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IN THE COURT OF COMMON PLEAS
CENTRE COUNTY, PENNSYLVANIA

STACY PARKS MILLER, DISTRICT ATTORNEY, Plaintiff, v. COUNTY OF CENTRE, SEAN P. MCGRAW, ESQ., ANDREW SHUBIN ATTORNEY AT LAW, P.C. dba THE LAW OFFICE OF ANDREW SHUBIN, BERNARD F. CANTORNA, ESQ., BRYANT & CANTORNA, P.C., and JOHN DOES 1-5, Defendants.	:	No.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR SPECIAL AND/OR PRELIMINARY INJUNCTION

I. Matter Before the Court

Plaintiff, Centre County District Attorney Stacy Parks Miller, submits this memorandum of law in support of her petition for injunctive relief under Pa.R.C.P. 1531 to address illegal

dissemination of law enforcement materials by agents of Centre County. DA Parks Miller seeks to preserve the status quo with an order enjoining Defendants Centre County, Sean P. McGraw, Esq., Andrew Shubin Attorney at Law, P.C. dba The Law Office of Andrew Shubin, Bernard F. Cantorna, Esq., and Bryant & Cantorna, P.C. from violating the Right-To-Know law, 65 P.S. § 67.101 et seq., and the Criminal History Records Information Act ("CHRIA"), 18 Pa.C.S. § 9101, et seq., by illegally intercepting Right-to-Know requests and disseminating telephone and text message records to the public. DA Parks Miller also seeks an order to recover materials illegally disseminated.

II. Facts

The factual background in this matter is detailed in the accompanying verified Complaint and Petition for Injunctive Relief. Plaintiff, Stacy Parks Miller, is the twice-elected District Attorney for Centre County. Defendants Sean P. McGraw, Esq. and Bernard F. Cantorna, Esq. are defense attorneys practicing in Centre County.

The Centre County Policy Manual beginning at page 112 contains a Right-To-Know Policy. The policy, which has been in place since January 2009, *explicitly* identifies the District Attorney as the person to whom requests for District Attorney's records must be addressed, directs the receiving agency to follow statutory exclusions under the Right-To-Know law, and references appellate options where requests are denied by the "independently elected officials listed above," including the District Attorney. The policy is attached to the Complaint as Exhibit "A."

Despite the policy, certain actors within Centre County, including its Solicitor Louis Glantz, County Commissioners Steven G. Dershem and C. Chris Exarchos, and County Administrator Timothy Boyde, conspired with certain members of the defense bar, including the

Defendant attorneys and others, to illegally release the District Attorney's Office phone and texting records, ostensibly under the Pennsylvania Right-to-Know Law. Attorneys McGraw and Cantorna filed the illegally disclosed documents of public record on the criminal docket, ostensibly to advance their law practices and their criminal defense clients' cases.

In reality, the County actors sought to embarrass the District Attorney, the District Attorney's Office, and certain members of the Centre County judiciary that the County actors considered to be political adversaries. This is why the County actors orchestrated the Right-to-Know requests and release of the phone and text information without even notifying the affected law enforcement and judicial personnel. This itself violates the Right-to-Know Law, circumvents the safeguards that the legislature built into the law, and was intended to prevent the affected law enforcement and judicial personnel from asserting valid public safety exceptions to disclosure under the Right-to-Know Law.

The County actors' conduct also violated CHRIA, which prohibits the disclosure of law enforcement protected information, including investigative and intelligence information, the Right-to-Know Law itself, DA Parks Miller's privacy rights, and the County's own written policy for handling Right-to-Know requests dating to January 2009.

Disclosure policies recently proffered by the Count of Common Pleas for Centre County do not address law enforcement records, and do not require the County actors to recognize the legal requirement that Right-To-Know requests relating to DA Parks Miller's office must be directed to the District Attorney's office for consideration. In fact, the proffered policy itself violates the law by failing to permit any input from the District Attorney into what may or may not be legally protected records, instead cutting the District Attorney and all other elected row officers entirely out of the process in direct contravention of the Right-To-Know law. In

addition, the proffered policy fails to remedy the County actors' prior and ongoing illegal release of such materials.

Pending adjudication of her Complaint, DA Parks Miller seeks temporary and preliminary injunctive relief to restore the *status quo*, direct the Defendants to follow the law, and preclude further releases of law enforcement materials.

III. Argument

The purpose of a preliminary injunction is to preserve the *status quo* as it exists or as it existed before the acts complained of, thereby preventing irreparable injury or gross injustice which might occur before the merits of a case can be heard and determined. American Express Travel Related Services Co., Inc. v. Laughlin, 623 A. 2d 854, 856 (Pa. Super. 1993); Township of Clinton v. Carmat, Inc., 432 A.2d 238, 239 (Pa. Super. 1981).

The criteria governing the issuance of a preliminary injunction are well settled. An injunction is warranted when the moving party demonstrates: (1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) that a preliminary injunction will probably restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, that it is likely to prevail on the merits; (5) that the injunction it seeks is reasonably suited to abate the offending activity; and (6) that a preliminary injunction will not adversely affect the public interest. Warehime v. Warehime, 860 A.2d 41, 46-47 (Pa. 2004).

Those requirements are satisfied here. The requested injunctive relief is warranted.

District Attorney Parks Miller Has a Clear Right of Action and Is Likely To Succeed on the Merits of Her Claims

To obtain a preliminary injunction under Pennsylvania law, a movant must demonstrate that the activity she seeks to restrain is actionable, that her right to relief is clear, and that the wrong is manifest, or, in other words, that she is likely to prevail on the merits. Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003).

Here, the Defendants have plainly violated the Right-To-Know law and CHRIA. Under the Right-to-Know law, when an agency produces a record that is not a public record or financial record, it is required to notify "any third party provided the records to the agency, the person that is the subject of the record, and the requester." 65 P.S. § 67.707(a).

The fact that a government employee's cellular telephone is provided by the government and that government business may be discussed over a personal cellular telephone does not make that telephone any less "personal" within the meaning of the Right-to-Know law. Commonwealth Office of the Governor v. Raffle, 65 A.3d 1105, 1111 (Pa. Commw. 2013).

Under the Right-to-Know Law, records "containing all or part of a person's …cellular or personal telephone number" are completely exempt from disclosure. 65 P.S. § 67.708(b)(6)(i)(A). The Right-To-Know law requires all agencies to designate an open-records officer, who is tasked with handling record requests. 65 P.S. § 67.502(a)(1), (b). The statute further obliges agency employees who receive requests to forward the requests to the agency's open-records officer. 65 P.S. § 67.703.

Employees of an agency shall be directed to forward requests for records to the open-records officer. Commonwealth v. Office of Open Records, 103 A.3d 1276, 1280 (Pa. 2014). Where the request is initially misdirected, it should be routed to "other appropriate persons within the agency or to appropriate persons in another agency." 65 P.S. § 67.502(b)(1).

As indicated in the County policy, the County already designated the District Attorney as the open records officer for requests pertaining to the District Attorney's Office. Exhibit "A." The records requests at issue here, and all future similar requests, should have been and, going forward, should be directed to the District Attorney. That is the *status quo* to be requested here, as distinct from what has been happening.

The Pennsylvania Right-To-Know Law contains various exceptions to the disclosure of records. Examples pertinent to the present case include exceptions for: cellular or personal telephone numbers, personal email addresses, internal predecisional deliberations, confidential proprietary information, records related to criminal investigations (complaints, investigative materials, correspondence, records identifying confidential sources, victim information). 65 P.S. § 67.708(b).

The law enforcement exception applies to documents related to both completed and ongoing investigations undertaken by an agency in the performance of its official duties. PG Publishing Company v. County of Washington, 638 A.2d 422 (Pa. Cmwlth. 1994); Gutman v. Pennsylvania State Police, 612 A.2d 553 (Pa. Cmwlth. 1992). The exclusion for information relating to police investigations applies not only to active investigations, but also to any records related to completed investigations. Commonwealth v. Mines, 680 A.2d 1227 (Pa. Cmwlth. 1996), appeal denied 690 A.2d 238, *certiorari* denied 117 S.Ct. 1477.

Under the Right-To-Know law, when an agency produces a record that is not a public record or financial record, it is required to notify "any third party provided the records to the agency, the person that is the subject of the record, and the requester." 65 P.S. § 67.707(a).

In this case, the County actors even compiled phone records to tailor a report to be used to overturn valid criminal convictions. Yet the Right-To-Know law explicitly states that the

agency is not obligated to do so: "When responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record." 65 Pa.C.A. § 67.705. That provision precludes a requester from being able to "shanghai" government employees to create a record when one does not exist and take them away from carrying out their normal responsibilities. Pennsylvania State Police v. McGill, 83 A.3d 476, 481 (Pa. Commw. 2014).

Here, the County actors were willingly "shanghaied" by criminal defense attorneys. In addition to keeping the District Attorney in the dark about the records requests, the County actors obtained call history information from the phone carriers, reviewed the historical call records, astonishingly compiled the call histories into spreadsheets, and analyzed those spreadsheets to identify the calls of interest. The County actors were essentially deputized as defense paralegals working to overturn valid criminal convictions!

The County's Right-To-Know policy tracks the Right-To-Know law with respect to obtainable materials and exclusions from disclosure, and also identifies the District Attorney as the Right to Know Officer for requests for materials related to the District Attorney's Office, and was obviously authored by someone who wanted the County to be in compliance with the law and adopted by county commissioners who desired the same. Yet the County has failed to give the notices that it is required to give under 65 P.S. § 67.707(a) and its own policy, and compiled, created, and released materials in violation of both the Right-To-Know law and the County's own policy in aid of convicted criminals and their lawyers.

Under CHRIA, "[i]t [is] the duty of every criminal justice agency within the commonwealth to maintain complete and accurate criminal history record information." 18

Pa.C.S. § 9111. This information is maintained in a central repository for the use of criminal justice agencies. Id. at §§ 9106, 9121.

Criminal history record information is defined 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, information 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. 18 Pa.C.S. § 9102.

The three categories of information excluded from the definition of "criminal history information" comprise what CHRIA describes as "protected information" that is not usually reported to the central repository for state-wide access. Id. at § 9106(a). Accordingly, the criminal justice agency that collected the protected information may only disseminate it to its authorized members (i.e., not defense attorneys or vendetta-driven politicians), and upon specified request, other criminal justice agencies. 18 Pa.C.S. § 9106(c).

"Investigative information" 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. Indicative of its sensitive nature, CHRIA prohibits the inclusion of investigative information in the central law enforcement repository. 18 Pa.C.S. § 9106(a).

"What distinguishes 'criminal history record information' from 'investigative information' is that the former arises from the initiation of a criminal proceeding, i.e., an arrest, whereas the latter is composed of information assembled as a result of the performance of an

inquiry into a crime that is still under investigation." Dep't of Auditor Gen. v. Pennsylvania State Police, 844 A.2d 78, 82 (Pa. Commw. Ct. 2004) (finding that Megan's Law registry of sexual offenders constituted information assembled by PSP as a result of the performance of inquiries into unsolved Megan's Law offenses, making it "investigative information" under CHRIA, which the Auditor General was not entitled to).

CHRIA violations are punishable by civil penalties. 18 Pa.C.S. § 9181.

In addition CHRIA provides that the Attorney General "or any other individual or agency" may bring suit to "enjoin any criminal justice agency, noncriminal justice agency, organization or individual violating the provisions of this chapter or to compel such agency, organization or person to comply with the provisions of this chapter." 18 Pa.C.S. § 9183(a).

Irreparable Harm Will Result Absent Court Intervention

The phone and email records include information identifying law enforcement personnel, crime victims, and witnesses, including confidential informants. The Defendants, who are not law enforcement officers, simply have no business trolling through law enforcement records.

In addition to violating the Right-to-Know law and CHRIA, dissemination of such information presents a real and immediate danger to the individuals identified in the materials.

Given that the Defendants have already plainly ignored the County Right-To-Know policy, the statute it purports to implement, and CHRIA, an injunction is necessary to abate the present and otherwise irreparable harm.

The Balance of Harms Favors Injunctive Relief

Denying the requested relief would cause greater harm than granting it. The requested injunctive relief will merely enforce (or, more accurately, prevent the immediate violation of) the Right-To-Know law and CHRIA. Defendants will simply be barred from further breaking the

law. Thus, any harm to Defendants would be self-inflicted. Merrill Lynch v. Napolitano, 85 F. Supp.2d 491, 498 (E.D. Pa. 2000) ("Significantly, any harm that [defendant] would suffer would be self-inflicted . . . The self-inflicted nature of the harm suffered by the wrongdoer [defendant] weighs heavily in favor of granting preliminary injunctive relief.").

The balance of harms therefore strongly favors granting injunctive relief. The balance of harms strongly favors the issuance of an injunction to put the parties in the position they were in before the wrongful conduct occurred. Walter v. Stacy, 837 A.2d 1205, 1209 (Pa. Super. Ct. 2003).

The Requested Relief Seeks Preservation of the *Status Quo*

A primary purpose of a preliminary injunction is to preserve the status quo until a decision can be made on the merits. Acierno v. New Castle County, 40 F.3d 645 (3d Cir. 1994).

In this case, the requested injunctive relief will preserve the status quo by preventing Defendants from further violating the law, returning the illegally disseminated materials, and ceasing the further dissemination of the materials.

The Requested Relief is Reasonably Tailored to the Concerns at Issue and Consistent with the Public Interest

The requested injunction will simply bar the Defendants from breaking the law and require them to remedy (to the extent possible) the illegal dissemination of the materials at issue. An injunction that seeks to enforce the Right-To-Know law and CHRIA is obviously consistent with the public interest.

WHEREFORE, Plaintiff, Centre County District Attorney Stacy Parks Miller, in her capacity as the elected chief law enforcement officer of Centre County, requests that the Court enter the accompanying proposed orders for temporary and preliminary injunctive relief.

Respectfully submitted,

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