the 1252-B information and placed restrictions upon the 1252-B information.

When ascertaining the intent of the General Assembly, there is a presumption that the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable. 1 Pa. C.S. § 1922 (1). Furthermore, the words of a statute shall be construed according to rules of grammar and according to their common and approved usage. 1 Pa. C.S. § 1903(a). Every statute shall be construed, if possible, to give effect to all its provisions. 1 Pa. C.S. § 1921(a). [The Court] will only look beyond the plain meaning of the statute where the words of the statute are unclear or ambiguous. 1 Pa. C.S. § 1921(c). see, also, Commonwealth v. Diodoro, 970 A.2d 1100 (2009).

Further, it is presumed that when enacting legislation, the General Assembly is familiar with the extant law. See, generally, White Deer Twp. v. Napp, 985 A.2d, 745, 762 (Pa. 2009).

It is asserted that the General Assembly's significant amendments to the Coroner's Act in 2018 require a new and full and complete review of the interplay between the RTKL and the Coroner's Act and reconsideration of the authorities relied upon by Judge Sommer in this case, Penn Jersey Advance, Inc. v. Grim, 963 A.2d 632 (Pa 2009) and Hearst Television Inc v. Norris, 54 A.3d 23 (Pa. 2012).

Because the amendments differentiate between 1236-B “records” and 1252-B “reports”, these authorities are no longer accurate. In fact, these changes are consistent with the views of and the inciteful analysis set forth by Justice Eakin in both Penn Jersey Advance, v. Grim, 962 A.2d 632 (2009) and Hearst Television, Inc. v. Norris, 54 A.3d 23 (Pa. 2012).

Justice Eakin in these two dissents lays out a well thought out explanation of the Coroner’s Act and the interplay with the RTKL. He specifically states with respect to Penn Jersey, that he disagrees with the majority’s conclusion that “conducting autopsies is one of the official duties of the coroner.” This is now made clear by the 2018 amendments differentiating between 1236-B and 1252-B and as supported by other substantive changes as set forth in the 2018 amendments and discussed previously.

Consistent with the position of Appellant, Justice Eakin finds that the determination of the “cause and manner of death” are the duties of the Coroner and that the details of an “autopsy” should not be made public, as opposed to the “view of forms” which were approved for release under Johnstown Tribune Publishing Company v. Ross, 871 A.2d 324 (Pa. Cmwlth. 2005). See, 926 A.2d at pp. 638-639.

Similarly, in Hearst Television, Inc. v. Norris, Justice Eakin’s dissent correctly noted that Penn Jersey, was focused on the “official” nature of autopsy

reports and did not involve the RTKL. 54 A.3d at 35. Justice Eakin in Hearst Television, went on to find a conflict between the predecessor to Section 1236-B (which provided for and still provides for an annual release of information (“records”)) and the predecessor to Section 1252-B (which under the prior Commonwealth Court Opinion adopted by Justice Eakin gave the coroner discretion regarding a more immediate release). Any such “discretion” has now actually been restricted by the new language in Section 1252-B.

However, because 1252-B information is now restricted in its release, this accords with Justice Eakin’s position that it should not be available for an “immediate release” and that Section 1252-B is in conflict with Section 1236-B. Thus, Justice Eakin would still be correct in concluding that there is a conflict between these two provisions of the Coroner’s Act.

Under the circumstances presented in this case, the major amendments to the Coroner’s Act in 2018 require a reconsideration and reversal of the analysis advanced by Judge Sommer and the cases upon which Judge Sommer relies and which have been shown to reach an absurd result. Such a result is contrary to the rules of statutory construction which seek to avoid an absurd result. See, 1 Pa. C.S. A. § 1922 (1)(In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: (1)

That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.) Id.

IX. CONCLUSION

Based upon the foregoing reasoning and legal authorities cited, the Appellant requests that this Honorable Court reverse the ruling of Judge Sommer which sustained the Final Determination of the Office of Open Records and rejected the Chester County Coroner's refusal to release autopsy reports and toxicology reports to the public.

Autopsy reports and toxicology reports are exempt from release under provisions of the RTKL. It is asserted that they do not constitute Section 1236-B records released annually. Regardless, the 2018 amendments to the Coroner's Act make it clear that as 1252-B records they are not to be released absent proof that the requesting party is a "nongovernmental agency" seeking this information "in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased" as required by 16 Pa. C.S. A. § 1252-B. Because the Appellee has not established compliance with Section 1252-B, the Appellee is not entitled to the information.

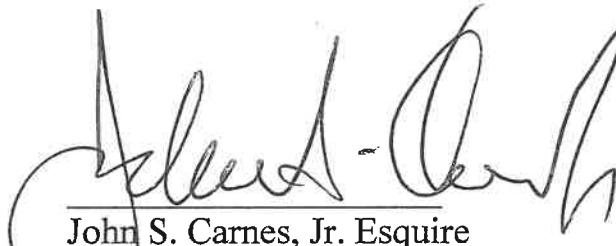
Lastly, the autopsy reports and toxicology reports are records that are inherently private and protected under HIPAA and other privacy laws including exemptions under the RTKL. Additionally, it is asserted that these records are not readily available under the Coroner's Act. Thus, the interplay between the RTKL and Coroner's Act needs to be revisited to correct any continued misplaced

reliance upon Penn Jersey Advance, Inc. v. Grim, 963 A.2d 632 (Pa 2009) and Hearst Television, Inc. v. Norris, 54 A.3d 23 (Pa. 2012). These cases are no longer relevant given the changes in the law. It would be absurd to interpret the interplay between the RTKL and the Coroner's Act in such a fashion as to establish that the coroner is a conduit for the release to the public of private information such as an autopsy report or toxicology report.

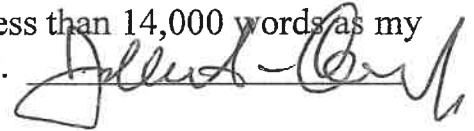
Respectfully submitted,

Date:

7/12/23


John S. Carnes, Jr. Esquire
Attorney for Appellant

Certification of compliance with Pa. R. App. P. 2135 (d). I certify that the principal brief, excluding supplementary matters is less than 14,000 words as my word processing word count establishes 7,735 words.



John S. Carnes, Jr.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CHESTER COUNTY OFFICE OF THE :
CORONER :

Appellant :

vs. :

TERENCE KEEL AND THE UNIVERSITY: OF CALIFORNIA – LOS ANGELES, :
INSTITUTE FOR SOCIETY AND :
GENETICS, BIOSYSTEMS LAB :

NO. 242 C.D. 2023

Appellee :

PUBLIC ACCESS POLICY CERTIFICATE OF COMPLIANCE

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

Dated: 7/12/23


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pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

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

v.

CHESTER COUNTY OFFICE OF THE
CORONER,
Respondent

Docket No: AP 2022-1801

INTRODUCTION

Terence Keel and the University of California-Los Angeles, Institute for Society and Genetics, Biostudies Lab (collectively, the "Requester") submitted a request ("Request") to the Chester County Office of the Coroner ("Office") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking autopsy and toxicology reports. The Office denied the Request arguing, among other things, that the records are exempt autopsy records, and the Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Office is required to take additional action as directed.

FACTUAL BACKGROUND

On June 27, 2022, the Request was filed, seeking “the complete autopsy and toxicology reports” for seventeen individuals. On July 1, 2022, the Office invoked a thirty-day extension during which to respond to the Request. 65 P.S. § 67.902(b). On August 2, 2022, the Office denied the Request, arguing that the Office has no duty to create a record, 65 P.S. § 67.705, and that the records are exempt medical records, autopsy records, criminal investigatory records, and noncriminal investigatory records, 65 P.S. §§ 67.708(b)(5), (20), (16), and (17).

On August 2, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal.¹ 65 P.S. § 67.1101(c).

On August 26, 2022, the Office submitted a position statement arguing that the Office is subject to the Health Insurance Portability and Accountability Act (“HIPAA”) and that the records are exempt under Section 708(b)(20) of the RTKL. The Office further argues that the records contain “very private and confidential medical records” subject to exemption pursuant to Sections 708(b)(5), (16) and (17) of the RTKL. Finally, the Office argues that the Pennsylvania Supreme Court’s decision in *Penn Jersey Advance, Inc. v. Grim*, 962 A.2d 632 (Pa. 2009) is “not controlling with respect to the case at bar.” In support of its argument, the Office submitted the attestation of Jesse Poole-Gulick, First Deputy Coroner for the Office.²

On August 26, 2022, the Requester submitted a position statement, arguing, among other things, that autopsy and toxicology reports “must be made available for inspection.”

¹ The Office attests that it has “sent notice to the Chester County District Attorney’s Office and the County Prison/County Solicitor regarding any third party rights that such agencies might have with respect to the requests for information but said parties have chosen not to intervene in this matter.” See Poole-Gulick Attestation at ¶7.

² On September 9, 2022, the Office submitted a Memorandum of Law correcting typographical errors submitted in its August 26, 2022 submission.

LEGAL ANALYSIS

“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 L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law 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).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The Office is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

1. Autopsy and toxicology reports are not exempt under the RTKL and HIPAA.

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt from disclosure. 65 P.S. § 67.708(a)(1). In the present case, the Office first argues that the autopsy reports are “prepared by a forensic pathologist (a medical doctor) under contract with the County and subject to HIPAA”. Most notably, the Office has not submitted argument or evidence to demonstrate how the Office falls within the definition of “covered entity” under HIPAA and the Privacy Rule.³ See *Segelbaum and the York Daily Record v. York County*, OOR Dkt. AP 2017-1459, 2017 PA O.O.R.D. LEXIS 1332 (finding that the Office is not a covered entity under HIPAA), *rev'd in part on other grounds, County of York v. Segelbaum*, 2017-SU-002770 (York Co. Com. Pl. April 4, 2018) (confirming that neither York County nor the Office is a covered entity under HIPAA). Furthermore, while the OOR notes that HIPAA provides for the confidentiality of a deceased individual’s “protected health information” for a period of 50 years following the individual’s death, this limitation pertains only to protected health information of covered entities. See 45 C.F.R. § 164.502(f) (“A *covered entity* must comply with the requirements of this subpart with respect to the protected health information of a deceased individual for a period of 50 years following the death of the individual) (emphasis added).

Finally, the Office suggests that it “makes other information available to the ‘next of kin’ or in response to a subpoena in a legal action in which the interests of the decedent are being represented and as appropriate in the exercise of [the Coroner’s] discretion”; however, apart from the Coroner’s attestation and citing to Section 1217-B, the Office provides no case citation specifically excluding this type of information. To the contrary, the Pennsylvania Supreme Court has determined that autopsy reports constitute “official records and papers” of the coroner which,

³ The Office’s response to the Request does not address the definition of a “covered entity” within HIPAA in any meaningful way.

in accordance with the Coroner's Act, must be deposited with the county prothonotary for inspection by the public. *Penn Jersey Advance, Inc. v. Grim*, 962 A.2d 632, 636-37 (Pa. 2009) ("It is clear from these sections of the Coroner's Act that conducting autopsies is one of the official duties of a coroner. It follows logically that a coroner's resulting autopsy reports constitute 'official records and papers' within the meaning of Section 1251 [of the Coroner's Act]") (internal citations omitted);⁴ *see also* 16 P.S. § 1236-B ("In counties of the third, fourth, fifth, sixth, seventh and eighth classes, every coroner, within thirty (30) days after the end of each 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.").⁵ Likewise, the Court has concluded that the Coroner's Act does not provide coroners with discretion to withhold records such as autopsy and toxicology reports. *Hearst TV, Inc. v. Norris*, 54 A.3d 23, 32-33 (Pa. 2012). Accordingly, the Office has failed to establish that the requested autopsy and toxicology reports are protected from disclosure by HIPAA and the Privacy Rule; therefore, they must be disclosed to the Requester.

2. The Office failed to meet its burden that autopsy and toxicology reports are subject to any RTKL exemptions

The Office also argues that the autopsy and toxicology reports are exempt under Sections 708(b)(5), (b)(16), (b)(17) and (b)(20) of the RTKL. 65 P.S. §§ 67.708(b)(5) (b)(16)-(17), (b)(20). However, for the reasons set forth above, the Coroner's Act makes the reports subject to public access, as such the RTKL yields to the Act. *See* 65 P.S. § 67.306 ("Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in ... State

⁴ The Office asks the OOR to not consider the *Penn Jersey* case because "[i]t did not address the Right to Know Law and was a very different case from this case before the OOR." As *Penn Jersey* has not been explicitly overturned, we find this argument unpersuasive.

⁵ Chester County is a county of the third class. The OOR notes that the Requester provided the dates of deaths of the decedents and all were the years 2021 or prior; therefore, the autopsy reports should have been deposited in the County Prothonotary.

law...."); 65 P.S. § 67.3101.1 ("If the provisions of th[e RTKL] regarding access to records conflict with any other ... state law, the provisions of th[e RTKL] shall not apply").

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Office is required to provide copies of all available reports under 16 P.S. § 1252-B, upon receipt of the fees for autopsy and toxicology reports set forth in that section.⁶ This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Chester County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁷ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 30, 2022

/s/ Lyle Hartranft
Lyle Hartranft, Esq.
Appeals Officer

Sent via email to: Terence Keel;
Sophia Garcia-Jackson;
John Carnes, Jr., Esq.

⁶ The Requester may also access the available reports under 16 P.S. § 1236-B from the County Prothonotary's office, to the extent that the County Coroner has complied with that statutory section.

⁷ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013)

CHESTER COUNTY OFFICE OF THE
CORONER

VS.

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

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENN

NO. 2022-08612-CS
CIVIL ACTION



DECISION

I. INTRODUCTION

Petitioner, the Coroner of Chester County, Sophia Garcia-Jackson ("Coroner"), seeks review of the Final Determination of the Pennsylvania Office of Open Records ("OOR") permitting the disclosure of autopsy and toxicology reports for seventeen (17) named individuals requested by Respondent Terence Keel of the University of California-Los Angeles, Institute for Society and Genetics, Biostudies Lab, in Los Angeles, California (hereinafter "Requester" or "Dr. Keel"). According to the Coroner, the OOR committed an error of law when it granted Requester's appeal and failed to give effect to the exemption provisions of Pennsylvania's Right to Know Law, 65 Pa.C.S.A. §67.1302 ("RTKL"), the Coroner's Act, 16 P.S. §1201-B, et seq., and privacy concerns.

The Coroner appealed the OOR's Final Determination to this court on October 28, 2022. On November 14, 2022, the court issued a scheduling order establishing deadlines for certification of the record and briefing by the parties. On January 23, 2023, the court scheduled a hearing on the matter for February 13, 2023. Requester sought to continue the hearing by filing a motion for continuance on February 9, 2023, which was received by the court on February 10, 2023. The request was denied by the court on February 10, 2023, and the hearing proceeded as scheduled. At the

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hearing on February 13, 2023, the court did not take additional evidence, but heard argument on the Petition. Requester did not appear at the hearing.

Upon consideration of the certified record, the argument heard on February 13, 2023, and the parties' briefing, the court finds no error in the OOR's Final Determination. The present appeal is therefore denied.

II. FACTUAL BACKGROUND

On June 27, 2022, Dr. Keel submitted a request to the Coroner pursuant to Pennsylvania's RTKL seeking copies of autopsy and toxicology reports for seventeen (17) individuals identified by their name and dates of death (the "Request"). Following receipt and review of the Request, on August 2, 2022, the Coroner responded to Dr. Keel's Request by letter. She advised him that it was her position that the information sought was "was clearly excluded under the pertinent terms of the RTKL" and identified ten (10) provisions within the RTKL that she believed exempted the requested documents from production.

On August 2, 2022, Respondent filed an appeal of the Coroner's response to the OOR. The OOR did not conduct a hearing. On September 30, 2022, the OOR issued its Final Determination. The OOR concluded that the Request sought documents that were not exempt under the RTKL and which were required to be produced consistent with the provisions of the Coroner's Act. It granted Requester's appeal and directed the Coroner to provide copies of all available reports under 16 P.S. §1252-B of the Coroner's Act, upon receipt of the required fees for autopsy and toxicology reports. The OOR also noted that Requester could access the available reports under 16 P.S. §1236-B of the Coroner's Act from the Prothonotary's Office "to

the extent that the county coroner has complied with that statutory section.” (R.R., at Ex. 7, p. 6, n.6). This appeal then followed.

III. DISCUSSION

Standard of Review

Appeals from decisions of the OOR are reviewed *de novo* by the appropriate court. *Bowling v. Office of Open Records*, 621 Pa. 133, 75 A.3d 453 (Pa. 2013). The reviewing court's scope is plenary and it may consider evidence in addition to the administrative record as it deems necessary. See *Wishnefsky v. Pennsylvania Dept. of Corrections*, 144 A.3d 290, 294, n.7 (Pa. Cmwlth. 2016). The court has taken no additional evidence.

The RTKL and the Coroner's Act: Autopsy Reports and Toxicology Reports

The present appeal and its disposition involves the interplay between two Pennsylvania statutes, the RTKL and the Coroner's Act.

The RTKL

The RTKL “is designed 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.” *Ali v. Philadelphia City Planning Com'n*, 125 A.3d 92, 99 (Pa. Cmwlth. 2015). 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. Section 67.708(b) identifies the documents and information exempt from access by a requester. 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. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Cmwlth. 2010)). "All exemptions from disclosure . . . must be narrowly construed." *Ali, supra*.

At the center of this dispute is the exemption found at Section 67.708(b)(20) of the RTKL which addresses autopsy and similar post-mortem reports. The RTKL provides:

(20) 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, however, is not without limitation. The RTKL further provides that this exemption does not limit "the reporting of the name of the deceased individual and the cause and manner of death." *Id.*

The RTKL at Section 67.3101.1 recognizes the potential for conflict between it and other laws. It provides guidance for resolving such conflicts when they appear at Section 67.3101.1, which states:

[i]f the provisions of this act regarding access to records conflict with any other Federal or State law, the provisions of this act shall not apply.

RTKL, §67.3101.1.

The Coroner's Act

The Coroner's Act codifies the duties of a county coroner. As provided for in the Coroner's Act, a coroner is tasked with ascertaining the cause and manner of certain deaths. 16 P.S. §1218-B(a). If, after investigation, the coroner is unable to

determine the cause and manner of death, the coroner shall perform or order an autopsy on the body. 16 P.S. §1219-B.

In connection with the above duties, the Coroner's Act at Section 1236-B - "Records" - mandates

[i]n counties of the third, fourth, fifth, sixth, seventh and eighth classes, every coroner, within 30 days after the end of each 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.

16 P.S. §1236-B.

Chester County is a county of the third class.

The Coroner's Act also sets for the fees that may be charged by a coroner for certain reports, including autopsy reports. Section 1252-B - "Fees for reports", provides

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.

16 P.S. §1252-B.

The OOR did not err in concluding that the autopsy and toxicology reports sought by Requester were not exempt from disclosure.

Under Pennsylvania law, a coroner's autopsy report is considered an official record or paper of the coroner that is required to be deposited with the Office of Prothonotary at the end of each year in accordance with 16 P.S. §1236-B. *Penn Jersey Advance, Inc. v. Grim*, 599 Pa. 534, 962 A.2d 632 (2009). Although the

Coroner is correct that the *Penn Jersey* Court in its decision did not address any conflict between the RTKL, which had just been enacted, and the Coroner's Act, the Supreme Court's conclusion that an autopsy record is an official record of the Coroner remains valid and undisturbed. Therefore, the question is not whether an autopsy report is an official record of the Coroner, and thus a public record - it is - but whether its disclosure is nonetheless exempt under the RTKL - it is not.

A conflict clearly exists between these two statutes as it relates to the disclosure of autopsy and toxicology reports of a decedent. Put simply, the Coroner's Act permits the disclosure of autopsy reports and toxicology reports for a fee and as official records of a coroner and the RTKL does not. However, the RTKL makes clear that in the case of a conflict, such as found here, the Coroner's Act controls the release of the requested records. The Coroner's exemption argument thus fails.

The Coroner alternatively argues that she has discretion under the Coroner's Act and her interpretation thereof to challenge the right of Requester to obtain these documents. According to the Coroner, Section 1252-B of the Coroner's Act, which allows the setting of fees for reports, provides the Coroner with discretion when responding to requests for certain information. This argument, however, was rejected by the Supreme Court in *Hearst Television, Inc. v. Norris*, 617 Pa. 602 (2017).

In *Hearst*, the Court analyzed a prior version of the Coroner's Act as it relates to fees for reports. The *Hearst* Court held that there "is no mention ... of discretion in [then Section 1236.1(c)]. By its plain terms, Section 1236.1 allows the coroner to charge fees for records, but does not afford the coroner any discretion with regard to releasing such records." *Hearst*, 617 Pa. at 617, 54 A.3d at 32. In sum, the *Hearst* Court concluded that the Coroner's Act provides two (2) methods for public access to

certain documents: (1) a coroner's year end archiving of all "official records and papers" with the Prothonotary or (2) rapid access for those who do not wish to wait and are willing to pay a fee. *Id.* at 318

The Coroner suggests that the court should not rely on the decisions in *Penn Jersey* or *Hearst* because each pre-date the 2018 amendments to the Coroner's Act. According to the Coroner, the "fee for reports" provision of the Coroner's Act is now "entirely different" rendering the Supreme Court's prior decisions on the issue to be unreliable authority. The court disagrees.

First, the court does not view the 2018 amendments to the Coroner's Act and the provisions at issue here to be significant or dispositive. The provision relating to the setting of fees for reports, such as autopsy and toxicology reports, at the time of *Penn Jersey* and *Hearst* provided:

(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 amended provision now provides as follows:

The coroner shall charge and collect a fee of \$500 for an autopsy report, \$100 for a toxicology report, . . . 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 court notes that the County Code Comments following the newest provision state:

COUNTY CODE COMMENTS

This section is analogous to County Code Section 1236.1(c) and SCCC Section 1235.1 (c), except that the fees for reports have been increased.¹ [PA Local Gov't Comm. <<http://www.lgc.state.pa.us>>, Act

154 of 2018 (SB 1005, PN 2026) Section-by-Section Commentary, 2017-18 Sess. (2018)]

1 Amendment A07280 removes a new subsection which would have specified that the section should not be construed as authorizing disclosure of a record exempt from public access under Act 3 of 2008, known as the Right-to-Know Law.

The General Assembly had the opportunity to address the issue of exemptions under the RTKL and the Coroner's Act but chose not to do so. See *Verizon Pennsylvania Inc v. Commonwealth*, 127 A.3d 745, 757 (Pa. 2015) (noting "one of the most venerable and fundamental tenets of statutory interpretation is that, whenever our court has interpreted the language of the statute, and the General Assembly subsequently amends or reenacts that statute without changing that language, it must be presumed that the General Assembly intends that our courts' interpretation become part of the subsequent legislative enactment."). Under a fair reading of the above provision, neither the reference to fee setting by the Coroner for "nongovernmental agencies" in the predecessor statute nor the new language limiting requests for other reports to "nongovernmental agencies in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased" changes the public nature of autopsy reports (Section 1236-B) or creates discretion on the Coroner where the Supreme Court has already determined there is none.

The Coroner's next challenge to the OOR's Final Determination centers upon the exemption under the RTKL for medical and drug test reports as set forth in Section 67.708(b)(5). The RTKL provides as follows:

(b) Exceptions.—Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

(5) A record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation,

prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

RTKL, §67.708(b)(5).

The problem with this argument is once again one of conflict and thus the result is the same. As was the case with the autopsy report exemption, to the extent the RTKL prohibits the disclosure of medical records and information and the Coroner's Act does not, per the RTKL, the Coroner's Act prevails.

Even if the court did not find the statutes to be in conflict, it does not agree that the type of records referenced in what the Coroner identifies as the "medical record and drug test exemption" pertain to the records at issue here. The exemption set forth in Section 708(b)(5) reasonably refers to the medical records of someone that is living. Consistent therewith, this provision references records regarding diagnoses, treatment, enrollment in health care programs and the like. Furthermore, if this provision was meant to include autopsy reports and related reports of a decedent, the statutory language regarding the records of a coroner, would be unnecessary and surplusage. It is apparent to the court that the General Assembly considered these two categories of medical documents (those records related to the living and deceased persons) to be separate and distinct records for consideration.

Finally, as for the Coroner's privacy arguments, the court recognizes the concerns proffered by the Coroner and the protections offered under HIPAA and other similar privacy laws. However, the coroner's burden of demonstrating an exemption was simply not met here. Furthermore, the court notes that while the Coroner, per the Affidavit attached to the Petition, acknowledged reaching out to the District Attorney's

office (implicating the criminal investigation exemption) about this matter, no similar effort is set forth regarding any attempts to involve next of kin in this matter.

In summary, the Supreme Court has twice addressed third party requests for autopsy reports and each time has concluded that the production of the same are not violative of the privacy rights of individuals. The appeal is thus denied.

An appropriate Order follows.

BY THE COURT:

Date: March 1, 2023

Jeffrey R. Sommer
Jeffrey R. Sommer, J.

CHESTER COUNTY OFFICE OF THE CORONER : IN THE COURT OF COMMON PLEAS

: CHESTER COUNTY, PENNSYLVANIA

VS.

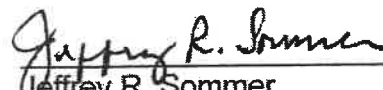
TERENCE KEEL and THE
UNIVERSITY OF CALIFORNIA-LOS ANGELES, INSTITUTE FOR SOCIETY : NO. 2022-08612-CS
AND GENETICS, BIOSTUDIES LAB : CIVIL ACTION

ORDER

AND NOW, this 1st day of March, 2023, upon review and consideration of the Coroner of Chester County's Petition for Review/Appeal of Final Determination of the Pennsylvania Office of Open Records, Respondent's Answer thereto, and argument held on February 13, 2023, it is hereby ORDERED and DECREED the Petition is DENIED.

The Final Determination of the Office of Open Records is hereby AFFIRMED.

BY THE COURT:


Jeffrey R. Sommer, J.

CHESTER COUNTY OFFICE OF THE
CORONER

VS.

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

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENN

NO. 2022-08612-CS

CIVIL ACTION



OPINION PURSUANT TO Pa.R.A.P. 1925(a)

I. PROCEDURAL SETTING

This matter comes before the Court as the result of an appeal by the Chester County Coroner ("Appellant" or the "Coroner") of the trial court's Decision and Order of March 1, 2023, denying the Coroner's Petition for Review/Appeal of Final Determination of the Pennsylvania Office of Open Records ("OOR") (the "Final Determination"). The Final Determination permitted the disclosure of autopsy and toxicology reports requested by Appellees Terence Keel ("Dr. Keel") and the University of California-Los Angeles, Institute for Society and Genetics, Biostudies Lab (collectively "Appellees" or "Requester").

By Order dated March 14, 2023, the trial court directed Appellant to file a Concise Statement of matters complained of on appeal. Appellant filed a Concise Statement on March 31, 2023. The matter is now ripe for review.

II. FACTS

On June 27, 2022, Dr. Keel submitted a request to the Coroner pursuant to Pennsylvania's Right to Know Law, 65 P.S. §67.101, *et. seq.* ("RTKL") seeking copies of autopsy and toxicology reports for seventeen (17) individuals identified by name and dates of death (the "Request"). Following receipt and review of the Request, on August 2, 2022, the Coroner responded to Dr. Keel's Request by letter. She advised him that

it was her position that the information sought was "was clearly excluded under the pertinent terms of the RTKL" and identified ten (10) provisions within the RTKL that she believed exempted the requested documents from production.

On August 2, 2022, Appellees filed an appeal of the Coroner's response to the OOR. The OOR did not conduct a hearing. On September 30, 2022, the OOR issued its Final Determination. The OOR concluded that the Request sought documents that were not exempt under the RTKL and which were required to be produced consistent with the provisions of the Coroner's Act. It granted Appellees' appeal and directed the Coroner to provide copies of all available reports under 16 P.S. §1252-B of the Coroner's Act, upon receipt of the required fees for autopsy and toxicology reports. The OOR also noted that Requester could access the available reports under 16 P.S. §1236-B of the Coroner's Act from the Prothonotary's Office "to the extent that the county coroner has complied with that statutory section." (R.R., at Ex. 7, p. 6, n.6).

On October 28, 2022, the Coroner appealed to the trial court seeking review of the Final Determination. On November 14, 2022, the trial court issued a scheduling order establishing deadlines for certification of the record and briefing by the parties. On January 23, 2023, the trial court scheduled a hearing on the matter for February 13, 2023. Appellees sought to continue the hearing by filing a motion for continuance on February 9, 2023, which was received by the trial court on February 10, 2023. The request was denied by the court on February 10, 2023, and the hearing proceeded as scheduled. At the hearing, the trial court did not take additional evidence, but heard argument on the Petition. Requester did not appear at the hearing.

III. ISSUE PRESENTED

Did the trial court properly conclude that the requested documents were not protected from disclosure under Pennsylvania's RTKL and Coroner's Act?

IV. HOLDING

Yes, the trial court properly denied the Coroner's appeal of the Final Determination.

V. RATIONALE

Upon further review, the trial court believes that its ten-page Decision and Order of March 1, 2023 adequately explains the court's reasoning and conclusions and addresses the main errors identified in the Concise Statement. In the interest of completeness, however, the trial court will address further a few of the issues raised in the Concise Statement.

Alleged Errors 1-4, 7-8

At Alleged Errors 1-4 and 7-8, Appellant again sets forth her reasoning as to why she believes the requested documents are exempt from disclosure, including her interpretation of the interplay between the RTKL and the Coroner's Act. The trial court considered those arguments, but properly concluded following its review of the plain language of the two applicable statutes and Pennsylvania decisional law that the Coroner's position was not sustainable. The trial court's analysis and conclusions are found at pp. 4-10 of its Decision.

The Coroner also suggests in her Concise Statement that the trial court erred in failing to acknowledge the significance of the Verification of Death form her office deposits annually with the Prothonotary. According to the Coroner, this is the "official

record" of the Coroner's Office and all that is required to be disclosed. The trial court disagrees.

First, the Coroner failed to provide support for the argument that the created "Verification Forms" replace an autopsy report as the Coroner's only "official record." Second, although the Coroner may have created and prepared a Verification of Death form for reporting purposes, Pennsylvania case law and the provisions of the Coroner's Act remain consistent that autopsy reports are nonetheless "official records" of the Coroner available for inspection.

Alleged Error 5

As the trial court understands this alleged error, the Coroner contends that the requested autopsy and toxicology reports are exempt from disclosure under the medical records exemption under the RTKL. The Coroner cites at Paragraph 5 of the Concise Statement the definition of "autopsy," within the Coroner's Act, which includes certain phrases and analysis related to medical matters. (Concise, at 5). Thus, the Coroner argues, autopsy reports must be exempt under the medical records exemption of the RTKL as well. The trial court considers it to demonstrate the contrary.

As the trial court explained at pp. 8-9 of its Decision, consideration of the medical records exemption requires the same analysis of the two statutes at issue as does any analysis of the autopsy exemption. To the extent the RTKL prohibits the disclosure of medical records and information and the Coroner's Act does not, per the RTKL, the Coroner's Act prevails. Furthermore, by highlighting the fact that the definition of "autopsy" in the Coroner's Act includes medical analysis etc., the Coroner strengthens the conclusion reached by the trial court because the case law is clear that autopsy reports, as official records of a coroner, are not exempt from disclosure.

Alleged Error 6

As for the Coroner's argument that the trial court failed to recognize the restrictions on disclosure imposed by HIPAA. The trial court concluded that the Coroner had failed to demonstrate, as was her burden, that HIPAA prevented the requested disclosures. The trial court noted that although efforts were made to involve the district attorneys' office in assessing the propriety of the request against any applicable exemptions, it did not appear that a similar inquiry had been made of family members of those whose records were requested. The trial court finds no error in its conclusion.

I respectfully request that the appellate court affirm the trial court's Decision and Order entered on March 1, 2023.

All of which is respectfully submitted,

BY THE COURT:

Date: April 27, 2023

Jeffrey R. Sommer
Jeffrey R. Sommer, J.

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

FILED
2017 APR 10 PM 12:01
JESSIE
THOMPSON
PROTESTANT
CHESTER CO. PA

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.

BY THE COURT:

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SOLICITOR'S OFFICE

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, *Gulrinfano 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

:

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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.

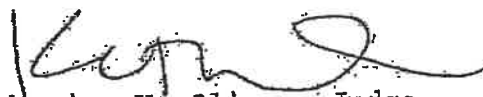
Any aggrieved party has the right to file an appeal to the Commonwealth Court within Thirty (30) Days of today's date.

BY THE COURT:

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


Katherine V. Oliver, Judge

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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
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JEREMY S. BREON
PROTHONOTARY
CENTRE COUNTY, PA

IN THE COURT OF COMMON PLEAS
CENTRE COUNTY, PENNSYLVANIA

COUNTY OF CENTRE, Petitioner,

v.

RICHARD COWEN, Respondent.

Docket No. AP 2022-1053

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.

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By:


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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: 8/17/2022

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Counsel for County of Centre, Petitioner

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MICHAEL SHELIGA, Respondent.

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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:

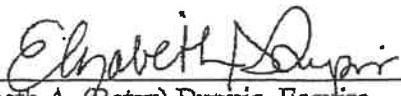
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U.S. First-Class Mail, Postage Prepaid Addressed to:

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PROOF OF SERVICE

I hereby certify that I am this day serving the Appellant's Brief and Reproduced Record upon the persons and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121 and the Order of Court:

Via regular mail (4 copies of Brief and Reproduced Record) addressed to:

Michael F. Krimmel, Prothonotary
Commonwealth Court
Pennsylvania Judicial Center
601 Commonwealth Ave., Suite 2100
P.O. Box 69185
Harrisburg, PA 17106-9185

Via regular mail (1 copy of brief) to:

The Honorable Jeffrey R. Sommer
Court of Common Pleas
201 W. Market St., P.O. Box 2746
West Chester, PA 19380-0989

Via regular mail (1 copies of brief) (1 copy of Reproduced Record) to

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Via regular mail (1 copy of brief) to:

Lyle Hartranft, Esquire
Appeals Officer, Pa. Office of Open Records
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Dated: 7/12/23

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