

COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY--CIVIL ACTION

AMY MARCHIANO and  
THE REPUBLICAN HERALD,  
Requestor/Respondent  
vs.  
COUNTY OF SCHUYLKILL,  
Local Agency/Petitioner

NO.: S-1401-2018

PROthonotary OFFICE  
2018 OCT 23 AM 10:36  
SCHUYLKILL COUNTY PA  
17901

Amy Marchiano – Requestor/Respondent ProSe  
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Benjamin Lorah, Esq. – for Office of Open Records

RECEIVED

OCT 25 2018

OPINION of COURT

DOMALAKES, J.

OFFICE OF OPEN RECORDS

The matter before the Court is a Petition for Review filed by the Schuylkill County Coroner's Office on August 10, 2018. The issue involves Coroner's Reports involving Decedents who died in the year 2017. The County provided Toxicology and Autopsy Reports entitled "Deaths Involving Drugs" to the Requestors, Amy Marchiano and The Republican Herald. Ms. Marchiano is a Reporter for The Republican Herald. In providing the requested information the County had redacted the names of the Decedents, but provided information as to gender, age, race, date and time of death, primary cause of death, manner of death and drugs. The Requestors have demanded the names of the individuals and filed an action with the Office of Open Records which ordered the County to release the names of the Decedents. The Office of Open Records issued its Final Determination on July 12, 2018. The County's Petition for Review was timely filed on August 10, 2018.

It is noted that the only additional information being sought by the Requestors concerns the names of the decedents of drug overdoses in the autopsy reports as all other requested information has been provided to them.

The issue is whether the Open Records Law mandates that the names of the Decedents be released to the Requestor. The County claims that the redacted information is exempt from disclosure pursuant to 65 P.S. § 708 (b) (1) and the constitutional Right to Privacy. At the Hearing held on October 11, 2018 the County appeared to limit its position to the HIPPA Law.

At said Hearing, Deputy Coroner, Jonathan Mika testified for the County and was cross-examined. He testified that the Coroner's Office investigates death scenes and receives personal information contained in medical records, hospital records and from other medical care providers. As such he feels bound to protect the identities of drug overdose victims because of HIPPA. Both parties have briefed their respective positions. The matter is now ripe for Disposition.

The County first (1<sup>st</sup>) argues that the redacted information is exempt because of HIPAA. 45 C.F.R. § 502(a) provides that a covered entity may not disclose protected health information. A "covered entity" is "(1) a health plan; (2) a health care clearing house; (3) a health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." 45 C.F.R. 164.502(a) The County argues that Coroner, David Moylan, a medical doctor, is a "covered entity" and therefore the HIPAA restriction applies to his reports. It is apparent however, that a Coroner is not a health plan, a health care clearing house and/or a

health care provider to those whose deaths have been investigated. As such HIPAA exceptions do not apply to the Coroner's Reports.

Next the County argues that the requested information is exempt under the Protection Health Information (PHI) exemption of the Open Records Law as set forth in 65 P.S. § 708 (b) (1) & (6). The Act in § 701 provides,

**"General rule.** -- Unless otherwise provided by law, a public record, legislative record or financial record shall be accessible for inspection and duplication in accordance with this act. A record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists. Public records, legislative records or financial records shall be available for access during the regular business hours of an agency."

The burden of proving an exemption to the requirement is on the Commonwealth Agency by a preponderance of evidence. See 65 P.S. § 708(a) of the Act.

Section 65 P.S. § 708(b) provides as follows:

**Burden of proof.--**

(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.

(2) The burden of proving that a legislative record is exempt from public access shall be on the legislative agency receiving a request by a preponderance of the evidence.

(3) The burden of proving that a financial record of a judicial agency is exempt from public access shall be on the judicial agency receiving a request by a preponderance of the evidence.

**(b) Exceptions.**--Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

(1) A record, the disclosure of which:

(i) would result in the loss of Federal or State funds by an agency or the Commonwealth; or

(ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.

(2) A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority.

(3) A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include:

(i) documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act;

(ii) lists of infrastructure, resources and significant special events, including those defined by the Federal Government in the National Infrastructure Protections, which are deemed critical due to their nature

and which result from risk analysis; threat assessments; consequences assessments; antiterrorism protective measures and plans; counterterrorism measures and plans; and security and response needs assessments; and

(iii) building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

(4) A record regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security.

(5) A record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

(6)(i) The following personal identification information:

(A) A record containing 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 identification number.

(B) A spouse's name, marital status or beneficiary or dependent information.

(C) The home address of a law enforcement officer or judge.

(ii) Nothing in this paragraph shall preclude the release of the name, position, salary, actual compensation or other payments or expenses, employment contract, employment-related contract or agreement and length of service of a public official or an agency employee.

(iii) An agency may redact the name or other identifying information relating to an individual performing an undercover or covert law enforcement activity from a record.

(7) The following records relating to an agency employee:

(i) A letter of reference or recommendation pertaining to the character or qualifications of an identifiable individual, unless it was prepared in relation to the appointment of an individual to fill a vacancy in an elected office or an appointed office requiring Senate confirmation.

(ii) A performance rating or review.

(iii) The result of a civil service or similar test administered by a Commonwealth agency, legislative agency or judicial agency. The result of a civil service or similar test administered by a local agency shall not be disclosed if restricted by a collective bargaining agreement. Only test scores of individuals who obtained a passing score on a test administered by a local agency may be disclosed.

(iv) The employment application of an individual who is not hired by the agency.

(v) Workplace support services program information.

(vi) Written criticisms of an employee.

(vii) Grievance material, including documents related to discrimination or sexual harassment.

(viii) Information regarding discipline, demotion or discharge contained in a personnel file. This subparagraph shall not apply to the final action of an agency that results in demotion or discharge.

(ix) An academic transcript.

(8)(i) A record pertaining to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings. This subparagraph shall not apply to a final or executed contract or agreement between the parties in a collective bargaining procedure.

(ii) In the case of the arbitration of a dispute or grievance under a collective bargaining agreement, an exhibit entered into evidence at an arbitration proceeding, a transcript of the arbitration or the opinion. This subparagraph shall not apply to the final award or order of the arbitrator in a dispute or grievance procedure.

(9) The draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency.

(10)(i) A record that reflects:

(A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

(B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.

(ii) Subparagraph (i)(A) shall apply to agencies subject to 65 Pa.C.S. Ch. 7 (relating to open meetings) in a manner consistent with 65 Pa.C.S. Ch. 7. A record which is not otherwise exempt from access under this act and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 shall be a public record.

(iii) This paragraph shall not apply to a written or Internet application or other document that has been submitted to request Commonwealth funds.

(iv) This paragraph shall not apply to the results of public opinion surveys, polls, focus groups, marketing research or similar effort designed to measure public opinion.

(11) A record that constitutes or reveals a trade secret or confidential proprietary information.

(12) Notes and working papers prepared by or for a public official or agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.

(13) Records that would disclose the identity of an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

(14) Unpublished lecture notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related material and scholarly correspondence of a community college or an institution of the State System of Higher Education or a faculty member, staff employee, guest speaker or student thereof.



(15)(i) Academic transcripts.

(ii) Examinations, examination questions, scoring keys or answers to examinations. This subparagraph shall include licensing and other examinations relating to the qualifications of an individual and to examinations given in primary and secondary schools and institutions of higher education.

(16) A record of an agency relating to or resulting in a criminal investigation, including:

(i) Complaints of potential criminal conduct other than a private criminal complaint.

(ii) Investigative materials, notes, correspondence, videos and reports.

(iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised.

(iv) A record that includes information made confidential by law or court order.

(v) Victim information, including any information that would jeopardize the safety of the victim.

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.

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

(C) Impair the ability to locate a defendant or codefendant.

(D) Hinder an agency's ability to secure an arrest, prosecution or conviction.

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

This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b) (relating to accident prevention investigations).

(17) A record of an agency 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.

(18)(i) Records or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.

(ii) This paragraph shall not apply to a 911 recording, or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure.

(19) DNA and RNA records.

(20) An autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmortem examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner. This exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death. (Emphasis Added)

(21)(i) Draft minutes of any meeting of an agency until the next regularly scheduled meeting of the agency.

(ii) Minutes of an executive session and any record of discussions held in executive session.

(22)(i) The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to the following:

(A) The leasing, acquiring or disposing of real property or an interest in real property.

(B) The purchase of public supplies or equipment included in the real estate transaction.

(C) Construction projects.

(ii) This paragraph shall not apply once the decision is made to proceed with the lease, acquisition or disposal of real property or an interest in real property or the purchase of public supply or construction project.

(23) Library and archive circulation and order records of an identifiable individual or groups of individuals.

(24) Library archived and museum materials, or valuable or rare book collections or documents contributed by gift, grant, bequest or devise, to the extent of any limitations imposed by the donor as a condition of the contribution.

(25) A record identifying the location of an archeological site or an endangered or threatened plant or animal species if not already known to the general public.

(26) A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

(27) A record or information relating to a communication between an agency and its insurance carrier, administrative service organization or risk management office. This paragraph shall not apply to a contract with an insurance carrier, administrative service organization or risk

management office or to financial records relating to the provision of insurance.

(28) A record or information:

(i) identifying an individual who applies for or receives social services; or

(ii) relating to the following:

(A) the type of social services received by an individual;

(B) an individual's application to receive social services, including a record or information related to an agency decision to grant, deny, reduce or restrict benefits, including a quasi-judicial decision of the agency and the identity of a caregiver or others who provide services to the individual; or

(C) eligibility to receive social services, including the individual's income, assets, physical or mental health, age, disability, family circumstances or record of abuse.

(29) Correspondence between a person and a member of the General Assembly and records accompanying the correspondence which would identify a person that requests assistance or constituent services. This paragraph shall not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbying disclosure).

(30) A record identifying the name, home address or date of birth of a child 17 years of age or younger.

Section 708 (b)(6) provides as follows:

(A) A record containing 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 identification number.

(B) A spouse's name, marital status or beneficiary or dependent information.

(C) The home address of a law enforcement officer or judge.

It is apparent that none of the situations described therein apply to the names of Decedents set forth in Autopsy and/or Toxicology Reports.

In Hearst Television, Inc. v. Norris, 54 A.3d 23 (Pa. 2012) the Supreme Court held that the names of individuals and the cause and manner of their deaths in Autopsy Reports are not exempt from disclosure. See also 65 P.S. § 708 (b)(20). The Hearst Court also held that Autopsy Reports are official records and papers that the Coroner's Office must file with the Prothonotary under the Coroner's Act.

The County further argues that the redacted information, the names of the Decedents, are exempt from disclosure because of the constitutional Right to Privacy. Under those circumstances, a balancing test, weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure must be conducted. Times Publ. Co., Inc. v. Michel, 633 A.2d 1233, 1237 (Pa. Commw. Ct. 1993) The County argues that there is no public benefit for the release of Decedents' names and to do so would cause embarrassment and place a negative stigma on Decedent and his/her family. The County argues that release of this information would open up old wounds and further subject families of Decedents to pain. While this could undoubtedly occur it appears under the Open Records Act the

Legislature has concluded that Autopsy and Toxicology Reports are subject to public access. Penn Jersey v. Grimes, 962 A.2d 632 (Pa. 1009).

Finally the County argues tha the families of the Decedents had not been notified of the Hearing. Of course, to do so would reveal the identifies of the Decedents. Also, the requested information is not being made from them. The County has adequately explained privacy concerns.

The Court finds that the County has not carried its' burden of proof to demonstrate that the names of decedents of drug overdoses can be redacted to prevent public access to same.

Accordingly, the Court enters the following Order:

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THE REPUBLICAN HERALD,  
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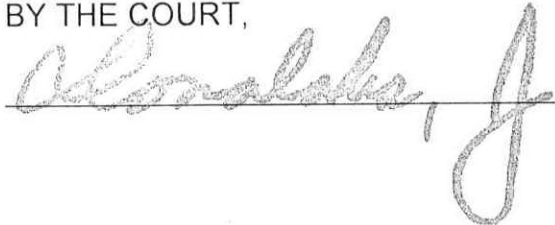
Michael Cosgrove, Esq. – for Amy Marchiano – Requestor/Respondent  
Glenn T. Roth, Jr., Esq. – Local Agency/Petitioner  
Benjamin Lorah, Esq. – for Office of Open Records

ORDER of COURT

DOMALAKES, J.

AND NOW, this 23<sup>rd</sup> day of October, 2018, the Petition for Review is **DENIED**  
and the Coroner's Office is **DIRECTED** to comply with the Decision of the Office of  
Open Records.

BY THE COURT,

 J.