

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

In re Appeal of PHILADELPHIA DISTRICT
ATTORNEY'S OFFICE,

Appellant

MAY TERM 2023
NO. 02033

From the Decision of the
PENNSYLVANIA OFFICE OF OPEN RECORDS,

Agency Appellee

SPECIAL DOCKET PROGRAM

RE:

OOR Docket No. AP 2022-2836:

PAULA KNUDSON BURKE,

Requestor/Appellee

v.

PHILADELPHIA DISTRICT ATTORNEY'S
OFFICE,

Respondent/Appellant

2023 DEC 28 AM 11:37

ORDER

AND NOW, this 28th day of December 2023, upon consideration of the above-captioned statutory appeal and associated pleadings filed on behalf of the Appellant, the Philadelphia District Attorney's Office, the responses thereto, the oral arguments and evidence presented during the hearing that had been conducted on December 14, 2023, it is hereby **ORDERED** and **DECREED** that the Appeal filed on behalf of the Philadelphia District Attorneys' Office partially challenging the April 20, 2023 Final Determination of the Pennsylvania Office of Open Records in the matter docketed under OOR AP-2022-2836, Paula Knudson Burke v. Philadelphia District Attorney's Office, pursuant sections of the Pennsylvania Right to Know Law codified in 65 P.S. Section 67.101-67.3104 is **GRANTED IN PART** as follows:

ORDRF-In Re: Appeal Of Phila. District Attorney'S Office



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The Pennsylvania Office of Open Records' Final Determination requiring Appellant to disclose the two contested investigatory memoranda that has been maintained by City of Philadelphia District Attorneys' Office is **REVERSED** and **VACATED** because the two requested memoranda are concretely related to a noncriminal investigation and are exempt from disclosure pursuant to the Pennsylvania Right to Know Law, Section 708(b)(17).

It is further **ORDERED** and **DECREED** that all other non-conflicting directives that had been issued by the Pennsylvania Office of Open Records are **AFFIRMED**.

MEMORANDUM

The non-conflicting legal conclusions and supporting factual analysis within the Certified Record that had been on behalf of the Pennsylvania Office of Open Records ("OOR") are largely incorporated into this Court's findings and rationale. This Court's rationale is summarized with reservation of supplementation as follows:

A. FACTUAL AND PROCEDURAL HISTORY

The genesis of this appeal lies within the November 2, 2022 request for records maintained by the Philadelphia District Attorney's Office ("DAO"), submitted pursuant Pennsylvania Right to Know Law, ("RTKL"), 65 P.S. Section 67.101 *et seq.* by Requester, Paula Knudsen Burke, Esquire, as counsel for the Reporters Committee for Freedom of the Press. The stated reason for the request was to evaluate the allegations of the DAO's "interference of the newsgathering work of a Philadelphia-based journalist Ralph Cipriano." The Request sought records as follows:

1. The "entire media distribution list" utilized by the (Office) through MailChimp. Records sought are the distribution lists for 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 hanged/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 from July 1, 2022 through November 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 January 1, 2022 through November 1, 2022.

As aptly recited by the OOR within the Factual Findings section of filed Certified Record:

"On December 9, 2022, following a thirty-day extension, ...the Office ("DAO") 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...and the state constitutional right to privacy. The Office also provided two emails and an as single Zoom invitation receipt, but argues that any additional responsive records are subject to the attorney-work product doctrine or relate to a noncriminal investigation...

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...

On January 19, 2023, the Requester submitted a position statement that the office had not demonstrated that other responsive records-particularly prior instances of the media distribution list-dud not exist, that "geographic 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 Niemtow, Esquire 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.”

See Certified Record OOR Factual Background pp. 1-3.

Following its review, the OOR submitted its Final Determinations on April 20, 2023, which included its partial grant of Requester’s appeal of contested memoranda that had been authored by two Philadelphia Police Officers, Sergeant Thomas Kolenkiewicz and Officer Agnes Torres, during their assigned detail as security or protection officers for the Philadelphia District Attorney Larry Krasner. The requested memoranda summarily recorded the Officers’ respective observations and interactions with news reporter Ralph Cipriano on different dates. Upon review of the attestations, the OOR determined that the DAO had not sufficiently demonstrated that the subject memoranda had been exempt from disclosure pursuant to RTKL Section 708(b)(17). The OOR directed the DAO to provide the withheld memoranda within thirty (30) days of Order entry.

The DAO appealed the OOR’s Final Determination on May 19, 2023 to the Civil Division of the Court of Common Pleas for the First Judicial District of Pennsylvania. Following issuance of Case Management and Scheduling Orders, the Certified Record was submitted, and the respective briefs were duly filed on behalf of the respective parties. Following review of the record, on December 14, 2023 this Court, sitting as the presiding jurist in Motions Civil Division, heard oral arguments, and considered the sworn testimony of Sergeant Thomas Kolenkiewicz and conducted *in camera* review of the two contested memoranda. The matter was then held under advisement.

B. DISCUSSION

It is undisputed that this Court’s standard of review of the instant RTKL agency appeal is *de novo* and the scope is plenary. The trial court is statutorily imbued with authority to broaden

the evidentiary record. “(U)nder the RTKL, the Chapter 13 courts¹ are the ultimate finders of fact and they are to conduct full *de novo* reviews of appeals from decisions made by RTKL appeals officers, allowing for adoption of the appeals officers’ factual findings and legal conclusions when appropriate.” *Bowling v Office of Open Records*, 75 A.3d 453, 474 (Pa. 2013) “A *de novo* standard of review permits the court to determine the case anew, including matters pertaining to testimony and other evidence.” *Bowling*, 75 A.3d at 466 n.4 (emphasis in original) citing *Commonwealth v. Emerick*, 96 A.2d 370, 373-74 (Pa.1953).

The sole issue that has been presented is whether the DAO has sufficiently demonstrated that the contested memoranda are exempt from public disclosure pursuant to the RTKL. After contextually considering the entire record that has been supplemented with the testimony of Philadelphia Police Sergeant Thomas Kolenkiewicz and by the *in camera* review of the challenged memoranda, this trial court determined that the DAO has met their required burden as the producing agency by sufficiently demonstrating that RTKL 708(b)(17) provides for the exemption of public disclosure of the requested memoranda.

Notably, the OOR’s analysis relative to exemption status of the memoranda was well-reasoned. However, the OOR did not hold any evidentiary hearing during its review process and therefore did not assess salient facts derived from the live testimony of Philadelphia Police Sergeant Thomas Kolenkiewicz or from *in camera* review of the documents at issue. Review of this supplemental evidence that had been admitted at the hearing held on December 14, 2023 altered the outcome. Because this the Judgment and Order is confined to this specific instance, no future prediction of any general point of view should be gleaned from this Court’s resulting ruling.

¹ “Chapter 13 courts” references the Courts of Common Pleas that are operating under Chapter 13 of the RTKL, 65 P.S. Sections 1301-1310.

Salient guiding principles were succinctly recited in the majority's analysis of RTKL as authored by the Honorable Kevin Dougherty, Justice of the Pennsylvania Supreme Court in *Pennsylvania State Police v. Grove*, 161 A.3d 877 (Pa. 2017):

"The RTKL requires Commonwealth agencies to provide access to public records upon request. 65 P.S. § 67.301 ("A Commonwealth agency shall provide public records in accordance with this act.") Section 102 of the RTKL defines a public record" as: "A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (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. A "record" is further defined under the RTKL as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, reviewed or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document...

The RTKL provides, "(t)he burden of providing that a record of a Commonwealth agency...is exempt from public access shall be on the Commonwealth Agency...receiving a request by the by the preponderance of the evidence." 65 P.S. § 67.708(a)(1).

Grove, Id. at 892-893.

Specifically, Section 708(b)(17) of the RTKL allows agencies to withhold records relating to a noncriminal investigation, including:

- (i) Complaints submitted to an agency.
- (ii) Investigative materials, notes, correspondence and reports.
- (iii) A record that includes the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L.1559, No.169), known as the Whistleblower Law.
- (iv) A record that includes information made confidential by law.
- (v) Work papers underlying an audit.
- (vi) A record that, if disclosed, would do any of the following:
 - (A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an

agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

(B) Deprive a person of the right to an impartial adjudication.

(C) Constitute an unwarranted invasion of privacy.

(D) Hinder an agency's ability to secure an administrative or civil sanction.

(E) Endanger the life or physical safety of an individual.

RTKL Section 708(b)(17).

Since the RTKL does not define the central phrase "noncriminal investigation" as utilized in Section 708(b)(17), the Pennsylvania Supreme Court in *Grove* provides further direction. In *Grove*, the Court noted that the RTKL similarly did not define the meaning of "criminal investigation" as employed within Section 708(b)(16) and opined:

"the plain meaning of a "criminal investigation" refers to an official inquiry into a possible crime. See ., <https://www.meiamwebster.com/dictionary/criminal> (last visited Jan. 17, 2017)("relating to crime or to the prosecution of suspects in a crime"); <https://www.merriamwebster.com/dictionary/investigation> (last visited Jan. 17, 2017),("to investigate" is "to observe or study by close examination and systematic inquiry," "to make a systematic examination;" or "to conduct an official inquiry")."

Id. at 892-893.

Extrapolating from this appellate methodology, "noncriminal investigation" as utilized in RTKL Section 708(b)(17) would be plainly defined as an observation or study by close examination or systematic inquiry into a matter that is not related to a crime or to the prosecution of suspects in a crime. This Court has applied this definition to the contested memoranda.

All parties have acknowledged that the requested memoranda had been prepared and authored by two Philadelphia Police Officers, Sergeant Thomas Kolenkiewicz and Officer Agnes Torres, during their assigned detail as security or protection officers for the Philadelphia District Attorney Larry Krasner. The memoranda contained the authorized police officers' respective

notations that had recorded their close-time-observations or interactions with journalist Ralph Cipriano on certain dates.

Sergeant Thomas Kolenkiewicz testified that the genesis for the memoranda preparation was a raised concern by Officer Torres. Officer Torres had reported verbally to her supervising officer, Sergeant Kolenkiewicz, certain observations surrounding an unusual encounter with the subject news reporter at a press conference held by District Attorney during their collective protection or security duties. Sharing the Officer's reported concerns, Sergeant Kolenkiewicz directed Officer Torres to memorialize her accounts and he decided to do the same.

From that point forward, Sergeant Kolenkiewicz closely and systematically observed, studied, and examined the subject journalist's conduct particularly during press conferences conducted by the District Attorney of Philadelphia. The memoranda that Sergeant Kolenkiewicz had prepared documented his investigative observations that were conducted consistently with official duties.

The cumulative evidence established that the requested memoranda stemmed from the ongoing investigation that had been initiated and continued due to legitimate concern for the security of a public official. Sergeant Kolenkiewicz's sworn testimony was credible, consistent, and convincing before this Court. The *in camera* review of the contested memoranda corroborated the Sergeant's information. As the Pennsylvania Supreme Court has held,

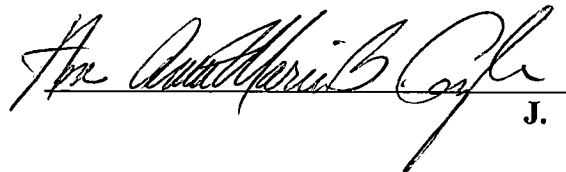
(W)hile the overriding purpose of the RTKL may relate to ensuring expanded and expedited transparency in our government, the RTKL, nonetheless, protects from disclosure documents subject to a privilege, exempt from disclosure under another federal or state law, or subject to any of the exceptions expressly and painstakingly listed in Section 708(b). In these provisions, **we recognize a legislative intent to shield numerous categories and subcategories of documents from disclosure in order to protect, inter alia, the Commonwealth's security interests and individuals' privacy rights.**

Levy v. Senate of Pa., 65 A.3d 361, 381-82 (Pa.2013) (emphasis added), citing 65 P.S. Sections 67.102, 67.305, 67.708(b). Upon evaluation of the cumulative proffered data, this Court deemed that the subject memoranda qualified as exempt “noncriminal investigatory materials” pursuant to the RTKL 7089b0(17).

C. CONCLUSION

The DAO sufficiently substantiated its assertion, that the requested materials that had been authored by Sergeant Kolenkiewicz and Officer Torres, had been exempted from public disclosure as investigative materials pursuant to the RTKL 708(b0 (17).

BY THE COURT:


J.

