IN THE SUPREME COURT OF PENNSYLVANIA

No. 66 MAP 2018

AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

Appellant,

v.

PENNSYLVANIA STATE POLICE

Appellee.

REPLY BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

By Allowance of Appeal from the May 18, 2018 Order of the Commonwealth Court Reversing the Determination of the Office of Open Records after briefing and argument.

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The response brief submitted by the Pennsylvania State Police (the "State Police") fails to respond. Most fundamentally, the brief does not engage with the ACLU's redaction-by-redaction analysis of the Burig Affidavit's shortcomings: instead, the State Police (like the affidavit they defend) engage in only a cursory and superficial analysis of that document.[1] And, rather than join issue on whether stripping the OOR and reviewing courts of their prerogative to engage in *in camera* review would vitiate the plenary scope of review afforded to reviewing courts in Right-to-Know Law ("RTKL") cases and frustrate the basic purpose of the RTKL, the State Police's answer conflates the scope of review with the standard of review and ignores the first principles and statutory structure of the RTKL, both of which should inform any analysis of the availability of *in camera* review.

The decision below is unprecedented in its deference to an agency's assertion that disclosure of an otherwise public document would imperil public safety. This Court should restore the balance in the RTKL that the Commonwealth Court's decision upset, and it should reject wholesale the idea that the State Police are the arbiters of all access to their records. The ACLU respectfully requests that this Court reverse the judgment of the Commonwealth Court and affirm the final

[1] Such a failure is telling, since each separate redaction within the document must be separately described, and the supporting evidence must outline the connection between each redaction and the impact of its publication on public safety. *See Bowling v. Office of Open Records*, 990 A.2d 813, 825 (Pa. Cmwlth. 2010).

determination of the Office of Open Records that the social-media monitoring policy in question (AR 6-9) be released in its entirety.

I. The Burig Affidavit Is Superficial, Conclusory, and Fails to Demonstrate a Reasonably Likely Threat to Public Safety.

The public safety exemption in the RTKL is a narrow one, and has been upheld only "when the agency shows a nexus between the disclosure of the information at issue and the alleged harm." *Fennell v. Pa. Dep't of Corrections*, No. 1827 CD 2015, 2016 WL 1221838, at *2 (Pa. Cmwlth. 2016). Applying this standard to the Burig Affidavit and AR 6-9, the OOR Appeals Officer—the only factfinder to actually review the unredacted text of the policy—found that "the threats outlined in PSP's affidavit simply do not match the text of the policy," ACLU Br. App. B at 9. According to that factfinder, "there is no material in [the policy] that is reasonably likely to jeopardize public safety," *id.* at 5. For example, the Appeals Officer noted that "[w]here the policy does touch upon interaction with outside parties, it merely prohibits PSP Troopers from breaking applicable laws." *Id.* at 5-6.

The Appeals Officer's *in camera* review was not only appropriate—it was necessary, because the affidavit is deficient on its face. As the ACLU pointed out in its Principal Brief, most of the affidavit consists of reciting the headings of the redacted sections and then averring, in often repetitious conclusory statements, that criminals would gain a tactical advantage by understanding when social media

might be used, when authorization is needed, and what information might be reviewed by law enforcement. R.32a-R.34a. Paragraph 13 of the Affidavit typifies this practice:

> Additionally, some terms in Section 9.02 - Definitions have been redacted because the terms and their definitions provide insight into how PSP conducts its investigations using open sources. Public disclosure of the terms and their definitions would provide insight into how PSP would conduct an investigation and what sources and methods it would use.

R.33a.

The affidavit also says that Section 9.04 of the policy is fully redacted because it describes when a State Police employee must seek approval to monitor social media accounts and the process for seeking that approval, and it avers that disclosing such information would reveal to criminals that the State Police uses a specific investigative method. R.32a. The affidavit does not explain how disclosure of the internal procedural steps necessary to secure approval for social media monitoring would impair public safety; it likewise provides no basis—other than *ipse dixit*—for concluding that the safety of the public would be diminished if it became known that the State Police have access to the referenced "specific investigative method." R.32a.

Even setting aside the affidavit's vagueness, the substance of its argument in this regard is deficient as well. Virtually ***any*** information about State Police operations would yield ***some*** degree of "insight" into how the agency would handle

a particular situation. But merely providing a measure of insight is not the relevant standard under the RTKL. Rather, the test—as this Court well knows—is whether there is a reasonable likelihood that disclosure would threaten public safety. 65 P.S. § 67.708(b)(2). "Insight" into law enforcement procedures does not, without more, establish such a threat. And Major Burig's affidavit does not explain the threat. It does not, therefore, meet the evidentiary burden that the RTKL places on the State Police to defend its redactions.

The significant redactions in AR 6-9 make little sense for yet another reason—namely, the public availability of similar social-media monitoring policies from Philadelphia and elsewhere. *See* R.48a-R.58a (Philadelphia); R.61a-62a (Salt Lake City); R.67a-R.72a (Orange County). The State Police do not address this counter evidence at all—much less explain why release of the analogous policy and provisions in AR 6-9 would be uniquely dangerous.

Perhaps recognizing these shortcomings, the State Police seek to dismiss the ACLU's arguments as "a thinly veiled attack on the credibility or veracity of the affidavit." PSP Br. at 12. This is misdirection. Major Burig's veracity and credibility are not the subject of this appeal; a person can speak truthfully and still say too little. Instead, the question is whether his affidavit is sufficient to support the application of the public-safety exception. Quite plainly—for the reasons stated above and in the ACLU's Principal Brief—it is not. Such a conclusion says

nothing at all about either the credibility or the veracity of Major Burig. All it says is that, when viewed dispassionately and in the context of the other evidence presented, his affidavit lacks the detail and analysis necessary to show, by a preponderance of the evidence, that disclosure of the redacted portions of AR 6-9 would be reasonably likely to threaten public safety.[2]

To be sure, other affidavits, dealing with other records and arising in the circumstances of other cases, could certainly be drafted so as to satisfy on their face the agency's burden. But the Burig Affidavit is not that affidavit, and this is not that case. In ***this*** case, with ***this*** affidavit, the OOR's disclosure order was correct and must be reinstated.

II. The Commonwealth Court Erred in Reversing the OOR's Determination Without Considering the Predicate Facts Upon Which That Decision Was Based.

In its Principal Brief, the ACLU explained that, under the definition of "plenary" review endorsed by this Court in *Bowling*, a reviewing court may expand upon—but may not contract—the scope of the record it considers when evaluating

[2] The State Police also accuse the OOR Appeals Officer of "disregard[ing] the evidence (Burig Affidavit) and ma[king] his own judgment on the likelihood of harm that could occur to public safety should a record be released." PSP Br. at 20 n.8. Not so. The Appeals Officer did not question the credibility of the affiant nor overrule Major Burig's experience and expertise. Instead, the clear gravamen of the Appeals Officer's conclusion is that the Burig Affidavit failed to demonstrate the required nexus between the information being withheld and a reasonably likely threat to public safety. Absent such moorings, there simply was no evidentiary basis for a finding that disclosure would be reasonably likely to threaten public safety. That straightforward application of the established legal standard to the extant factual record is precisely what Appeals Officers are obligated to do under the RTKL.

whether to affirm or reverse a decision of the OOR. In their response, the State Police urge that, because the Commonwealth Court performs a ***de novo*** review in RTKL appeals, it was justified in ignoring the bases for the OOR's decision. PSP Br. at 13-14.

This is a *non sequitur*. The ACLU's argument rests on the meaning and import of the applicable ***scope*** of review rather than the ***standard*** of review. To be sure, *de novo* review does empower the reviewing court to issue a decision without affording any deference to the decision of the tribunal below. But that is not at issue here. Instead, the question on which this Court granted review requires assessing whether a reviewing court may, consistent with the plenary ***scope*** of review, ignore the procedural, legal, and evidentiary landscape that produced the decision it is being called upon to review. *See* PSP Br. at 15. On that (dispositive) question the State Police's brief is curiously silent, except to say that courts often conflate the two.

The fact that courts sometimes err is not an invitation to do so. The Rules of Appellate Procedure expressly require statements of ***both*** the scope and standard of review, and this Court has chastised the intermediate appellate courts in the past for ignoring the distinction. *See, e.g., Morrison v. Commonwealth, Dep't of Pub. Welfare*, 646 A.2d 565 (Pa. 1994). In *Morrison*, the Court conceded that the two are erroneously often used interchangeably but cautioned that the "two terms carry

distinct meanings and ***should not be*** substituted for one another." *Id*. at 570 (emphasis added).

As the Court explained, in reviewing a grant of a new trial, the standard of review is an abuse of discretion, but the scope of review "is determined by whether the trial court cites a finite set of reasons for its decision, indicating that but for the cited reasons it would not have granted a new trial, or 'leaves open the possibility that it would have ordered a new trial for reasons other than those it specified. If the trial court leaves open the possibility that reasons additional to those specifically mentioned might warrant a new trial, or orders a new trial 'in the interests of justice,' the appellate court applies a broad scope of review, ***examining the entire record*** for any reason sufficient to justify a new trial." *Id.* (emphasis added).

In this case, the Commonwealth Court did not even review the actual basis for the OOR's decision, much less the entire record—although "full" or "plenary" at least means more than "broad." *Morrison* thus articulates a different application of the same principle the Court articulated in *Bowling*, which is to say that the analysis undertaken by the originating tribunal determines the proper scope of the appellate court's review. *Bowling v. Office of Open Records*, 75 A.3d 453, 475 (Pa. 2013) ("We held, however, that the appropriate **scope** of review of a trial court's discretionary decision expanded or contracted on the basis of the reasons

given by the trial court for its holding." (emphasis in original)). Simply put, "'scope of review' is dependent upon the nature of the task given the reviewing court." *Id.*

Applied here, this means that a court reviewing an OOR decision that rests on an *in camera* review may not ignore the materials that the Appeals Officer considered *in camera*. Of course, nothing requires the court to weigh that evidence the same way that the Appeals Officer did, nor to find the same pieces of evidence to be significant or dispositive. (***That*** is the meaning of *de novo* review.) But to place the evidence wholly out of bounds is an act that cannot be squared with the proper ***scope*** of review as defined by this Court in *Morrison* and *Bowling*.

III. *In Camera* Review Is Not Limited to Cases Involving Privilege Determinations.

The crux of the State Police's argument on the availability of *in camera* review is that it may not be used in cases, such as this one, where the applicable RTKL exception requires predicting the likely effects of disclosure—*i.e.*, whether disclosure is reasonably likely to threaten public safety. PSP Br. at 17-18. The RTKL, however, does not create a different procedure for the OOR's review of a claimed public safety exemption. And neither precedent nor first principles support such a limitation of an appeal officer's—or a court's—review.

As for precedent, the ACLU's Principal Brief pointed out that both this Court and the Commonwealth Court have repeatedly endorsed the use of *in*

camera review in cases that require an assessment of the likely effects of disclosing the record in question. *See, e.g.*, *Commonwealth ex rel. Dist. Attorney of Blair County, In re Buchanan*, 880 A.2d 568, 577-78 (Pa. 2005) (holding that on remand a trial court "may, pursuant to its broad discretionary authority, conduct an *in camera* review of [an] autopsy report" to determine whether its release "would actually substantially hinder or jeopardize" an ongoing criminal investigation); *Commonwealth v. Natividad*, 200 A.3d 11, 40 (Pa. 2019) (approving *in camera* review of alleged impeachment material, including materials related to the witness's drug use and mental health, to determine whether disclosure would unduly invade the witness's privacy); *cf. Octave ex rel. Octave v. Walker*, 103 A.3d 1255, 1263 (Pa. 2014) (approving use of *in camera* review to balance individual's privacy interests in mental health records with interests of justice in disclosure during discovery); *PG Publ'g Co. v. Commonwealth*, 614 A.2d 1106, 1109-10 (Pa. 1992) (holding that *in camera* review of affidavits was necessary "to balance the right of access to judicial documents with the interests of the Commonwealth in protecting the integrity of [a] criminal investigation").

In response, the State Police argue that such cases are irrelevant to whether *in camera* review is available under the RTKL because the cited decisions were not applying the RTKL. That is nonsense. In this case, the Commonwealth Court ruled that *in camera* review was inappropriate because this was an "effects" case

rather than a "words on the page" case. *See* ACLU Br. App. A at 13. The decisions cited above demonstrate quite clearly both (1) that the courts are competent to make such predictive ("effects") judgments, and (2) that *in camera* review is a critical tool making those judgments. The State Police cannot dismiss them simply because they arose out of a different statutory scheme.

Nor do its case citations help the PSP. A good example is its reliance on *UnitedHealthcare of Pa., Inc., v. Dep't of Human Servs.*, 187 A.3d 1046, 1060 (Pa. Cmwlth. 2018). PSP Br. at 6, 17. In that case, in which United wanted documents to challenge DHS's determination, made after its review and scoring of proposals, to continue to negotiate with only certain proposers in each region for its Community Health Choices Program, the OOR had found that the records in question were exempt from disclosure, and in that regard, it had found the Department's explanation of the records adequate. On appeal, United argued that the OOR should have demanded to see the documents *in camera*, even though United had not expressly requested the OOR to review them *in camera*. ***Rejecting*** the suggestion that a party has an obligation to ask for *in camera* review, the Commonwealth Court held that because it was "OOR's responsibility to ensure that the record contains sufficient information to evaluate the exemptions," OOR was required to determine independently whether *in camera* review was warranted. 187 A.3d at 1058 n.12. Thus, while it is accurate that the agency can determine

what to submit in support of its contention that records are exempt, PSP Br. at 6, the OOR has an independent responsibility to take any steps necessary to assess the sufficiency of that showing. Here, that responsibility led it to an *in camera* review of AR 6-9.

The State Police later truncate the holding of the Commonwealth Court in *United*, and in the process give an impression that the Commonwealth Court prescribed a very specific order of operations for OOR reviews—specifically, that the OOR must not look beyond the agency's affidavit unless and until it determines that the agency's affidavit is inadequate on its face. *See* PSP Br. at 17. What the Commonwealth Court actually held was that the burden rests on the OOR to determine what procedures it needs to deploy in order to resolve the questions before it. *See* 187 A.3d at 1058 n.12 (explaining that it is "OOR's responsibility to ensure that the record contains sufficient information to evaluate the exemptions"); *id.* at 1060 (stating that "OOR has the authority to request production of an exemption log and to conduct *in camera* review of documents where an exemption or privilege has been asserted" and observing that the use of such tools "***may*** not be necessary" where the affidavit is facially sufficient to determine the applicability of the asserted exception (emphasis added)).

The OOR's decision in this case is entirely consistent with the Commonwealth Court's holding in *United*. What is ***not*** consistent across the two

cases is the Commonwealth Court's approach, which in this case disregarded its prior (correct) acknowledgment of the OOR's discretion to compile the record it believed necessary to evaluate the agency's claim of exemption.

The State Police's position also conflicts with important first principles of RTKL cases. As this Court has explained, the purpose of the RTKL is to give citizens "access to information concerning the activities of their government," so as to "prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions." *Levy v. Senate,* 65 A.3d 361, 381 (Pa. 2013) (internal quotation marks omitted). For that reason, the RTKL makes agency records presumptively public and puts the burden on the agency to prove, by a preponderance of the evidence, that one or more of the RTKL's exemptions applies. 65 P.S. §§ 67.305, 67.708(a).

Yet the State Police urge this Court to short-circuit this system by treating Major Burig as the dispositive expert on the effect of disclosing AR 6-9. PSP Br. at 18-19. This attempt to confer on Major Burig the mantle of an expert witness in civil litigation is deeply flawed. First, in civil litigation a jury would never be given ***only*** an expert's opinion. Instead, in the mine-run of cases, a jury would receive both the primary evidence (*e.g.*, photos, videos, and testimony about an automobile accident) and ***then*** hear expert testimony on what conclusion the jury (in the expert's opinion) should draw from that primary evidence (*e.g.*, the cause of

the accident). Put differently, "because I said so" is not a sufficient answer from an expert in litigation. Yet that is exactly what the State Police demand here: the right to submit ***only*** an affidavit without also providing the primary document about which the "expert" is opining. They provide neither citation nor argument in support of that novel request.

Second, and also unlike traditional civil litigation, there can be no "battle of the experts" in a RTKL appeal, because only one "expert" (the agency's) would have access to the requested record, and therefore only one expert (again, the agency's) would be in a position to provide an accurate, precise, and full-throated defense of his or her view on the likely effects of disclosing the record. This is one of the reasons the General Assembly established the Office of Open Records—to ensure that the structural asymmetry is corrected. There could be a world in which any challenged document had to be ***produced***, and whether it could be ***used*** would be determined by advocacy on both sides—as is done with the admissibility of evidence in general. Instead, *in camera* review protects a document from the harms that could flow from indiscriminate production while operating as "an essential check against the possibility that a privilege may be abused."

Commonwealth Office of Open Records v. Ctr. Twp., 95 A.3d 354, 367 (Pa. Cmwlth. 2014).[3]

Third, as already noted, under the RTKL all records are presumed public, and the agency has the burden of showing, by a preponderance of the evidence, that an established exception (here, a reasonably likely threat to public safety) applies to the record in question. 65 P.S. §§ 67.305, 67.708(a)(1), (b)(2). Allowing that burden to be carried solely by the opinion of an agency employee, which opinion may not be evaluated against the backdrop of the actual record at issue, would gut the RTKL's presumption of disclosure, *id.* § 67.305, and would, in most cases, render the factfinding functions of the OOR and the Commonwealth Court a mere formality at best. *See Bowling*, 75 A.3d at 473, 476.

[3] The State Police's argument faulting the ACLU for not submitting opinion evidence in support of its request for disclosure is thus absurd. *See* PSP Br. at 20 n.7. In point of fact, the ACLU submitted the best evidence available to it: publicly released social-media-monitoring policies from law enforcement agencies around the country—including one from the largest city in this Commonwealth. *See* R.48a-R.72a.

CONCLUSION

For the foregoing reasons, as well as those stated in the ACLU's Principal Brief, the Court should review the text of AR 6-9 *in camera*, reverse the judgment of the Commonwealth Court, and remand this case to the Commonwealth Court with instructions to affirm the decision of the Office of Open Records.

Dated: June 3, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for Appellant hereby certifies that, pursuant to Pa.R.A.P. No. 2135(d), the preceding Brief for Appellant is produced using 14-point font in the text and 12-point font in the footnotes and contains no more than 7,000 words. This word count relies on the word count of the computer program used to prepare this brief. The word count is less than the total words permitted under Pa.R.A.P. 2135(a)(1).

Dated: June 3, 2019

/s/ Mary Catherine Roper
Mary Catherine Roper

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: June 3, 2019

/s/ Mary Catherine Roper
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PROOF OF SERVICE

I, Mary Catherine Roper, hereby certify that, on this day, I caused true and correct copies of the foregoing Reply Brief of Appellant, to be served upon the following via the PACFile electronic-filing system, which service satisfies the requirements of Pa.R.A.P. 121:

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