

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bryant Arroyo, :  
Appellant :  
v. :  
District Attorney of Lancaster :  
and Open Records Office and : No. 1624 C.D. 2010  
Attorney General's Office : Submitted: April 8, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: June 29, 2011

Bryant Arroyo (Requester) appeals from the order of the Court of Common Pleas of Lancaster County (trial court) which denied Requester's request for records under the Right-to-Know Law (RTKL).<sup>1</sup>

On March 11, 2010, Requester sought the following records from the District Attorney's Office and the Coroner's Office<sup>2</sup>:

[T]he release of both the forensic-slides and hair samples that are related to my case... I am hereby formally requesting this office/agency for the opportunity to have the complete set of forensic-slides in their possession to be released along with hair samples in their complete

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<sup>1</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101–67.3104. The RTKL repealed the former Right-to-Know Law, Act of June 21, 1957, P.L. 390, *as amended*, formerly 65 P.S. §§ 66.1–66.4.

<sup>2</sup> Requester also copied the Coroner's Office with his request for forensic materials under the RTKL. However, Requester does not argue that the Coroner possesses or controls the forensic slides and hair samples.

form in order to have said forensic materials tested, reviewed and analyzed by an independent team of forensic scientist/pathologist [sic] at no cost to your agency.

Requester's Request for Forensic Materials under the Right to Know Act, March 11, 2010, at 1, Certified Record (C.R.), Item No. 63.

Ms. Susan E. Moyer, the Right to Know Officer of the Lancaster County District Attorney's Office (RTK Officer), denied Requester's request:

First... such forensic slides and hair samples do not fall within the definition of "Record" under the RTK Law. Alternatively . . . even should such samples be considered "Records" under the RTK Law, such samples would fall within the criminal investigative exception to the RTK Law. More particularly, criminal investigative records are not public records and their dissemination is specifically protected under an exception in Pennsylvania's RTK Law at **65 P.S. §67.708(b)(16)**. Accordingly, this Office invokes the criminal investigative exception as listed and denies your request.

RTK Officer's Denial of Requester's Request, March 17, 2010, at 1.

Requester then appealed RTK Officer's Denial to Christopher P. Larsen, Open Records Appeal Officer (Appeal Officer), and alleged:

...[T]he district [sic] Attorney's Office in their [sic] denial of my request make the erroneous assertion that the requested forensic materials i.e., Forensic-Slides and hair samples are to be construed as investigative. This logic is flawed in that it entirely overlooks the fact that said materials were used to prosecute me in a public forum and not... merely used for investigative purposes...

In addition, merely providing some baseless assertion is insufficient grounds to deny my request for the forensic materials... The "Right to Know Act" provides a right to

access and when reading the reasons for denial in this case it is immediately apparent that the District Attorney's Office reasons [sic] for denying me access are without foundation and must be reversed.

....

...The [D]istrict Attorney's denial of the request is nothing more than a dilatory tactic designed to impede my access to the forensic materials for the purposes of having them independently tested....

Requester's Appeal from the Denial of Request Under the "Right to [K]now Act [Law]" For Forensic Slides/Hair Samples, Case No. A94-347, March 29, 2010, at 1.

On April 29, 2010, the Appeal Officer denied Requester's request pursuant to the criminal investigative records exception of the RTKL.

Requester then sought review of the Appeal Officer's determination to the trial court:

[I]n the event that the materials, i.e., forensic slides/hair samples could be characterized as 'records' they would be exempt from disclosure because criminal investigative records are not subject to disclosure under the Right to Know Act. [citing RTK Officer's denial.]

2. The assertion by Ms. Moyer [RTK Officer] that the requested materials are investigative records and therefore exempt is fatally flawed for the following reason, the forensic slides/ hair samples were more than investigative records they were, in fact, material evidence in a criminal prosecution...

3. Ms. Moyer [RTK Officer] also overlooks the fact that the slides/hair samples became more than investigative record when they were subjected to forensic analysis by the state and the results used as evidence in my prosecution...

....

5. I further submit that Ms. Moyer's [RTK Officer] argument not only misconstrues the language of the (RTK) but also entirely ignores the fact that the state willingly introduced [sic] the materials in question into evidence in my [sic] trial.

Requester's Appeal to the trial court at 1-2.

After review of the record and pertinent statutory authority, the trial court made the following pertinent findings of fact:

1. By letter dated March 11, 2010, Requester requested the "release of both the forensic . . . slides and hair samples that are related to [his] case."
2. The letter further stated that the "[RTKL] provides the public with the right to obtain forensic materials, i.e., hair samples, and the complete set of forensic . . . slides in their entirety to be independently tested, reviewed and analyzed by a forensic team regarding this information, actions and activities of this agency."
3. The forensic slides and hair samples Requester requested where [sic] part of his criminal case which resulted in his conviction of first-degree murder in the beating death of his girlfriend's eight-month old son.
4. The Right to Know Officer of the Lancaster County District Attorney's Office denied Requester's request pursuant to the criminal investigative records exception of the RTKL, 65 P.S. § 67.708(b)(16).
5. By letter of March 29, 2010, Requester appealed to the Open Records Appeals Officer.
6. The Appeals Officer reviewed all documentation related to the request and found the reasoning and denial appropriate.

7. By letter of April 29, 2010, the Appeals Officer denied Requester's appeal.
8. On May 26, 2010, Requester filed a petition for review of the denial with this Court.
9. Requester argued that "the forensic slides . . . [and] hair samples were more than investigative records[.] [T]hey were in fact, material evidence in a criminal prosecution."
10. Requester claims that because the Commonwealth introduced the slides and hair samples into evidence in the trial against him, it waives any claim that the materials are exempt from the RTKL.

Trial Court Opinion (Opinion), August 27, 2010, Findings of Fact Nos. 1-10 at 1-2.

On appeal, Requester contends<sup>3</sup> that the District Attorney's office committed legal error when it denied Petitioner's request for forensic slides and hair samples.

Section 102 of the RTKL, 65 P.S. § 67.102, defines the term "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. The term includes a

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<sup>3</sup> Where there is no dispute as to the facts, this Court's review is limited to a determination of whether the trial court abused its discretion, committed an error of law or violated any constitutional rights. *SWB Yankees LLC v. Gretchen Wintermantel*, 999 A.2d 672, 674 n. 2 (Pa. Cmwlth. 2010). "The scope of review for a question of law under the [RTKL] is plenary." *Id.* at 674 n. 2, quoting *Stein v. Plymouth Township*, 994 A.2d 1179, 1181 n. 4 (Pa. Cmwlth. 2010).

document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

Section 102 of the RTKL, 65 P.S. § 67.102, defines the term “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.

Section 302(a) of the RTKL, 65 P.S. § 67.302, provides that “[a] local agency shall provide public records in accordance with this act.”

Moreover, Section 305(a) of the RTKL, 65 P.S. § 67.305(a), provides:

**(a) General rule.-** A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record. The presumption shall not apply if:

- (1) the record is exempt under section 708;
- (2) the record is protected by a privilege; or
- (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree.

Critical to the present controversy is the criminal investigation exception for public records at Section 708 of the RTKL:

**(a) 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.<sup>[4]</sup>

.....

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

.....

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

.....

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

.....

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

.....

(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.

Recently, in *Mitchell v. Office of Open Records*, 997 A.2d 1262 (Pa. Cmwlth. 2010), this Court reviewed the criminal investigative exception under the RTKL and also under the Criminal History Records Information Act (CHRIA). In *Mitchell*, George E. Mitchell, Jr. (Mitchell) had filed a request with the Pennsylvania State Police (PSP) and sought “copies of any documents showing the time the officers arrived and departed from Mitchell’s residence on April 11, 2006,

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<sup>4</sup> A “preponderance of the evidence” is defined as “[t]he greater weight of the evidence... evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other....” Black’s Law Dictionary 1301 (9<sup>th</sup> ed. 2009).

in serving a search warrant on behalf of the Attorney General’s Office.” *Id.* at 1263. The PSP notified Mitchell that his request was identified as a “criminal investigative” record which was exempt under Section 708(b)(16) of the RTKL, 65 P.S. § 67.708(b)(16), and Section 9106(c)(4) of the CHRIA, 18 Pa. C.S. §9106(c)(4). Mitchell appealed to the Office of Open Records which “determined that the record Mitchell requested would reveal the institution, progress or result of a criminal investigation . . . [t]herefore, the record was determined to be exempt from public release pursuant to 65 P.S. § 67.708(b)(16)(vi)(A).” *Id.* at 1264.

On appeal, Mitchell argued that “the Office incorrectly interpreted, defined and designated the requested record as a criminal investigative record . . . and that the document is not exempt under the RTKL and the CHRIA . . . .” *Id.* at 1264. This Court rejected Mitchell’s argument:

Section 708 of the RTKL provides that the Commonwealth has the burden of proving a record exempt by a preponderance of the evidence . . . . Lieutenant [Gary L.] Schuler found only a single record, the AIMS [Automated Incident Memo System] report, which he determined was a criminal investigative record . . . . The PSP’s denial letter appropriately identified the record requested by Mitchell and cited the legal basis for its denial pursuant to Section 903 of the RTKL[,] 65 P.S. § 67.903 (agency denial must be in writing and include a description of the record requested and specific reasons for the denial, including legal authority).

. . . . Mitchell further argues that the AIMS record was not an investigative record, but an incident report, which is the equivalent of a police blotter and therefore, a public record pursuant to CHRIA.

CHRIA concerns the collection, maintenance, dissemination and receipt of criminal history record

information. CHRIA defines “Criminal history record information” as:

Information collected by criminal justice agencies concerning individuals, and arising from the initiation of a criminal proceeding, consisting of identifiable descriptions, dates and notations of arrests, indictments, informations, or other formal criminal charges and any dispositions arising therefrom. **The term does not include** intelligence information, **investigative information** or treatment information, including medical and psychological information, or information and records specified in section 9104 (relating to scope).

18 Pa. C.S. § 9102. Investigative information is defined as “[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.” 18 Pa.C.S. § 9102. The record reflects that the AIMS record pertains to a criminal investigation regarding the PSP’s involvement in the execution of a search warrant,” therefore the record “constituted ‘investigative information’ and was not a public record as defined by CHRIA. *Mitchell*, 997 A.2d at 1265-1266.

Presently, as in *Mitchell*, the RTK Officer and the Appeal Officer’s denial letters identified the records requested, i.e. the forensic slides and hair samples, were “assembled as a result of the performance of an inquiry... into a criminal incident.” Therefore, the trial court properly concluded<sup>5</sup> that the requested

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<sup>5</sup> The trial court astutely noted:

Here, the Court is not persuaded that forensics slides or hair samples are “public records” for purposes of the RTKL. These items were not created or maintained in connection with the business or daily functioning of the District Attorney’s Office.

**(Footnote continued on next page...)**

documents were exempt under Section 708(b)(16)(ii) of the RTKL and as such were not “public records.”<sup>6</sup> Also, as in *Mitchell*, this Court must conclude that the requested documents constituted “investigative information” which is not to be considered a public document pursuant to CHRIA.

Requester also contends that the trial court abused its discretion when it affirmed the decision of the District Attorney’s office to deny access to the forensic materials. Requester asserts that the trial court abused its discretion when it inaccurately surmised that Requester sought to relitigate his conviction.

“An abuse of discretion is not merely an error in judgment.” *Ambrogio v. Reber*, 932 A.2d 969, 974 (Pa. Super. 2007), *appeal denied*, 597 Pa. 725, 952 A.2d 673 (2008). “Rather an abuse of discretion exists if the trial court renders a judgment that is [plainly] unreasonable, arbitrary or capricious, fails to apply the law, or was motivated by partiality, prejudice, bias or ill will.” *Id.* “If the record supports the trial court’s reasons and factual basis, the court did not abuse its discretion.” *Id.*

In the present controversy, the trial court correctly and thoroughly reviewed the RTKL and made findings of fact and conclusions of law based on the

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**(continued...)**

Requester makes no assertions [sic] of misconduct by the District Attorney’s Office for which it would need to be accountable.

Trial Court Opinion at 3-4.

<sup>6</sup> This Court also notes that pursuant to the definition of “record” in Section 102 of the RTKL, the forensic slides and hair samples sought by Requester are not a record that “document[s] a transaction or activity” of the District Attorney’s Office.

evidence presented. The trial court issued its ruling based on those findings and conclusions. This Court discerns no abuse of discretion.<sup>7</sup>

Accordingly, the decision of the trial court is affirmed.

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BERNARD L. MCGINLEY, Judge

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<sup>7</sup> Assuming that the trial court erred in its observation of Requester's motive of using "the RTKL to relitigate his case," "it is axiomatic that [this Court] will not disturb a judgment, order, or decree on appeal for harmless error." *Campbell v. Department of Environmental Resources*, 396 A.2d 870 (Pa. Cmwlth. 1979).

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Attorney General's Office	:	

**ORDER**

AND NOW, this 29th day of June, 2011, the decision of the Court of Common Pleas in Lancaster County is affirmed.

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BERNARD L. MCGINLEY, Judge