

August 25, 2023

Office of the Prothonotary
Court of Common Pleas of Philadelphia County
First Judicial District of Pennsylvania
Civil Trial Division
City Hall
Philadelphia, PA 19107

RE: Submission of Record in:
Philadelphia District Attorney's Office v. Paula Knudsen Burke,
May Term 2023 No. 02033

Dear Prothonotary:

We hereby submit the record in the above-referenced matter. Section 1303 of the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*, (“RTKL”), defines the Record on Appeal as “the record before a court shall consist of the request, the agency’s response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer.” Pursuant to *Department of Transportation v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010), this record includes all “evidence and documents admitted into evidence by the appeals officer pursuant to Section 1102(a)(2).” The record in this matter consists of the following:

Office of Open Records Docket No. AP 2022-2836:

1. The appeal filed by Paula Knudsen Burke (“Requester”) to the Office of Open Records (“OOR”), received December 21, 2022.
2. Official Notice of Appeal dated December 22, 2022, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Philadelphia District Attorney’s Office (“Office”) extension request and Requester agreement emails dated December 23, 2022.
4. OOR correspondence dated December 27, 2022, confirming the parties’ extension agreement.

5. Email chain dated January 19, 2023 wherein the OOR confirms the parties' agreement to an additional extension.
6. Requester submission dated January 19, 2023.
7. Office submission submitted January 27, 2023 (inadvertently dated 2022).
8. OOR correspondence dated April 13, 2023, seeking clarification from the Office.
9. Office submission dated April 14, 2023.
10. The Final Determination dated April 20, 2023, issued by the OOR.

The OOR has discretion to hold a hearing on appeals filed but chose not to do so in this matter. Therefore, there is no transcript to transmit. Certification of the record in this case is attached to this letter. Please feel free to contact us for any reason in connection with this matter.

Sincerely,

A handwritten signature in black ink that reads "Kyle Applegate". The signature is written in a cursive, flowing style.

Kyle Applegate
Chief Counsel

Attachments

cc: Paula Knudsen Burke, Esq. (Requester)
Joshua Niemtzow, Esq. (Office)

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

PHILADELPHIA DISTRICT	:	
ATTORNEY'S OFFICE,	:	
Appellant	:	
	:	May Term 2023
v.	:	
	:	No. 02033
PAULA KNUDSEN BURKE,	:	
Appellee	:	

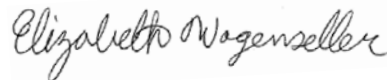
CERTIFICATION OF RECORD

I hereby certify the contents of the record transmitted with this Certification of Record pursuant to Pa.R.A.P. 1952 in *Paula Knudsen Burke v. Philadelphia Office of the District Attorney*, OOR Dkt. AP 2022-2836, which is the subject of this appeal.

The record transmitted with this certification is generated entirely from the Office of Open Records database. It is our practice to scan in each and every document submitted in an appeal. Thus, no originals are being transmitted to this Court.

I 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 differently than non-confidential information and documents.

Also, my signature on this Certification of Record and on all other correspondence directed to the Court in connection with this matter may be electronic and not original. I hereby certify that this is my true and correct signature and that I have approved the use thereof for these purposes.



Elizabeth Wagenseller, Executive Director
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: OpenRecords@pa.gov

Dated: August 25, 2023

Case ID: 230502033

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

**PHILADELPHIA DISTRICT
ATTORNEY'S OFFICE,
Appellant**

v.

**PAULA KNUDSEN BURKE,
Appellee**

:
:
:
: **May Term 2023**
:
: **No. 02033**
:
:

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Certified Record upon the following persons via e-mail addressed to their e-mail address as follows:

Joshua B. Niemtow, Esquire
Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107
josh.niemtzow@phila.gov

Paula Knudsen Burke, Esq.
Reporters Committee For
Freedom of the Press
PO Box 1328
Lancaster, PA 17608
pknudsen@rcfp.org



Faith Henry, Administrative Officer
Pennsylvania Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: fahenry@pa.gov

Dated: August 25, 2023

Case ID: 230502033

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

PHILADELPHIA DISTRICT	:	
ATTORNEY'S OFFICE,	:	
Appellant	:	
v.	:	May Term 2023
	:	
PAULA KNUDSEN BURKE,	:	No. 02033
Appellee	:	

CERTIFIED RECORD

Kyle Applegate
Chief Counsel
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
Email: kyapplegat@pa.gov

August 25, 2023

Case ID: 230502033

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

PHILADELPHIA DISTRICT	:	
ATTORNEY’S OFFICE,	:	
Appellant	:	
v.	:	May Term 2023
PAULA KNUDSEN BURKE,	:	No. 02033
Appellee	:	

TABLE OF CONTENTS RECORD

Paula Knudsen Burke v. Philadelphia Office of District Attorney,
OOR Dkt AP 2022-2836:

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9. Office submission dated April 14, 2023.
10. The Final Determination dated April 20, 2023, issued by the OOR.

OOOR Exhibit 1

From: no-reply@openrecordspennsylvania.com
To: pknudsen@rcfp.org
Subject: [External] PA Office of Open Records - Appeal Confirmation
Date: Wednesday, December 21, 2022 3:51:01 PM
Attachments: [oor_logo_email.png](#)

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook.](#)



You have filed an appeal of an agency's response to a request for records under the Right-to-Know Law.

Name:	Paula Knudsen Burke
Company:	Reporters Committee for Freedom of the Press
Address 1:	PO Box 1328
Address 2:	
City:	Lancaster
State:	Pennsylvania
Zip:	17608
Phone:	717-951-6314
Email:	pknudsen@rcfp.org
Email2:	sdudding@rcfp.org
Agency (list):	City of Philadelphia, District Attorney
Agency Address 1:	
Agency Address 2:	
Agency City:	

Case ID: 230502033

Agency State:	Pennsylvania
Agency Zip:	
Agency Phone:	215-686-7644
Agency Email:	josh.niemtzow@phila.gov
Records at Issue in this Appeal:	(1) The “entire media distribution list” utilized by the DA’s office through MailChimp. (2) Zoom invitation records showing reporters, editors, or other members of the news media invited to participate in remote/virtual press calls with DA Krasner (3) Records referencing barring members of the news media from DA press conferences, either in person or virtually.
Request Submitted to Agency Via:	e-mail
Request Date:	11/02/2022
Response Date:	12/09/2022
Deemed Denied:	No
Agency Open Records Officer:	Josh Niemtow, Open Records Officer
Attached a copy of my request for records:	Yes
Attached a copy of all responses from the Agency regarding my request:	Yes
Attached any letters or notices extending the Agency's time to respond to my request:	Yes

Agree to permit the OOR additional time to issue a final determination:

90 Days

Interested in resolving this issue through OOR mediation:

No

Attachments:

- Nov 2 RTKL request.pdf
- Burke 30 day Extension.pdf
- Burke_Media list_Final with attachments.pdf

I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

Final response to your 11-2-2022 Right to Know

1 message

Josh Niemtzow <Josh.Niemtzow@phila.gov>

Fri, Dec 9, 2022 at 2:20 PM

To: Paula Knudsen Burke <pknudsen@rcfp.org>

Cc: Jane Roh <Jane.Roh@phila.gov>, Jennifer Lin <Jennifer.Lin@phila.gov>

Hello Paula,

Please see attached for the DAO's final response to your Right to Know request. Feel free to reach out should you have any questions.

Best,

Josh Niemtzow
Assistant District Attorney
Philadelphia District Attorney's Office
Three [South Penn Square](#)
[Philadelphia, PA 19107](#)
Phone: 215-686-7644



Burke_Media list_Final with attachments.pdf
2421K



LAWRENCE S. KRASNER
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
215-686-8000

December 9, 2022

Via Email

Paula Knudsen Burke
Reports Committee for Freedom of the Press
pknudsen@rcfp.org

Re: Final Response to Your Right to Know Law Request

Dear Ms. Knudsen Burke:

This letter is in response to your Right-to-Know-Law (RTKL) request, which was received by the Open Records Officer of the Philadelphia District Attorney's Office (DAO) on November 2, 2022. You requested:

- (1) The "entire media distribution list" utilized by the DA's office through MailChimp. Records sought are the distribution lists for Jan. 1, 2022 through Nov. 1, 2022. This request anticipates that reporters are added or dropped over the months and that the list would be changed/updated during this time period.
- (2) Zoom invitation records showing reporters, editors, or other members of the news media invited to participate in remote/virtual press calls with DA Krasner. Records sought are from July 1, 2022 through Nov. 1, 2022.
- (3) Records referencing barring members of the news media from DA press conferences, either in person or virtually. Key words include "eject," "invite," "press conference," "Ralph Cipriano." Records sought for Jan. 1, 2022 through Nov. 1, 2022.

By email on November 9, 2022, the DAO invoked an extension of time, until December 9, 2022, in which to respond. *See* 65 P.S. § 67.902(a). This constitutes the DAO's final response to your request.

1. The Media Distribution List Utilized by DA's Office from January 1, 2022 Through November 1, 2022

The DAO is unable to generate responsive records to this query due to the nature of the media distribution list and the fact that it is a dynamic database: participants are added to or removed from the list or may choose to opt-out of receiving DAO press notices. In other words, the DAO has a current media distribution list, though to the best of our knowledge based on the mechanics of the program, there is no means of isolating the names or contact information of recipients on such list at particular dates in the past. However, as the current media distribution list

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is partially reflective of who may have been on prior iterations of the list during the requested time period, the DAO has enclosed that list herein. The DAO has redacted this record to remove IP addresses, geographical identification, and email addresses. *See* 708(b)(6)(exempting from disclosure agency records containing home, cellular or personal telephone numbers and email addresses). *See also Pa. State. Educ. Ass'n v. Commonwealth*, 148 A.3d 142, 144 (Pa. 2016) (discussing the state constitutional right to informational privacy, including disclosure of home addresses, in the context of a RTK request).

2. Zoom Invitation Records for Press Calls

After a good-faith search for responsive records, the DAO has located one item responsive to your query, which it has enclosed herein.

3. Records Referencing Barring Media from Press Conferences

After a thorough and comprehensive search for responsive records, the DAO has identified two items responsive to this request (attached herein). To the extent you are seeking additional records, they are privileged, non-public records. *See Heavens v. Pennsylvania Dep't of Env'tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. 2013) (“The work-product doctrine offers broad protection to the mental impressions, theories, notes, strategies, research and the like created by an attorney in the course of his or her professional duties, particularly in anticipation or prevention of litigation.”). *See id.* ([“U]nder the RTKL, the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked.”); *see also* 65 P.S. § 67.708(b)(17) (exempting agency records relating to a noncriminal investigation).

This letter is the DAO’s response to your RTKL request. Should you wish to contest this decision, an appeal must be filed with the Pennsylvania Office of Open Records, 333 Market Street, 16th Floor, Harrisburg, PA 17101-2234, no later than 15 business days from the date of this letter.


Sincerely,

/s/ Josh Niemtow






Josh Niemtow
Open Records Officer
PHILADELPHIA DISTRICT ATTORNEY’S OFFICE
Three South Penn Square
Philadelphia, PA 19107-3499
(215) 686-7644
josh.niemtow@phila.gov

Email Address	First Name	Last Name	EMAIL_TYPE	MEMBER_RATING	OPTIN_TIME	CONFIRM_TIME	CLEAN_TIME	CLEAN_CAMPAIGN_CLEAN_CAMPAIGN_LEID	EUID	NOTES	TAGS
jmyer@comcast.net	Taylor	Allen	html	1	5/16/2018 15 50	5/16/2018 15 50	5/18/2018 6 35	Attempted Rape @ 71c5a4b84	1602917 e6ba4693a		
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mat.furman@comcast.net	Matt	Ferner	html	1	5/16/2018 15 50	5/16/2018 15 50	5/18/2018 6 36	Attempted Rape @ 71c5a4b84	17029793 54417ab95		
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mborrell@comcast.net	Maria	Borrell	html	1	3/20/2019 15 54	3/20/2019 15 54	2/18/2019 12 22	Cash Bail 1 Year Bail 5137f4022	17459577 203a5c249		"Main_Media"
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greg.rose@comcast.net	Greg	Rowe	html	1	5/16/2018 15 50	5/16/2018 15 50	1/7/2020 13 24	District Attorney Kr a832c130e	17029537 d479335ed		"Main_Media", "Advisory 042020"
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laura.cahn@comcast.net	Marco	Cerino	html	1	5/16/2018 15 50	5/16/2018 15 50	7/20/2020 14 08	District Attorney Kr 8804a3a0d	16028885 622a3eaac4		"Main_Media", "Advisory 042020"
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laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	5/18/2018 6 34	Attempted Rape @ 71c5a4b84	16029313 a3519f7b9		"Advisory 042020"
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	3/15/2020 11 24	District Attorney Kr 7a4b0d70c	82604748 e02943a3c		"Main_Media"
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	11/4/2019 15 04	District Attorney Kr 8804a3a0d	16028813 e0dc3a3c6		"Main_Media"
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	5/18/2018 6 34	Attempted Rape @ 71c5a4b84	16028333 e0eafecf8		"Advisory 042020"
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	1/2/2022 12 50	DAO LGSTKr Advnot62315c4	82604741 5a8717620		"Main_Media", "Advisory 042020"
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	11/4/2019 15 18	District Attorney Kr 8804a3a0d	17029451 57138212b6		
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	10/2/2018 15 34	DOUJ presser d0f9a4c9b	17029441 6a9b7022de		
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	9/27/2019 15 16	DA Kravner Statement7a5e604a	17029748 e431b6d89		
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	2/2/2022 15 36	DA Kravner Statemente5500b7	17029345 1a000b932		
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	1/2/2022 12 50	DAO LGSTKr Advnot62315c4	17029451 57138212b6		"Main_Media", "Advisory 042020"
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	11/2/2019 15 16	District Attorney Kr 7a4b0d70c	17028871 61a3a8786		"Main_Media", "Advisory 042020"
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	10/4/2018 11 00	DOUJ press relea 5593a75db	16028525 9c1266d8f		
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	6/7/2018 11 06	CW v Chaz Johnson ce180da4c	17029557 94001e053		
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	9/29/2021 10 20	DA Kravner to High b0f04a797c	18204886 a847d56d1		
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	11/9/2021 13 06	Statement from DA 615a1e913	17172318 623ba03a2		"Main_Media", "Advisory 042020"
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	5/16/2022 13 37	DAO Election Task f50940d6f	17030121 a8d085cd4		"Main_Media"
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	5/18/2018 6 35	Attempted Rape @ 71c5a4b84	16028997 e0c507645		"Advisory 042020"
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	5/18/2018 6 35	Attempted Rape @ 71c5a4b84	17029003 72a621d9a		
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laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	7/16/2019 16 02	DA Justice Advocate 41004a742	17029345 4516a8095		
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	10/2/2020 17 12	District Attorney Kr 8804a3a0d	16028981 575c5a58b		
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	5/1/2019 10 00	Bye Bye 437a7c3b2	17029945 57a8c1786		"Main_Media"
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laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	9/30/2020 18 22	DAO to Host Virtual b401838e7	25172705 70202b0e6		"Main_Media"
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	10/18/2019 19 32	MEDIA AVAILABLE b0774a32f	82604817 4438c771a5		
laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	5/18/2018 6 37	Attempted Rape @ 71c5a4b84	17029253 51a8f78a5		
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laura.cahn@comcast.net			html	1	5/16/2018 15 50	5/16/201					


Accepted: DA Larry Krasner





Jane Roh
To: kboyer@inquirer.com





Fri 9/16/2022 3:19 PM

 Accepted: DA Larry Krasner

 Tue 9/20/2022 2:30 PM - 3:00 PM

 Jane Roh has accepted this event

 Reply

 Forward

Josh Niemtzw

From: Ralph Cipriano <ralphcipriano@gmail.com>
Sent: Monday, October 31, 2022 11:49 AM
To: larry.krasner@phila.gov; Lawrence.Krasner@Phila.gov; Jane Roh; dustin.slaughter@phila.gov
Subject: viewpoint discrimination

External Email Notice. This email comes from outside of City government. Do not click on links or open attachments unless you recognize the sender.

Dear Larry, Lawrence, Jane & Dustin:

I note for the second straight week that you apparently are not holding your normal Monday morning press conference where I have a chance to question you about the many issues of the day.

Last week, on Tuesday, Jane sent out a message about an invitation-only conference call with the D.A. I immediately RSVPed and was prohibited from participating in this event.

Mr. D.A., I thought you had come around to the concept that you could no longer practice viewpoint discrimination against me by having me evicted from your press conferences, or not answering my questions at your press conferences.

Now, you apparently have figured out a new way to discriminate against me by no longer holding public press conferences, but invitation only "conference calls" on subjects of your choosing, forums that I am not allowed to participate in.

Once again, you are committing viewpoint discrimination, which the courts have steadfastly held is unconstitutional. You also did not respond to questions I emailed you on Oct 7th, as follows:

Dear District Attorney Krasner:

At a press conference at your office on Monday, Oct. 3rd, I asked you a question about Amir Harvey, who had just been arrested by the U.S. Attorney's office for the alleged Sept. 19th armed carjacking of a woman and her daughter in the 8900 block of Maxwell Place.

Harvey's been previously arrested a total of six times in Philadelphia. He's a suspect in four previous carjackings and was also arrested for allegedly firing four shots at police and then barricading himself.

Your office tried Harvey on carjacking charges and he was acquitted on Sept. 8, 2021 or had the charges withdrawn or dismissed on some 14 counts including robbery, reckless endangerment and robbery of a motor vehicle. Twelve days later, Harvey was in court on Sept. 20, 2021 on the case involving the alleged firing of four shots at police officers.

The most serious charge Harvey faced was reckless endangerment. He was sentenced to 11 1/2 to 23 months in jail but the negotiated plea bargain included immediate parole.

At your press conference, I asked about the lenient charges and lenient sentence Harvey was given.

Your response: "I would have to look into the details of that matter."

Four days later, have you had a chance to look into the details of this case, sir? And do you have any explanation for the lenient charges and lenient sentence Harvey was given?

Thanks for taking the time to consider this request.

Ralph Cipriano
for BigTrial.net
cell: 215-901-0219

So, 24 days later, have you yet had a chance, sir, to look into the details of the matter of Amir Harvey, and your office's repeated lenient treatment of him?

I would like a response on this question.

I also want to ask you about the case of Jahmir Harris, a convicted killer that you "exonerated," only to discover that Mr. Harris had allegedly used his newfound freedom to get involved in another murder.

From the original motions filed under seal in this case, it looks like the D.A.'s office pulled a bait and switch on the judge involved in the original Harris murder conviction.

First, your office repeatedly claimed that the D.A. had determined who the real killer was in the first Harris murder, a suspect named A.J. Your office repeatedly claimed that the D.A. wanted to prosecute A.J., and that publicly disclosing the information contained in any of your motions filed under seal would jeopardize that investigation and prosecution of A.J.

Then, after the judge let Harris out of jail, we discover from the motions originally filed by the D.A. under seal that not only did you never arrest or prosecute A.J., you didn't even bother to interview him, based on the recommendation of that brilliant homicide detective Jerry Rocks, who, like your prosecutors in the "exoneration" of Harris, has never investigated or prosecuted a homicide case.

The public is due an explanation for the bait and switch tactic employed in secret by your office to free a convicted killer, only to discover that he allegedly has killed again.

What is your explanation for this travesty of justice, sir? And how long do you plan to continue to hide in your bunker and evade the press corps? At a time when the state legislature is planning to impeach you.

Ralph Cipriano
for Big Trial, now on Substack

Josh Niemtzw

From: Ralph Cipriano <ralphcipriano@gmail.com>
Sent: Monday, August 15, 2022 12:05 PM
To: dustin.slaughter@phila.gov; larry.krasner@phila.gov; Lawrence.Krasner@Phila.gov; Jane Roh
Subject: questions for DA's press conference today

External Email Notice. This email comes from outside of City government. Do not click on links or open attachments unless you recognize the sender.

1. What do you have to say about the criticism leveled at you by state Supreme Court Justice Kevin Dougherty, that you had abused the grand jury process in indicting former police officer Ryan Pownall for murder, along with keeping the grand jury in the dark about applicable case law involving justifiable use of force by a police officer?
2. Why did you give accused SEPTA killer Derrick Jones a sweetheart deal that allowed him to get out of jail and allegedly hunt down and murder three innocent men?
3. Why do you allow two of your senior staff members, Nancy Winkelman and Gregory Holston, who together are paid more than \$300,000, to live in New Jersey, in flagrant violation of the residency requirement for all DAO employees that is specified by the city charter?
4. Why haven't you paid your taxes from the past two years, which, according to records, amount to \$79,521?
5. Why did you, in violation of the First Amendment, have me evicted under threat of arrest by two police officers from your press conference last week? According to two lawyers that I consulted with, one a former senior attorney in the city's law department, the other a staff attorney for the Reporters Committee For Freedom of the Press, you discriminated against me on the basis of viewpoint, an abuse that the U.S. Supreme Court and federal appeals courts have consistently opposed as a flagrant violation of the First Amendment?



LAWRENCE S. KRASNER
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
215-686-8000

November 9, 2022

Via Email

Paula Knudsen Burke
pknudsen@rcfp.org

Re: Response to Your Right to Know Law Request – Thirty-Day Extension

Dear Ms. Burke:

This letter is in response to your Right-to-Know-Law (RTKL) request, which was received by the Open Records Officer of the Philadelphia District Attorney's Office (DAO) on November 2, 2022. You requested:

- (1) The "entire media distribution list" utilized by the DA's office through MailChimp. Records sought are the distribution lists for Jan. 1, 2022 through Nov. 1, 2022. This request anticipates that reporters are added or dropped over the months and that the list would be changed/updated during this time period.
- (2) Zoom invitation records showing reporters, editors, or other members of the news media invited to participate in remote/virtual press calls with DA Krasner. Records sought are from July 1, 2022 through Nov. 1, 2022.
- (3) Records referencing barring members of the news media from DA press conferences, either in person or virtually. Key words include "eject," "invite," "press conference," "Ralph Cipriano." Records sought for Jan. 1, 2022 through Nov. 1, 2022.

The DAO is reviewing your request but will require a thirty-day extension of time pursuant to RTKL Section 902 until **December 9, 2022**, to respond. *See* 65 P.S. § 67.902(a)(3) (bona fide staffing limitations); *id.* (a)(4) (legal review necessary); *id.* (a)(7) (extent or nature of request).

Thank you for your consideration in this matter.

Sincerely,

/s/ Josh Niemtzw

Josh Niemtzw
Open Records Officer
PHILADELPHIA DISTRICT ATTORNEY'S OFFICE

Case ID: 230502033

Three South Penn Square
Philadelphia, PA 19107-3499
(215) 686-8703
josh.niemtzow@phila.gov

Right to Know Law request

1 message

Paula Knudsen Burke <pknudsen@rcfp.org>
To: da.rtk@phila.gov

Wed, Nov 2, 2022 at 8:23 AM

Good morning -
Attached please find a Right to Know Law request.

--



Paula Knudsen Burke
Local Legal Initiative Attorney (Pennsylvania)
PO Box 1328, Lancaster, PA 17608
pknudsen@rcfp.org 717-370-6884 · [@paula_rcfp](https://twitter.com/paula_rcfp)



Nov 2 2022 RTKL request.pdf
1658K



Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: _____ (Attn: AORO)

Date of Request: _____ Submitted via: ☐ Email ☐ U.S. Mail ☐ Fax ☐ In Person

PERSON MAKING REQUEST:

Name: _____ Company (if applicable): _____

Mailing Address: _____

City: _____ State: _____ Zip: _____ Email: _____

Telephone: _____ Fax: _____

How do you prefer to be contacted if the agency has questions? ☐ Telephone ☐ Email ☐ U.S. Mail

RECORDS REQUESTED: *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.*

DO YOU WANT COPIES? ☐ Yes, printed copies (*default if none are checked*)

☐ Yes, electronic copies preferred if available

☐ No, in-person inspection of records preferred (*may request copies later*)

Do you want certified copies? ☐ Yes (*may be subject to additional costs*) ☐ No

RTKL requests may require payment or prepayment of fees. See the [Official RTKL Fee Schedule](#) for more details.

Please notify me if fees associated with this request will be more than ☐ \$100 (or) ☐ \$_____.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: \$_____

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

*NOTE: In most cases, a completed RTKL request form is a public record.
More information about the RTKL is available at <https://www.openrecords.pa.gov>*

Form updated Feb. 3, 2020

Case ID: 230502033

00R Exhibit 2

NOTICE OF DEADLINES

The appeal has been docketed by the OOR and it has been assigned to an Appeals Officer. The docket number and the Appeals Officer's contact information are included in the attachments you received along with this notice.

The Final Determination is currently due on **April 20, 2023**.

The timeline for this RTKL appeal may be extended by the OOR during the appeal. This extension will allow the OOR the flexibility it requires to protect due process and to ensure that the agency and requester, along with any third parties, have a full and fair opportunity to meaningfully participate in the appeal.

Evidence, legal argument and general information to support your position must be submitted within seven (7) business days from the date of this letter, unless the Appeals Officer informs you otherwise. *Note: If the proceedings have been stayed for the parties to submit a completed mediation agreement, the record will remain open for seven (7) business days beyond the mediation agreement submission deadline.*

Submissions in this case are currently due on **January 5, 2023**.

If you are unable to meaningfully participate in this appeal under the above deadlines, please notify the Appeals Officer as soon as possible.

Due to delays in U.S. mail, we urge agencies and requesters to use email or the E-File Appeal Portal for all communications with the OOR to the extent possible.

Presently, the OOR is receiving postal mail on a limited basis. Accordingly, we urge agencies and requesters to use email for all communication with the OOR to the extent possible.

If you have any questions about this notice or the underlying appeal, please contact the Appeals Officer. The OOR is committed to working with agencies and requesters to ensure that the RTKL appeal process proceeds as fairly and as smoothly as possible.

December 22, 2022

Via Email Only:

Paula Knudsen Burke
Reporters Committee for Freedom of the Press
PO Box 1328
Lancaster, PA 17608
pknudsen@rcfp.org

Via Email Only:

Josh Niemtzw
Agency Open Records Officer
City of Philadelphia, District Attorney
3 South Penn Square
Philadelphia, PA 19107
Josh.Niemtzow@phila.gov

RE: OFFICIAL NOTICE OF APPEAL - Knudsen Burke and Reporters Committee for Freedom of the Press v. City of Philadelphia, District Attorney OOR Dkt. AP 2022-2836

Dear Parties:

Review this information and all enclosures carefully as they affect your legal rights.

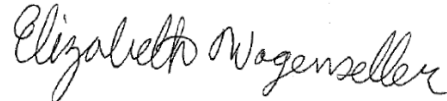
The Office of Open Records (“OOR”) received this appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. on December 21, 2022. A binding Final Determination (“FD”) will be issued pursuant to the timeline required by the RTKL, **please see the attached information for more information about deadlines.**

Notes for both parties (more information in the enclosed documents):

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,



Elizabeth Wagenseller
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

Case ID: 230502033

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

The Office of Open Records (“OOR”) has received the enclosed appeal, which was filed under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the notice of deadlines enclosed herein. If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents.

Submissions to the OOR **Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer.** Please contact the Appeals Officer as soon as possible.

Any information provided to the OOR must be provided to all parties involved in this appeal. Information submitted to the OOR will not be considered unless it is also shared with all parties.

Include the docket number on all submissions.

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

It is strongly advised that attorneys and other party representatives **file an Entry of Appearance** by contacting the Appeals Officer or completing the form at <https://www.openrecords.pa.gov/Appeals/EntryOfAppearance.cfm>.

NOTE TO AGENCIES: In cases assigned to the E-File Portal, if an Entry of Appearance is not filed, the AORO is responsible to inform attorneys and other party representatives of all docket activity.

Generally, submissions to the OOR — other than *in camera* records — will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

Agency Must Notify Third Parties **If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; or are held by a contractor or vendor, the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above.**

Such notice must be made by: (1) Providing a copy of all documents included with this letter; **and** (2) Advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer or completing the form at <https://www.openrecords.pa.gov/Appeals/DIPRequest.cfm>. (see 65 P.S. § 67.1101(c)).

The Commonwealth Court has held that “the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt.” (*Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)).

A third party's failure to participate in a RTKL appeal before the OOR Case ID: 202502033

may be construed as a waiver of objections regarding release of requested records.

NOTE TO AGENCIES: If you have questions about this requirement, please contact the Appeals Officer immediately.

Statements of Fact & Burden of Proof

Statements of fact must be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.**

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, openrecords.pa.gov.

Any evidence or legal arguments not submitted or made to the OOR may be waived.

Preserving Responsive Records

The agency must preserve all potentially responsive records during the RTKL appeal process, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had “a mandatory duty” to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that “a fee award holds an agency accountable for its conduct during the RTKL process...”

Mediation

The OOR offers a mediation program as an alternative to the standard appeal process. To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court — saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.



IN THE MATTER OF

**PAULA KNUDSEN BURKE,
Requester**

v.

**CITY OF PHILADELPHIA, DISTRICT
ATTORNEY,
Respondent**

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Docket No.: AP 2022-2836

This correspondence confirms the above-referenced Requester's agreement to an additional ninety (90) day extension of time to issue a Final Determination in this matter as indicated in the Requester's appeal form. Accordingly, pursuant to 65 P.S. § 67.1101(b)(1), the Office of Open Records will now issue a Final Determination in the above-captioned matter on or before April 20, 2023.

Case ID: 230502033



APPEALS OFFICER:

Jordan Davis, Esq.

CONTACT INFORMATION:

**Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234**

FACSIMILE:

(717) 425-5343

EMAIL:

jordddavis@pa.gov

**Preferred method of contact and
submission of information:**

**EMAIL
(Except cases assigned to the E-File
Appeal Portal)**

**Please direct submissions and correspondence related to this appeal to the above Appeals Officer.
Please include the case name and docket number on all submissions.**

**You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot
speak to parties individually without the participation of the other party.**

The OOR website, <https://openrecords.pa.gov>, is searchable and both parties are encouraged to review
prior final determinations involving similar records and fees that may impact this appeal.

The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff
are also available to provide general information about the appeals process by calling (717) 346-9903.



IN THE MATTER OF

_____,
Requester

v.

_____,
Agency

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OOR Dkt. AP _____

Please accept my appearance for the _____ in the above captioned case.
(Requester/Agency)

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Attorney: _____

Firm: _____

Address: _____

Email: _____

Phone #: _____

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

Case ID: 230502033

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____

Today's date: _____

Name: _____

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Address/City/State/Zip _____

E-mail _____

Fax Number: _____

Name of Requester: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Name of Agency: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Record at issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- ☐ An employee of the agency
- ☐ The owner of a record containing confidential or proprietary information or trademarked records
- ☐ A contractor or vendor
- ☐ Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, _____ (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

OOOR Exhibit 3

From: [Paula Knudsen Burke](#)
To: [Josh Niemtzw](#)
Cc: [Davis, Jordan](#)
Subject: [External] Re: Knudsen Burke and Reporters Committee for Freedom of the Press v. City of Philadelphia, District Attorney, Dkt. AP 2022-2836: Portal Access
Date: Friday, December 23, 2022 10:17:23 AM

ATTENTION: *This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

Two week extension is fine with me. We'll be submitting our supplemental argument by the OOR closing argument date, but yes, this is an appeal of all grounds of the denial.
Happy holidays all, and stay safe in the weather.
Paula



Paula Knudsen Burke
Local Legal Initiative Attorney (Pennsylvania)
PO Box 1328, Lancaster, PA 17608
pknudsen@rcfp.org 717-370-6884 · @paula_rcfp

On Fri, Dec 23, 2022 at 9:50 AM Josh Niemtzw <Josh.Niemtzow@phila.gov> wrote:

Hello Appeals Officer Davis:

On behalf of the DAO, I would like to request a two-week extension of time to file our brief in this matter. It appears from the appellate record that Ms. Burke filed a general appeal, challenging the DAO's response *in toto*. Without specificity, the DAO will have to respond to all aspects of the initial request. Moreover, our small Civil Litigation Unit has recently received an influx of activity on both the lawsuit front re: suits challenging our prosecutorial activities, and on the RTK front. I play a large role in responding to both. Therefore, I would greatly appreciate your consideration of this request. I see that Ms. Burke consented to a 90 day extension for the FD, so I hope this will not be a problem.

Sincerely,

Josh Niemtzw
Open Records Officer
Assistant District Attorney
Civil Litigation Unit
Philadelphia District Attorney's Office

From: DC, OpenRecords <RA-OpenRecords@pa.gov>

Case ID: 230502033

OOOR Exhibit 4

From: [Davis, Jordan](#)
To: [Josh Niemtzw](#)
Cc: pknudsen@rcfp.org
Subject: RE: Knudsen Burke and Reporters Committee for Freedom of the Press v. City of Philadelphia, District Attorney, Dkt. AP 2022-2836: Portal Access
Date: Tuesday, December 27, 2022 9:03:00 AM

Dear Attorney Neimtzow,

Thank you for your email. Per the Requester's agreement, the OOR will extend the deadline to file for both parties until January 19, 2023. Please let me know in advance of that date if any further time is needed for any reason.

Sincerely,



Jordan Davis
Senior Appeals Officer
Office of Open Records
333 Market St., 16th Floor
Harrisburg, PA 17101-2234
[\(717\) 346-9903](tel:(717)346-9903) | <http://openrecords.pa.gov>
jorrdavis@pa.gov | [@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

From: Josh Niemtzw <Josh.Niemtzow@phila.gov>
Sent: Friday, December 23, 2022 9:50 AM
To: Davis, Jordan <jorrdavis@pa.gov>
Cc: pknudsen@rcfp.org
Subject: Re: Knudsen Burke and Reporters Committee for Freedom of the Press v. City of Philadelphia, District Attorney, Dkt. AP 2022-2836: Portal Access

Hello Appeals Officer Davis:

On behalf of the DAO, I would like to request a two-week extension of time to file our brief in this matter. It appears from the appellate record that Ms. Burke filed a general appeal, challenging the DAO's response *in toto*. Without specificity, the DAO will have to respond to all aspects of the initial request. Moreover, our small Civil Litigation Unit has recently received an influx of activity on both the lawsuit front re: suits challenging our prosecutorial activities, and on the RTK front. I play a large role in responding to both. Therefore, I would greatly appreciate your consideration of this request. I see that Ms. Burke consented to a 90 day extension for the FD, so I hope this will not be a problem.

Sincerely,

Josh Niemtzw
Open Records Officer
Assistant District Attorney
Civil Litigation Unit

Case ID: 230502033

Philadelphia District Attorney's Office

From: DC, OpenRecords <RA-OpenRecords@pa.gov>

Sent: Thursday, December 22, 2022 3:05 PM

To: Josh Niemtow <Josh.Niemtzow@phila.gov>; pknudsen@rcfp.org <pknudsen@rcfp.org>

Subject: Knudsen Burke and Reporters Committee for Freedom of the Press v. City of Philadelphia, District Attorney, Dkt. AP 2022-2836: Portal Access

External Email Notice. This email comes from outside of City government. Do not click on links or open attachments unless you recognize the sender.

Portal access has been granted in this OOR Appeal; Knudsen Burke and Reporters Committee for Freedom of the Press v. City of Philadelphia, District Attorney, Dkt. AP 2022-2836. You should automatically receive your appeal credentials (or use your existing credentials). Access the E-File Appeal Portal at <https://www.openrecords.pa.gov/portal/login.cfm>. If you have not received your credential, use the Reset Password.

A User Guide can be found by visiting https://www.openrecords.pa.gov/Documents/Appeals/E-File_AppealPortal-UserGuide.pdf.

Technical issues can be directed to the OOR at openrecords@pa.gov.

Sincerely,



Ian Spiess

Administrative Officer

Office of Open Records

333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

[\(717\) 346-9903](tel:(717)346-9903) | **Fax** [\(717\) 425-5343](tel:(717)425-5343)

<https://openrecords.pa.gov>

[@OpenRecordsPA](#)

[Open Records in Pennsylvania Blog](#)

Case ID: 230502033

OOR Exhibit 5

From: [Davis, Jordan](#)
To: [Paula Knudsen Burke](#); [Josh Niemtzw](#)
Subject: Re: Knudsen Burke and Reporters Committee for Freedom of the Press v. City of Philadelphia, District Attorney, Dkt. AP 2022-2836: Portal Access
Date: Thursday, January 19, 2023 11:38:00 AM

Dear Parties,

Thank you both for your communications. For future communications at this docket, please submit your messages or filings to the OOR's electronic portal, which you should have been provided access to when the appeal commenced. Please let me know if you have any difficulty accessing or using the electronic portal. I will save a copy of this email chain to the online docket for your convenience.

Per the DA's Office's request and the Requester's agreement, the OOR will accept any submission filed in this matter on or before **January 27, 2023**. Please let me know if you have any questions or will require additional time for any reason.

Sincerely,



Jordan Davis
Senior Appeals Officer
Office of Open Records
333 Market St., 16th Floor
Harrisburg, PA 17101-2234
(717) 346-9903 | <http://openrecords.pa.gov>
jorddavis@pa.gov | [@OpenRecordsPA](#)

From: Paula Knudsen Burke <pknudsen@rcfp.org>
Sent: Thursday, January 19, 2023 9:36 AM
To: Josh Niemtzw <Josh.Niemtzow@phila.gov>
Cc: Davis, Jordan <jorddavis@pa.gov>
Subject: [External] Re: Knudsen Burke and Reporters Committee for Freedom of the Press v. City of Philadelphia, District Attorney, Dkt. AP 2022-2836: Portal Access

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I do not object to the one-week extension. I'll be filing my argument later today.
thank you

On Thu, Jan 19, 2023 at 9:09 AM Josh Niemtzw <Josh.Niemtzow@phila.gov> wrote:

Good morning Appeals Officer Davis:

The parties' position statements are currently due today. The DAO would respectfully

Case ID: 230502033

request one more week to submit its position statement, because it is proceeding blindly regarding what grounds Ms. Burke will assert in her appeal (as her appeal was general and she made three distinct requests), which makes submitting the agency's position statement difficult. While we understand that the briefing schedule did not specify that requester's brief would be due on x date and the agency (DAO)'s brief would be due at a certain point after, we were under the mistaken impression that Ms. Burke would file her position statement closer to the original January 5 deadline, so as to give us a better understanding of what to address.

We have been working diligently on the DAO's position statement and evidentiary attestations over the last several weeks, and I am confident that once I receive Ms. Burke's position statement today, we will be able to incorporate our changes and additions within the added time. **Ms. Burke indicated to me that she does not oppose a one-week extension of time for the DAO to respond.**

Best,
Josh Niemtzw

From: Davis, Jordan <jorddavis@pa.gov>
Sent: Tuesday, December 27, 2022 9:03 AM
To: Josh Niemtzw <Josh.Niemtzow@phila.gov>
Cc: pknudsen@rcfp.org <pknudsen@rcfp.org>
Subject: RE: Knudsen Burke and Reporters Committee for Freedom of the Press v. City of Philadelphia, District Attorney, Dkt. AP 2022-2836: Portal Access

External Email Notice. This email comes from outside of City government. Do not click on links or open attachments unless you recognize the sender.

Dear Attorney Neimtzow,

Thank you for your email. Per the Requester's agreement, the OOR will extend the deadline to file for both parties until January 19, 2023. Please let me know in advance of that date if any further time is needed for any reason.

Sincerely,



Jordan Davis
Senior Appeals Officer
Office of Open Records
333 Market St., 16th Floor

Harrisburg, PA 17101-2234

Case ID: 230502033

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jorddavis@pa.gov | [@OpenRecordsPA](#)

From: Josh Niemtzw <Josh.Niemtzow@phila.gov>

Sent: Friday, December 23, 2022 9:50 AM

To: Davis, Jordan <jorddavis@pa.gov>

Cc: pknudsen@rcfp.org

Subject: Re: Knudsen Burke and Reporters Committee for Freedom of the Press v. City of Philadelphia, District Attorney, Dkt. AP 2022-2836: Portal Access

Hello Appeals Officer Davis:

On behalf of the DAO, I would like to request a two-week extension of time to file our brief in this matter. It appears from the appellate record that Ms. Burke filed a general appeal, challenging the DAO's response *in toto*. Without specificity, the DAO will have to respond to all aspects of the initial request. Moreover, our small Civil Litigation Unit has recently received an influx of activity on both the lawsuit front re: suits challenging our prosecutorial activities, and on the RTK front. I play a large role in responding to both. Therefore, I would greatly appreciate your consideration of this request. I see that Ms. Burke consented to a 90 day extension for the FD, so I hope this will not be a problem.

Sincerely,

Josh Niemtzw

Open Records Officer

Assistant District Attorney
Civil Litigation Unit

Philadelphia District Attorney's Office

From: DC, OpenRecords <RA-OpenRecords@pa.gov>

Sent: Thursday, December 22, 2022 3:05 PM

To: Josh Niemtzw <Josh.Niemtzow@phila.gov>; pknudsen@rcfp.org

Case ID: 230502033

00R Exhibit 6

IN THE COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

PAULA KNUDSEN BURKE
Petitioner

:

Docket No.: AP 2022-2836

:

:

v.

:

:

PHILADELPHIA DISTRICT
ATTORNEYS' OFFICE,
Respondent.

:

:

:

PETITIONER'S BRIEF

Petitioner Paula Knudsen Burke submits this brief in support her appeal to the OOR from the denial of her November 2, 2022 Right-to-Know Law ("RTKL") request by the Philadelphia District Attorney's Office ("DAO").

PROCEDURAL AND FACTUAL HISTORY

On November 2, 2022, Ms. Burke (hereinafter, "Requester") submitted an RTKL request (hereinafter, "the Request") to the DAO seeking:

- (1) The "entire media distribution list" utilized by the DA's office through MailChimp. Records sought are the distribution lists for Jan. 1, 2022 through Nov. 1, 2022. This request anticipates that reporters are added or dropped over the months and that the list would be changed/updated during this time period.
- (2) Zoom invitation records showing reporters, editors, or other members of the news media invited to participate in remote/virtual press calls with DA Krasner. Records sought are from July 1, 2022 through Nov. 1, 2022.
- (3) Records referencing barring members of the news media from DA press conferences, either in person or virtually. Key words include "eject," "invite," "press conference," "Ralph Cipriano." Records sought for Jan. 1, 2022 through Nov. 1, 2022.

After invoking a 30-day extension of time pursuant to RTKL Section 902, the DAO responded to the Request on December 9, 2022, largely denying it. The DAO's response

consisted of a two-page letter from Open Records Officer Josh Niemtzow and four responsive records. The DAO did not provide any supporting affidavits or other evidence.

As to the first part of the Request, the DAO stated that it could not produce media distribution lists from the requested timeframe because the list is “dynamic” and changes over time as individuals are added and removed. The DAO did not describe any steps it took to fulfill the request, such as asking IT personnel. The DAO instead produced its current media distribution list, with redactions that it said were of individuals’ email addresses, IP addresses, and undefined “geographical identification.” As bases for the redactions, the DAO cited RTKL Section 708(b)(6), exempting personal telephone numbers and email addresses, and *Pa. State Educ. Ass’n v. Commonwealth Dep’t of Cmty. & Econ. Dev. (PSEA)*, 148 A.3d 142, 144 (Pa. 2016), concerning informational privacy.

In response to the second part of the Request, the DAO produced a single Zoom invitation record from the four-month period at issue. The record was an automated notification that a reporter had accepted a calendar invitation to a press conference. The DAO did not explain its lack of additional records or detail its search for such records.

As to the third part of the Request, the DAO produced two emails from independent journalist Ralph Cipriano to DAO officials regarding his removal from press conferences. The DAO did not describe its search other than calling it “thorough and comprehensive,” and stated that “[t]o the extent you are seeking additional records, they are privileged, non-public records,” citing the attorney work-product doctrine and RTKL Section 708(b)(17), which exempts records relating to a noncriminal investigation. The DAO did not explicitly state that it was, in fact, withholding responsive records, describe any withheld records, or explain how the cited exemptions applied.

Requester filed the instant appeal to the OOR on December 21, 2022.

ARGUMENT

The RTKL 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. Off. of Open Recs.*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010). Courts “must” therefore interpret the RTKL so as “to maximize access to public records.” *McKelvey v. Pa. Dep’t of Health*, 255 A.3d 385, 400 (Pa. 2021). Consistent with its remedial purpose, the law requires an agency in receipt of an RTKL request to promptly “make a good faith effort to determine if the record requested is a public record . . . and whether the agency has possession, custody or control of the identified record.” 65 P.S. § 67.901. A record in an agency’s possession “shall be presumed to be a public record,” 65 P.S. § 67.305, and any claimed “exemptions from disclosure must be narrowly construed.” *Off. of Dist. Att’y of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017); *see also Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commw. Ct. 2013).

An agency claiming that it lacks responsive records or that an RTKL exemption applies bears the burden of proof by a preponderance of the evidence. 65 P.S. § 67.708(a); *Bagwell*, 155 A.3d at 1130; *Scolforo*, 65 A.3d at 1101; *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). “A preponderance of the evidence is such evidence as would lead a fact-finder to find that the existence of a contested fact is more probable than the nonexistence of the contested fact.” *Bagwell*, 155 A.3d at 1130 (citations omitted). To meet this burden, an agency must submit “relevant and credible testimonial affidavits,” *id.*, which must “be detailed, nonconclusory, and submitted in good faith.” *Brown v. Pa. Dep’t of State*, 123 A.3d 801, 804 (Pa. Commw. Ct. 2015) (internal quotation marks and citations omitted). If an agency meets its

burden as to part of a public record, it may not withhold the full record; rather, the agency must redact the exempt information and grant access to the rest. 65 P.S. § 67.706.

Here, the DAO did not meet its burden to either establish that it lacked responsive records or that the claimed exemptions apply.

I. The DAO failed to satisfy its burden to establish that it lacks responsive records.

By failing to describe in its final response on December 9 *any* steps the DAO took to search for records responsive to the Request or submitting *any* evidence regarding its search, the DAO failed to meet its burden to establish that it lacks responsive records.

To fulfill the RTKL’s good-faith search requirement, “[a]n agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency’s records, that it has conducted a search reasonably calculated to uncover all relevant documents.” *Hoy v. Palmer Twp.*, No. AP 2022-2713, 2022 WL 17887312, at *1 (Pa. Off. Open Recs. Dec. 20, 2022). As part of that search, “the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.” *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161, 1171–72 (Pa. Commw. Ct. 2018), *aff’d*, 243 A.3d 19 (Pa. 2020). If the open records officer comes up empty-handed, the agency bears the burden of showing it is more likely than not that it does not possess responsive records. *Hodges*, 29 A.3d at 1192; *Bagwell*, 155 A.3d at 1130. An agency “may satisfy its burden of proof . . . with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record.” *Hodges*, 29 A.3d at 1192. Such evidence should “detail the search [the] RTKL officer conducted for documents responsive to a RTKL request,” *Bagwell* 2017, 155 A.3d at 1130, “including, at a minimum, a description of the records he reviewed,” *Moore v. Dep’t of Corr.*, No. 1638 C.D. 2016, 2017 WL

4171299, at *3 (Pa. Commw. Ct. Sept. 21, 2017). An “Open Records Officer’s conclusory and generic declaration is insufficient to satisfy the [agency’s] burden of proof.” *Moore*, 2017 WL 4171299, at *3; *see also Hench v. Perry Cnty.*, No. AP 2019-2416, 2019 WL 7454410, at *3 (Pa. Off. Open Recs. Dec. 31, 2019) (finding respondent failed to meet burden where its conclusory affidavit did not state “what County office conducted the search or what records were searched”).

“Absent an agency’s provision of a sufficient evidentiary basis as to whether any responsive records exist . . . the OOR will order the disclosure of responsive public records.” *Grega v. Weatherly Area Sch. Dist.*, No. AP 2021-0204, 2021 WL 794837, at *4 (Pa. Off. Open Recs. Feb. 26, 2021); *see Wright v. Luzerne Cnty.*, No. AP 2020-0067, 2020 WL 889340, at *2 n.2 (Pa. Off. Open Recs. Feb. 20, 2020); *Riches v. Coal Twp. Police Dep’t*, No. AP 2015-2205, 2015 WL 7075194, at *1 (Pa. Off. Open Recs. Nov. 6, 2015); *Godfrey v. Del. Cnty. Reg’l Water Quality Control Auth.*, No. AP 2014-0318, 2014 WL 1308491, at *3 (Pa. Off. Open Recs. Mar. 26, 2014); *Schell v. Delaware Cnty.*, No. AP 2012-0598, 2012 WL 1826240, at *1 (Pa. Off. Open Recs. May 7, 2012). The OOR should do so here, where the DAO has not established the non-existence of responsive records.

A. The DAO failed to satisfy its burden to establish that it does not possess media distribution lists from the requested timeframe.

As to the request for media distribution lists from January 1, 2022 to November 1, 2022, the DAO claimed it was “unable to generate responsive records to this query due to the nature of the media distribution list and the fact that it is a dynamic database: participants are added to or removed from the list or may choose to opt-out of receiving DAO press notices.”

To start, “any contention that the manner in which the District Attorney maintains information should excuse compliance with the RTKL . . . is without merit.” *Bagwell 2017*, 155

A.3d at 1145–46. The DAO’s obligation to thoroughly search for responsive records, and to establish the non-existence of such records, applies fully regardless of the technology it uses. Here, the DAO did not describe any steps it took to attempt to produce its media distribution lists from the requested period, such as describing the type of software it uses to maintain the list or asking IT personnel whether it was possible to retrieve past versions of the list. *Cf., e.g., Dep’t of Lab. & Indus. v. Earley*, 126 A.3d 355, 358 (Pa. Commw. Ct. 2015) (holding agency failed to meet burden to establish that requested emails no longer existed in retrievable form); *Paint Twp. v. Clark*, 109 A.3d 796, 808 (Pa. Commw. Ct. 2015) (requiring agency to submit affidavits detailing its search for requested data to meet burden of showing data no longer existed).

In many cases, such retrieval is easily possible. For example, Microsoft Excel and Windows permit users to view previous versions of a file, as do cloud-based storage systems such as Google Drive and Dropbox. *See, e.g., Lincoln Spector, 3 Ways to Recover an Older Version of an Existing File*, PC World (June 3, 2016), <https://perma.cc/P4L2-LF7Q>; *View Previous Versions of Office Files*, Microsoft, <https://perma.cc/YA56-KEET>. Additionally, DAO staff may have printed out, emailed, or saved local copies of the media distribution list during the requested timeframe, all of which could be easily retrievable. In the absence of “any factual or legal support that the records do not exist,” the DAO has not met its burden to show it lacks responsive records. *Riches*, 2015 WL 7075194, at *1.

B. The DAO failed to satisfy its burden to establish that it does not possess additional Zoom invitation records for press calls.

The DAO produced just one email in response to the request for records relating to Zoom press conferences with District Attorney Krasner from July 1, 2022 to November 1, 2022. The email was an automated notification sent to DAO spokesperson Jane Roh notifying her that one Philadelphia Inquirer reporter had accepted a calendar invite to one press conference, in

September 2022. The DAO’s sole description of its search was that its “good-faith search for responsive records . . . located one item.” The DAO did not provide any details on its search, such as listing the custodians it asked for records, describing the steps those custodians took to search for responsive records, or explaining why the agency could not locate additional records—such as other records from the September press conference. Nor did the DAO confirm the types of records it searched, and notably did not state whether it searched the calendars of relevant custodians. To the extent the DAO is claiming it lacks responsive records because they have been deleted,

When an individual deletes an email from his or her email account, as many people to their chagrin have found out, that does not mean that the email is necessarily deleted. Those emails remain on the mail server until they are deleted in accordance with a retention schedule established by the [agency]. Consequently, to establish that the email records do not exist, the [agency] must also establish that they no longer exist on the mail server.

Earley, 126 A.3d at 358. Indeed, many forms of electronic records may be retrievable on backup servers even if deleted by a user.

Overall, the DAO’s brief and conclusory statement fails to meet the agency’s burden to establish that it lacks additional responsive records. *Id.*

C. The DAO failed to satisfy its burden to establish that it does not possess additional records referencing barring media from press conferences.

Last, the DAO stated that it found only two emails referencing barring members of the media from press conferences. Again, the DAO did not provide any details on its search process, such as which records it searched and whether it used the requested key words—“eject,” “invite,” “press conference,” and “Ralph Cipriano”—or any other search terms. The DAO added that, “[t]o the extent you are seeking additional records, they are privileged, non-public records.” Although this comment appears to indicate the agency is withholding responsive records, the DAO did not explicitly say it was doing so or describe any such “additional” records.

Requester is aware that the DAO has *at least three* additional responsive, public records—specifically, two letters Requester sent the DAO via email in August and September 2022 regarding the removal of Mr. Cipriano from press conferences and one response letter from the DAO. *See Exhibit 1.* This omission further establishes that the DAO failed to meet its burden to show it properly searched for responsive records in its possession, custody, or control.

* * *

Because the DAO has failed to meet its burden to establish the non-existence of responsive records with respect to all three parts of the Request, the OOR should order the DAO to promptly conduct a search reasonably calculated to locate responsive records and to disclose those records to Requester. *See Grega*, 2021 WL 794837, at *4; *Wright*, 2020 WL 889340, at *2 & n.2; *Riches*, 2015 WL 7075194, at *1; *Godfrey*, 2014 WL 1308491, at *3; *Schell*, 2012 WL 1826240, at *1.

II. The DAO failed to satisfy its burden to establish that responsive records are exempt from disclosure.

Next, the DAO failed to meet its burden to establish that responsive records are exempt from disclosure under the RTKL. Specifically, the DAO did not establish that the “geographical identification” in its media distribution lists is exempt or that the attorney work-product doctrine and noncriminal investigation exception apply to records referencing barring members of the media from press conferences. Requester does not, however, challenge the DAO’s redactions to IP addresses or personal email addresses contained in its media distribution lists.

A. The DAO failed to satisfy its burden to establish that the “geographical identification” in its media distribution list was properly redacted.

The DAO redacted undefined “geographical identification” from its media distribution list, citing the case *PSEA*, 148 A.3d at 144, which discusses the constitutional right to

informational privacy as applied to home addresses.¹ The DAO did not, however, describe what “geographical identification” refers to, much less meet its burden to explain how disclosing that information implicates or violates the right to informational privacy under *PSEA*.

Under *PSEA*, “[b]efore the government may release personal information, it must conduct a balancing test to determine whether the right of informational privacy outweighs the public’s interest in dissemination.” *Off. of Gen. Couns. v. Bumsted*, 247 A.3d 71, 85 (Pa. Commw. Ct. 2021) (citing *PSEA*, 148 A.3d at 144). The RTKL request at issue in *PSEA* sought public employees’ home addresses, thus implicating their informational privacy rights and triggering the balancing test, which the court found weighed in the employees’ favor. *PSEA*, 148 A.3d at 158. An agency bears the burden of performing this balancing test in the first instance. *Bumsted*, 247 A.3d at 85. On appeal, the OOR examines the agency’s affidavits and other evidence to assess whether it properly withheld the requested records under *PSEA*. *See Hench*, 2019 WL 7454410, at *6 & n.3 (finding agency’s “vague allegations” and lack of “an affidavit or sworn statement” insufficient to justify withholding under *PSEA*); *Mezzacappa v. Colonial Intermediate Unit 20*, No. AP 2019-0840, 2019 WL 2865516, at *4 (Pa. Off. Open Recs. June 28, 2019) (finding agency’s affidavit failed to meet its burden to establish informational privacy right applied or prevented disclosure).

Here, unlike in *PSEA*, the DAO did not state that it *was* in fact withholding individuals’ home addresses. “Geographical identification” could, for example, refer to the city of a listed reporter’s media outlet or that outlet’s business address, which are matters of public record. *Cf.*,

¹ The DAO also cited RTKL Section 708(b)(6) as a basis for redacting the IP and email addresses—redactions that, as stated, Requester does not challenge. This exemption plainly does not cover any “geographical identification” in the media distribution lists, as it only exempts the “home address of a law enforcement officer or judge.” 65 P.S. § 67.708(b)(6)(i)(C).

e.g., *City of Harrisburg v. Prince*, No. 1228 C.D. 2021, 2023 WL 17928, at *11 (Pa. Commw. Ct. Jan. 3, 2023) (affirming order requiring disclosure of the city and state in which donors resided, but not their home addresses, under *PSEA*); *Pa. Liquor Control Bd. v. Beh*, 215 A.3d 1046, 1058 (Pa. Commw. Ct. 2019) (ordering disclosure of licensees’ city, state, and zip code of residence, but not home address, under *PSEA*); *Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173, 1184 (Pa. Commw. Ct. 2017) (finding no cases “have recognized that an address is personal information when it is unclear that the requested address correlates to an individual’s home”). Moreover, several emails on the list are unredacted and do not pertain to named individuals, such as “editor@germantownnewspapers.com,” making it far from clear that geographical information related to those emails was properly redacted. Because the DAO has failed to show how the unspecified “geographical identification” in its media distribution lists implicates the right to informational privacy, the DAO should be required to disclose this information. *See Mezzacappa*, 2019 WL 2865516, at *4 (ordering disclosure where agency “has not explained what other information” it was withholding and thus “has not met its burden of proving . . . that any other information is protected by a constitutional right to privacy”).

Even if, *arguendo*, the withheld “geographical identification” implicated privacy rights and thus triggered the *PSEA* balancing test, the DAO has not established that it in fact conducted this test or that the test bars disclosure. In conducting the test, the DAO would be required to consider the public interest in disclosure—a subject its denial fails to address. There is indeed a public interest in learning where the members of the media receiving DAO press releases and press conference invitations are based. Such information contributes to public understanding of where and with whom the DAO chooses to share its messages, which sheds light on the operations of the office overall and its relationship to the press and public. On the other side of

the balance, the DAO has not shown how “the records requested would potentially impair the reputation or personal security of another.” *Prince*, 2023 WL 17928, at *7; *see also Hench*, 2019 WL 7454410, at *6 & n.3 (ordering disclosure where agency’s “vague allegations” of harm failed to satisfy *PSEA* balancing test). Because the DAO has not shown that the informational privacy right attaches to the withheld “geographical information” or that this right outweighs the public interest in dissemination, the OOR should order the DAO to disclose this information. *See Pennsylvanians for Union Reform*, 172 A.3d at 1185; *Hench*, 2019 WL 7454410, at *6; *Mezzacappa*, 2019 WL 2865516, at *4.

B. The DAO failed to satisfy its burden to establish that the work-product doctrine applies to records referencing barring media from press conferences.

In response to part three of the Request, the DAO produced two emails from Ralph Cipriano to DAO officials regarding his removal from press conferences and stated that “[t]o the extent you are seeking additional records, they are privileged, non-public records,” citing the attorney work-product privilege.

When an agency asserts a privilege over records responsive to an RTKL request, it bears the burden of proving by a preponderance of the evidence that the privilege applies. *Bagwell* 2017, 155 A.3d at 1130. “A mere assertion that responsive documents are protected from disclosure under the RTKL by the attorney-work product privilege is insufficient to deny disclosure.” *Id.* at 1133. So, too, are conclusory affidavits. *Id.* at 1130. Instead, as the DAO’s own cited case says, the agency must “set[] forth facts demonstrating that the privilege has been properly invoked.” *Heavens v. Pa. Dep’t of Env’tl Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013). Specifically, those facts must “demonstrate that the documents reveal the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” *Bagwell* 2017, 155 A.3d at 1133 (citation and

internal quotation marks omitted). This requirement stems from “[t]he underlying purpose of the work product doctrine,” which “is to guard the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client’s case.” *Levy v. Senate of Pa.*, 94 A.3d 436, 443 (Pa. Commw. Ct. 2014) (citation omitted).

The DAO has not conclusively stated that it has withheld additional responsive records as privileged, has not described the nature of those records, has not described how their disclosure would reveal the conclusions and mental impressions of a party’s attorney, and has not submitted affidavits. In the absence of any evidence, let alone a preponderance of the evidence, that responsive records are covered by the attorney work-product privilege, the OOR should order their disclosure. *See* 65 P.S. § 67.708(a); *Mangold v. Bethlehem Water Auth.*, No. AP 2022-0544, 2022 WL 1554922, at *6 (Pa. Off. Open Recs. May 11, 2022) (ordering disclosure of unredacted records where agency failed to establish work-product privilege applied); *Jonas v. New Hanover Twp.*, No. AP 2020-2323, 2020 WL 7321412, at *1 (Pa. Off. Open Recs. Dec. 9, 2020) (ordering disclosure where respondent did not provide “any explanation as to the nature of the record or how the exemption applies”); *Krug v. Bloomsburg Univ. of Pa.*, No. AP 2018-1659, 2018 WL 5113101, at *6 (Pa. Off. Open Recs. Oct. 15, 2018) (ordering disclosure where respondent “has not identified the records being withheld under . . . the attorney-work product doctrine, nor has it submitted any competent evidence in support of withholding records based upon privilege”); *Peterson v. Stroudsburg Area Sch. Dist.*, No. AP 2019-0557 (Pa. Off. Open Recs. June 19, 2019) (ordering disclosure where agency did not identify withheld records and did not describe how work-product privilege applied to each). Even if the DAO were able to meet its burden with respect to any portion of the withheld records, the proper remedy would be for it to apply narrow redactions to the privileged material and disclose the remainder of the records.

See 65 P.S. § 67.706; *Jonas v. New Hanover Twp.*, No. AP 2020-2323, 2021 WL 5356737, at *6 (Pa. Off. Open Recs. Nov. 12, 2021).

C. The DAO failed to satisfy its burden to establish that the noncriminal investigation exception applies to records referencing barring media from press conferences.

The DAO also made a passing reference to the RTKL’s exemption for records related to a noncriminal investigation, 65 P.S. § 67.708(b)(17), in response to part three of the Request, but did not describe its withholdings or how the exemption applied.

RTKL Section 708(b)(17) exempts from disclosure agency records “relating to a noncriminal investigation,” including “complaints submitted to an agency,” “investigative materials, notes, correspondence and reports,” and “record[s] that, if disclosed, would . . . reveal the institution, progress or result of an agency investigation.” 65 P.S. § 67.708(b)(17)(i)-(ii), (vi). As with all RTKL exemptions, an agency invoking this one bears the burden of proving it applies by a preponderance of the evidence. 65 P.S. § 67.708(a). Specifically, the agency must demonstrate that it conducted “a systematic or searching inquiry, a detailed examination, or an official probe” regarding a noncriminal matter. *Pa. Dep’t of Health v. Off. of Open Recs.*, 4 A.3d 803, 811 (Pa. Commw. Ct. 2010). The investigation must be “conducted by an agency acting within its legislatively-granted fact-finding and investigative powers. That is, its ‘official duties.’” *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920, 925 (Pa. Commw. Ct. 2012). These limits ensure that agencies do not “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257, 259 (Pa. Commw. Ct. 2014). An agency fails to meet its burden when it “generally asserts that the responsive records relate to . . . noncriminal investigations” but “does not identify the responsive records” or “provide evidence of any . . . noncriminal investigations and how responsive records relate to those investigations.” *Knudsen v. Lancaster*

Cnty. Dist. Atty's Off., No. AP 2019-0665, 2019 WL 2724261, at *1 (Pa. Off. Open Recs. June 26, 2019); *see also, e.g., Devard v. Yeadon Borough*, No. AP 2021-1896, 2021 WL 5279712, at *3 (Pa. Off. Open Recs. Nov. 8, 2021) (ordering disclosure where respondent “has not identified what records are responsive to the Request” and “has not submitted any evidence to show how the records responsive to the Request relate to a noncriminal investigation”).

The DAO has not confirmed that it is withholding responsive records pursuant to the noncriminal investigation exemption, has not identified those records, and has not submitted any evidence establishing that it conducted a noncriminal investigation or explaining the records' relation thereto. Accordingly, the DAO has failed to meet its burden to invoke the noncriminal investigation exemption and the OOR should order it to disclose all responsive records. *See Johnson*, 49 A.3d at 926; *Chawaga*, 91 A.3d at 260; *Devard*, 2021 WL 5279712, at *3; *Knudsen*, 2019 WL 2724261, at *1.

CONCLUSION

For the reasons stated above, the OOR should order the DAO to promptly conduct a good-faith search for responsive records and disclose the responsive records to Requester.

Respectfully submitted,

/s/ Paula Knudsen Burke

Paula Knudsen Burke
PA Attorney ID: 87607
REPORTERS COMMITTEE FOR
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Respondent

Dated: January 19 2023

OOR EXHIBIT 1

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JUDY WOODRUFF, *the PBS NewsHour*

Affiliations appear only for purposes of identification.

August 10, 2022

Lawrence S. Krasner
Philadelphia District Attorney
Three South Penn Square
Philadelphia, PA 19107-3499

Re: Press access to District Attorney's office

Dear District Attorney Krasner:

I write on behalf of my client, Ralph Cipriano. I am the Pennsylvania-based attorney for the Reporters Committee for Freedom of the Press (RCFP). RCFP is a non-profit organization that provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists across the country.

Mr. Cipriano is a journalist who reports for BigTrial.net, an online publication. Prior to writing for BigTrial.net, he covered Philadelphia for the past 32 years for media outlets that include The Philadelphia Inquirer, Philadelphia magazine, Newsweek, National Catholic Reporter, Fox 29, Philadelphia Weekly, and the defunct Philadelphia City Paper. His current coverage includes scrutiny of criminal justice issues within the City of Philadelphia, including the practices and policies of the District Attorney's office. As a reporter who covers criminal justice in Philadelphia, it is critical that Mr. Cipriano has access to information about the prosecutor's office, including its public news releases and press conferences.

It is our understanding that during a Philadelphia District Attorney press conference at the Emmanuel Christian Center Inc. at 5913 Chestnut Street on Monday, August 8, 2022, Mr. Cipriano was physically escorted from the building by two police detectives and a private security officer from the host facility. Mr. Cipriano's understanding of his ejection from the facility was that you indicated he was failing to follow unspecified "rules" and directed the police to escort him from the building.

We object to the removal of Mr. Cipriano from a public press conference. As you know, an elected District Attorney is a government actor for First Amendment purposes, and any limits you or your office may impose on First Amendment activity must meet constitutional scrutiny. Government officials cannot make media access decisions based on the content of news coverage, media organizations' interaction with government officials, or the agency's perception thereof. Such action would amount to unconstitutional content-based restrictions on First Amendment activity. Simply put, a government official such as an elected District Attorney has a constitutional duty to remain content-neutral when dealing with the press.

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In an effort to ensure there are no constitutional issues, we would like to review any policies or rules that govern the District Attorney's interaction with media generally, and more specifically, any policies pertaining to District Attorney press conferences or other media events, as well as policies governing your office's distribution of press releases, on-the-record communications with journalists, and your communications department's response to media inquiries. We would appreciate you forwarding a copy of any such policies by August 12, 2022.

Our goal is two-fold: (1) to ensure that Mr. Cipriano is not physically removed from any future press conferences; and (2) to understand the rules that govern the District Attorney's office's interaction with the press and thereby help identify and rectify any potential constitutional issues.

In closing, press access to media events and materials should be permitted without regard to the content of news organizations' coverage and newsgathering practices. Thank you for your time and attention to this matter.

Sincerely,

/s/Paula Knudsen Burke

Paula Knudsen Burke

Cc: Jane Roh, Philadelphia DA office Communications Director (Jane.Roh@phila.gov)

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SAUNDRA TORRY, *Freedance*

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September 9, 2022

Lawrence S. Krasner
Philadelphia District Attorney
Three South Penn Square
Philadelphia, PA 19107-3499

Re: Second inquiry about press access to District Attorney's office

Dear District Attorney Krasner:

It has been a month since I last wrote to you on behalf of my client, Ralph Cipriano. On August 10, 2022, I emailed you, sent a copy by U.S. mail and left a message for your communications director, Ms. Jane Roh. My letter sought to (1) to ensure that Mr. Cipriano was not physically removed from any District Attorney press conferences, and (2) to understand the rules that govern the District Attorney's office interaction with the press and to help identify and rectify any potential constitutional issues.

I did not receive the courtesy of a response to any of my inquiries.

In the interim, I did, however, receive a response to a Right to Know Law ("RTKL") request I filed on July 14, 2022 seeking records about the District Attorney's office interactions with the press. My RTKL request sought:

Official written policies, directives or guidelines of the Philadelphia District Attorney's office dictating how press conferences or media advisories are scheduled and presented to members of the news media. Requester seeks records that would explain who the District Attorney's office invites to press conferences or media advisories, as well as the manner in which members of the news media are invited and any criteria or direction on exclusion of news media members. These records should cover any external facing press event, whether it is entitled press conference, press briefing, media advisory or a similar term. Records should include press conferences held by the District Attorney himself as well as briefings or conferences presented by DA staff. Records requested should cover in-person press conferences, virtual press conferences and audio-only press conferences. Date range for records sought is Jan. 1, 2022 through July 14, 2022.

On August 22, 2022, I received a written response to my RTKL request from Josh Niemtzow, an assistant district attorney in your office's Civil Litigation Unit. Mr. Niemtzow's letter stated, "The DAO was unable to locate any written policies, directives or guidelines from January 1, 2022, through July

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14, 2022, discussing which members of the news media are included or excluded from, inter alia, press conferences, briefings, or media advisories, or any criteria concerning invitations to the press to these functions.”

Given both your lack of response, and Mr. Niemtow’s August 22 letter, it is clear that there are no “rules” or procedures governing access to press conferences held by your office. Therefore, we presume there will be no future incidents such as the one that occurred on August 8, 2022 when Mr. Cipriano was physically escorted from a District Attorney press conference for failing to follow non-existent “rules.”

As we noted in our August 10 letter, the District Attorney’s office is a government actor for First Amendment purposes, and as such, the office has a constitutional duty to remain content-neutral when dealing with the press. Given that the DA’s office has no rules governing interaction with the media, we urge your office to take time to prioritize the important role the press provides the public and to implement the following:

- The DA’s office should discontinue invitation-only press briefings and selective access to advisories because these practices raise constitutional issues and interfere with the free flow of information.
- The DA’s office should establish and implement clear and fair policies regarding access to media advisories and press briefings that take into account today’s varied media landscape.
- The DA office’s media policy should be published and include explicit and meaningful standards for including a reporter and/or news organization on its media advisory and press briefing list, along with procedures to give members of the news media notice of the reasons for any exclusion from the list and the evidence upon which such exclusions are based, as well as an opportunity to be heard to contest such a decision.

We look forward to an update from your office confirming the Philadelphia District Attorney’s commitment to improving its procedures to ensure press access to media events.

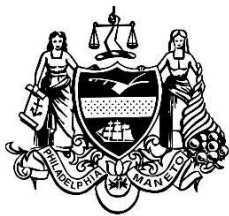
Sincerely,

/s/Paula Knudsen Burke

Paula Knudsen Burke

Cc: Jane Roh, Philadelphia DA office Communications Director (Jane.Roh@phila.gov)

Email attachments (Aug. 10, 2022 letter to DA Krasner; Aug. 22, 2022 RTKL response)



LAWRENCE S. KRASNER
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
215-686-8000

August 22, 2022

Via Email

Paula Knudsen Burke
Reports Committee for Freedom of the Press
pknudsen@rcpf.org

Re: Final Response to Your Right to Know Law Request

Dear Ms. Knudsen Burke:

This letter is in response to your Right-to-Know-Law (RTKL) request, which was received by the Open Records Officer of the Philadelphia District Attorney's Office (DAO) on July 14, 2022. You requested:

Official written policies, directives or guidelines of the Philadelphia District Attorney's office dictating how press conferences or media advisories are scheduled and presented to members of the news media. Requester seeks records that would explain who the District Attorney's office invites to press conferences or media advisories, as well as the manner in which members of the news media are invited and any criteria or direction on exclusion of news media members. These records should cover any external facing press event, whether it is entitled press conference, press briefing, media advisory or a similar term. Records should include press conferences held by the District Attorney himself as well as briefings or conferences presented by DA staff. Records requested should cover in-person press conferences, virtual press conferences and audio-only press conferences. Date range for records sought is Jan. 1, 2022 through July 14, 2022.

By email on July 21, 2022, the DAO invoked an extension of time, until August 21, 2022, in which to respond. *See* 65 P.S. § 67.902(a).¹ This constitutes the DAO's final response to your request.

The DAO was unable to locate any written policies, directives or guidelines from January 1, 2022, through July 14, 2022, discussing which members of the news media are included or excluded from, *inter alia*, press conferences, briefings, or media advisories, or any criteria concerning invitations to the press to these functions. It is not a denial of access under the RTKL if the requested records do not exist in the agency's possession, custody or control. *See, e.g., Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. 2010) (explaining that "[agency] cannot grant access to a record that does not exist."). Moreover, the DAO is not required to

¹ In the DAO's extension letter sent on July 21, 2022, it inadvertently cited a deadline date that fell on a Sunday. It therefore sent this final response on the next work day.

generate records in response to RTKL requests. *See* 65 P.S. § 67.705 (“[A]n agency shall not be required to create a record which does not currently exist”).

By way of further information, the DAO holds a regularly scheduled weekly press conference, in addition to other ad hoc press briefings. Media advisories are generally sent out via MailChimp to the entire media distribution list.

This letter is the DAO’s response to your RTKL request. Should you wish to contest this decision, an appeal must be filed with the Pennsylvania Office of Open Records, 333 Market Street, 16th Floor, Harrisburg, PA 17101-2234, no later than 15 business days from the date of this letter.

Sincerely,

/s/ Josh Niemtow

Josh Niemtow
Open Records Officer
PHILADELPHIA DISTRICT ATTORNEY’S OFFICE
Three South Penn Square
Philadelphia, PA 19107-3499
(215) 686-7644
josh.niemtow@phila.gov

OOOR Exhibit 7



DISTRICT ATTORNEY'S OFFICE
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215-686-8000

January 27, 2022

Via electronic mail

Jordan Davis
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Jorddavis@pa.gov

**Re: *Knudsen Burke and Reporters Committee for Freedom of the Press
v. City of Philadelphia, District Attorney, AP 2022-2836***

Dear Mr. Davis:

Please accept this letter and attached exhibits as the submission of the Philadelphia District Attorney's Office (DAO) in the above matter. This appeal should be **dismissed**. Following a good faith search for records responsive to the underlying request, the DAO provided all responsive records that it was able to locate with respect to items one and two. In regards to item number three, the DAO provided two responsive records, but noted that it was unable to provide additional records, which are privileged or otherwise exempt under the RTKL. In this submission, the DAO further describes the privileged/exempt records in further support of its position.

On November 2, 2022, the DAO received a Right-to-Know-Law (RTKL) request from requester seeking:

- (1) The "entire media distribution list" utilized by the DA's office through MailChimp. Records sought are the distribution lists for

Jan. 1, 2022 through Nov. 1, 2022. This request anticipates that reporters are added or dropped over the months and that the list would be changed/updated during this time period.

- (2) Zoom invitation records showing reporters, editors, or other members of the news media invited to participate in remote/virtual press calls with DA Krasner. Records sought are from July 1, 2022 through Nov. 1, 2022.
- (3) Records referencing barring members of the news media from DA press conferences, either in person or virtually. Key words include “eject,” “invite,” “press conference,” “Ralph Cipriano.” Records sought for Jan. 1, 2022 through Nov. 1, 2022.

See Request, attached as Exhibit A.

On November 9, 2022, pursuant to Section 902 of the RTKL, the DAO invoked an extension of time until December 9, 2022, to respond. On December 9, 2022 the DAO sent Ms. Burke its final response, granting in part, and denying in part, her request. *See Response, attached as Exhibit B.* Specifically, the DAO provided responsive records for all three of requester’s queries, but withheld certain records as privileged/exempt in response to item number three.

Ms. Burke filed an appeal with the OOR, which was docketed on December 22, 2022. On appeal, Ms. Burke challenges the thoroughness of the DAO’s search, as well as the privileges/exemptions asserted. The DAO provides the following position statement and attestations of Open Records Officer Josh Niemtow (“Exhibit C”), and Communications Director, Jane Roh, (“Exhibit D”) herein, in support of its determination.

1. Following a Good Faith Search, the DAO Provided Responsive Records to Items One and Two of the Request

As the DAO explained in its final response, due to technical limitations with the Mailchimp program and the dynamic nature of its media distribution list, it was unable to isolate media distribution lists for the fixed time intervals sought. However, the DAO was able to locate and provide requester with a copy of the most up-to-date media distribution list. This list is the only record that the DAO was able to obtain that is partially responsive to requester’s query. As highlighted in the attestation by the Open Records Officer (Exhibit C), the list provided to the requester

includes hundreds of names, a large number of which would have been included on past iterations of the list from the requested time period.¹ The DAO has enclosed attestations from the undersigned Open Records Officer, who reviewed the pertinent software, as well as Communications Director, Jane Roh, whose team has familiarity with the software. Ms. Roh's attestation also discusses her search for records responsive to item number two, which Ms. Roh confirmed is the only responsive record in the DAO's possession, following a comprehensive search of her Outlook email and calendar.²

2. The DAO Properly Redacted the Media Distribution List

The Right to Know Law encourages redaction as an alternative to outright denial of access to records. *See* 65 P.S. § 67.706 ("If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the

¹ To the extent the requester is asserting that the agency failed to conduct a thorough search for the "entire media distribution list," the DAO would further highlight that the Open Records Officer communicated extensively with the office's Communications Team, particularly its Director, and confirmed that: 1) Mailchimp is the sole program used by the DAO for purposes of circulating invitations to press conferences; and 2) the Communications Team is the only department at the DAO that utilizes Mailchimp as a tool for circulating this information; therefore, the members of the DAO's Communications Team have the most insight and experience with the Mailchimp program and its functionality for purposes of the records sought. Requester's suggestion that the DAO could have consulted with its IT Department or found "local copies" of the list are based on misconceptions of how the list is maintained and was generated.

² The DAO notes that Ms. Roh searched her Outlook calendar, notwithstanding the fact that the Right to Know Law exempts from disclosure calendars that are used exclusively for agency employee's own personal convenience. *See* 65 P.S. § 708(b)(12) (describing the "working papers" exemption). *See also Glunk v. Dep't of State*, 102 A.3d 605, 615 (Pa. Commw. Ct. 2014) (exempting hearing examiner's calendar from disclosure where "the calendar was produced exclusively for [the examiner's] personal convenience"); *City of Phila. v. Phila. Inquirer*, 52 A.3d 456, 461-62 (Pa. Commw. Ct. 2012) (holding that "appointment calendars . . . created solely for the convenience of [an agency employee or public official's] personal use in scheduling daily activities and [that are] not circulated outside of the official's office" are exempt as notes and working papers.).

information which is not subject to access, and the response shall grant access to the information which is subject to access.”). The DAO redacted portions of the media distribution list are consistent with Section 708(b)(6) and the Pennsylvania Constitution’s right to privacy. The media distribution list generated from Mailchimp includes, *inter alia*, IP addresses, geographical identification, and email addresses. The DAO redacted the IP addresses and geographical information,³ and attempted to redact email addresses where the individual’s name was elsewhere included on the list. In doing so, the DAO sought to ensure that requester could ascertain the names of the recipients on the list, while not invasively providing the email addresses and searchable locations of hundreds of reporters.

Under Section 708(b)(6) of the RTKL, personal email addresses are exempted from disclosure. 65 P.S. § 67.708(b)(6). Moreover, protecting individuals’ constitutional rights to privacy under Article 1, Section 1 of the Pennsylvania Constitution is a pertinent consideration in evaluating any Right to Know request. *See Pa. State Educ. Ass’n v. Commonwealth*, 148 A.2d 142, 144 (Pa. 2018). As our courts have held, if the information sought under the Right-to-Know Law implicates the constitutional right to privacy, the reviewing authority must engage in an interest-balancing analysis to ascertain whether such information should be disclosed. *Id.* The pertinent inquiry is whether the right to privacy outweighs the public’s interest in dissemination. *Sapp Roofing Co., v. Sheet Metal Workers’ Int’l Ass’n, Local Union, No. 12*, 713 A.2d 627 (Pa. 1998). For example, the Pennsylvania Supreme Court in *Pa. State Educ. Ass’n*, held that the Commonwealth could not provide requester with a list of thousands of public-school employees’ home addresses, because that information implicated the right to privacy. The Court agreed, finding that there is a constitutional right to privacy in one’s home address in connection with a Right-to-Know request, and that interest outweighed the public’s interest in disclosure in that case. *Pa. State Educ. Ass’n*, 148 A.2d at 158.

Requester does not challenge the DAO’s decision to redact email addresses, but rather, its decision to redact geographic information. Here, when considering that the original record included *non-requested* information that is extremely invasive to an individual’s privacy, such as precise IP and geolocation information (as set forth earlier in footnote 3), the privacy interest at stake is significant. Moreover, the DAO’s redactions do not impact the ability of requester to learn about the

³ For purposes of the redacted spreadsheet provided to requester, “geographical information” includes exact latitude and longitudinal coordinates, which allow anyone reviewing this information to track down the location of an individual, as well as country code, region, and time zone information.

information she seeks: she still was able to identify through names and partial email addresses who was on the distribution list. Therefore, the DAO appropriately balanced the relevant interests, as set forth by the Supreme Court, having properly redacted the record provided, while still disclosing information responsive to the request.

3. The DAO Properly Withheld Security Official Memos and Privileged Communications

The DAO conducted an extensive search for records referencing barring members of the media from DAO press conferences, and produced two responsive records. The DAO also noted in its response that there were other privileged or exempt records that it was withholding, and cited those bases. Those records consist of two sets of memos authored by members of the District Attorney's security detail, which are further described in Exhibit C.

Under the RTKL, local agencies are required to provide public records. 65 P.S. § 67.302. The RTKL defines a "public record" in relevant part, as a "record . . . of a . . . local agency that:

- (1) is not exempt under section 708 [of the RTKL];
- (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or
- (3) is not protected by a privilege

65 P.S. § 67.102. "Privilege" is further defined to include the attorney-work product doctrine and the attorney-client privilege. *Id. See also In re Thirty-Third Investigating Grand Jury*, 86 A.3d 204, 225 (Pa. 2014) (citation omitted) ("[T]o the extent material constitutes an agency's work product, it is not subject to compulsory public disclosure pursuant to the RTKL.").

A. The security memos are exempt from disclosure under the work-product doctrine and 708(b)(17) of the RTKL as records relating to a noncriminal investigation.

As the attestation from the undersigned Open Records Officer explains, the two privileged memos were created by members of the District Attorney's security

detail in furtherance of their security responsibilities and in anticipation of potential litigation or a potential Internal Affairs investigation. Exhibit C, ¶¶ 12-15.

The work-product doctrine protects materials prepared in anticipation or prevention of litigation from disclosure. *Levy v. Senate of Pa.*, 94 A.3d 436, 443 (Pa. Commw. Ct. 2014). This protection also extends to materials prepared by agents for the attorney. *Commonwealth v. Kennedy*, 876 A.2d 939, 945 (Pa. 2005). The purpose of the doctrine is principally to protect against the disclosure of mental impressions, conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. Pa. R. Civ. P. 4003.3. *See also Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 91 A.3d 680, 694 (Pa. 2014) (discussing two types of work product: “core work product” and “factual work product”). Because the instant memos were created in anticipation of a potential litigation, and include facts and opinions from persons with knowledge of the incidents, such material is covered by the work-product privilege.

Additionally, the Right-to-Know Law contains an exemption for records “relating to a noncriminal investigation.” 65 P.S. § 67.708(b)(17). It specifically lists “investigative materials, notes, correspondence, and reports” as examples of records that fit this exemption. *Id.* § (b)(17)(ii). Courts have found that police internal affairs investigations qualify as noncriminal investigations under the RTKL. *See Black v. Pa. State Police*, 676 C.D. 2016, 2016 WL 6900781 (Pa. Commw. Ct. Nov. 23, 2016). Here, members of the District Attorney’s security detail created these memos as part of their own investigation into concerning behavior at DAO press conferences, therefore, such records are investigative materials or notes relating to a noncriminal investigation. Moreover, as the DA’s security team anticipated that such memos may be relevant and important to defending against any potential police Internal Affairs investigations, they are further exempt for that reason.⁴

⁴ In the event the Office of Open Records would deem other exemptions applicable in this context where, for security reasons, members of a public official’s security detail record their interactions with individuals that they encounter in the course of their duties, the DAO respectfully defers to the OOR’s determination to incorporate any additional exemption(s) it may find applicable.

B. The DAO subsequently provided two email exchanges to the requester, which it had concluded were non-responsive; the third exchange is protected under attorney-client privilege.

Requester challenges the thoroughness of the DAO's search, citing the agency's alleged failure to produce email correspondence that the requester herself sent to the DAO. However, this is not indicative of the thoroughness of the DAO's search: the Open Records Officer did in fact review such materials during his search, for email communications, but concluded that the three emails in question were unresponsive,⁵ and in one case, privileged as well. The DAO has since provided requester with two email exchanges, and is unable to disclose the third email because it includes privileged communication. Therefore, to the extent that the OOR finds that these three email exchanges – the body of which did not include any of the requested search terms – are responsive records, the only disputed record is the one the DAO has deemed privileged.

The attorney-client privilege protects communications made for the purpose of obtaining or providing professional legal advice. *Gilliard v. AIG Insurance Co.*, 15 A.3d 44, 59 (Pa. 2011). The privilege extends to an agency setting where attorneys are working in their professional capacity. *Sedat, Inc. v. Department of Env'tl. Resources*, 651 A.2d 1243 (Pa. Commw. Ct. 1994). For instance, in *Heavens v. Pa. Dep't of Env'tl. Prot.*, 65 A.3d, 1069, 1076-77 (Pa. Commw. Ct. 2013), the Court upheld the agency's assertion that the requested records were protected under the attorney-client privilege because certain communications were made to and by counsel (representing the Department of Environmental Protection) for the purpose of providing legal advice. *Id.* at 1076-77.

Similarly, the communication at issue in the instant appeal contains a request for legal advice from the DAO's Communications Director to the undersigned Open Records Officer, a member of the DAO's Civil Litigation Unit, who is tasked with providing legal advice to employees at the Office, and the Supervisor of the DAO's Law Division, who oversees the Civil Litigation Unit. This communication was made in response to Ms. Burke's letter which raised legal concerns regarding DAO press access. The DAO has not waived the privilege, as there are no other recipients to the email and the communication was not forwarded to any outside party. Therefore, this exchange (if responsive) is plainly privileged. *See Gilliard*, 15 A.3d at 59.

⁵ In his attestation, the undersigned sets forth his reasoning in concluding that these emails were non-responsive.

Accordingly, the DAO respectfully requests that this appeal be dismissed. If I can provide further clarification or legal argument, please do not hesitate to contact me.

Sincerely,

/s/ Josh Niemtzow

Joshua B. Niemtzow
Assistant District Attorney
PHILADELPHIA DISTRICT ATTORNEY'S
OFFICE
Three South Penn Square
Philadelphia, PA 19107-3499
(215) 686-7644
josh.niemtzow@phila.gov

cc: Paula Knudsen-Burke

Exhibit A



Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Philadelphia District Attorney's Office (Attn: AORO)

Date of Request: Nov. 2, 2022 Submitted via: ☒ Email ☐ U.S. Mail ☐ Fax ☐ In Person

PERSON MAKING REQUEST:

Name: Paula Knudsen Burke Company (if applicable): RCFP

Mailing Address: PO Box 1328

City: Lancaster State: PA Zip: 17608 Email: pknudsen@rcfp.org

Telephone: 717-370-6884 Fax:

How do you prefer to be contacted if the agency has questions? ☒ Telephone ☐ Email ☐ U.S. Mail

RECORDS REQUESTED: Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.

Background: An Aug. 22, 2022 Right to Know Law response from attorney Josh Niemtzw to me stated that "Media advisories are generally sent out via MailChimp to the entire media distribution list." Based on this, records sought are: (1) The "entire media distribution list" utilized by the DA's office through MailChimp. Records sought are the distribution lists for Jan. 1, 2022 through Nov. 1, 2022. This request anticipates that reporters are added or dropped over the months and that the list would be changed/updated during this time period. (2) Zoom invitation records showing reporters, editors, or other members of the news media invited to participate in remote/virtual press calls with DA Krasner. Records sought are from July 1, 2022 through Nov. 1, 2022. (3) Records referencing barring members of the news media from DA press conferences, either in person or virtually. Key words include "eject," "invite," "press conference," "Ralph Cipriano." Records sought for Jan. 1, 2022 through Nov. 1, 2022.

DO YOU WANT COPIES? ☐ Yes, printed copies (default if none are checked)

☒ Yes, electronic copies preferred if available

☐ No, in-person inspection of records preferred (may request copies later)

Do you want certified copies? ☐ Yes (may be subject to additional costs) ☐ No

RTKL requests may require payment or prepayment of fees. See the [Official RTKL Fee Schedule](#) for more details.

Please notify me if fees associated with this request will be more than ☐ \$100 (or) ☐ \$_____.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: \$_____

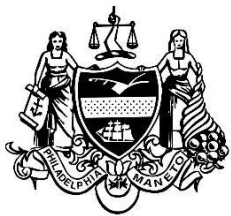
☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

NOTE: In most cases, a completed RTKL request form is a public record.
More information about the RTKL is available at <https://www.openrecords.pa.gov>

Form updated Feb. 3, 2020

Case ID: 230502033

Exhibit B



LAWRENCE S. KRASNER
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
215-686-8000

December 9, 2022

Via Email

Paula Knudsen Burke
Reports Committee for Freedom of the Press
pknudsen@rcfp.org

Re: Final Response to Your Right to Know Law Request

Dear Ms. Knudsen Burke:

This letter is in response to your Right-to-Know-Law (RTKL) request, which was received by the Open Records Officer of the Philadelphia District Attorney's Office (DAO) on November 2, 2022. You requested:

- (1) The "entire media distribution list" utilized by the DA's office through MailChimp. Records sought are the distribution lists for Jan. 1, 2022 through Nov. 1, 2022. This request anticipates that reporters are added or dropped over the months and that the list would be changed/updated during this time period.
- (2) Zoom invitation records showing reporters, editors, or other members of the news media invited to participate in remote/virtual press calls with DA Krasner. Records sought are from July 1, 2022 through Nov. 1, 2022.
- (3) Records referencing barring members of the news media from DA press conferences, either in person or virtually. Key words include "eject," "invite," "press conference," "Ralph Cipriano." Records sought for Jan. 1, 2022 through Nov. 1, 2022.

By email on November 9, 2022, the DAO invoked an extension of time, until December 9, 2022, in which to respond. *See* 65 P.S. § 67.902(a). This constitutes the DAO's final response to your request.

1. The Media Distribution List Utilized by DA's Office from January 1, 2022 Through November 1, 2022

The DAO is unable to generate responsive records to this query due to the nature of the media distribution list and the fact that it is a dynamic database: participants are added to or removed from the list or may choose to opt-out of receiving DAO press notices. In other words, the DAO has a current media distribution list, though to the best of our knowledge based on the mechanics of the program, there is no means of isolating the names or contact information of recipients on such list at particular dates in the past. However, as the current media distribution list

Case ID: 230502033

is partially reflective of who may have been on prior iterations of the list during the requested time period, the DAO has enclosed that list herein. The DAO has redacted this record to remove IP addresses, geographical identification, and email addresses. *See* 708(b)(6)(exempting from disclosure agency records containing home, cellular or personal telephone numbers and email addresses). *See also Pa. State. Educ. Ass'n v. Commonwealth*, 148 A.3d 142, 144 (Pa. 2016) (discussing the state constitutional right to informational privacy, including disclosure of home addresses, in the context of a RTK request).

2. Zoom Invitation Records for Press Calls

After a good-faith search for responsive records, the DAO has located one item responsive to your query, which it has enclosed herein.

3. Records Referencing Barring Media from Press Conferences

After a thorough and comprehensive search for responsive records, the DAO has identified two items responsive to this request (attached herein). To the extent you are seeking additional records, they are privileged, non-public records. *See Heavens v. Pennsylvania Dep't of Env'tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. 2013) (“The work-product doctrine offers broad protection to the mental impressions, theories, notes, strategies, research and the like created by an attorney in the course of his or her professional duties, particularly in anticipation or prevention of litigation.”). *See id.* ([“U]nder the RTKL, the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked.”); *see also* 65 P.S. § 67.708(b)(17) (exempting agency records relating to a noncriminal investigation).

This letter is the DAO’s response to your RTKL request. Should you wish to contest this decision, an appeal must be filed with the Pennsylvania Office of Open Records, 333 Market Street, 16th Floor, Harrisburg, PA 17101-2234, no later than 15 business days from the date of this letter.

Sincerely,

/s/ Josh Niemt看


Josh Niemt看
Open Records Officer
PHILADELPHIA DISTRICT ATTORNEY’S OFFICE
Three South Penn Square
Philadelphia, PA 19107-3499
(215) 686-7644
josh.niemtzow@phila.gov

Email Address	First Name	Last Name	EMAIL_TYPE	MEMBER_RATING	OPTIN_TIME	CONFIRM_TIME	CLEAN_TIME	CLEAN_CAMPAIGN_CLEAN_CAMPAIGN_LEID	EUID	NOTES	TAGS
jmyer@comcast.net	Taylor	Allen	html	1	5/16/2018 15 50	5/16/2018 15 50	5/18/2018 6 35	Attempted Rape @ 71c5a0b84	1602917 e6ba4693a		
rmora@comcast.net			html	1	9/3/2021 14 48	9/3/2021 14 48	8/28/2022 20 25	DA Kravner, Communique4da064	236712252 098181536		
stephen.mckinzie@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	5/18/2018 6 35	Attempted Rape @ 71c5a0b84	17030093 01ee9797d		
agreen@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	3/20/2019 13 46	prohibition policy on csa05d0f6	17020475 17aa9de98		"Advisory 042020"
mdonofrio@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	5/18/2018 6 34	Attempted Rape @ 71c5a0b84	17020307 664814533		
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hward@comcast.net			html	1	5/17/2018 14 08	5/17/2018 14 09	12/3/2021 17 14	DA Kravner, Gun W 1728ed4080	17040747 c6d93a3c6		"Main_Media", "Advisory 042020"
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lucile@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	5/18/2018 6 35	Attempted Rape @ 71c5a0b84	16028501 30d58e384e		
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jalejandro@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	10/22/2020 14 04	District Attorney Kr 8804a3a040	16028509 5b299a3c1		"Main_Media"
bab@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	7/25/2021 19 24	Philadelphia District a53a33f2f1	16028417 4b97431a1f		"Main_Media", "Advisory 042020"
ahv@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	8/15/2019 11 22	DA Kravner Annon 79d8f6f454	17029181 40939db70		"Advisory 042020"
editor@scouthillreview.com	Patrick	Kerkstra	html	1	5/16/2018 15 50	5/16/2018 15 50	1/8/2021 15 54	DA Kravner to Annot 5171a161c3	16028981 5750a508b		"Main_Media", "Advisory 042020"
patrick@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	10/2/2019 17 12	DISTRICT ATTORNEYb94310d53	16028779 47a86a0459		
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repzinger@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	5/18/2018 6 35	Attempted Rape @ 71c5a0b84	17029731 e7a31a2898		
sahaghe@comcast.net	Jennifer	Logue	html	1	5/16/2018 15 50	5/16/2018 15 50	6/7/2018 11 07	CW v Chaz Johnson ce180da4c	16028437 31e3a4e99b		"Advisory 042020"
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jef@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	9/2/2020 02 02	DAO to Host Virtual ebb11319	17029260 6d2901e3d		"Main_Media"
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telemundophila@telemundocable.com			html	1	5/16/2018 15 50	5/16/2018 15 50	7/9/2018 15 14	West Philly Mt & 7u244a4d88f	17029737 895645d8c		
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Michael.Ortiz@comcast.net	Michael	Ortiz	html	1	5/16/2018 15 50	5/16/2018 15 50	1/2/2022 12 50	DAO LGSTKr Advnot783215c44	82604741 5487176220		"Main_Media", "Advisory 042020"
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clariel.colazzo@comcast.net	Clariel	Colazzo	html	1	5/16/2018 15 50	5/16/2018 15 50	2/22/2022 15 36	DA Kravner Stateme65500097	17029345 1a000b9312		
john@comcast.net			html	1	5/16/2018 15 50	5/16/2018 15 50	1/21/2022 12 50	DAO LGSTKr Advnot783215c44	17029414 894c391a7a		"Main_Media", "Advisory 042020"
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kimberly@comcast.net	Kimberly	Aguilera	html	1	5/16/2018 15 50	5/16/2018 15 50	2/9/2020 13 42	District Attorney Kr a49e6ca27	17030029 d37817632d		"Main_Media"
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Sloter			html	1	5/16/2018 15 50	5/16/2018 15 5
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Ros.Lev	Ross	Levitt	html	1	5/16/2018 15 50	5/16/2018 15 5
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	Spies	Adrian	html	1	7/16/2019 14 20	7/16/2019 14 2
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7/31/2018 13 21 Grant for homicide	635b2f3a8	16028681 0186409c04
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5/18/2018 6 31 Attempted Rape @	71c5ba8b4	17030031 91e5abec6b
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3/20/2019 13 41 probation policy an	c45a0b5b9	16028511 80ca4f311
5/2/2020 10 31 District Attorney Kr	cc40b22477	81496661 c444a47a8
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5/18/2018 6 31 Attempted Rape @	71c5ba8b4	17029408 63b80ba0b
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5/18/2018 6 31 Attempted Rape @	71c5ba8b4	16029285 4d64a4b912
3/9/2021 9 41 Ad Shuprio, DA Kra	0e6cd45cb9	17030301 860a4c1a9
5/18/2018 6 31 Attempted Rape @	71c5ba8b4	17029351 91552556c
4/18/2022 7 01 DA Krasner to Highl	4c4c49f45d	16028931 3e16d3c20c
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12/27/2021 16 21 SEPTA Police Officer	429518057	74720685 b1f151a041
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5/18/2018 6 31 Attempted Rape @	71c5ba8b4	17029391 34da9704a
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6/7/2021 7 01 DA Krasner to Anno	dc38a84e88	16029361 9f0c4a1b06
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3/21/2022 16 51 DA Krasner to Anno	5a38c1084d	17030331 798b8d9cf
5/11/2020 14 31 District Attorney Kr	890b0a0a5b	16029451 0a2812b88f
3/20/2019 13 41 probation policy an	c45a0b5b9	16028511 80ca4f311
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6/30/2019 15 01 DA Krasner to Join T	f55b6700b	23671286 25a08f3ae
3/27/2019 20 51 probation policy an	c45a0b5b9	16028691 799a9f820
3/17/2022 15 31 DAO Election Task F	a0337f4cf	82604806 f52b10a49
6/29/2022 15 31 Two Teens Arrested b02308b4e		17029721 0c564e5180
6/14/2021 16 31 DA Krasner Announ		17029842 30ca3a3c2a
8/11/2019 15 01 DA KRASNER, DAO F	c31a00053	1171807267
5		


Accepted: DA Larry Krasner





Jane Roh
To: kboyer@inquirer.com





Fri 9/16/2022 3:19 PM

 Accepted: DA Larry Krasner

 Tue 9/20/2022 2:30 PM - 3:00 PM

 Jane Roh has accepted this event

 Reply

 Forward

Josh Niemtzw

From: Ralph Cipriano <ralphcipriano@gmail.com>
Sent: Monday, October 31, 2022 11:49 AM
To: larry.krasner@phila.gov; Lawrence.Krasner@Phila.gov; Jane Roh; dustin.slaughter@phila.gov
Subject: viewpoint discrimination

External Email Notice. This email comes from outside of City government. Do not click on links or open attachments unless you recognize the sender.

Dear Larry, Lawrence, Jane & Dustin:

I note for the second straight week that you apparently are not holding your normal Monday morning press conference where I have a chance to question you about the many issues of the day.

Last week, on Tuesday, Jane sent out a message about an invitation-only conference call with the D.A. I immediately RSVPed and was prohibited from participating in this event.

Mr. D.A., I thought you had come around to the concept that you could no longer practice viewpoint discrimination against me by having me evicted from your press conferences, or not answering my questions at your press conferences.

Now, you apparently have figured out a new way to discriminate against me by no longer holding public press conferences, but invitation only "conference calls" on subjects of your choosing, forums that I am not allowed to participate in.

Once again, you are committing viewpoint discrimination, which the courts have steadfastly held is unconstitutional. You also did not respond to questions I emailed you on Oct 7th, as follows:

Dear District Attorney Krasner:

At a press conference at your office on Monday, Oct. 3rd, I asked you a question about Amir Harvey, who had just been arrested by the U.S. Attorney's office for the alleged Sept. 19th armed carjacking of a woman and her daughter in the 8900 block of Maxwell Place.

Harvey's been previously arrested a total of six times in Philadelphia. He's a suspect in four previous carjackings and was also arrested for allegedly firing four shots at police and then barricading himself.

Your office tried Harvey on carjacking charges and he was acquitted on Sept. 8, 2021 or had the charges withdrawn or dismissed on some 14 counts including robbery, reckless endangerment and robbery of a motor vehicle. Twelve days later, Harvey was in court on Sept. 20, 2021 on the case involving the alleged firing of four shots at police officers.

The most serious charge Harvey faced was reckless endangerment. He was sentenced to 11 1/2 to 23 months in jail but the negotiated plea bargain included immediate parole.

At your press conference, I asked about the lenient charges and lenient sentence Harvey was given.

Your response: "I would have to look into the details of that matter."

Four days later, have you had a chance to look into the details of this case, sir? And do you have any explanation for the lenient charges and lenient sentence Harvey was given?

Thanks for taking the time to consider this request.

Ralph Cipriano
for BigTrial.net
cell: 215-901-0219

So, 24 days later, have you yet had a chance, sir, to look into the details of the matter of Amir Harvey, and your office's repeated lenient treatment of him?

I would like a response on this question.

I also want to ask you about the case of Jahmir Harris, a convicted killer that you "exonerated," only to discover that Mr. Harris had allegedly used his newfound freedom to get involved in another murder.

From the original motions filed under seal in this case, it looks like the D.A.'s office pulled a bait and switch on the judge involved in the original Harris murder conviction.

First, your office repeatedly claimed that the D.A. had determined who the real killer was in the first Harris murder, a suspect named A.J. Your office repeatedly claimed that the D.A. wanted to prosecute A.J., and that publicly disclosing the information contained in any of your motions filed under seal would jeopardize that investigation and prosecution of A.J.

Then, after the judge let Harris out of jail, we discover from the motions originally filed by the D.A. under seal that not only did you never arrest or prosecute A.J., you didn't even bother to interview him, based on the recommendation of that brilliant homicide detective Jerry Rocks, who, like your prosecutors in the "exoneration" of Harris, has never investigated or prosecuted a homicide case.

The public is due an explanation for the bait and switch tactic employed in secret by your office to free a convicted killer, only to discover that he allegedly has killed again.

What is your explanation for this travesty of justice, sir? And how long do you plan to continue to hide in your bunker and evade the press corps? At a time when the state legislature is planning to impeach you.

Ralph Cipriano
for Big Trial, now on Substack

Josh Niemtzw

From: Ralph Cipriano <ralphcipriano@gmail.com>
Sent: Monday, August 15, 2022 12:05 PM
To: dustin.slaughter@phila.gov; larry.krasner@phila.gov; Lawrence.Krasner@Phila.gov; Jane Roh
Subject: questions for DA's press conference today

External Email Notice. This email comes from outside of City government. Do not click on links or open attachments unless you recognize the sender.

1. What do you have to say about the criticism leveled at you by state Supreme Court Justice Kevin Dougherty, that you had abused the grand jury process in indicting former police officer Ryan Pownall for murder, along with keeping the grand jury in the dark about applicable case law involving justifiable use of force by a police officer?
2. Why did you give accused SEPTA killer Derrick Jones a sweetheart deal that allowed him to get out of jail and allegedly hunt down and murder three innocent men?
3. Why do you allow two of your senior staff members, Nancy Winkelman and Gregory Holston, who together are paid more than \$300,000, to live in New Jersey, in flagrant violation of the residency requirement for all DAO employees that is specified by the city charter?
4. Why haven't you paid your taxes from the past two years, which, according to records, amount to \$79,521?
5. Why did you, in violation of the First Amendment, have me evicted under threat of arrest by two police officers from your press conference last week? According to two lawyers that I consulted with, one a former senior attorney in the city's law department, the other a staff attorney for the Reporters Committee For Freedom of the Press, you discriminated against me on the basis of viewpoint, an abuse that the U.S. Supreme Court and federal appeals courts have consistently opposed as a flagrant violation of the First Amendment?

Exhibit C



DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
215-686-8000

ATTESTATION BY OPEN RECORDS OFFICER JOSH NIEMTZOW

I, Josh Niemtzw, Assistant District Attorney, Civil Litigation Unit, state the following to the best of my knowledge information and belief under penalty of perjury pursuant to 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities:

1. I serve as the Open Records Officer for the Philadelphia District Attorney's Office (DAO).
2. In that role, I am responsible for processing Right-to-Know-Law (RTKL) requests filed with the DAO, which includes determining whether requested records are public records, searching for records, and responding to records requests.
3. I process all requests in good faith.
4. In addition to my responsibilities as Open Records Officer, I am also an attorney in the DAO's Civil Litigation Unit, which is a part of the DAO's Law Division. Among its responsibilities, the Unit represents the Office in affirmative and defensive civil litigation, and upon request, provides legal advice to members of the Office.
5. On November 2, 2022, the DAO received a RTKL request from Paula Burke seeking: (i) the DAO's media distribution lists for a specified time period; (ii) records of private Zoom calls with reporters; and (iii) records referencing barring members of the media from DAO press conferences.
6. Upon receipt of the request, I reached out to DAO Communications Director, Jane Roh, for help locating responsive records for items one and two. Ms. Roh explained that due to the dynamic nature of the DAO's media

distribution list and the technical capacity of the MailChimp program, the DAO would be unable to generate the distribution lists for designated periods in the past. As further verification, I received a demonstration on the program from a member of the communications team, and I did not ascertain any readily available method to isolate prior mailing lists. I requested a current media distribution list from Ms. Roh, which was appended to our final response, as I believed this current list was partially responsive to the request, because the current list includes hundreds of names, a large number of which would have been included in past iterations of the list from the requested time period.

7. The record containing the current media distribution list also included email addresses, names, IP addresses and pinpoint geographic locations, revealed through exact latitude and longitudinal coordinates, country code, region, and time zone information. I instructed our unit paralegal to redact IP addresses and geographic information, as well as email addresses where members of the list could be otherwise identified by name. These redactions were completed pursuant to 708(b)(6) of the RTKL and the constitutional Right to Privacy.
8. For item number two, Ms. Roh provided me with a Zoom invitation notification for a press call between District Attorney Krasner and the Philadelphia Inquirer Editorial Board. She confirmed that, to the best of her knowledge, this was the only Zoom invitation record between the District Attorney and members of the media during the specified period.
9. In order to respond to Ms. Burke's request for records referencing barring members of the media from press conferences, I submitted a request for employee emails from the City of Philadelphia's Office of Information Technology ("OIT") using Ms. Burke's requested search terms. OIT requires a search request to identify a particular user account, a defined time frame, and search terms. I requested emails from individuals who are involved with DAO press conferences for the requested period. Additionally, Ms. Roh and the other members of the DAO Communications Team conducted an independent search of their emails relating to this request. Thereafter, I reviewed any records generated from the search and provided the only two responsive emails available.
10. In the course of corresponding with Ms. Burke regarding this appeal, she informed me that she had expected the DAO to produce records of her

email correspondence with the DAO involving press access. During my review of email communication, I had come across three emails from Ms. Burke: one sent to me, and two directed to Ms. Roh, which included a letter attachment discussing DAO press access; however, the body of the emails included no such discussion. I therefore made the determination that these were not responsive records, particularly given that Ms. Burke was the sender of these emails, and already in possession of these records.

11. Moreover, I determined that as one of these emails included a follow-up message from Ms. Roh, to myself and the Law Division Supervisor, requesting legal advice, that email communication is protected under attorney-client privilege. I have since turned over the two other emails sent by Ms. Burke.
12. To further our diligence, I spoke with members of District Attorney Krasner's security detail, Sergeant Tom Kolenkiewicz and Officer Agnes Torres, two Philadelphia Police officers specially assigned this responsibility, to ascertain whether they had any responsive records concerning the DAO barring members of the media from press conferences. They each provided me with a respective memo, documenting instances where Ms. Burke's client, Ralph Cipriano, was asked to leave DAO press conferences, or otherwise recording their interactions with him.
13. Sgt. Kolenkiewicz explained to me that his practice of memorializing his interactions with Mr. Cipriano is in furtherance of his security responsibilities. He described these memos as a "police working file" that those working on the DA's security detail team typically and routinely use to document unusual or suspicious behavior. As part of his responsibilities as a member of DA Krasner's security detail, Sgt. Kolenkiewicz has kept working files on other individuals as well.
14. Sgt. Kolenkiewicz also explained that his memorialization of these interactions further assists in recalling specific incidents in the event that he or the office is subjected to litigation or complaints relating to his duties. From his experience, it is not atypical for people who are dissatisfied in their interaction with law enforcement to provide an incomplete narrative of a particular incident when reporting complaints to police internal affairs or in litigation. Accordingly, Sgt. Kolenkiewicz created these memos in

order to record a comprehensive and accurate set of facts in preparation for litigation or for a police internal affairs investigation.

15. Officer Torres' memo similarly documents her interaction with Ralph Cipriano in response to the first DAO press conference attended by Mr. Cipriano. This instance was particularly noteworthy because Officer Torres had been providing security for DA Krasner since the start of his first term as District Attorney in 2018, and as part of her duties, she attended most DAO press conferences and was familiar with many of the participants in attendance. As a first-time participant at the DAO press conference, Mr. Cipriano did not appear to be associated with the press, which prompted her to notate any unusual conduct or interactions. The officer described her memo as serving a similar purpose as that which Sgt. Kolenkiewicz described: documentation required pursuant to her security responsibilities, and recorded in the event of potential litigation or internal affairs complaints. Officer Torres' memo is addressed to Sgt. Kolenkiewicz, who is her supervisor.
16. Accordingly, I determined that these memos were written as part of an ongoing noncriminal investigation and constitute factual work product.

/s/ Josh Niemtzow

Joshua Niemtzow
Open Records Officer
Philadelphia District Attorney's
Office

January 27, 2023

Exhibit D



DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
215-686-8000

ATTESTATION BY DAO COMMUNICATIONS DIRECTOR JANE ROH

I, Jane Roh, Communications Director for the Philadelphia District Attorney's Office, state the following to the best of my knowledge information and belief under penalty of perjury pursuant to 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities:

1. I serve as the Communications Director for the Philadelphia District Attorney's Office ("DAO"), a position which I have held since 2019.
2. In that role, I am responsible for overseeing the DAO Communications Team, as well as managing relationships with the press and strategic story placement in service of fair coverage of the DAO as an office and DAO staff individually.
3. The DAO Communications Team generally circulates mass electronic press releases and media advisories by utilizing Mailchimp, an online email marketing product. My team has developed familiarity with Mailchimp throughout our time serving on the Communications Team at the DAO.
4. The DAO maintains a primary media distribution list on Mailchimp. Media advisories, such as those announcing DAO press conferences, are generally sent out via Mailchimp to this media distribution list. Participants are added to or removed from the list, and they may also choose to opt out of receiving DAO press notices. In other words, the DAO's distribution list is dynamic.
5. The DAO's Open Records Officer requested my help in responding to the instant Right-to-Know request. Specifically, I was asked to provide copies

- of the media distribution lists that the DAO used from January 1, 2022, through November 1, 2022, and to provide Zoom invitation records showing reporters, editors, or other members of the news media invited to participate in remote/virtual press calls with DA Krasner between July 1, 2022 through November 1, 2022.
6. As the DAO's Communications Director, I coordinate press calls with DA Krasner, and would be looped in on any such calls. Therefore, in seeking out responsive records, I ran an email search in my Outlook for Zoom invitations with the press, and I also searched my Outlook calendar. I was able to locate one responsive record, which I shared with the Open Records Officer.
 7. After revisiting the mechanics of our Mailchimp software, I was able to confirm and conclude that, to the best of my knowledge, Mailchimp does not provide any means of generating past distribution lists. Our team is only able to access the current media distribution list.
 8. I informed the Open Records Officer that, for this reason, I could not provide him with past media distribution lists, but that the current list had significant overlap with recipients who would have been on prior versions of the list. I shared with him an excel file for the media distribution list that was current as of December 7, 2022, which Mr. Niemtzow disclosed to Ms. Burke.
 9. I generated the current distribution list by logging on to Mailchimp, selecting the contacts on the main media distribution list and selecting "Export Audience as a CSV file." To the extent requester is claiming that there may be prior lists that were previously exported and saved, the Communications Team did not locate any such lists from the requested time period, nor do I have any reason to believe that any such records were generated during the requested period, as Mailchimp is a tool exclusively utilized by the DAO's Communications Team for purposes of circulating press invitations.

/s/ Jane Roh

Jane Roh
Communications Director

Philadelphia District Attorney's
Office

January 27, 2023

OOOR Exhibit 8

April 13, 2023

Via Email Only:

Paula Knudsen Burke
Reporters Committee for Freedom of the Press
PO Box 1328
Lancaster, PA 17608
pknudsen@rcfp.org

Via Email Only:

Josh Niemtzw
Agency Open Records Officer
City of Philadelphia, District Attorney
3 South Penn Square
Philadelphia, PA 19107
Josh.Niemtzow@phila.gov

RE: Knudsen Burke and Reporters Committee for Freedom of the Press v. City of Philadelphia, District Attorney OOR Dkt. AP 2022-2836

Dear Attorney Niemtzw:

Thank you for your submission in this matter. I am in the process of finishing the Final Determination in this case, and I write today with a very quick question to resolve a matter of ambiguity in the record:

1. When you describe the memos prepared by Sgt. Kolenkiewicz and Officer Torres, you state that the memos document "instances" where Mr. Cipriano was asked to leave press conferences. Could you clarify whether the memos document a pattern of multiple interactions with Mr. Cipriano, or are they, effectively, incident reports regarding events at a single press conference?

I do not believe that I require a supplemental attestation in response to this question. Please let me know if I can clarify this inquiry in any way. Thank you.

Sincerely,

/s/ Jordan Davis

Jordan Davis

00R Exhibit 9



LAWRENCE S. KRASNER
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
215-686-8000

April 14, 2023

Via Email

Jordan Davis
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Jorddavis@pa.gov

Re: *Knudsen Burke and Reporters Committee for Freedom of the Press v. City of Philadelphia, District Attorney OOR Dkt. AP 2022-2836*

Dear Officer Davis:

This letter is in response to your request for clarification regarding a point of factual ambiguity in the record. The memos authored by Sgt. Kolenkiewicz, a senior member of District Attorney Krasner's security detail, document a pattern of interactions with Mr. Cipriano over the course of several months.

Sincerely,

/s/ Josh Niemtzow

Joshua Niemtzow
Open Records Officer
PHILADELPHIA DISTRICT ATTORNEY'S OFFICE
Three South Penn Square
Philadelphia, PA 19107-3499
(215) 686-7644
josh.niemtzow@phila.gov

Case ID: 230502033

OOR Exhibit 10



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
PAULA KNUDSEN BURKE,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2022-2836
	:	
PHILADELPHIA DISTRICT	:	
ATTORNEY'S OFFICE,	:	
Respondent	:	

FACTUAL BACKGROUND

On November 2, 2022, Paula Knudsen Burke, Esq. ("Requester") submitted a request ("Request") to the Philadelphia District Attorney's Office ("Office") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking:

1. The "entire media distribution list" utilized by the [Office] through MailChimp. Records sought are the distribution lists for Jan. 1, 2022 through Nov. 1, 2022. This request anticipates that reporters are added or dropped over the months and that the list would be changed/updated during this time period.
2. Zoom invitation records showing reporters, editors, or other members of the news media invited to participate in remote/virtual press calls with DA Krasner. Records sought are from July 1, 2022 through Nov. 1, 2022.
3. Records referencing barring members of the news media from [Office] press conferences, either in person or virtually. Key words include "eject," "invite," "press conference," "Ralph Cipriano." Records sought for Jan 1, 2022 through Nov. 1, 2022.

On December 9, 2022, following a thirty-day extension, 65 P.S. § 67.902(b), the Office granted the Request in part, providing a copy of the current media distribution list, but with email addresses, IP addresses and geographical identification redacted pursuant to Section 708(b)(6) of the RTKL, 65 P.S. § 67.708(b)(6), and the state constitutional right to privacy. The Office also provided two emails and a single Zoom invitation receipt but argued that any additional responsive records are subject to the attorney-work product doctrine or relate to a noncriminal investigation. 65 P.S. § 67.708(b)(17).

On December 21, 2022, the Requester appealed to the Office of Open Records (“OOR”), providing reasons 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. 65 P.S. § 67.1101(c).

On January 19, 2023, the Requester submitted a position statement arguing that the Office had not demonstrated that other responsive records—particularly prior instances of the media distribution list—did not exist, that “geographical distribution” should not have been redacted, and that the Office had not demonstrated that any responsive records are privileged or subject to the noncriminal investigative exemption. The Requester also submitted copies of letters written by the Requester to the Office in relation to a prior RTKL request.

On January 27, 2023, the Office submitted a position statement arguing that it had no ability to retrieve any earlier version of the media distribution list via MailChimp, and that the geographic data was properly redacted under the right to privacy, that the Office had properly withheld two security memoranda, and that it had properly withheld an email exchange as privileged because it involved legal concerns regarding Office press access policies. In support of these arguments, the Office submitted the attestation of its Open Records Officer, Josh Niemtzw, Esq., who avers that

he asked the Office's Communications Director to demonstrate the MailChimp program and was satisfied that it could not be made to produce past records, that there was only one record of a Zoom call between the District Attorney and a media entity in the identified period, that he had reviewed the responsive emails produced by the Office's IT department and that he had spoken to various other identified members of the Office and determined that their memos regarding interaction with Mr. Cipriano constituted part of a noncriminal investigation. The Office additionally submitted the attestation of Jane Roh, the Office's Communications Director, who explains that she attempted to discern whether past distribution lists could be accessed and could not find any way to do so.

On April 14, 2023, in response to an inquiry from the OOR, the Office submitted a brief letter clarifying that one of the memos regarding interaction with Mr. Cipriano spanned several months.

LEGAL ANALYSIS

The Office is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Office is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. § 67.708(a)(1). 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." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, "[t]he burden of proving a

record does not exist...is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The appeal is dismissed as moot in part

On appeal, the Requester notified the Office that it had not produced two communications she herself had sent the Office. The Office explained that it did not believe that the emails were responsive because they were associated with letter attachments that contained responsive discussion, but the body of the email did not itself contain responsive text. Nevertheless, the Office provided the records on appeal. On review, the OOR agrees with the Requester that the communications are responsive and that the emails should have been provided. Because the Office has provided these responsive records during the appeal, the appeal is dismissed as moot as to those records. *See Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The Office has not demonstrated that geolocation data is exempt

The Office provided the Requester with a copy of the current media distribution list, a document the Office uses to distribute press invitations and other news. The list includes email addresses, first names, last names, the email type, a variable showing an aggregate engagement metric, the dates of mailing opt-in and confirmation, geolocation data, notes on whether communications are bouncing, internal IDs and tags, and IP addresses. The Office redacted part of most email addresses, the IP addresses, and the “geolocation data” under a combination of Section 708(b)(6) of the RTKL and the right to privacy. On appeal, the Requester challenges only the failure to provide the geolocation data.

It appears that Section 708(b)(6) of the RTKL was invoked only to redact the personal email addresses, as neither IP addresses nor geolocation data appear within the exemption. 65 P.S.

§ 67.708(b)(6)(i)(A) (exempting “all or part of a person’s Social Security number, driver’s license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal information number.”). To the extent that the Requester is alleging that the geolocation data is exempt under Section 708(b)(6)(i)(A), it is not among the items listed as exempt in the statute and therefore may not be withheld under Section 708(b)(6). Though the withheld IP addresses are not before the OOR, they and the geolocation data were both redacted pursuant to the state constitutional right to privacy.

When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual’s interest in informational privacy with the public’s interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Pa. State Education Ass’n v. Commonwealth* (“PSEA”), 148 A.3d 142 (Pa. 2016) (holding that an individual possesses a right to privacy in certain types of personal information); *see also Pa. State Univ. v. State Employees’ Retirement Bd.*, 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

Although the Pennsylvania Supreme Court did not expressly define the types of “personal information” subject to the balancing test, the Court recognized that certain types of information, by their very nature, implicate privacy concerns and require balancing. *Id.* at 156-57; *see also Pa. State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers’ International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, home

addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test).

To determine whether the constitutional right to privacy precludes disclosure of an individual's personal information, the OOR must apply the balancing test articulated in *Denoncourt v. Pa. State Ethics Comm'n*, 470 A.2d 945 (Pa. 1983), and applied in the public records context in *Times Publ. Co., Inc. v. Michel*, 633 A.2d 1233, 1237 (Pa. Commw. Ct. 1993), “weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure.”

Here, the Office explains that “geographical information” includes the latitude and longitude of the contact, along with country code, region, and time zone information. This information is generated by the MailChimp service, which presumably populates it based on the IP address of the individuals interacting with the mailing list.¹ The Office states that this record provides “the exact latitude and longitudinal coordinates” of the contacts, but it is impossible to know whether the IP address from which individuals on the marketing distribution list connected were home network addresses, business addresses, or even mobile network connections.²

The Pennsylvania Supreme Court reaffirmed the status of home addresses as potentially subject to redaction or withholding under the right to privacy in *PSEA*. However, individuals do not have the same expectation of privacy in a business address, and business entities have no such expectation at all. *See Butler Area Sch. Dist. v. Pennsylvanians for Union Reform*, 172 A.3d 1173

¹ Intuit provides a short article about MailChimp’s geolocation service which states that the collection uses a standard process to reference an IP address with a geographic database. *See* “About Geolocation”, mailchimp.com, <https://mailchimp.com/help/about-geolocation/>

² The precision of the addresses provided by such a service also tends to vary; often an IP address may only be used to determine the city or neighborhood of the user. Here, however, there is no evidence in the record showing how accurate MailChimp’s service is and the OOR will refrain from speculation.

* 20 (Pa. Commw. Ct. 2017) (“The constitutional right to informational privacy only inures to individuals”).

Therefore, the Office has not demonstrated whether the geolocation data contained on the list encompasses home addresses, nor did it explain whether the latitude and longitude data is precise enough for the Requester to accurately determine a street address from it. Because the Office did not demonstrate that any home addresses would be identified by this release, the geographic location information may not be withheld under the auspices of the state constitutional right to privacy.

3. The Office has demonstrated that it does not possess the prior versions of the distribution list

The Request sought copies of the media distribution list as it existed throughout the period from January 1, 2022 through November 1, 2022. The Office provided a copy of the current distribution list but argues on appeal that it does not possess the ability to provide prior versions of the list. In support of this argument, the Niemtzow Attestation provides, in part, as follows:

6. Upon receipt of the request, I reached out to [the Office’s] Communications Director, Jane Roh, for help locating responsive records for items one and two. Ms. Roh explained that due to the dynamic nature of the [Office’s] media distribution list and the technical capacity of the MailChimp program, the [Office] would be unable to generate the distribution lists for designated periods in the past. As further verification, I received a demonstration on the program from a member of the communications team, and I did not ascertain any readily available method to isolate prior mailing lists. I requested a current media distribution list from Ms. Roh, which was appended to our final response, as I believed this current list was partially responsive to the request, because the current list includes hundreds of names, a large number of which would have been included in past iterations of the list from the requested time period.

Meanwhile, the Roh Attestation provides, in part, that:

3. The [Office’s] Communications Team generally circulates mass electronic press releases and media advisories by utilizing Mailchimp, an online email marketing product. My team has developed familiarity with Mailchimp throughout our time serving on the Communications Team at the [Office].

4. The [Office] maintains a primary media distribution list on Mailchimp. Media advisories, such as those announcing [Office] press conferences, are generally sent out via Mailchimp to this media distribution list. Participants are added to or removed from the list, and they may also choose to opt out of receiving [Office] press notices. In other words, the [Office's] distribution list is dynamic.

7. After revisiting the mechanics of our Mailchimp software, I was able to confirm and conclude that, to the best of my knowledge, Mailchimp does not provide any means of generating past distribution lists. Our team is only able to access the current media distribution list.

8. I informed the Open Records Officer that, for this reason, I could not provide him with past media distribution lists, but that the current list had significant overlap with recipients who would have been on prior versions of the list. I shared with him an excel file for the media distribution list that was current as of December 7, 2022, which Mr. Niemtow disclosed to [the Requester].

9. I generated the current distribution list by logging on to Mailchimp, selecting the contacts on the main media distribution list and selecting "Export Audience as a CSV file." To the extent [R]equester is claiming that there may be prior lists that were previously exported and saved, the Communications Team did not locate any such lists from the requested time period, nor do I have any reason to believe that any such records were generated during the requested period, as Mailchimp is a tool exclusively utilized by the DAO's Communications Team for purposes of circulating press invitations.

Under the RTKL, a statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Office acted in bad faith or that the responsive records exist, "the averments in [the attestation] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

In response to a request for records, "an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]" 65 P.S. § 67.901. While the

RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors ... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff’d*, 243 A.3d 19 (Pa. 2020).

An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency’s records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep’t of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is “the open records officer’s duty and responsibility” to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

In *Pennsylvania Department of Health v. Mahon*, the Commonwealth Court discussed the evidence required to establish the absence of records, quoting its previous decision in *Hodges v. Pennsylvania Department of Health*, which held that an agency “may satisfy its burden of proof...with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record.” 283 A.3d 929, 936 (Pa. Commw. Ct. 2022) (quoting *Hodges*, A.3d 1190, 1192 (Pa. Commw. Ct. 2011)); *see also Campbell v. Pa. Interscholastic Athletic Ass’n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a “more likely than not” inquiry).

Here, the Office has submitted the attestation of the custodian of the records, who attests that she and the Open Records Officer both attempted to manipulate the MailChimp program to access prior lists and were unable to discern a way to produce them. The Requester argues that the Office might either have printed out past copies of lists, or that it might be possible that the software saves past versions of the list that are accessible, but the Roh Attestation establishes that the Office's Communications Team are the only users of the list and its software and have no other saved copies of the list. Roh Attestation ¶ 9. Therefore, the Office has met its burden of showing that it does not possess the versions of the list sought by the Requester.³ *See Mahon*, 283 A.3d at 936; *Hodges*, 29 A.3d at 1192.

4. The Office has demonstrated that no other responsive Zoom emails exist

The Request seeks "Zoom invitation records showing reporters, editors, or other members of the news media invited to participate in remote/virtual press calls with DA Krasner" for a five-month period. The Office provided a single record, an Outlook calendar entry showing acceptance of a meeting between the District Attorney and the Philadelphia Inquirer. On appeal, the Requester argues that the Office must demonstrate that no additional meeting records exist and that it has conducted a sufficient search of, for example, deleted email items.

In support of its position, the Office submitted the attestations of Attorney Niemtzow, who attests that:

8. For item number two, Ms. Roh provided me with a Zoom invitation notification for a press call between District Attorney Krasner and the Philadelphia Inquirer Editorial Board. She confirmed that, to the best of her knowledge, this was the only Zoom invitation record between the District Attorney and members of the media during the specified period.

³ Notably, this is not the same question as whether it is possible to view archived contacts which may have been removed from the list; such information would not permit either party to reconstruct the list as it existed during the period identified in the Request.

Likewise, Ms. Roh attests that:

6. As the [Office's] Communications Director, I coordinate press calls with DA Krasner, and would be looped in on any such calls. Therefore, in seeking out responsive records, I ran an email search in my Outlook for Zoom invitations with the press, and I also searched my Outlook calendar. I was able to locate one responsive record, which I shared with the Open Records Officer.

As noted above, an attestation may serve as sufficient evidence to show that records do not exist. *Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. The Requester argues correctly that a search for records on an email server may not suffice where there is reason to believe that records may have been deleted but remain retrievable by the agency's IT department. *Pa. Dep't of Labor & Indus. v. Earley*, 126 A.3d 355, 357 (Pa. Commw. Ct. 2015); *but see Klaves v. Pa. Dep't of Health*, OOR Dkt. AP 2021-2228, 2021 PA O.O.R.D. LEXIS 2711 (explaining the factors distinguishing *Earley* from other RTKL requests). However, when the officer of the agency responsible for maintaining such records states on appeal that additional records do not exist because they were never created, that may suffice to meet the agency's burden. *Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (Dr. Lombardi's attestation that he had only ever created responsive correspondence in communication with the PIAA's legal team sufficed to meet the minimal burden of proof.). Therefore, because the Office has demonstrated that it conducted a search for responsive records and that additional responsive records were never created, it has met its burden of proof that no additional responsive records exist. *See Mahon*, 283 A.3d at 936; *Hodges*, 29 A.3d at 1192.

5. The Office has demonstrated that one inquiry is privileged

The Office withheld an email exchange between Ms. Roh and Attorney Niemtzow responsive to Item 3 of the Request, arguing that it is subject to the attorney-client or attorney-work product privileges. For the attorney-client privilege to apply, an agency must demonstrate

that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *See Bousamra v. Excelsa Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citation omitted). An agency may not rely on a bald assertion that the attorney-client privilege applies; instead, the agency must establish the first three prongs of the privilege for it to apply. *See id.* When waiver is at issue, the burden of proof shifts to the requester. *See Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014).

The attorney work-product doctrine, on the other hand, prohibits disclosure “of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. “The purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation.” *Bousamra*, 210 A.3d at 976; *see also Heavens v. Pa. Dep't of Env'tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) (“[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked”).

In support of this argument, Attorney Niemtzow attests that:

10. In the course of corresponding with [Requester] regarding this appeal, she informed me that she had expected the [Office] to produce records of her email correspondence with the [Office] involving press access. During my review of email communication, I had come across three emails from [the Requester]: one sent to me, and two directed to Ms. Roh, which included a letter attachment discussing [Office] press access; however, the body of the emails included no such

discussion. I therefore made the determination that these were not responsive records, particularly given that Ms. Burke was the sender of these emails, and already in possession of these records.

11. Moreover, I determined that as one of these emails included a follow-up message from Ms. Roh, to myself and the Law Division Supervisor, requesting legal advice, that email communication is protected under attorney-client privilege. I have since turned over the two other emails sent by [Requester].

In its position statement, the Office also notes that “[t]his communication was made in response to [Requester’s] letter which raised legal concerns regarding DAO press access. The DAO has not waived the privilege, as there are no other recipients to the email and the communication was not forwarded to any outside party[.]”⁴ A review of the included communications from the Requester confirm that they contain an allegation that the Office’s removal of Mr. Cipriano violated federal law and that further illegal restriction of access was occurring. Given the context provided in the record, the Office’s attestation suffices to establish that the Office’s press officer sent the Office’s civil litigation staff an inquiry regarding the validity of the legal claims being made by the Requester’s letter. That inquiry, and any legal advice subsequently provided, plainly constitute a request for legal advice from the client of an attorney, and there is no evidence on appeal that the advice was later disseminated. *Bousamra*, 210 A.3d at 983. Therefore, the Office has demonstrated that one email was properly withheld as subject to the attorney-client privilege.

6. The Office has not demonstrated that the security detail memos may be withheld

Finally, the Office withheld two records responsive to Item 3 of the Request; memos written by the two members of the Philadelphia Police Department assigned as the District

⁴ The Office notes several times that it did not view this record or the ones it later provided to the Requester as responsive because although the communications related to a letter attachment regarding Mr. Cipriano’s removal. For the reasons set forth in this appeal, the OOR does not need to address this argument that the records are non-responsive; however, this interpretation of Item 3 of the Request is unreasonably narrow.

Attorney's security detail regarding the incident in which they removed Mr. Cipriano from a press conference. The Office argues that these memos are exempt under Section 708(b)(17) of the RTKL because they chronicle a noncriminal investigation undertaken into Mr. Cipriano's conduct and the incident itself.

Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to a noncriminal investigation," including "[c]omplaints submitted to an agency, [i]nvestigative materials, notes, correspondence and reports" and "[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation." 65 P.S. § 67.708(b)(17)(i)-(ii); 65 P.S. § 67.708(b)(17)(vi)(A). For this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. *See Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be "conducted as part of an agency's official duties." *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). Only a noncriminal investigation conducted by agencies acting within their legislatively granted factfinding and investigative powers constitutes an official probe. *Pa. Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would "craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure." *Id.* at 259. In addition, the agency must demonstrate that while the investigation was within the agency's official duties, it surpassed the agency's routine performance of its duties. *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 523 (Pa. Commw. Ct. 2011).

In support of this argument, Attorney Niemtzow attests that:

12. To further our diligence, I spoke with members of District Attorney Krasner's security detail, Sergeant Tom Kolenkiewicz and Officer Agnes Torres, two

Philadelphia Police officers specially assigned this responsibility, to ascertain whether they had any responsive records concerning the [Office] barring members of the media from press conferences. They each provided me with a respective memo, documenting instances where [Requester's] client, Ralph Cipriano, was asked to leave Office press conferences, or otherwise recording their interactions with him.

13. Sgt. Kolenkiewicz explained to me that his practice of memorializing his interactions with Mr. Cipriano is in furtherance of his security responsibilities. He described these memos as a "police working file" that those working on the DA's security detail team typically and routinely use to document unusual or suspicious behavior. As part of his responsibilities as a member of DA Krasner's security detail, Sgt. Kolenkiewicz has kept working files on other individuals as well.

14. Sgt. Kolenkiewicz also explained that his memorialization of these interactions further assists in recalling specific incidents in the event that he or the office is subjected to litigation or complaints relating to his duties. From his experience, it is not atypical for people who are dissatisfied in their interaction with law enforcement to provide an incomplete narrative of a particular incident when reporting complaints to police internal affairs or in litigation. Accordingly, Sgt. Kolenkiewicz created these memos in order to record a comprehensive and accurate set of facts in preparation for litigation or for a police internal affairs investigation.

15. Officer Torres' memo similarly documents her interaction with Ralph Cipriano in response to the first [Office] press conference attended by Mr. Cipriano. This instance was particularly noteworthy because Officer Torres had been providing security for DA Krasner since the start of his first term as District Attorney in 2018, and as part of her duties, she attended most [Office] press conferences and was familiar with many of the participants in attendance. As a first-time participant at the [Office] press conference, Mr. Cipriano did not appear to be associated with the press, which prompted her to notate any unusual conduct or interactions. The officer described her memo as serving a similar purpose as that which Sgt. Kolenkiewicz described: documentation required pursuant to her security responsibilities, and recorded in the event of potential litigation or internal affairs complaints. Officer Torres' memo is addressed to Sgt. Kolenkiewicz, who is her supervisor.

16. Accordingly, I determined that these memos were written as part of an ongoing noncriminal investigation and constitute factual work product.

The Office does not argue that the memos at issue on appeal were created pursuant to any specific statutory delegation of authority, but the Philadelphia Police Department are granted authority to safeguard and investigate affairs within the city by Section 5-201 of the City Charter.

Philadelphia Home Rule Charter section § 5-201. Notably, the two officers responsible for the memos at issue are members of the Philadelphia Police Department on assignment to the Office, and not employees of the Office itself. Here, Officer Torres' memo describes her observations and conduct at a press conference, while Sgt. Kolenkiewicz' memo includes observations of interactions with Mr. Cipriano over the course of several months.

Officer Torres' memo describes an incident wherein Mr. Cipriano was removed from a press conference, and Attorney Niemtzow attests that it serves as a "police working file," where Officer Torres recorded both her actions in removing Mr. Cipriano from the conference and in notating strange or suspicious actions Mr. Cipriano took prior to the removal. Niemtzow attestation ¶ 13, 15. As noted above, an incident report detailing an incident that does not result in an investigation may not be withheld under Section 708(b)(17) of the RTKL. See *Corpora v. City of Bethlehem*, OOR Dkt. AP 2015-2862, 2016 PA O.O.R.D. LEXIS 140 (finding that an incident report relating to a medical call was not exempt under Section 708(b)(17)); see also *Jewish Home of Eastern Pa. v. Pa. Dep't of Health*, OOR Dkt. AP 2014-0892, 2015 PA O.O.R.D. LEXIS 1813 (finding that records are not exempt under Section 708(b)(17) where they do not contain any investigatory material and are not investigative in nature). On appeal, the Office confirms that Sgt. Kolenkiewicz' memo describes a larger pattern of observations including Officer Torres' memo and actions at the press conference; however, the Office does not establish that these observations are in service of an "official probe" undertaken pursuant to any specific obligations. *Pa. Dep't of Health*, 4 A.3d at 810-11. Instead, the only specific official purpose the Office notes for the observations is that they may be relevant to later complaints or lawsuits. Niemtzow attestation ¶ 14, 15. This may be good practice for a security detail, but it is not part of any

investigation now. Therefore, the OOR is constrained to hold that the Office has not demonstrated that the memos are exempt under Section 708(b)(17) of the RTKL.

The Office argues further that the memos, which were created at least part in anticipation of potential future litigation, are subject to the “factual work product” privilege. As noted above, the attorney-work product privilege prohibits disclosure “of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. The Office argues that this privilege also encompasses the factual studies of experts retained by attorneys in the course of that work, citing to *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*. 91 A.3d 680 (Pa. 2014). In that case, a divided Pennsylvania Supreme Court determined that correspondence between an attorney and an engaged expert witness was generally not discoverable. *Id.* The Office reasons that because the memos were prepared in part to establish a factual record in expectation of potential litigation, they may be considered privileged.

The memos on appeal, however, are quite distinct from the communications between the engaged expert and attorney in *Barrick*; they are observations written down by the security detail and kept in a file. Nothing in the record indicates that they were prepared at the direction of the Office’s civil litigation unit, or contain expert testimony requested by any attorney thereof. Regardless of the Supreme Court’s expansive interpretation of Pa.R.C.P. 4003.3, it ruled only on the actual communications between attorney and expert, and not the expert’s own records, prepared without prior direction. *See also Carrier Corp. v. Workers’ Comp. Appeal Bd. (Haugh)*, 241 A.3d 692 (Pa. Commw. Ct. 2020) (unpublished). As the privilege is a statutory one, the OOR cannot find that the Pa.R.C.P. 4003.3, which exclusively addresses communications and work prepared by or for a party’s attorney, can apply to memos which the Office does not establish were

prepared by or for an attorney at all. *Maleski by Chronister v. Corp. Life Ins. Co.*, 163 Pa. Commw. 36, 641 A.2d 1, 5 (Pa. Cmwlth. 1994).⁵ Finally, the Office explains that there may be other reasons for exemption and defers to the OOR's analysis. As with all tribunals in Pennsylvania, the OOR is not empowered to raise an issue *sua sponte*, save for questions of jurisdiction or constitutional obligations. *See, e.g., Quigley v. Unemployment Comp. Bd. of Review*, 263 A.3d 574 (Pa. 2021) (explaining how a tribunal raising and resolving an issue on its own motion can deprive one or more parties of due process).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part, and dismissed as moot in part**, and the Office is required to provide the media contact list without redaction of geolocation data and the withheld memos from Sgt. Kolenkiewicz and Officer Torres within thirty days. 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 Philadelphia 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.⁶ This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: April 20, 2023

/s/ Jordan C. Davis
JORDAN DAVIS, ESQ.
SENIOR APPEALS OFFICER

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⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

Sent via email to: Paula Knudsen Burke, Esq.; Josh Niemtzow, Esq., AORO