

**COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY  
CIVIL TRIAL DIVISION**

**CWIEK**

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No. 170401594

v.

**PHILADELPHIA DISTRICT  
ATTORNEY'S OFFICE**

Cwiek Vs Philadelphia District Attorney'S Of-ORDRF



17040159400033

**OPINION AND ORDER**

This is an appeal of the denial by the Philadelphia District Attorney's Office and an Office of Open Records ("OOR") appeals officer of the fourth request under the Pennsylvania Right to Know Law ("RTKL") from Timothy Cwiek, a reporter with the *Philadelphia Gay News*, for 911 recordings related to the unsolved 2002 murder of transgender activist Nizah Morris. For the following reasons, the Court denies the appeal.

**FACTS AND PROCEDURAL BACKGROUND**

**A. Cwiek's First and Second RTKL Requests**

**a. First RTKL Request**

On December 19, 2006, Mr. Cwiek submitted his first RTKL request to the District Attorney's Office for "a complete unredacted version of the 911 tape" related to the Nizah Morris case. (Ltr. request from T. Cwiek to L. Abraham, dated 12/19/06, Certified Record<sup>1</sup> ("R.") 106-07, at 106.) The District Attorney's Office responded that it possessed no responsive documents. (Ltr. response from K.B. Jordan to T. Cwiek, dated 12/20/06, R. 104-05, at 104). The District Attorney's Office also cited the criminal investigative records exemption. (*Id.*) Mr. Cwiek did not appeal this determination.

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<sup>1</sup> Appellee, the District Attorney's Office, filed a paginated version of the Certified Record in conjunction with its brief. Page references are to that version of the Certified Record.

**b. Second RTKL Request**

**i. *Cwiek v. Williams*, Dkt. No. 091201090 (Phila.C.C.P.)**

On October 13, 2009, Mr. Cwiek submitted his second RTKL request to the District Attorney's Office. (*See* Ltr. request from T. Cwiek to D. Waite, dated 10/13/09, R. 109–10.) The Honorable Idee C. Fox heard the appeal of Mr. Cwiek's second request for records from the Philadelphia District Attorney's Office. The Court quotes and adopts Judge Fox's decision (*see* Order and Opinion, *Cwiek v. R. Seth Williams*, Dkt. No. 091201090 at 1/30/12, R. 160–69) on the early history of this matter:

Nizah Morris, a prominent Philadelphia transgender rights activist, died of head trauma on December 24, 2002. Two days earlier, on December 22<sup>nd</sup>, she had been found unconscious and bleeding profusely from the head on a Center City street corner. It was subsequently determined that Ms. Morris' injuries had occurred sometime after being dropped off by a City of Philadelphia Police officer near that location.

This matter first entered the Courts on April 3, 2007. On that date, Tim Cwiek, a reporter with the *Philadelphia Gay News* who was investigating Ms. Morris' death, filed an action in the Court of Common Pleas after having been denied access to records held by the City of Philadelphia Police Department. The Philadelphia District Attorney's Office was not a named Defendant or a party in that action. Just over a year later, on May 27, 2008, Judge Greenspan<sup>2</sup> entered an Order encapsulating a stipulated agreement between Cwiek and the City. This order required the City to turn over all records related to the subject of Cwiek's investigation – namely, the tragic death of Nizah Morris.

Upon receiving records from the City pursuant to Judge Greenspan's order, Cwiek believed there were some discrepancies and there were additional transmissions he wanted to examine. Cwiek filed a record request with the Philadelphia District Attorney's Office under the theory that the City of Philadelphia Police Department would have given that Office all records related to Morris' death. This request was filed on October 13, 2009, and

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<sup>2</sup> Judge Greenspan became Justice Greenspan of the Pennsylvania Supreme Court, and subsequently retired from the bench.

sought “all Philadelphia Police Department radio room transmissions retained by the Philadelphia District Attorney’s Office during the course of its 2003 investigation into the Nizah Morris case.” The law applicable under this request was the Right-to-Know-Law effective February 2008.

The District Attorney’s Office of Philadelphia is bound by the procedures set forth under 65 Pa.C.S.A. §67.503(d)(2). The Office denied Cwiek’s request on October 14, 2009, “without confirming or denying” that any such radio transmission records existed. This denial rested on the Office’s understanding that the RTKL exempted criminal investigation documents from disclosure. Cwiek appealed this decision to the Appeals Officer designated by the D.A., Arnold Gordon, under the theory that the records “have been deemed to be in the public domain under Judge Greenspan’s order.” Gordon, in turn, denied Cwiek’s appeal on November 16, 2009, relying on the criminal investigation exception to the RTKL, the Criminal History Record Information Act (CHRIA), and law enforcement privilege. 65 P.S. § 67.101 *et seq.*; 18 Pa.C.S. § 9101 *et seq.*

(R. at 160–62.)

Mr. Cwiek appealed Mr. Gordon’s decision to Judge Fox, who denied the appeal, holding that the requested dispatch tape recordings are exempt under Section 708(b)(16) of the RTKL as “record[s] of an agency relating to or resulting in a criminal investigation.” (Order and Opinion, *Cwiek v. R. Seth Williams*, Dkt. No. 091201090 at 1/30/12, R. 160–69, at 168.) She further held that the requested records are “information assembled as a result of an investigation,” and therefore are protected by Section 9106(c)(4) of CHRIA. (*Id.*) Having held that the records are both exempt under Section 708 and protected by CHRIA, the Court held that they are not “public records” under the RTKL and need not be disclosed to Mr. Cwiek. (*Id.*)

Mr. Cwiek did not appeal Judge Fox’s order.

## **ii. Creation of the Nine-Page 911 Transcript**

In a July 21, 2010 affidavit, Mr. Cwiek attested that in April 2003 a Philadelphia police lieutenant played two tapes for Mr. Cwiek, which together constituted a recording of a number of

911 calls in the Morris case. (Cwiek Suppl. Aff. ¶ 6, *attached as Exhibit A to Rebuttal Brief of Appellant, Cwiek v. R. Seth Williams*, Dkt. No. 091201090 at 7/21/10, R. 144–47.) Mr. Cwiek obtained a copy of the tapes from “a private citizen” in 2003.<sup>3</sup> (Ltr. submission to OOR from T. Cwiek, dated 10/5/16, R. 172–178, at 173.) Mr. Cwiek created a nine-page transcript of the tapes in 2006 for the purpose of assisting the City to reconstitute the Morris police-homicide file, which had been lost. (*Id.* at 174.)

**c. Third RTKL Request**

On November 12, 2015, Mr. Cwiek filed his third request from the District Attorney’s Office, again seeking Morris 911 records. (*See* Attestation by Open Records Officer BJ Graham-Rubin, dated 9/30/16, R. 194–95.) This time, Mr. Cwiek sought certified copies of the recordings. (Ltr. submission to OOR from T. Cwiek, dated 10/5/16, R. 172–178, at 175.) In response, the Open Records Officer of the District Attorney’s Office provided Mr. Cwiek with a copy of the 911 tape transcript Mr. Cwiek had created based on the tapes the City had produced. (Attestation by Open Records Officer BJ Graham-Rubin ¶ 8, dated 9/30/16, R. 194–95.) She declined to certify the document, however, because it was part of Mr. Cwiek’s filing in a prior RTKL appeal. (Final Determination, *Cwiek v. Phila. Dist. Atty’s Office*, No. AP 2015-2688, dated 12/28/16, R. 183–92, at 184.) The District Attorney’s Office argued that it accordingly was not the custodian of the original record; that the record is not the type that documents a transaction or activity of the office; and that the appeal should be barred based on Judge Fox’s prior ruling and the doctrine of *res judicata*. (*Id.*)

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<sup>3</sup> Philadelphia Police Captain Michael R. Costello attested on January 10, 2008 that the Police Department had located two 911 tapes related to the death of Nizah Morris and that “[t]hese tapes have already been released to Appellant, Timothy Cwiek.” (Affirmation of the Philadelphia Police Department ¶ 6, dated 1/10/08, R. at 156.)

The OOR appeals officer denied Mr. Cwiek’s appeal on December 28, 2016. (*Id.* at 191–92) She determined that the District Attorney’s Office possessed no additional responsive records, that it had not acted in bad faith, and that the office was not required to provide Mr. Cwiek with certified records because it was unable to verify the veracity of the records it provided, which it had received from Mr. Cwiek. (*Id.* at 188–91.) Mr. Cwiek did not appeal that decision.

**d. Fourth RTKL Request**

On January 3, 2017, Mr. Cwiek submitted his fourth request to the District Attorney’s Office seeking Morris 911 records. The request before the Court is for:

All 911 recordings in any format, presentation or configuration pertaining to the Nizah Morris incident of Dec. 22, 2002, that originated at the Philadelphia Police Department (“PPD”) and that document a transaction or activity of the PPD. This Right-to-Know Law request does not seek Morris 911 recordings that originated at the Philadelphia District Attorney’s Office (“DAO”) or that document a transaction or activity of the DAO.

(Standard Right-to-Know Request Form, dated 1/3/17, R. at 9.)

On February 9, 2017, the District Attorney’s Office denied the request under 65 P.S. § 67.506(a)(1), which permits denial of a RTKL request “if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.” (Letter from Open Records Officer to T. Cwiek, Feb. 9, 2017, R. 11–12, at 11.) The District Attorney’s Office also stated that it had no responsive records. (*Id.* at R. 12.) This assertion was supported by an attestation by Open Records Officer Douglas Weck, in which he stated:

8. In response to Mr. Cwiek’s fourth request, I conducted a good-faith search for Morris 911 Records, including personally searching all files, physical and electronic, associated with Nizah Morris.

9. In response to Mr. Cwiek's November 12, 2015, request for Morris 911 Records, which was his third request, I personally searching [sic] all files, physical and electronic, associated with Nizah Morris.
10. Those searches never yielded any Morris 911 Records because the DAO does not have any Morris 911 Records in its possession, custody and control.

(Attestation by Open Records Officer Douglas Weck ("Weck Attestation") ¶¶ 8–10, dated 2/23/17, R. 180–82.)

Mr. Weck, however, acknowledged that the District Attorney's office "has maintained copies of documents Mr. Cwiek has submitted during RTKL litigation in its civil litigation files." Mr. Weck further stated that those documents include "nine pages of what Mr. Cwiek has described as 'transcripts' of 'two cassette tapes of police radio transmissions pertaining to the Morris incident' that he has admitted to creating." (*Id.* ¶¶ 11–12, R. at 181)

Mr. Cwiek appealed again to the OOR, which again denied his appeal. On March 24, 2017, OOR Appeals Officer Young determined that "the [District Attorney's Office] has demonstrated that it does not possess the requested 911 recordings." (Final Determination, *Cwiek v. Phila. Dist. Atty's Office*, Dkt. No. AP 2017-0277, dated 3/24/17, R. 287–91, at 291.) OOR Appeals Officer Young made no determination whether the repeated requests were disruptive. (*See id.*) On reconsideration, OOR Chief Counsel and Appeals Officer Charles Rees Brown denied the petition, holding that "it is clear" that the Morris 911 records "are not in the possession, custody or control of [the District Attorney's Office]." (Ltr. re: Petition for Reconsideration from C.B. Brown to T. Cwiek, dated 4/11/17, R. 313.)

On April 12, 2017, Mr. Cwiek filed the pending appeal. The Court held oral argument on January 23, 2018.

## DISCUSSION

### A. Standard and Scope of Review

The standard of review in appeals to the Court of Common Pleas from final OOR determinations is *de novo*; the scope of review is plenary. *Bowling v. Office of Open Records*, 75 A.3d 453, 476–77 (Pa. 2013).

### B. The OOR Erred in Its Determination that the DAO Sustained Its Burden To Prove the Requested Documents Do Not Exist Within its Possession, Custody or Control

The objective of the RTKL “is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012). The RTKL presumes records in an agency’s possession are “public records, accessible for inspection and copying by anyone requesting them, and must be made available to a requester unless they fall within specific enumerated exceptions or are privileged.” *Bowling*, 75 A.3d at 457 (citing 65 P.S. §§ 67.305(a), 67.701(a), 67.708(b)).

An agency evaluating an RTKL request must first determine whether the requested records are within its possession, custody or control. *Dental Benefits Providers, Inc. v. Eiseman*, 86 A.3d 932, 936 (Pa. Comm. Ct. 2014). The RTKL defines “record” as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.

65 PA. CONS. STAT. ANN. § 67.102 (West 2008).

The local agency has the burden of proving that a record does not exist. *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). The agency can prove nonexistence through either an unsworn affidavit by an individual who searched for the record or by a sworn affidavit that the record does not exist. *Id.*

In this case, the District Attorney Office’s Open Records Officer, Douglas Weck, swore that the District Attorney’s Office had no Morris 911 records in its possession, custody and control. (Weck Attestation ¶ 10, R. at 181.) Yet Mr. Weck also acknowledged that the District Attorney’s Office maintained copies of the transcript Mr. Cwiek created from the two Morris 911 tapes he had obtained. (*Id.* ¶¶ 11–12, R. at 181.)

In his fourth RTKL request, Mr. Cwiek sought “[a]ll 911 recordings in any format, presentation or configuration pertaining to the Nizah Morris incident of Dec. 22, 2002, that originated at the Philadelphia Policy Department (‘PPD’) and that document a transaction or activity of the PPD.” (Standard Right-to-Know Request Form, dated 1/3/17, R. at 9.) The nine-page transcript Mr. Cwiek created from 911 tapes pertaining to Nizah Morris and which admittedly is in the possession of the District Attorney’s Office constitutes a responsive document. The OOR Appeals Officer therefore erred when he determined otherwise.

**C. The Responsive Documents Are Not Discoverable From the District Attorney’s Office**

“Only ‘records’ of the agency to which the request is directed, the responding agency, are subject to the RTKL.” *Meguerian v. Office of the Atty. Gen.*, 86 A.3d 924, 929–30 (Pa. Commw. Ct. 2013); 65 PA. CONS. STAT. ANN. § 67.102 (defining “record” as “[i]nformation . . . that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.”)(West 2008).

In this case, Mr. Cwiek explicitly sought records of the Philadelphia Police Department. (Standard Right-to-Know Request Form, dated 1/3/17, R. at 9 (requesting “[a]ll 911 recordings in any format, presentation or configuration pertaining to the Nizah Morris incident of Dec. 22, 2002, that **originated at the Philadelphia Police Department. . . .**”)(emphasis added.) He sought these records from the District Attorney’s Office. Police radio transmissions that reflect



contact among concerned citizens, police dispatcher and police officers document activities of the Philadelphia Police Department and not of the District Attorney's Office.<sup>4</sup> (See Transcript of Nizah Morris courtesy ride partial 911 tape, R. 121–29.) Because the requested records do not document activities of the District Attorney's Office, it had no obligation to reproduce to Mr. Cwiek the transcript he created to help the City reconstitute its missing Morris police-homicide file.

**D. The OOR Did Not Err in Denying Mr. Cwiek's Request Because He Had Made Repeated Requests for the Same Records, Which Has Placed an Unreasonable Burden on the District Attorney's Office**

Section 67.506 of the RTKL permits an agency to deny a requester access to a record if the requester has made repeated requests for the same record and the repeated requests have placed an unreasonable burden on the agency. 65 PA. CONS. STAT. ANN. § 67.506(a)(1)(West 2008).

The District Attorney's Open Records Officer denied Mr. Cwiek's fourth request under Section 67.605(a)(1). (Ltr. re: Response to Your RTKL Request – Morris 911 Recordings from D, Weck to T. Cwiek, dated 2/9/17, R. 329–30, at 329.) Having held that the District Attorney's Office had demonstrated that it did not possess any responsive documents, the Appeals Officer did not reach the issue of whether the District Attorney's Office's denial on the basis of repeated burdensome requests was warranted. (See Final Determination, *Cwiek v. Phila. Dist. Atty's Office*, Dkt. No. AP 2017-0277, dated 3/24/17, R. 287–91.)

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<sup>4</sup> It is unclear from the record whether Mr. Cwiek ever submitted a RTKL request to the Philadelphia Police Department.

Since this Court's review is plenary, and there is a high likelihood that Mr. Cwiek will file a fifth request, this Court holds that the District Attorney's Open Records did not err when he denied Mr. Cwiek's fourth request as repetitive and unduly burdensome.

### CONCLUSION

It has been more than 15 years since Nizah Morris was found dead on the streets of Philadelphia, and her murder tragically remains unsolved. It is entirely understandable that appellant Timothy Cwiek would feel frustrated. Mr. Cwiek, however, has requested the same documents four times. Each time, either the Philadelphia Police Department or the District Attorney's Office has attested that no responsive documents exist, other than the tapes that already were provided to Mr. Cwiek (and subsequently lost) and the transcript that he produced from those tapes. Moreover, production of the documents has previously been denied on additional valid grounds, including that they constitute investigative information exempt from disclosure under the Right-to-Know Law and that Mr. Cwiek has repeatedly requested the same documents, placing an undue burden on the District Attorney's Office. As the Pennsylvania Supreme Court has commented, "At some point litigation must come to an end."

*Commonwealth v. Sam*, 952 A.2d 565, 577 (Pa. 2008) (quoting *Commonwealth v. Peterkin*, 722 A.2d 638, 643 (Pa. 1998)). It is time for Mr. Cwiek's serial requests to stop.

**ORDER**

AND NOW, this 12<sup>th</sup> day of June 2018, upon consideration of the appeal filed by Timothy Cwiek from the decision of the appeals officer of the District Attorney's Office, which denied his request under the Pennsylvania Right to Know Law, the response, a review of the certified record, the briefs submitted by the parties, and after oral argument, it is hereby ORDERED that the appeal is DENIED.

BY THE COURT:

Alle F. G.  
J.

Dated: June 12, 2018