

JIM LOCKWOOD and THE SCRANTON
TIMES, L.P. d/b/a THE SCRANTON
TIMES-TRIBUNE
149 Penn Avenue
Scranton, Pennsylvania 18503

IN THE COURT OF COMMON
PLEAS OF LACKAWANNA
COUNTY

RECEIVED

AUG 13 2019

OFFICE OF OPEN RECORDS

2019 JUN 17 P 2:40
CLERKS OF JUDICIAL
RECORDS CIVIL DIVISION

PLAINTIFFS

CIVIL ACTION- MANDAMUS

v.

NANCY KRAKE, in her official capacity as
the CITY OF SCRANTON OPEN RECORDS
OFFICER
340 N. Washington Avenue
Scranton, Pennsylvania 18503

NO.: 2019-CV- 3668

DEFENDANT

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER. THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

NORTH PENN LEGAL SERVICES
33 NORTH MAIN STREET, SUITE 200
PITTSTON, PA 18640
(570) 299-4100 or
(855) 236-6405

PA LAWYER REFERRAL SERVICE
P.O. BOX 186
100 SOUTH STREET
HARRISBURG, PA 17108
Pa Residents 1-800-692-7375
Out of State 1-717-238-6807

MAURI B. KELLY
LACKAWANNA COUNTY

JIM LOCKWOOD and THE SCRANTON
TIMES, L.P. d/b/a THE SCRANTON
TIMES-TRIBUNE
149 Penn Avenue
Scranton, Pennsylvania 18503

IN THE COURT OF COMMON
PLEAS OF LACKAWANNA
COUNTY

2019 JUN 17 P 2:46
CLERKS OF JUDICIAL
RECORDS CIVIL DIVISION

PLAINTIFFS

CIVIL ACTION- MANDAMUS

v.

NANCY KRAKE, in her official capacity as
the CITY OF SCRANTON OPEN RECORDS
OFFICER
340 N. Washington Avenue
Scranton, Pennsylvania 18503

NO.: 2019-CV- 3668

DEFENDANT

COMPLAINT IN MANDAMUS

And now come the Plaintiffs, Jim Lockwood and The Scranton Times, L.P. d/b/a The Scranton Times-Tribune, by and through their counsel, Haggerty Hinton & Cosgrove, LLP, and file this Complaint in Mandamus against the Defendant pursuant to the Pennsylvania Rules of Civil Procedure § 1091 et. seq. and aver in support thereof as follows:

1. The Plaintiff, Jim Lockwood, is a reporter for the Plaintiff, The Scranton Times, L.P. d/b/a The Scranton Times-Tribune, a newspaper of general circulation with a principal place of business located at 149 Penn Avenue, Scranton, Pennsylvania 18503.
2. The Defendant, Nancy Krake, is employed by the City of Scranton and serves as the City of Scranton Open Records Officer with a business address at the City Hall Building at 340 N. Washington Avenue, Scranton, Pennsylvania 18503.
3. On January 11, 2019, the Plaintiff, Jim Lockwood, submitted a Right-To-Know Law Request

Form to the Defendant, Nancy Krake, the City of Scranton Open Records Officer, requesting "video of all surveillance cameras in Scranton City Hall on Jan. 9, 2019, for the duration of that day, during normal business hours." (Right-To-Know Law Request Form attached hereto and incorporated herein as Exhibit "A").

4. By correspondence dated January 22, 2019, the Defendant, Nancy Krake, the City of Scranton Open Records Officer, untimely replied to the Plaintiff, Jim Lockwood, that his request was extensive in nature, was under review at that time, and that the City expected to respond within the next thirty (30) days. (Correspondence dated January 22, 2019 attached hereto and incorporated herein as Exhibit "B").

5. The City Solicitor, Jessica L. Eskra, Esquire, untimely and incorrectly responded by email correspondence dated February 22, 2019 to the Plaintiff, Jim Lockwood, that his request for "All search warrants and/or subpoenas executed at Scranton City Hall on January 9, 2019" was denied and cited the criminal investigation exemption of the PA Right-To-Know Law (RTKL), 65 P.S. § 67.708(b)(16)(ii). (Email correspondence dated February 22, 2019 attached hereto and incorporated herein as Exhibit "C").

6. The Plaintiff, Jim Lockwood, subsequently timely filed an appeal to the Pennsylvania Office of Open Records (OOR) on February 28, 2019 contending that the criminal investigation exemption under the RTKL was inapplicable to his request. (Appeal correspondence dated February 28, 2019 attached hereto and incorporated herein as Exhibit "D").

7. After the OOR invited both parties to supplement the record (which neither did), and directed the City of Scranton to notify any third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c), the OOR Appeals Officer, Joshua T. Young, handed down his Final

Determination on March 25, 2019. (Final Determination dated March 25, 2019 attached hereto and incorporated herein as Exhibit "E").

8. The OOR found that the requested video footage of City Hall was not on its face a criminal investigative record and that the City of Scranton failed to meet the threshold of proving that the video footage relates to a criminal investigation conducted by the City; and therefore the City had not met its burden of proof under 65 P.S. § 67.708(a)(1) and the appeal was granted, and the City was required to provide all responsive records within thirty days.

9. A Petition for Reconsideration dated April 10, 2019 filed by the City of Scranton with the OOR was denied by the OOR on April 24, 2019. (Petition for Reconsideration dated April 10, 2019 and the OOR Denial of the Reconsideration dated April 24, 2019 are attached hereto and incorporated herein as Exhibits "F" and "G" respectively).

10. The City of Scranton did not file an appeal from the OOR Final Determination to the Court of Common Pleas pursuant to 65 P.S. § 67.1302(a), and has failed to produce the responsive records to the Plaintiffs as of the present date.

11. "The writ of mandamus exists to compel official performance of a ministerial act or mandatory duty, as opposed to a discretionary one, and may issue if the petitioner has a clear legal right, the responding public official has a corresponding duty, and no other adequate and appropriate remedy at law exists." Ledcke v. County of Lackawanna, 28 Pa. D. & C. 5th 34, 2013 WL 504447 (2013).

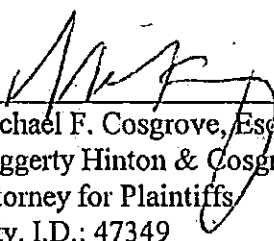
12. The Plaintiffs have a clear legal right to the requested video footage and the Defendant has a mandatory statutory obligation to produce the requested video footage as the OOR issued a final determination and there has been no appeal filed.

13. The Plaintiffs lack an available legal remedy at law.

Wherefore, Plaintiffs, Jim Lockwood and The Scranton Times, L.P. d/b/a The Scranton Times-Tribune, respectfully request this Honorable Court:

- a.) issue a Writ of Mandamus ordering the Defendant, Nancy Krake, in her official capacity as the City of Scranton Open Records Officer, provide to the Plaintiffs all of the requested video footage;
- b.) award attorney fees and costs; and
- c.) Grant such other relief as is just and appropriate under the circumstances.

Respectfully submitted,



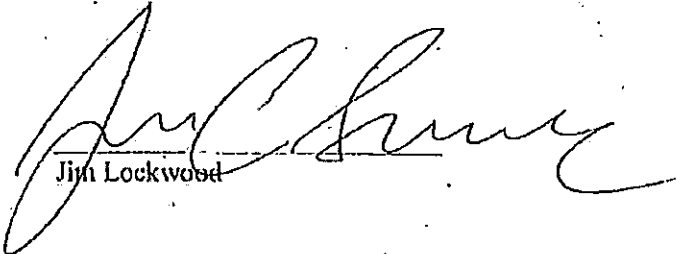
Michael F. Cosgrove, Esquire
Haggerty Hinton & Cosgrove, LLP
Attorney for Plaintiffs
Atty. I.D.: 47349
203 Franklin Avenue
Scranton, PA 18503
(570) 344-9845
Fax : (570) 343-9731
mikecosgrove@haggertylaw.net

VERIFICATION

I, Jim Lockwood, Plaintiff, verify that the facts contained in the Complaint in Mandamus are true and correct to the best of my knowledge, information and belief. I understand that any false statements therein may be subject to the penalties of 18 Pa. C.S.A. §4904, relating to unsworn falsifications to authorities.

Date:

6-14-19


Jim Lockwood



Jim Lockwood <jlockwood@timeshamrock.com>

RTKL request for video

1 message

Jim Lockwood <jlockwood@timeshamrock.com>
To: Nancy Krake <nkrake@scrantonpa.gov>

Fri, Jan 11, 2019 at 4:30 PM

RIGHT-TO-KNOW LAW REQUEST FORM

DATE REQUESTED: Jan. 11, 2019

REQUEST SUBMITTED BY: E-MAIL

NAME OF REQUESTOR : Jim Lockwood

STREET ADDRESS: % Scranton Times Tribune, 149 Penn Avenue

CITY/STATE/COUNTY (Required): Scranton, PA 18503, Lackawanna County

TELEPHONE (Optional): W-570-348-9100, ext. 5185; C-570-309-7084

RECORDS REQUESTED: video of all surveillance cameras in Scranton City Hall on Jan. 9, 2019, for the duration of that day, during normal business hours

DO YOU WANT COPIES? YES: I prefer to receive the information in digital format, such as in a pdf attachment emailed to me. Otherwise, I would want copies, but if the cost would be more than \$20, please call me first, as I may choose to inspect them in person and scan, copy, or photograph them myself on site.

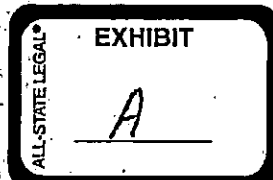
DO YOU WANT TO INSPECT THE RECORDS? possibly, see above

DO YOU WANT CERTIFIED COPIES OF RECORDS? NO

RIGHT TO KNOW OFFICER:

DATE RECEIVED BY THE AGENCY:

AGENCY FIVE (5)-DAY RESPONSE DUE:





DEPARTMENT OF BUSINESS ADMINISTRATION

CITY HALL • 340 NORTH WASHINGTON AVENUE • SCRANTON, PENNSYLVANIA 18503 • PHONE: 570-348-4118 • FAX: 570-348-4225

January 22, 2019

Jim Lockwood
c/o Scranton Times Tribune
149 Penn Ave.
Scranton, PA 18503

RE: Right-to-Know Request

Dear Sir/Madam:

I am in receipt of your January 14, 2019 correspondence requesting the following:

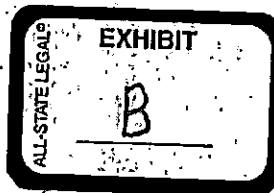
- Video of all surveillance cameras in Scranton City Hall on Jan. 9, 2019, for the duration of that day, during normal business hours.

Due to the extensive nature of your request, it is under review at this time. The City expects to respond within the next thirty (30) days. Additionally, please be advised that the cost for copies is twenty-five cents (\$0.25) per page.

Very truly yours,

Nancy Krake
Open Records Officer

RTK 2540





DEPARTMENT OF LAW

PENNSYLVANIA CITY HALL • 240 NORTH WASHINGTON AVENUE • SCRANTON, PENNSYLVANIA 18503 • PHONE: 570-348-4105 • FAX: 570-348-4283

February 22, 2019

Via Email Only

Jim Lockwood
c/o The Times-Tribune
149 Penn Ave.
Scranton, PA 18503

RE: RTK #2540, Surveillance Cameras – January 9, 2019

Dear Jim:

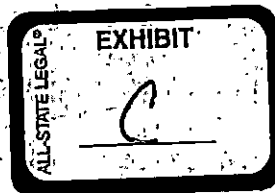
Pursuant to your Right to Know Request of January 11, 2019, requesting “All search warrants and/or subpoenas executed at Scranton City Hall on January 9, 2019”, please see the following exception under the Right to Know Law, 65 Pa C.S.A. §67.708 (b)(16) et seq., specifically subsection (ii) pertaining to, “Investigative materials, notes, correspondence, videos, and reports.” As such, your request is denied.

Thank you for your time and attention in this matter.

Very truly yours,

Jessica L. Eskra, Esquire
City Solicitor

JLE/mpd



To: The Pennsylvania Office of Open Records
From: Jim Lockwood, Staff Writer/Reporter for The Times-Tribune newspaper in Scranton, Pa.

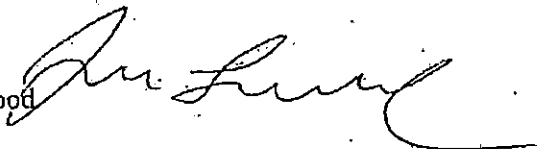
Feb. 28, 2019

Please accept the following basis for appeal to the Pennsylvania Office of Open Records of the city of Scranton's Feb. 22, 2019 denial of a RTKL request submitted Jan. 11, 2019 by Jim Lockwood, Staff Writer/Reporter for The Times-Tribune.

To invoke Section 708(b)(16), an agency must have both the authority to investigate a criminal violation and the records at issue must have been created or obtained for the purpose of the investigation. See Pa. State Police v. Grove, 161 A.3d 877, 893 (Pa. 2017); Pa. State Police v. Kim, 150 A.3d 155, 159 (Pa. Commw. Ct. 2016). Here, the city has not offered evidence to show that the records requested in this case were made in connection with any criminal investigation being conducted by the city. The city has summarily cited exemptions to the RTKL without further explanation or evidence presented to meet the burden of proof imposed by law. Moreover, the city has not made any showing that it is empowered to or actually conducting a criminal investigation that resulted in the creation of the records requested in this case or the city taking affirmative action to obtain them. On the contrary, the city, as the subject of a warrant and/or subpoena, was provided a copy pursuant to rules of court, not because the city is conducting a criminal investigation. The city cannot rely on the criminal investigation exemption because it is not conducting one, as evidenced by the fact that the warrants and/or subpoenas were issued by a court on behalf of an outside criminal investigating authority *against* the city itself. Agencies cannot rely on the criminal investigation exemption when it is not actually conducting a criminal investigation itself.

Thank you,

Jim Lockwood





pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

JIM LOCKWOOD AND THE
SCRANTON TIMES-TRIBUNE,
Requester

v.

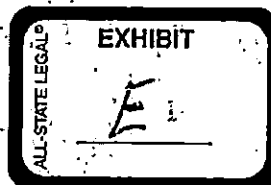
Docket No: AP 2019-0279

CITY OF SCRANTON,
Respondent

On January 14, 2019, Jim Lockwood, a reporter for the Scranton Times-Tribune (collectively, the "Requester"); submitted a request ("Request") to the City of Scranton ("City") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking "video of all surveillance cameras in Scranton City Hall on Jan. 9, 2019; for the duration of that day, during normal business hours."

On January 22, 2019, the City invoked a thirty-day extension of time to respond to the Request, 65 P.S. § 67.902(b); however, the City did not issue a timely final response, and the Request was deemed denied on February 21, 2019. 65 P.S. § 67.902(b)(2). On February 22, 2019, the City issued an untimely response, arguing that the requested video footage is exempt from disclosure because it relates to a criminal investigation, 65 P.S. § 67.708(b)(16)(ii).

On February 28, 2019, the Requester filed an appeal with the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure. The OOR invited both parties



to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c). Neither party submitted additional information.

In its response of February 22, 2019, the City argues that the video footage is exempt from disclosure under Section 708(b)(16) of the RTKL. 65 P.S. § 67.708(b)(16). A local agency claiming that records are exempt under Section 708(b)(16) does not automatically divest the OOR of jurisdiction over an appeal.

Section 503(d) of the RTKL creates a two-step analysis for determining when cases should be heard by the OOR and when they should be heard by the appeals officer appointed by a District Attorney. 65 P.S. § 67.503(d). First, jurisdiction is properly transferred from the OOR to the District Attorney's Office when an appeal on its face involves records that relate to a criminal investigation. (e.g., search warrants, witness statements, etc.). See *Porter v. Allegheny County Sheriff's Office*, OOR Dkt. AP 2014-1910, 2014 PA O.O.R.D. LEXIS 1444 (transferring an appeal to the District Attorney where the request for a search warrant was on its face related to a criminal investigation).

Second, when it is unclear whether the requested records relate to a criminal investigation, the local agency must provide some evidence showing how the records relate to a specific criminal investigation. While a very low threshold for transferring a case is needed, an agency must provide more than a conclusory affidavit that merely repeats the language of Sections 503(d) and 708(b)(16). See *Bush v. Westtown-East Goshen Police Dep't*, OOR Dkt. AP 2016-1869, 2016 PA O.O.R.D. LEXIS 1708 (Agency submitted affidavit demonstrating how the requested records related to a specific criminal investigation); *Burgess v. Willistown Twp. Police Dep't*, OOR Dkt. AP 2013-1511, 2013 PA O.O.R.D. LEXIS 868 (holding that where a local agency made a

preliminary showing that records relate to a criminal investigation, the OOR lacked jurisdiction to consider the merits of the appeal).

In this case, the requested video footage of City Hall is not, on its face, a criminal investigative record. Additionally, the City has failed to submit evidence demonstrating how the records are related to any specific criminal investigation. The City has, therefore, failed to meet the threshold of proving that the video footage relates to a criminal investigation conducted by the City, and the OOR retains jurisdiction over this appeal. Furthermore, because the City has neither raised nor submitted evidence supporting any other reason for withholding the video footage, the City has not met its burden of proof under the RTKL. 65 P.S. § 67.708(a)(1).

For the foregoing reasons, the appeal is granted, and the City is required to provide all responsive records 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 or petition for review to the Lackawanna 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 according to 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.¹ This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: 25 March 2019

/s/ Joshua T. Young

JOSHUA T. YOUNG
APPEALS OFFICER

Sent to: . Jim Lockwood (via email only);
 Jessica Eskra, Esq. (via email only);
 Nancy Krake, AORO (via email only)



DEPARTMENT OF LAW

PENNSYLVANIA CITY HALL • 310 NORTH WASHINGTON AVENUE • SCRANTON, PENNSYLVANIA 18503 • PHONE: 570-348-4105 • FAX: 570-348-4263

April 10, 2019

Joshua Young, Esquire
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101
joshiyoung@pa.gov

RE: Docket #AP 2019-0297
Petition for Reconsideration

Dear Attorney Young:

I am in receipt of the Final Determination for the above Docket. On January 10, 2019, Jim Lockwood submitted a Right to Know Request to the City of Scranton requesting "video of all surveillance cameras in Scranton City Hall on Jan. 9, 2019, for the duration of that day, during normal business hours." In a letter dated February 22, 2019, the City denied the request, citing to an exception to the Right to Know Law, namely 65 Pa. C.S.A. §67.708(b)(16)(ii), as the documents requested pertained to a criminal investigation. A Final Determination was issued by the Office of Open Records on March 25, 2019 granting the appeal. The City files a Petition for Reconsideration in response to that Final Determination.

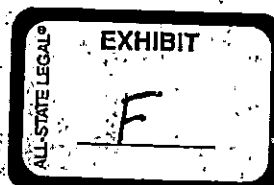
Petition for Reconsideration

In support of the City's position that the Right to Know Law exempts the documents requested, the City submits the following in support of its position:

65 Pa. C.S.A. §67.708(b)(16)(ii) provides that "investigative materials, notes, correspondence, videos and reports" are exempt from production pursuant to the Right to Know Law. The videos requested in this matter may include events that occurred in connection with an ongoing investigation by the Federal Bureau of Investigation (FBI), and as such, are clearly an investigative material exempt from production.

If the FBI had found it appropriate to release additional information pertaining to any investigation that may be pending, they presumably would have done so in their communications with Mr. Lockwood on January 10, 2019. In the only statement released by the FBI to date, the Bureau has chosen not to provide any additional information. The City strongly opposes any release of information that could jeopardize any investigation that is occurring.

65 Pa. C.S.A. §67.708(b)(9)(ii) provides that an agency may redact identifying information relating to an individual performing an undercover or covert law enforcement activity from a record. The videos may contain the identity of undercover law enforcement officers, and as such, the City opposes producing any such information.



65 Pa. C.S.A. §67.708(b)(16)(vi) provides that a record that would, "(A) Reveal the institution, progress or result of a criminal investigation, (B) Deprive a person of the right to a fair trial or an impartial adjudication, or ... (D) Hinder an agency's ability to secure an arrest, prosecution or conviction." In the present request, to produce the requested videos would confirm the institution and progress of a criminal investigation. Additionally, by releasing the videos, the ability of those referenced therein would deprive them of their entitlement to a fair trial, and could hinder law enforcement's ability to secure an arrest or prosecution.

While further case law on the above arguments is lacking, it is the City's position that *Levy v. Senate of Pennsylvania*, 94 A.3d 436 (Cmnwth. Ct. 2014), is clearly factually and legally distinguishable from the instant matter. *Levy* involved a Right to Know request for legislative records regarding the legal representation of Senate Democratic Caucus employees. While the Court held that these documents must be produced, here, the request is for video far greater than simply the identity of legal clients and billing. Here, the videos requested could reveal information protected from release for the reasons outlined above.

Due to the gravity of the pending investigation and out of respect for the duties of the FBI, the City respectfully requests that the OOR reconsider its Final Determination. The City strongly opposes being placed in a position where they may interfere or compromise an ongoing FBI investigation.

If you should have any additional questions or concerns, please do not hesitate to contact me. Thank you.

Respectfully,


Jessica Eskra, Esquire
City Solicitor

cc: Jim Lockwood, Scranton Times



pennsylvania
OFFICE OF OPEN RECORDS

Sent via email only:

April 24, 2019

Jessica Eskra, Esquire
City of Scranton
Department of Law
340 North Washington Avenue
Scranton, PA 18503
jeskra@scrantonpa.gov

Re: Petition for Reconsideration
OOR Dkt. AP 2019-0279
Lockwood and the Scranton Times v. City of Scranton

Dear Ms. Eskra:

The Office of Open Records ("OOR") is in receipt of your petition for reconsideration filed to OOR docket number AP 2019-0297. We are interpreting your petition for reconsideration as intended to be filed to OOR docket number AP 2019-0279.

The OOR is not permitted to accept new evidence on Reconsideration, *Pa. Dep't of Educ. v. Bagwell*, 131 A.3d 638, 656 n.12 (Pa. Commw. Ct. 2016). Accordingly, we are constrained to deny your petition for reconsideration.

Respectfully,

/s/ Charles Rees Brown

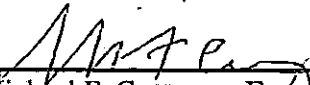
Charles Rees Brown
Chief Counsel

cc: Jim Lockwood (via email only)
Patrick Hughes (via email only)



CERTIFICATE OF COMPLIANCE

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



Michael F. Cosgrove, Esq.
PA Atty. I.D.: 47349