

MAY 27 2014



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May 23, 2014

Joshua D. Bonn, Esquire
Nauman, Smith, Shissler & Hall, LLP
200 North Third Street
PO Box 840
Harrisburg, PA 17108-0840
Counsel for Appellant Ryan Bagwell

Re: Ryan Bagwell's February 12, 2014 Right to Know Appeal

Dear Mr. Bonn:

On December 14, 2013, your client, Ryan Bagwell, submitted to the Pennsylvania Office of Attorney General (OAG) a Right to Know Law (RTKL) request for certain records related to communications between OAG and the Special Investigative Counsel for Pennsylvania State University (Louis Freeh and the Freeh Group). That request was denied, in part, by the RTKL Officer for OAG on January 22, 2014, and a timely appeal was then filed. Mr. Bagwell's appeal was received by the RTKL Appeals Officer at OAG on February 12, 2014.

Mr. Bagwell limited his appeal to one of his original nine requests for records.¹ Specifically, he appealed the denial of his request for:

all letters, emails, memos, reports, transcripts, audio recordings and video recordings that were sent or received by OAG employees including, but not limited to, Frank Fina, Linda Kelly, Joe McGettigan, and Randy Feathers, between November 1, 2011 and December 31, 2012, and were sent from or to the

¹ Prior related RTKL requests from Mr. Bagwell, all detailed in the RTKL Officer's January 22, 2014 letter, provided Mr. Bagwell with certain communications. Specifically, he received copies of three emails from October 31, 2012 and November 2, 2012, and several records from June 2012 and July 2012, as records that were public and relevant to his request for communications between OAG and the Freeh Group. In addition, Mr. Bagwell was advised in his prior related RTKL requests that since the OAG did not hire the Freeh law firm or Freeh International Solutions, other requested records (such as payment records) did not exist as agency records and thus could not be provided.

following individuals: Louis Freeh, an employee of The Freeh Group; Omar Y. McNeil, an employee of The Freeh Group; Thomas Cloud, an employee of The Freeh Group; Gregory Paw, an employee of The Freeh Group; any other employee of The Freeh Group.

After my initial review and with your client's consent, I remanded this matter on March 4, 2014 to the OAG RTKL Officer. This was done to permit an additional review of emails because an email recovery project had been undertaken by the OAG as part of the Attorney General's review of the Gerald Sandusky investigation. Also with your client's consent, I set April 23, 2014 as a new deadline because the email recovery process was ongoing and was expected to be completed in the next six weeks. The remand specifically instructed the RTKL Officer to search among recovered computer records for emails between former and current OAG employees Frank Fina, Linda Kelly, Joe McGettigan, and Randy Feathers, and the Freeh Group employees Louis Freeh, Omar Y. McNeil, Thomas Cloud, and Gregory Paw for the period 11/1/2011 and 12/31/2012. My time to review, also with your client's consent, was extended to May 23, 2014.

In compliance with my instructions, OAG's Information Technology Section conducted a search as directed and located responsive emails. After reviewing these recovered emails, the RTKL Officer found duplicative emails provided earlier to Mr. Bagwell as public records in responses dated June 12, 2013 and March 7, 2013 (specifically, three emails from October 31, 2012 and November 2, 2012, and seven emails from June 11, 13, 22, and 23, 2012 and July 8 and 12, 2012). Among the remainder of the newly recovered emails, the RTKL Officer determined that, under the RTKL, certain emails qualified as public records and certain emails did not qualify as public records. Those determined to be public records were provided to Mr. Bagwell's counsel, and are described as follows:

Two (2) emails dated November 28, 2011, Subject: Directions
Email dated December 13, 2011, Subject: Friday Preliminary
Email dated December 16, 2011, Subject: Well done
Email dated April 1, 2012, Subject: Motions
Two (2) emails dated April 2, 2012, Subject: Curley-Schultz

Those emails determined not to be public records and exempt from disclosure were withheld pursuant to subsection 16 of Section 708 of the RTKL and the Criminal History Record Information Act (CHRIA), 18 Pa.C.S.A. §§9101-9183. Subsection 16 exempts "record[s] of an agency relating to or resulting in a criminal investigation" and then lists types of records included within the exemption. The RTKL Officer relied specifically on subsections (i), (ii), (iv), (v), and (vi)(A) as the bases for his denial.² The emails withheld and not disclosed are described as follows:

Two (2) email exchanges dated November 30, 2011 and December 1, 2011, re: investigative report;

² The RTKL Officer provided a written explanation for his determination in a letter dated April 23, 2014 and addressed to me as the RTKL Appeals Officer for OAG. That letter was supplemented by a letter, also addressed to me, dated April 28, 2014. Both letters are attached.

Three (3) email exchanges dated March 11, 2012, re: investigative review of evidentiary materials;
Two (2) email exchanges dated March 21, 2012 and April 2, 2012, re: information obtained related to allegations of criminal conduct;
Two (2) email exchanges dated April 11, 2012 re: seized investigative materials;
Four (4) email exchanges dated April 12, 2012 and April 13, 2012 re: seized investigative materials;
Email dated April 13, 2012 re: seized investigative materials; and
Three (3) email exchanges dated April 30, 2012 and May 1, 2012 re: investigative documents
Three (3) email exchanges dated November 30, 2011, December 1, 2011 and December 6, 2011 re: investigative report;
Email dated December 17, 2011 re: expected future support;
Two (2) email exchanges dated January 5, 2012 re: victimization;
Two (2) email exchanges dated February 17, 2012 re: profile;
Two (2) email exchanges dated February 17, 2012 re: hiring practices;
Email exchange dated March 21, 2012 re: receipt of emails;
Email dated April 9, 2012 re: timesheet; and
Email dated April 30, 2012 re: attorney representation.

Discussion

The Pennsylvania Right to Know Law, 65 P.S. §§ 67.101-67.3104, “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.” *Pennsylvania State Police v. McGill*, 83 A.3d 476, 479 (Pa. Cmwlth. 2014). “[U]nder the RTKL, all records in the possession of an agency are presumed ‘public’ unless they are: (1) exempted by Section 708 of the RTKL; (2) protected by privilege; or (3) exempted ‘under any other Federal or State law or regulation or judicial order or decree.’” *Id.* (quoting 65 P.S. § 67.305; *Office of Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa.Cmwlth. 2013)). Section 708(a)(1) of the RTKL, 65 P.S. § 67.708(a)(1), places the burden on the agency to prove by a preponderance of the evidence that a particular record is exempt from public access. *Delaware County v. Schaefer ex rel. Philadelphia Inquirer*, 45 A.3d 1149, 1152 (Pa.Cmwlth. 2012).

Section 708 of the RTKL enumerates 30 types of records exempt from disclosure. 65 P.S. § 67.708. The exemptions at issue here are found in subsection 16:

- (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.

65 P.S. § 67.708(b)(16).

I have carefully examined each of the withheld emails. For the reasons explained below, the partial denial issued by the OAG's RTKL Officer is affirmed.

1. Complaints of Potential Criminal Conduct

Subsection (16)(i) exempts “[c]omplaints of potential criminal conduct other than a private criminal complaint.” 65 P.S. § 67.708(b)(16)(i). The information contained in the withheld emails which originated from Mr. Freeh’s group are complaints of potential criminal conduct and are, therefore, exempt from disclosure under the RTKL. The only exception to this exception is a private criminal complaint. A private criminal complaint refers to the initiation of criminal charges “[w]hen the affiant is not a law enforcement officer.” *See* Pa.R.Crim.P. Rule 506 (detailing the procedure for handling private criminal complaints). Without disclosing the contents of withheld emails, it can be stated that emails from Mr. Freeh’s group contained information about potential criminal conduct uncovered by the Freeh investigation. The authors of the emails never intended to be an “affiant” attempting to initiate a private criminal complaint. The nature of the emails was to bring potential criminal activity to the Commonwealth’s attention for potential investigation and prosecution. Therefore, the withheld emails originating from Mr. Freeh’s group are clearly within the exception found in subsection (16)(i).

2. Investigative Materials, Notes, and Correspondence

Subsection (16)(ii) exempts “[i]nvestigative materials, notes, correspondence, videos and reports.” 65 P.S. § 67.708(b)(16)(ii). In *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473, 479 (Pa. Cmwlth 2010), the Commonwealth Court determined that a state police incident report was a criminal investigative report within the subsection (16)(ii) exemption as it “contains notes of interviews with the alleged victims/perpetrators, as well as another witness” and “checkboxes regarding whether certain investigative tasks have been carried out.” The court found that the report was “assembled as a result of an investigation into a criminal incident or an allegation of criminal wrongdoing” and, therefore, “falls within the exemption at Section 708(b)(16)(ii) and is not a public record; therefore, it is not subject to disclosure.” *Id.*

Likewise, my examination of withheld emails has determined that they contain communications related to allegations and investigation of criminal wrongdoing. Emails at issue here constitute investigative materials, correspondence, or notes and are, therefore, exempt from disclosure under subsection (16)(ii).

3. Records Made Confidential by Law

Subsection (16)(iv) exempts “[a] record that includes information made confidential by law or court order.” 65 P.S. § 67.708(b)(16)(iv). Disclosure of information contained in the withheld emails would violate provisions of CHRIA.

CHRIA prohibits the dissemination of investigative information “to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency which requests the information in connection with its duties, and the request is based upon a name, fingerprints, modus operandi, genetic typing, voice print or other identifying characteristic.” 18 Pa.C.S. § 9106(c)(4). Investigative information is defined in CHRIA 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. In *Mitchell v. Office of Open Records*, 997 A.2d 1262, 1266 (Pa. Cmwlth. 2010), Commonwealth Court held that the Pennsylvania State Police properly determined that information related to the arrival and departure times of officers serving a search warrant was investigative information as defined in CHRIA and was not subject to disclosure under the RTKL. The court found that “[t]he record reflects that the [Pennsylvania State Police Automated Incident Memo System] record pertains to a criminal investigation regarding the PSP's involvement in the execution of a search warrant.” *Id.*

From my examination of the information contained in the withheld emails, I have determined that the information is clearly related to the performance of an inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and is, therefore, investigative information which, in accordance with CHRIA, may only be disseminated to another criminal justice agency. Thus, releasing the withheld emails to Mr. Bagwell, who does not represent a criminal justice agency, would violate the provisions of CHRIA. This renders the information confidential and not subject to disclosure under subsection (16)(iv).

4. Victim Information

Subsection (16)(v) exempts “[v]ictim information, including any information that would jeopardize the safety of the victim.” 65 P.S. § 67.708(b)(16)(v). Several of the withheld emails contain information related to victims of alleged criminal wrongdoing, so those emails are exempt from disclosure. Although subsection (16)(v) contains language related to endangering the safety of a victim, that language does not limit the exemption only to cases where disclosure would endanger the victim but includes information related to victims. *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473, 479-80 (Pa. Cmwlth 2010) (finding the inclusion of victims’ names and addresses sufficient as “victim information” and that “[a] victim's name is “victim information,” i.e. information about the victim.”).

As some of the withheld emails contain information related to victims, they are not subject to disclosure under subsection (16)(v).

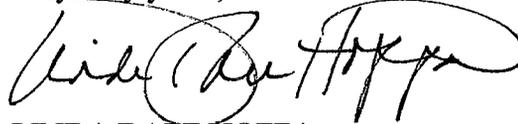
5. Revelation of the Institution, Progress, or Result of a Criminal Investigation

Subsection (16)(vi)(A) exempts “[a] record that, if disclosed, would... [r]evele the institution, progress or result of a criminal investigation, except the filing of criminal charges.” 65 P.S. § 67.708(b)(16)(vi)(A). My examination has found that disclosure of withheld emails may reveal the institution of criminal investigations against certain parties, the progress of criminal investigations, or the results of criminal investigations underway at the time of the emails. Therefore, such are not subject to disclosure under subsection (16)(vi)(A).

As each one of the withheld emails satisfy the requirements of one or more of the five cited exemptions found in subsection 16 of section 708 of the RTKL, including CHRIA, 18 Pa.C.S.A. §§9101-9183, the partial denial of the December 14, 2013 RTKL request submitted by Ryan Bagwell is affirmed.

You may appeal this decision to the Commonwealth Court of Pennsylvania. You have 30 days from the mailing date of this letter to do so.

Very truly yours,



LINDA DALE HOFFA
Senior Executive Deputy Attorney General
Right to Know Appeals Officer

Enclosures

cc: Robert A. Mulle, CDAG



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April 23, 2014

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Linda Hoffa, Senior Executive DAG
RTKL Appeals Officer
Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

**Re: Right to Know Request; Ryan Bagwell
Appeal determination dated March 4, 2014**

Dear Ms. Hoffa:

Pursuant to your letter dated March 4, 2014, the Right-to-Know Law (65 P.S. §67.101 *et seq.*) (“RTKL”) request of Ryan Bagwell that was received by the Right to Know Office on December 16, 2013, and denied in part on January 22, 2014, was remanded to this Office for amendment as a result of the email recovery project commenced by this agency.

Your instructions to this office state “to search among the recovered computer records for emails between former and current OAG employees Frank Fina, Linda Kelly, Joe McGettigan, and Randy Feathers, and the Freeh Group employees Louis Freeh, Omar Y. McNeil, Thomas Cloud, and Gregory Paw for the period 11/1/2011 and 12/31/2012.”

In compliance with your instructions, our Information Technology Section (“IT”) conducted a search as specified above and located emails that would be responsive to the aforementioned. The following is our response after reviewing the recovered emails:

Initially, duplicate emails that have been provided to Mr. Bagwell as public records as more fully set forth in our responses dated June 12, 2013 and March 7, 2013, were included in the emails recently retrieved by IT (three (3) emails from October 31, 2012 and November 2, 2012, and seven (7) emails from June 11, 13, 22, 23, 2012 and July 8, 12, 2012).

In addressing the remainder of newly recovered emails, which consist mainly of exchanged emails, we are providing the following records:

Two (2) emails dated November 28, 2011, Subject: Directions
Email dated December 13, 2011, Subject: Friday Preliminary
Email dated December 16, 2011, Subject: Well done
Email dated April 1, 2012, Subject: Motions
Two (2) emails dated April 2, 2012, Subject: Curley-Schultz

The balance of the recovered emails are being withheld pursuant to Section 708 of the RTKL and the Criminal History Record Information Act (CHRIA), 18 Pa.C.S.A. §§9101-9183.

Two (2) email exchanges dated November 30, 2011 and December 1, 2011, re: investigative report;
Three (3) email exchanges dated March 11, 2012, re: investigative review of evidentiary materials;
Two (2) email exchanges dated March 21, 2012 and April 2, 2012, re: information obtained related to allegations of criminal conduct;
Two (2) email exchanges dated April 11, 2012 re: seized investigative materials;
Four (4) email exchanges dated April 12, 2012 and April 13, 2012 re: seized investigative materials;
Email dated April 13, 2012 re: seized investigative materials; and
Three (3) email exchanges dated April 30, 2012 and May 1, 2012 re: investigative documents

Investigative file documents and materials that are maintained as part of a criminal investigation, are excluded from disclosure as “[a] record of an agency relating to or resulting in a criminal investigation, including complaints of potential criminal conduct other than a private criminal complaint; investigative materials, notes, correspondence, videos and reports . . . [a] record that includes information made confidential by law or court order or victim information, including any information that would jeopardize the safety of the victim . . . [a] record that, if disclosed, would . . . [r]eveal the institution, progress or result of a criminal investigation, except the filing of criminal charges . . .” 65 P.S. §67.708(b)(16)(i), (ii), (iv), (v), and (vi)(A). *Galloway v. Office of Pennsylvania Attorney General*, 63 A.3d 485 (Pa. Cmwlth. 2013); *Mitchell v. Office of Open Records*, 997 A.2d 1262 (Pa. Cmwlth. 2010); *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Cmwlth. 2010).

Under CHRIA, “[i]nvestigative...[i]nformation shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency...” 18 Pa.C.S. §9106(c)(4). “Investigative information” is defined by CHRIA 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. *Mitchell v. Office of Open Records*, 997 A.2d 1262 (Pa. Cmwlth. 2010).

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Please also note, that at this time, there are several email exchanges that are being reviewed by our Criminal Law Division to determine whether or not these exchanges are public records. To date, we have not received clarification from that division. Once a review has been completed and direction provided to this office, this response will be supplemented.

I trust that this response complies with your instructions.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert A. Mulle", with a long horizontal line extending to the right.

Robert A. Mulle
Chief Deputy Attorney General
Right to Know Officer

RAM:mlm
SR-53877-DHKS
Enclosures



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April 28, 2014

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By letter dated April 23, 2014, in accordance with your instructions, newly recovered emails located by our Information Technology Section (“IT”) that were determined to be public records, as more fully set forth in that letter, were forwarded to your attention.

This letter now serves as a supplement to our April 23, 2014 letter to you, in accordance with your telephonic request to provide you with a copy of the records that are being withheld in this matter. It is my opinion that the records being provided to you, which are detailed below, are precluded from disclosure pursuant to Section 708 of the RTKL and the Criminal History Record Information Act (CHRIA), 18 Pa.C.S.A. §§9101-9183.

Two (2) email exchanges dated November 30, 2011 and December 1, 2011, re:
investigative report;

Three (3) email exchanges dated March 11, 2012, re: investigative review of evidentiary materials;

April 28, 2014

- Two (2) email exchanges dated March 21, 2012 and April 2, 2012, re: information obtained related to allegations of criminal conduct;
- Two (2) email exchanges dated April 11, 2012 re: seized investigative materials;
- Four (4) email exchanges dated April 12, 2012 and April 13, 2012 re: seized investigative materials;
- Email dated April 13, 2012 re: seized investigative materials; and
- Three (3) email exchanges dated April 30, 2012 and May 1, 2012 re: investigative documents

Investigative file documents and materials that are maintained as part of a criminal investigation, are excluded from disclosure as “[a] record of an agency relating to or resulting in a criminal investigation, including complaints of potential criminal conduct other than a private criminal complaint; investigative materials, notes, correspondence, videos and reports . . . [a] record that includes information made confidential by law or court order or victim information, including any information that would jeopardize the safety of the victim . . . [a] record that, if disclosed, would . . . [r]eveal the institution, progress or result of a criminal investigation, except the filing of criminal charges . . .” 65 P.S. §67.708(b)(16)(i), (ii), (iv), (v), and (vi)(A). *Galloway v. Office of Pennsylvania Attorney General*, 63 A.3d 485 (Pa. Cmwlth. 2013); *Mitchell v. Office of Open Records*, 997 A.2d 1262 (Pa. Cmwlth. 2010); *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Cmwlth. 2010).

Under CHRIA, “[i]nvestigative...[i]nformation shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency...” 18 Pa.C.S. §9106(c)(4). “Investigative information” is defined by CHRIA 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. *Mitchell v. Office of Open Records*, 997 A.2d 1262 (Pa. Cmwlth. 2010).

The following email exchanges are being reviewed by our Criminal Law Division to determine the nature of these records, which our Criminal Law Division has now stated are not public records. Likewise precluded from disclosure for the above-stated reasons are the following emails:

- Three (3) email exchanges dated November 30, 2011, December 1, 2011 and December 6, 2011 re: investigative report;
- Email dated December 17, 2011 re: expected future support;
- Two (2) email exchanges dated January 5, 2012 re: victimization;
- Two (2) email exchanges dated February 17, 2012 re: profile;
- Two (2) email exchanges dated February 17, 2012 re: hiring practices;
- Email exchange dated March 21, 2012 re: receipt of emails;

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April 28, 2014

Email dated April 9, 2012 re: timesheet; and
Email dated April 30, 2012 re: attorney representation.

Given the above, it is expected that our obligations have been satisfied in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Mulle", with a long horizontal flourish extending to the right.

Robert A. Mulle
Chief Deputy Attorney General
Right to Know Officer

RAM:mlm
SR-53877-DHKS
Enclosures