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IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

CALIFORNIA BOROUGH,)

Appellant,)

vs.)

ANDREW GLENN ROTHEY,)

Appellee,)

No. 2016-4223

ENTRY OF OPINION & ORDER, DECREE,
ADJUDICATION OR JUDGMENT FILED 3-22-17

MAILED 3-22-17

TO Andrew G. Rothey, Esq.

OPINION AND ORDER

This case comes before the court on a Petition for Review of Final Determination of Office of Open Records filed by the California Borough (“Borough”) on July 15, 2016. The Borough seeks to overturn the determination of the Office of Open Record’s (“OOR”) determination video footage showing a confrontation between a police officer and suspect is subject to disclosure under the Right to Know Law (“RTKL”) and Criminal History Record Information Act (“CHRIA”).

BACKGROUND

On August 7, 2015, Andrew Glenn Rothey (“Requester”) submitted a request (“Request”) to the Borough seeking the “[v]ideo recording of all interaction between Adam Logan and California Borough Police Officer Justin Todd Shultz in a holding cell in the California Borough Police Department on November 9, 2013, particularly the physical altercation between Mr. Logan and Officer Shultz.” The Borough denied the Request on September 14, 2015 citing several exceptions related to public safety under the RTKL and asserting the video recording’s confidentiality under the CHRIA.

Requester appealed the Borough’s decision to the OOR on September 17, 2015. The OOR held an evidentiary hearing on February 8, 2016 and overturned the Borough’s decision to

deny the Request on June 15, 2016. The OOR found that the cited exceptions under the RTKL and the confidentiality assertion under the CHRIA did not apply and the Borough had to approve the Request. The Borough filed a Petition for Review of Final Determination of Office of Open Records on July 15, 2016 arguing the applicability of various RTKL exceptions, confidentiality under CHRIA, and that the OOR lacked jurisdiction to hear the appeal from the Borough. This Court held a hearing on the Petition on December 1, 2016 where Chief Encapera of the California Police Department was the only witness to testify.

DISCUSSION

The proper standard of review of a final determination by the OOR is *de novo* and the proper scope of review is broad and plenary. *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013). The RTKL is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Id.* Under the RTKL, the Borough is a local agency required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. 65 P.S. § 67.305.

An agency bears the burden of proving the applicability of any cited exemptions by a preponderance of the evidence. 65 P.S. § 67.708(b). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ...to find that the existence of a contested fact is more probably than its nonexistence.” *PA. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011)(quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

RTKL Exceptions

i. Personal Security of an Individual

The Borough argues five exceptions under the RTKL. The first relates to personal security and exempts from disclosure a record that “would be reasonable likely to result in a substantial and demonstrable risk of physical harm to the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). For this exemption to apply, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Delaware County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012). An agency must show more than “mere conjecture” to establish that this exemption applies. *Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010).

In support of the Borough’s assertion of the personal security exemption, the Borough submits the sworn affidavit of Chief Encapera, who states that:

10)The holding cell surveillance is utilized for reasons including the safety and security of individuals being detained and for the safety and security of California Borough Police Officers....;

...

15)These are blind spots in the holding cell because the camera does not record these areas, making the knowledge of the location of the camera highly sensitive;

16)This information could potentially enable a detained individual to use the video footage to find blind spots or weaknesses with the video surveillance, to enable a detained individual to dangerously surprise (assault) an officer’s entry into the holding cell, cause disturbances or otherwise enable him or her to block the camera, thus, allowing them to smuggle contraband and/or weapons into the holding cell;

17)Obviously, this could create a substantial risk of physical harm to the personal security/safety of law enforcement officers/officials, and, potentially to the public....

While statements made under the penalty of perjury are competent evidence to sustain an agency's burden of proof, conclusory affidavits or statements are insufficient to establish the personal security exemption. *Sherry v Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013). Chief Encapera statement that the requested footage "could create a substantial risk of physical harm" fails to rise above mere conjecture and he offered no specific examples or evidence at the hearing to meet the requirements for exemption under 708(b)(1)(ii).

ii. *Public Safety*

The Borough next argues the public safety exception which exempts from disclosure records "maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity[.]" 65 P.S. § 67.708(b)(2). In order to establish this exemption, an agency must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 374-375 (Pa. Commw. Ct. 2013); *Adams v Pa. State Police*, 51 A.3d 322 (Pa. Commw. Ct. 2012). "Reasonably likely" has been interpreted as "requiring more than speculation." *Carey*, A.3d at 375; *Governor's Office of Admin. V. Purcell*, 35 A.3d 811 (Pa. Commw. Ct. 2011); *Lutz*, 6 A.3d at 676.

The Borough relies on the affidavit of Chief Encapera to establish this exception who attests that:

13)The release of the video of the holding cell ... would reveal the layout of the holding cell, and, also, the capabilities, range and scope of the camera to the general public;

14)This would threaten public safety and the Police Department's ability to maintain a secure holding cell area because it could allow detained

individuals to share information that could be used to breach security procedures.

As with the personal security exception, the Borough offers nothing more than mere conjecture in support of their position. The release of the video “*could* allow detained individuals to share information that *could* be used to breach security procedures.” The exception requires a showing that the release of the video would be “reasonably likely” to jeopardize public safety, not that it *could*. The Borough’s position is further undermined by the fact that the Borough allowed television news reporters to have access to and film inside of the holding cell which later aired on live TV.

iii. Physical Security of a Building

This exemption states that the following category of records may be withheld from public access: “A record, the disclosure of which creates a substantial likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system....” 65 P.S. § 67.708(b)(3). Unlike the other two security exemptions asserted by the Borough, it is the “disclosure of” the records, not the records themselves, that must create a reasonable likelihood of endangerment to the safety or physical security of certain structures.

The Borough supported the assertion of this exemption with the supplemental affidavit of Borough Police Officer Timothy Sheehan, who states that:

- 6)The Borough’s holding cell is a private area that only authorized law enforcement officials are able to access;
- 7)The surveillance camera and the layout of the holding cell are not visible from outside of the cell or from any of the areas that are open to the public in police station;

...

9)The only individuals who would ever be in the holding cell are either authorized law enforcement officials or detainees.

Chief Encapera also testified that a suspect could determine where the blind spots in the holding cell are from viewing the video and then use that knowledge to maneuver into the blind spot to use drugs or a weapon they were hiding at the time they were picked up by the police.

As with the other security exceptions, the Borough here relies on conjecture and speculation which is not enough to sustain the agency's burden of proof. *Office of the Governor*, 65 A.3d at 1103. While the Borough has presented evidence that the disclosure of the record may reveal blind spots, there is no evidence that disclosure of the video would be reasonably likely to jeopardize the "safety or ... physical security" of the holding cell. Any concerns about blind spots can be addressed by the Borough simply moving the position of the camera which would in turn move any blind spots revealed by the video. The Borough's position here is again undermined by the Borough allowing television news reporters to view portions of the requested video and allowing them to film a report from physically inside of the holding cell.

iv. Criminal Investigation

The Borough argues that the requested video is exempt from public access under the RTKL criminal investigation exception. The RTKL exempts from disclosure a "record of an agency relating to or resulting in a criminal investigation, including ... (ii) investigative materials, notes, correspondence, videos and reports." 65 P.S. § 67.708(b)(16)(ii). To meet this exception, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or official probe" was conducted regarding a criminal matter. *Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Records protected under these provisions of the RTKL are "records created to report on a criminal investigation or set forth or document evidence in a criminal investigation or steps carried out in a criminal

investigation.” *Pa. State Police v. Grove*, 119 A.3d 1102 (Pa. Commw. Ct. 2015), *appeal granted*, 113 A.3d 292 (Pa. 2016).

The Borough argues that the requested video should fall under this exception to public access because the video was later used as part of a criminal investigation. However, the events on the video show an altercation between a police officer and a citizen while the citizen was detained in a holding cell. The video does not chronicle the collection of evidence, witness interviews or any type of investigative information that took place *as part of a criminal investigation* as required for the exception to apply.

v. *Non-Criminal Investigation*

The Borough also argues that the RTKL protects disclosure of the requested video because it was part of a noncriminal investigation of Mr. Shultz and the RTKL exempts from disclosure records of an agency “relating to noncriminal investigations.” For this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *Pa Dep’t of Health*, 4 A.3d at 810. The inquiry must be “conducted as part of an agency’s official duties.” *Id.* At 814; *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012).

Similar to the Borough’s argument for the criminal investigation exception, the Borough here alleges that the requested video relates to a noncriminal investigation simply because the video was used in a disciplinary action taken against Mr. Shultz. The video recording was the catalyst to the *start* of a noncriminal investigation of Mr. Shultz, it was not taken during or as part of an official probe or inquiry and therefor the Borough cannot meet the requirements for this exception.

CHRIA Confidentiality

The Borough argues that the requested video is confidential and exempt from public disclosure under the CHRIA. The CHRIA states that only a criminal justice agency may request “investigative information” related to a criminal investigation. 18 Pa.C.S. § 9106(c)(4). CHRIA defines “investigative information” as “information assembled as a result of the performance of an inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing.” 18 Pa.C.S. § 9102. The Borough again contends that the video footage should be considered part of a criminal investigation because it was later used as evidence in one and again misses the mark. The video recording is not investigative in nature and therefore cannot be considered confidential as contemplated by the CHRIA.

Jurisdiction

The Borough also argues that the OOR lacked jurisdiction over the appeal from the Request because the Request involved criminal investigative records and the district attorney of a county shall hear appeals “relating to access to criminal investigative records” under 65 P.S. § 67.503(d)(2). As stated above, a recording of a physical altercation that later resulted in charges is not a recording created or compiled in relation to a criminal investigation, thus the OOR had jurisdiction.

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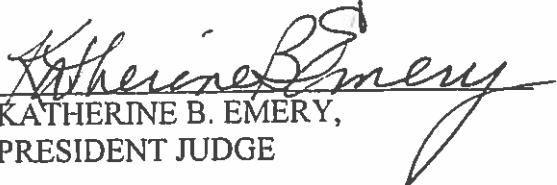
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No. 2016-4223

ORDER

AND NOW, this 21st day of March, 2017, it is hereby ORDERED, ADJUGED, and DECREED that California Borough's Petition for Review of Final Determination of Office of Open Records is DENIED. California Borough shall comply with the Office of Open Record's Order dated June 15, 2016 and provide the requested video to Andrew Glenn Rothey within 30 days.

BY THE COURT:


KATHERINE B. EMERY,
PRESIDENT JUDGE