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IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

JONATHAN D. GRINE Plaintiff	:	
v.	:	NO. 2015-1080
COUNTY OF CENTRE, THE McSHANE FIRM, LLC, and THEODORE C. TANSKI, Defendants	:	

SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF'S PETITION FOR PRELIMINARY INJUNCTION

I. FACTUAL BACKGROUND

Plaintiff Jonathan D. Grine ("Grine") is an adult individual and judge of the Centre County Court of Common Pleas. On February 3, 2015, the County of Centre ("County") received a Right-to-Know request from Theodore Tanski ("Tanski"), an attorney with The McShane Firm, LLC (the "McShane Firm"). Grine Ex. 1. The Right-to-Know request sought information about certain telephone communications, including text messaging information (hereinafter "telephone communications"), of Judge Grine and other members of the unified judicial system, including another judge and lawyers in the District Attorney's Office. Id. The

request did not seek disclosure of the personal cellular telephone number of Grine or others. Id.; Tanski and McShane Answer to Complaint (hereinafter "Answer"), ¶ 10.

After the Right-to-Know Law (the "RTKL") was amended in 2008, the County adopted a Right-to-Know Policy in 2009 which provided that Right-to-Know requests for Court records were to be directed to the Court's Prothonotary/Clerk of Court and that Right-to-Know requests for the District Attorneys' records were to be directed to the District Attorney. Despite that policy, the County did not direct the Tanski request to either the Prothonotary or the District Attorney. Testimony of T. Boyde. Moreover, although the Court had published information under Rule of Judicial Administration 509 directing that requests for financial records of the judiciary should be directed to the Office of the Court Administrator, the County did not direct the request to the County Administrator. Grine Ex. 6 and 7; Testimony of J. Grine; Testimony of T. Boyde. The County was even instructed by its special counsel for Right-to-Know issues, Craig Staudenmaier, that records of the Court and District Attorney were records of the judiciary and treated differently than County records are treated under the RTKL. Defendant's Ex. 7. Mr. Staudenmaier explained that it was an impermissible violation of the separation of powers for an executive branch agency to interfere with court records and employees. Id. Despite that advice, the County took it upon itself to respond to the Right-to-Know request, to make its own determination about what records of the judicial system qualify as "financial records" under the RTKL[1], and to create its own format for releasing alleged "financial records" of a judicial agency.

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[1] Under the RTKL, the obligation to produce financial records of a judicial agency is an obligation of the judicial agency, not the obligation of a local agency. Compare, 65 P.S. § (cont'd footnote)

The County did not produce billing records in response to Tanski's Right-to-Know request. Testimony of J. Lutz; Testimony of T. Boyde. Instead, the County created color-coded spreadsheets that reflected Grine's calls and text messages to and from Judge Lunsford, District Attorney Stacy Parks-Miller, and Assistant District Attorney Nathan Boob. Grine Ex. 2 and 3; Testimony of J. Lutz. The documents created by the County included portions of all these individuals' personal cellular phone numbers. Id. They did not reflect any information about the costs or charges incurred for the calls or texts; they did not disclose what amount of funds the County expended for any of the calls.[2] Id. In fact, Grine reimbursed the County for his personal cellular phone during the relevant time, and the District Attorneys' phones were paid for from forfeited drug funds. Testimony of J. Grine; Testimony of S. Parks-Miller.

Although the County consulted with President Judge Kistler regarding earlier Right-to-Know requests, they did not obtain the President Judge's approval to release the documents that the County created in order to respond to the Tanski request. Testimony of T. Kistler. Judge Kistler was, according to his testimony, unfamiliar with the RTKL, the County's policy for records requests, and Rule of Judicial Administration 509, and he was uncomfortable being

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(continued footnote)
67.304 ("A judicial agency shall provide financial records in accordance with this act or any rule or order of court providing equal or greater access to records"); 65 P.S. § 67.302 ("A local agency shall provide **public records** in accordance with this act"); and, 65 P.S. § 67.302 defining "public record" as **a record of a Commonwealth or local agency** and **not** including judicial agencies within the definitions of "Commonwealth agency" and "local agency."

[2] Had the County simply produced the billing records, with cellular phone numbers redacted, the response would have consisted solely of "financial records." However, the documents created by the County revealed no financial information at all, and instead revealed information about telephone communications of members of the unified judicial system which information is not subject to the RTKL.

involved in responding to the Right-to-Know requests seeking information about other Centre County judges. Testimony of T. Kistler. Judge Kistler was not the Court's Right-to-Know Officer under the County's policy and was not the records manager identified by the Court to handle requests for financial records of the Court under Rule of Judicial Administration 509. Grine Ex. 5, 6, 7. The County did not offer any explanation for its failure to consult with the appropriate Court personnel regarding the Right-to-Know requests.

The County did not notify Grine that it had received the Right-to-Know request or that it had provided information about Grine's telephone communications, including a portion of his cellular telephone number, in response to Tanski's Right-to-Know request. Testimony of J. Grine. Grine was later informed by the District Attorney that the County had produced information about his telephone communications in response to a Right-to-Know request. Id. However, the County would not disclose to Grine what information it had produced regarding his phone communications. Id.

II. PROCEDURAL HISTORY

Concerned that the County was not following the RTKL and concerned about what information the County had produced and would continue to produce in violation of the RTKL, Grine filed suit on March 16, 2015. The Complaint alleged that the County had improperly produced judicial records in response to a Right-to-Know request, that the County had improperly produced Grine's cellular telephone number in response to a Right-to-Know request, and that the County had improperly failed to give notice to Grine as required under the RTKL. Count I of the Complaint asserted a claim for declaratory relief against the County, the McShane Firm, and Tanski regarding the parties' rights under the RTKL. Count II of the Complaint

asserted a claim that the County had violated Judge Grine's constitutional right of privacy. Count III sought injunctive relief against the County, the McShane Firm, and Tanski.

Concurrently with the Complaint, Grine filed a Petition for Emergency Injunction and Preliminary Injunction, seeking to prevent the use or further disclosure of the information that the County had improperly produced. The Court, per Senior Judge Charles Brown, entered an order granting an emergency injunction that prohibited the County, the McShane Firm, and Tanski from disclosing any information related to Judge Grine's telephone communications. The hearing on Grine's Petition for Preliminary Injunction was held on April 2, 2015.

This Supplemental Brief is provided in accordance with the direction of the Court at the conclusion of the hearing that Plaintiff should submit a brief addressing the First Amendment issues raised by the McShane Firm and Tanski in their brief filed on April 1, 2015.

III. ARGUMENT

A. Applicable First Amendment Standards.

The First Amendment guarantees freedom of expression upon public questions. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 686 (1964). Debate on public issues should be uninhibited, robust, and wide-open. 376 U.S. at 270. Speech on matters of public concern is at the heart of First Amendment protection. Snyder v. Phelps, 562 U.S. 443, 131 S.Ct. 1207 179 L.Ed.2d 172 (2011). However, "not all speech is of equal First Amendment importance." Id. "Where matters of purely private significance are at issue, First Amendment protections are often less rigorous." Id. citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

> Restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: "[T]here

> is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas"; and the "threat of liability" does not pose the risk of "a reaction of self-censorship" on matters of public import.

Snyder v. Phelps, 131 S.Ct. 1215 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985)).

Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community" or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." Id. at 1215-16 (citations omitted). In deciding whether speech is of public or private concern, the court should examine content, form, and context of the speech at issue. Dun & Bradstreet, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

Courts have repeatedly noted that imposing a prior restraint on the expression of matters **of public significance** raises serious constitutional concerns. See, e.g., Madsen v. Women's Health Center, Inc., 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994)(injunction against abortion protestors); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)(injunction against newspapers' publication of information regarding trial of multiple murder case); New York Times Co. v. United States, 403 U.S. 713, 714, 91 S.Ct. 2140, 2141, 29 L.Ed.2d 822, 824-825 (1971)(government sought injunction against newspaper's publication of "Pentagon Papers" regarding political and military involvement in Viet Nam). Absent a state interest of the highest order, the state may not prevent or punish the publication of truthful information of public significance which has been lawfully obtained. Smith, 443 U.S. at 103. Even a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it

remains in effect. Capital Cities Media, Inc. v. Toole, 463 U.S. at 1303, 103 S.Ct. 3524, 77 L.Ed.2d at 1284. The case law addressing the high standard for prior restraints on speech, however, do not address situations where the proposed speech involves a matter of private concern. Cf., Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed. 456 (1967)(reserving the question whether publication of private matters can be constitutionally proscribed). Defendants' reliance on those "prior restraint" cases, therefore, is misplaced.

In fact, where private communications are at issue, the United States Supreme Court has recognized that the constitutional right to privacy must be weighed against the public importance of the substance of the communications. Bartnicki v. Vopper, 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001). In Bartnicki, the Court held that the First Amendment permits a party to disclose a matter of public importance, even where the information was obtained illegally. In so ruling, however, the United States Supreme Court emphasized the strong interest in protecting private communications, directly stating that "Privacy of communication is an important interest." Id. at 532. The Court also reasoned that fear of disclosure of private conversations might well have a chilling effect on private speech. Id. at 532-33. The Court explained:

> Accordingly, it seems to us that there are important interests to be considered on *both* sides of the constitutional calculus. In considering that balance, we acknowledge that some intrusions on privacy are more offensive than others, and that the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself. As a result, there is a valid independent justification for prohibiting such disclosures by persons who lawfully obtained access to the contents of an illegally intercepted message...

Id. at 533. The Court then concluded, **only because the speech involved a matter of public concern**, that these important privacy concerns must give way to the publication of matters of public importance. Id.

B. Personal cellular telephone numbers are not a matter of public significance, so the Plaintiff's privacy interests are not outweighed by First Amendment concerns.

Tanski's Right-to-Know request sought information regarding the cell phone calls and text messages between four members of the unified judicial system – Grine, Judge Lunsford, D.A. Stacy Parks-Miller, and A.D.A. Nathan Boob. Grine Ex. 1. The request did not ask that the cellular telephone numbers (or any portion of them) be disclosed. Id. Tanski and the McShane Firm concede that the records produced by the County included partial cellular telephone numbers, and they agree that telephone numbers were not requested. Answer, ¶ 10. And, while Tanski and the McShane Firm make various arguments about the "public significance" of the calls and texts, they offer absolutely no argument that the cellular telephone numbers of the four members of the unified judicial system are a matter of public concern or public significance.

Pennsylvania law makes clear that personal cellular telephone numbers are **not** matters of public concern. First, § 708 of the RTKL expressly identifies cellular telephone numbers as "personal identification information" that is exempt from disclosure. 65 P.S. § 67.708(b)(6)(i)(A). Second, Pennsylvania courts have recognized a strong privacy interest in personal telephone numbers and in cellular telephone numbers, even if supplied by a government agency and used for agency business. Tribune-Review Pub. Co. v. Bodack, 961 A.2d 110, 599 Pa. 256 (2008)(disclosure of private telephone numbers would operate to the prejudice or impairment of a person's privacy); Commonwealth Office of the Governor v. Raffle, 65 A.3d 1105 (Pa. Commw. 2013)(fact that employee's cellular telephone is provided by a government agency and used for government business does exclude the cellular phone number from the

protection of §708 of the RTKL). Third, the disclosure of any of the digits that constitute a personal cellular telephone does not serve a strong public interest because the public significance of personal cell phone numbers is "weak or non-existent." Cf., Bodack, 961 A.2d at 117-18 (holding that public significance of government employees' home addresses is weak or non-existent). The disclosure of personal information, such as home addresses or cellular phone numbers "reveals little, if anything, about the workings of government." Sapp Roofing Co., Inc. v. Sheet Metal Workers' Int'l Assoc., 713 A.2d 627, 552 Pa. 105 (1998).

Furthermore, none of the First Amendment cases cited by the McShane Firm and Tanski support the conclusion that a personal cellular telephone number is a matter of public concern. To the contrary, those cases involved disclosure of substantive information that was clearly a matter of public importance, including communications regarding a school district's negotiations with a teachers union[3]; proceedings of state judicial review commission[4]; newspaper coverage of the trial of a multiple murder case[5]; a play allegedly based upon a widely-publicized kidnapping[6]; abortion protests[7]; and, an investigation into unsanitary meat packing operations.[8] There is an obvious and important distinction between the kinds of matters of public concern that were protected by the First Amendment in those cases and the personal cellular telephone

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[3] Bartnicki v. Vopper, 532 U.S. 514, 121 S.Ct. 1753, 149 L.Ed. 787 (2001).

[4] Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

[5] Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

[6] Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

[7] Lawson v. Murray, 515 U.S. 1110, 115 S.Ct. 2264, 132 L.Ed.2d 269 (1995).

[8] CBS, Inc. v. Davis, 510 U.S. 1315, 114 S.Ct. 912, 127 L.Ed.2d 358, (1994).

number of Grine, which is sought to be protected in the present case. There is simply no basis to conclude that a personal cellular phone number (or any portion of it) is a matter that can be "fairly considered as relating to any matter of political, social or other concern to the community" or the "subject of legitimate news interest." Snyder, 131 S.Ct. at 1215-16. Moreover, when provided an opportunity at the preliminary injunction hearing to establish the public significance of the cellular telephone numbers, the McShane Firm and Tanski offered no such evidence.

Given that Tanski did not request personal cellular telephone numbers and given that such numbers have no public importance, there is no question that Grine's privacy interest outweighs the First Amendment right of Tanski and the McShane Firm to reveal the telephone numbers. As Bartnicki noted, important privacy interests must give way when balanced against the interest in publishing matters of public importance. The converse is also true. Important privacy concerns need not give way when the matter sought to be published has no public significance. Therefore, there is no First Amendment basis to deny Grine's request that the McShane Firm and Tanski be enjoined from disclosing the personal cellular telephone numbers that were improperly disclosed by the County.

C. The lists of telephone calls and text messages produced by the County do not reflect matters of public significance, so the Plaintiff's privacy interests are not outweighed by First Amendment concerns.

The McShane Firm and Tanski argue that they have a right to disclose the information regarding telephone communications that the County produced because that information is a matter of public or general interest. Tanski and McShane Firm's Answer to Plaintiff's Petition for Preliminary Injunction (hereinafter "Injunction Response"), at p. 3. Tanski and the McShane

Firm, however, offer no explanation as to why the information has any public significance. Instead, they attempt to conjure up public significance from the mere fact that Grine is an elected public official. While their arguments may seem to have some facial merit, the Defendants' "house of cards" argument cannot withstand further scrutiny.

Tanski and the McShane Firm first analogize their situation to the situation presented in Bartnicki, but that case is clearly distinguishable. 531 U.S. 514. In Bartnicki, the **substance** of a telephone conversation was recorded, and it related to ongoing negotiations between a teacher's union and a public school board. Id. In the present case, the information produced by the County about Grine's telephone communications does not include any information about the substance of the telephone calls and/or text messages. This factual difference is very significant, because the outcome in Bartnicki was founded upon the Court's determination that important privacy concerns must give way when balanced against the interest in publication of matters of public importance.

Because they have no information about the substance of the telephone communications, Tanski and the McShane Firm argue the mere fact that communications were made among judges and members of the District Attorney's Office is a matter of public significance. Tanski and the McShane Firm never explain how the fact that telephone communications occurred is a matter of public significance. The fact that phone communications occurred has no bearing on Grine's position as a judge.

The Code of Judicial Conduct does not prohibit judges from communicating with other judges or members of the District Attorney's Office. While *ex parte* communications "concerning a pending or impending matter" are prohibited (Code of Judicial Conduct, § 2.9),

there is no evidence that any *ex parte* communications occurred. Grine testified that he never had any ex parte communications with the District Attorneys about cases he was hearing.[9] The McShane Firm and Tanski offered no evidence to the contrary. They did not even offer any evidence showing that any calls or texts messages were exchanged by Grine and any District Attorneys in close proximity to any time that a criminal case was being heard by Grine.

The Code of Judicial Conduct also does not prohibit judges from having social interactions, or even friendships, with attorneys that appear before them. A judge is disqualified from presiding only where a judge has personal bias or prejudice, a personal knowledge of the facts of a case, or close personal tie to a case. Code of Judicial Conduct, § 2.11. As one of Pennsylvania's federal courts has explained:

> ... the mere friendship of a party's counsel to a judge, absent a connection between that friendship and the subject matter of the litigation or a resulting extrajudicial knowledge of the facts, would be insufficient to find that personal bias or prejudice exists. A reasonable person would consider that "I, like every other judge, claim personal friendship with many officials and people in the area [and that] there would be few cases upon which a judge would be qualified to sit if this were ground for recusation." Broome v. Simon, 255 F.Supp. 434 (W.D.La.1965). A reasonable person would also expect that I, like every other judge, would come into contact frequently with other members of the bar and that many friendships would result. However, a reasonable person would not find that such a friendship with a party's counsel would predispose a judge in favor of that party to the point where recusal is required because of bias.

Armstrong Rubber Co. v. Carr, No. CIV.A. 82-2426, 1986 WL 4485, at *2-3 (E.D. Pa. Apr. 9, 1986). Moreover, a judge is presumed to be impartial, and that presumption cannot lightly be overcome. Berger v. United States, 255 U.S. 22, 33–34 (1921). "A reasonable person would

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[9] Grine testified that the calls related to judicial business unrelated to ongoing criminal proceedings (such as the issuance of search warrants or work on the County's bail commission), or that they related to his second divorce, since the District Attorney had represented Grine in his first divorce.

and should conclude that the oaths and obligations of a judge are not so meaningless as to be overcome merely by friendship with a party's counsel." Armstrong Rubber, at *3.[10] Indeed, Grine testified at the hearing that he has social interactions with many members of the Centre County Bar, including criminal defense counsel, prosecutors, and many others. Those interactions, however, do not disqualify him from hearing cases that involve those lawyers. Thus, the mere fact of communications between Grine and lawyers that appear before him does not implicate any matter of relevant to Grine's service as a judge.

In short, the fact that four members of the unified judicial system exchanged telephone calls or texts is not a matter of public significance. Any attempt to imply any impropriety into Grine's telephone communications or to suggest that the calls reflect some misconduct must be rejected as unsupported by the evidence and the law. The McShane Firm and Tanski offered no evidence showing that the calls related to any matters over which Grine presided; they did not even offer any evidence (such as evidence showing calls or texts during the time that Grine was presiding over a criminal case) that would support a reasonable inference that the calls were related to Grine's conduct as a judicial officer. Thus, Grine's testimony regarding the completely proper reasons for the calls is uncontested.

Moreover, the mere fact that Grine is an elected judge does make every aspect of his private life a matter of public significance. The United States Supreme Court has recognized that

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[10] See, also, Wagner v. Anzon, Inc., 1998 WL 679817 (C.P. Phila. 1988)(fact that judge was former law partner with attorney and attorney formerly represented judge's wife was insufficient to require recusal); Shupper v. People, 157 P.3d 516 (Colo. 2007)(judge's friendship with a member of the prosecution team did not create actual bias or appearance of impropriety); Bailey v. Broder, 1997 WL 73717 (S.D.N.Y. 1997)(judge's social interactions with plaintiff's attorney did not require judge to recuse herself);

"some aspects of the lives of even the most public men fall outside the area of matters of public or general concern." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47-48, 91 S.Ct. 1811 29 L.Ed. 2d 296 (1971), abrogated by Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Moreover, the RTKL itself rejects the theory that public officials have no rights of privacy as reflected in the numerous exemptions that protect from disclosure public officials' personal telephone numbers, social security numbers, marital status, personal emails addresses, and, for judge and law enforcement officers, home addresses. Therefore, it is not enough for the McShane Firm and Tanski to suggest that, because a judge is a public official, every aspect of his life is a matter of public importance.

Additionally, Tanski and the McShane Firm are simply wrong when they claim that the remedy sought by Judge Grine is "unprecedented." Injunction Response, p. 4. To the contrary, the relief that Grine seeks in his petition for preliminary injunction is identical to the injunctive relief affirmed in Board of Supervisors of Milford Twp. v. McGogney, 13 A.3d 569 (Pa. Commw. 2011). In McGogney, a township's open records officer improperly released attorney-client privileged information in response to a Right-to-Know request submitted by McGogney. Id. at 570. The Bucks County Court of Common Pleas entered a permanent injunction requiring McGogney to relinquish the records and precluding him from using any of the information in them. Id. at 571. On appeal, the Commonwealth Court affirmed the permanent injunction. Id. at 574. As in the McGogney case, here, the defendants that received the information improperly produced in response to a Right-to-Know request should be prevented from using it.

Finally, disclosure of information that is exempt from the RTKL has already been determined to constitute irreparable harm. See, PSEA v. DCED, 981 A.2d 383, 386 (Pa.

Commw. 2009)(holding that disclosure of home addresses would constitute immediate and irreparable harm and weighing the fact that revealing employees' home addresses reveals little, if anything, about the working of government). Because the harm is irreparable, enjoining the use or further disclosure of the information is the only meaningful remedy.

IV. CONCLUSION

For the foregoing reasons, Plaintiff Jonathan D. Grine requests that the Court grant Plaintiff's Petition for Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing document by first class mail, postage prepaid, upon the following:

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