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NO. 230502033

Appeal from the April 20, 2023 Final Determination of the
of the Pennsylvania Office of Open Records, entered at
No. AP 2022-2836.

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**BRIEF OF APPELLANT PHILADELPHIA DISTRICT ATTORNEY'S
OFFICE**

I. MATTER BEFORE THE COURT

The DAO appeals from the Final Determination of the Office of Open Records (OOR) which concluded – in part – that the memos pertaining to Ralph Cipriano’s conduct at DAO press conferences created by Sgt. Thomas Kolenkiewicz and P/O Agnes Torres, members of District Attorney Krasner’s security detail, are subject to disclosure under the RTKL. (OOR 111-116). Because the memos were created as part of the security detail’s official duties and constitute a “working file” documenting an individual’s unusual and suspicious behavior, they should receive protection under the noncriminal investigative records exemption, or alternatively, under the criminal investigative records exemption.

II. STATEMENT OF JURISDICTION

The Court of Common Pleas has jurisdiction under 42 Pa.C.S. § 933(a)(3), which grants courts of common pleas appellate jurisdiction over determinations of government agencies.

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

The standard of review is *de novo*; the scope of review is plenary. *E.g.*, *Bowling v. Office of Open Records*, 75 A.3d 453, 476–77 (Pa. 2013).

IV. STATEMENT OF QUESTIONS INVOLVED

1. Did the DAO properly withhold the memos authored by the District Attorney's security detail under 708(b)(17) of the RTKL, as records relating to a noncriminal investigation?

(Answered in the negative by the OOR Appeals Officer).

2. Are the security memos entitled to protection under Section 708(b)(16) of the RTKL, which exempts from disclosure records related to a criminal investigation?

(Not answered by the OOR Appeals Officer).

V. STATEMENT OF FACTS

On November 2, 2022, the DAO Open Records Officer received a three-part Right-to Know request from Paula Knudsen Burke of the Reporters Committee for Freedom of the Press. (OOR 75).¹ Ms. Burke's request sought:

- (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.

¹ Record citations are to the unnumbered certified record filed by the OOR on August 25, 2023.

- (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.

(*Id.*).

On December 9, 2022, following a 30-day extension, the DAO issued a final response, granting in part and denying in part Ms. Burke’s request. (OOR 77-84). Specifically, the DAO provided (1) the DAO’s current media distribution list; (2) a calendar invitation for a zoom call between DA Krasner and the Inquirer, and (3) emails from Ralph Cipriano discussing press access concerns. (*Id.* at 79-84). However, the DAO explained that previous versions of the media distribution list did not exist in its possession/were irretrievable and that certain records responsive to item number three were privileged and/or exempt from disclosure under the work-product privilege and Section 708(b)(17) of the RTKL (exempting records of an agency relating to a non-criminal investigation). The DAO also redacted portions of the current media distribution list to remove IP addresses, geographical identification, and personal email addresses, pursuant to Section 708(b)(6) of the RTKL and the state constitutional right to privacy.

On December 22, 2022, Ms. Burke filed an appeal with the OOR challenging the DAO’s determinations. (OOR 8-10). While on appeal, the DAO identified three additional emails that were potentially responsive to item three of the request. (OOR 72, 88-89). The DAO provided two of them, but withheld one that it explained

contained a privileged attorney-client communication. The DAO submitted a position statement where it argued that requester's appeal should be dismissed because the DAO made a good faith search for responsive records, the DAO provided responsive records, and properly withheld privileged records. (OOR 66-73). Along with its position statement, the DAO provided attestations from Josh Niemtzow, the undersigned DAO Open Records Officer (OOR 86-89) and Jane Roh, the DAO Communications Director. (OOR 91-93).

Relevant to the instant appeal, the Niemtzow Attestation described the security memos:

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.

(OOR 88-89).

On April 20, 2023, the OOR issued its final determination. (OOR 99-117). It concluded that the DAO had demonstrated that it does not possess prior versions of the media distribution list, that no other responsive Zoom records exist, and that the one undisclosed email was properly withheld as attorney-client privileged. However, it determined that the DAO had not demonstrated that the geolocation data in the distribution list was exempt and that the DAO could not withhold the security detail memos under either Section 708(b)(17) of the RTKL or the work-product privilege.

It therefore ordered the DAO to turn over those two pieces of information. (OOR 116). The DAO subsequently provided requester with the geolocation data, but filed a notice of appeal with respect to the OOR's determination on the security memos. This appeal followed.

VI. ARGUMENT

A. The OOR erred in concluding that the security memos authored by members of DA Krasner's security detail did not meet the exemption for non-criminal investigative records.

The RTKL exempts from disclosure “a record of an agency relating to a non-criminal investigation.” 65. P.S. § 67.708(b)(17). It provides an illustrative list of categories of records that fall within the exemption. *See* § (b)(17)(i)-(vi). One example are “investigative materials, notes, correspondence and reports.” *Id.* § (b)(ii). While the statute does not define “noncriminal” or “investigation” the Commonwealth Court has held that a noncriminal investigation is “one not intended to consider prosecution and, in this context, ‘investigation’ means ‘a systematic or searching inquiry, a detailed examination, or an official probe.’” *Cal. Borough v. Rothey*, 185 A.3d 456, 465 (Pa. Cmwlth. 2018). Further, the inquiry must be “conducted as part of an agency's official duties.” *Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Cmwlth. 2010). The DAO submits that the aforementioned security memos are “investigative materials” created by DA Krasner's security detail in furtherance of its official duties. These records fall

squarably within the exemption’s plain language.

Before noting that it felt “constrained” to reject the DAO’s claim to the exemption (OOR 115), the OOR highlighted that the withheld records must relate to a “systematic or searching inquiry, a detailed examination, or an official probe”. (OOR 114). It reasoned that in this case, there existed no official probe, and likened the memos to incident reports that detail an incident but do not result in any follow-up investigation. (*Id.*). However, the OOR overstates the formality required to constitute an “investigation” under the RTKL. In *In re Appeal of Johnson*, the Commonwealth Court held that an incident report generated in response to a 9-1-1 call is a record that *per se* fits the exemption under Section 708(b)(17). 254 A.3d 796, 802 (Pa. Cmwlth. 2021) (holding that an incident report pertaining to a wellness check related to a non-criminal investigation). *See also Taylor v. Pa. State Police*, 623 C.D. 2019, 2020 WL 119593, at *5-6 (Pa. Cmwlth. Jan. 10, 2020) (denying request for state trooper’s report on 911 hang-up-call, where police arrived and concluded that no one needed emergency services). Here, both memos document behavior that members of the security detail are instructed to record when they encounter suspicious or unusual conduct. (OOR 88 ¶ 13). And in the case of the Kolenkiewicz memo, it documents an ongoing course of conduct.

The OOR also cited its decision in another matter for the proposition that records that relate to an official probe but contain no investigative material receive

no protection. *See 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 court filings, external letters, adjudicatory decisions, and public news articles, related to alleged discrimination at a nursing home were not investigative materials). But those records are completely different than the records at issue here. The withheld memos are not public court filings or external letters, but rather reflect personal investigatory observations.

The DAO also explained that the security detail's documentation of their unusual or confrontational interactions with members of the public serves the added function of capturing a complete accounting of events that it anticipates could become the subject of police internal affairs investigations. *See Black v. Pa. State Police*, 676 C.D. 2016, 2016 WL 6900781 (Pa. Cmwlth. Nov. 23, 2016)(police internal affairs investigations qualify as noncriminal investigations under the RTKL). This concern is not theoretical. During the pendency of this Right-to-Know challenge, Sgt. Kolenkiewicz was subjected to an internal affairs investigation from a "citizen journalist" who complained about mistreatment at a City press conference. There, the memos authored by Sgt. Kolenkiewicz, which were prepared for a similar purpose, proved useful in defending against the individual's unfounded allegations. Similarly, Mr. Cipriano, the subject of the memos at bar, has at times claimed mistreatment by DA Krasner's security detail. *See, e.g., Ralph Cipriano, Krasner*

Orders Reporter Evicted From Press Conference, BIGTRIAL.NET (Aug. 8, 2022), <https://www.bigtrial.net/2022/08/krasner-orders-reporter-evicted-from.html> (claiming that Sgt. Kolenkiewicz “grabbed [his] arm” while escorting him out of a DAO press conference).

In sum, the DAO suggests that the OOR’s interpretation of the exemption is unjustifiably narrow. It seems self-evident that security personnel must be able to document their suspicious interactions and share these findings internally without fear of public disclosure. Given the importance of the task of protecting public officials, such memos are at least as deserving of the protection that reports on one-off 9-1-1 calls receive. A ruling to the contrary could chill the free flow of information pertaining to an important security function.

B. In the alternative, the security memos should receive protection under Section 708(b)(16) of the RTKL, which exempts records related to a criminal investigation.²

Similarly, the Right-to-Know Law exempts from public disclosure records “relating to or resulting in a criminal investigation.” 65. P.S. § 67.708(b)(16). It

² See *Levy v. Senate of Pa.*, 65 A.3d 361, 383 (Pa. 2013) (holding that under the RTKL an agency may raise additional reasons for denial not stated in its initial response for the first time on appeal). See also *Wyo. Borough v. Boyer*, 715 CD 2021, 2023 WL 4770466, at *5 n.7 (Pa. Cmwlth. July 27, 2023)(noting in response to a claim that the agency waived an argument not raised at the OOR stage, that “[o]ur Supreme Court has made it clear Common Pleas is the ultimate fact-finder in these cases.”).

contains the same illustrative list which includes “investigative materials” and “notes.” *Id.* § (b)(16)(ii). After follow-up communication with Sgt. Kolenkiewicz regarding this appeal, the undersigned came to understand that the memos served criminal investigatory purposes as well. As was explained, when dealing with an unruly individual at a press conference, there is always a concern—however remote—that anger could precipitate criminal conduct, and documentation of behavior that preceded the unlawful conduct could serve useful in providing a fuller narrative should criminal charges result.

In presiding over a Right-to-Know appeal, the Court of Common Pleas is empowered to supplement the record on appeal through evidence presented at a hearing. *See Bowling v. Office of Open Records*, 90 A.2d 813, 822 (Pa. Cmwlth. 2010). At the hearing scheduled for December 14, 2023, the DAO would like to present the testimony of Sgt. Kolenkiewicz, to further expand on the circumstances surrounding the creation of these memos.

VII. REQUESTED RELIEF

Accordingly, the DAO respectfully requests that this Court reverse the order of the OOR directing the disclosure of the security memos, and affirm all other aspects of the OOR’s Final Determination.

Respectfully submitted,

/s/ Josh Niemtzow

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COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

CIVIL DIVISION

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I, Joshua B. Niemtzow, hereby certify that, on October 2, 2023, a true and correct copy of the foregoing Brief was filed on the Philadelphia Courts E-Filing system and served on all parties of record.

Signature: /s/ Joshua B. Niemtzow
Joshua B. Niemtzow
Assistant District Attorney