IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

CIVIL DIVISION

KELLEY GILLETTE-WALKER, Plaintiff	:	
vs.	:	NO. 15-1079
COUNTY OF CENTRE, SHUBIN LAW OFFICE, P.C. & SEAN P. McGRAW, Defendants	:	

ORDER

AND NOW, this 5th day of May, A.D., 2015, for the reasons set forth in a Memorandum filed this date, It is Ordered that:

1. The County of Centre is enjoined from making any response to any request made pursuant to the Pennsylvania Right-to-Know Law for judicial records relating to the Plaintiff. The County of Centre shall direct any request received to the District Court Administrator for a response.

2. The security previously deposited shall continue until the termination of the action.

3. The special injunction previously entered March 16 in this case is dissolved.

BY THE COURT,

S.J.

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

CIVIL DIVISION

KELLEY GILLETTE-WALKER, Plaintiff	:	
vs.	:	NO. 15-1079
COUNTY OF CENTRE, SHUBIN LAW OFFICE, P.C. & SEAN P. McGRAW, Defendants	:	

and

JONATHAN D. GRINE, Plaintiff	:	
vs.	:	NO. 15-1080
COUNTY OF CENTRE, THE McSHANE FIRM, LLC, and THEODORE C. TANSKI, Defendants	:	

MEMORANDUM

These two (2) cases were consolidated for a hearing held April 2, 2015. Each Plaintiff seeks a preliminary injunction[1] pending a resolution of the controversy that has arisen regarding responses made by the Centre County Administrator to requests made pursuant to the Pennsylvania Right-to-Know Law (RTKL).[2] For the reasons that follow, we will grant the request of Plaintiff Walker and grant the request of Plaintiff Grine in part.

Background

1. Plaintiff Kelley Gillette-Walker is a magisterial district judge in Centre County, Pennsylvania.

2. Her office is located at 3555 Benner Pike, Suite C, Bellefonte, Pennsylvania 16823.

---

[1] Pa.R.C.P. 1531.

[2] Act of February 14, 2008, P.L. 6, 65 P.S. 67-101-3104.

3. On December 17, 2014, Defendant Shubin Law Office per Sean P. McGraw, Esquire, (hereafter referred to as "Shubin Law Office") submitted a RTKL request to Centre County Administrator Tim Boyle.

4. The request was made utilizing a Centre County Public Records Request Form.

5. In the request, Defendant McGraw sought inter alia the following public records:

> "2. Records of communications between District Attorney Parks Miller, Assistant District Attorney Nathan Boob, and Magisterial District Judge Kelley Gillette Walker.
>
> We request (1) records of all telephone calls, text messages, instant messages, email, messages sent through phone applications such as Snapchat or Firechat, and/or any other form of electronic communication between District Attorney Stacy Parks Miller and Magisterial District Judge Kelley Gillette Walker and (2) records of all telephone calls, text messages, instant messages, email, messages sent through phone applications such as Snapchat or firechat, and/or any other form of electronic communication between Assistant District Attorney Nathan Boob and Magisterial District Judge Kelley Gillette Walker for March 2 – 19, 2014, inclusive."

6. Mr. Boyle, without notice to Judge Gillette-Walker, responded to the request and provided information that reflected cell phone communication on March 19, 2014, between Judge Gillette Walker and District Attorney Stacey Parks Miller.

7. The response showed a portion of Judge Gillette-Walker's cellular telephone number.

8. The response was thereafter published by Defendant McGraw in a motion filed March 6, 2015, in a criminal case filed to CP-14-CR-500-2014.

9. In Footnote 2 of the motion, Attorney McGraw wrote:

> "A Right to Know Act request for phone records from March 2, 2014, through March 19, 2014, showed that Parks Miller placed a telephone call to M.D.J. Gillette Walker at 11:50 a.m. on March 19, 2014. At 9:15 p.m. that same day, M.D.J. Gillette Walker placed a phone call to Parks Miller. See Verizon invoice, attached hereto as 'Exhibit D.' A Right to Know Act request is pending for records of text messaging between Parks Miller and M.D.J. Gillette Walker for March 2 – 19, 2014."

10. Jonathan D. Grine is a judge of the Court of Common Pleas of Centre County.

11. His office is located at 102 S. Allegheny Street, Bellefonte, Pennsylvania 16823.

12. On February 3, 2015, Defendant The McShane Firm, LLC, and Theodore C. Tanski (hereafter the McShane Firm) utilizing the same RTKL form filed a request for the following public records:

> "All to and from cell phone/call records and to and from text messages from Centre County District Attorney Stacey Parks Miller, Assistant District Attorney Nathan, Boob, the Honorable Bradley P. Lundsford and the Honorable Jonathan D. Grine. If available all text content for these parties.
>
> The request date frame is 9/16/2014 to 11/12/2014."

13. Mr. Boyle responded to this request on February 13, 2015, and provided a pen register noting the dates and times of incoming and outgoing communications between the four (4) individuals.

14. This action was initiated on March 16, 2015, when each Plaintiff filed a Complaint, a Petition for Emergency Injunction and Preliminary Injunction and a Motion to place under seal the first two (2) pleadings.

15. Senior Judge Charles C. Brown, Jr., granted the special injunction as well as the motion to seal.

16. Judge Brown also set the cases down for hearing on March 23, 2015.

17. Finally, Judge Brown directed each Plaintiff to deposit security of Five Hundred and No/100 ($500.00) Dollars.

18. This writer was assigned to the case March 20, 2015, and rescheduled the hearing on the Petition for Preliminary Injunction until April 2, 2015, at 9:00 a.m.

19. On April 2, 2015, before the reception of evidence and without objection, the March 16 injunction against the Shubin Law Office was set aside and vacated.

Legal Landscape

"A preliminary injunction's purpose is to 'preserve the status quo and to prevent imminent and irreparable harm that might occur before the merits of a case can be heard and determined'." Walter v. Stacy, 2003 Pa.Super. 458, 837 A.2d 1205, 1209 (Pa.Super. 2003), citing Soja v. Factoryville Sportsmen's Club, 361, Pa.Super. 473, 522 a.2d, 1112, 9, 2231 (Pa.Super. 1987). A plaintiff seeking an injunction must establish that:

> "1) relief is necessary to prevent immediate and irreparable harm;
>
> 2) greater injury will occur from refusing the injunction than from granting it;
>
> 3) the injunction will restore the parties to the status quo;
>
> 4) the alleged wrong is manifest and the injunction is reasonably suited to abate it;
>
> 5) the plaintiff's right to relief is clear."

Walter, at p. 1209.

Analysis

It is customary, albeit not mandatory, to begin a determination of a request for a preliminary injunction to address first whether the party seeking the injunction is likely to prevail on the merits of the underlying case since a negative or even neutral resolution of this question makes it unnecessary to go further. What makes this case unusual is that the legal principles that bear on the issue of ultimate success are totally different with respect to Defendant County of Centre and Defendant McShane law firm. Although Defendant McShane proclaimed at the hearing that the law firm stood "shoulder to shoulder" with Centre County, the truth is that the legal positions of these Defendants have nothing in common.

We will begin by addressing the Plaintiffs' request for an injunction against Centre County inasmuch as almost all the evidence presented at hearing focused on that question.

Plaintiffs argued at hearing that the County of Centre was without jurisdiction to respond to the requests for documents made in each of these cases, and that its responses constituted a violation of the separation of powers doctrine found in Article 5, Section 10, of the Pennsylvania Constitution. In support of this argument, Plaintiffs cited to the decision of the Commonwealth Court of Pennsylvania in Court of Common Pleas of Lackawanna County v. Pa. Office of Open Records, 2 A.3d 810 (Pa.Cmmwlth. 2010).

The County of Centre responded that it was obligated under the RTKL to provide the records insofar as they were financial records. It pointed to Section 304[3] of the RTKL, which provides that a "judicial agency shall provide financial records in accordance with this act". The County cited in support of its argument the decision of the Commonwealth Court of Pennsylvania in PG Publishing Company v. County of Washington, 162 Pa.Commw. 196, 638 A.2d 422 (Pa.Cmwlth. 1994), where the court ruled that itemized cellular phone billing records were a "public record". Centre County argued that the

[3] 65 P.S. 67.304.

Lackawanna County case was not applicable to the facts of this case since emails and not cellular phone records were the information requested in that case.

It is, we think, appropriate to parse the RTKL for resolution of the question of whether Plaintiffs can prevail on the merits of their case.

As noted, Section 304 of the RTKL imposes on a judicial agency a duty to provide financial records in accordance with the Act. The definition of "judicial agency" is found in Section 102[4] and encompasses all employees of the unified judicial system. Plaintiffs are obviously employees of the unified judicial system. Section 502(a) of the RTKL provides that each of the four (4) agencies identified in the act (Commonwealth, Local, Legislative and Judicial) shall designate an official or employee to act as the open records officer for that agency. Section 502(b) defines the duties of the open records officer which include the receipt of RTKL requests and the directing of the requests "to other appropriate persons within the agency or to appropriate persons in another agency. (Emphasis added.) The Pennsylvania Supreme Court, in recognition of the obligation of judicial agencies to provide upon request financial records, amended in 2008

[4] 65 P.S. 67.102.

Pa.R.J.A. 509 which addresses access to financial records. In pertinent part, the court directed that "A request to inspect or obtain copies of records accessible pursuant to this rule and in possession or control of a court of a judicial district shall be made in writing to the records manager, as designated by the president judge". Pa.R.J.A. 509(c)(1). In Centre County, the Prothonotary has been designated as records manager for the Court's records, and the District Court Administrator for the records of the magisterial district judges. Those designations are recorded in the policy manual for the county.

Centre County, on the other hand, is a local agency[5] under the Act with a duty to provide upon request "public records" in accordance with this Act".[6] Public record is defined in the RTKL as "A record, including financial record, **of a commonwealth or local agency** that: (1) is not exempt under Section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege".[7] (Emphasis added.)

[5] 65 P.S. 67.102.
[6] 65 P.S. 67.102.
[7] 65 P.S. 67.102.

This summary of the RTKL points to the conclusion in this case that the Centre County Administrator had no authority to respond to the requests made since the records sought were judicial and not public in nature. The financial records of the judiciary are not included in the definition of public record, and, Mr. Boyle has not been designated as records manager for judicial records by the president judge. In this case, the only statutorily approved response he could have made was to send the requests to the Prothonotary and District Court Administrator.

The format of the statute is a recognition by the Legislature of the separation of powers doctrine. The statute clearly makes the judiciary alone responsible for compliance with the RTKL, and it is for this reason that the decision of the Commonwealth Court in Court of Commonwealth Pleas of Lackawanna County is dispositive. In his opinion for the court, Judge Dan Pellegrini explained that "Neither the General Assembly nor the executive branch of government, acting through an administrative agency, may constitutionally infringe upon the powers or duties of the judiciary. (Citation omitted.) Among the judiciary powers is the ability to supervise its own personnel without interference from another branch of government. (Citation

omitted.) **An inescapable corollary to this power is that no administrative agency may exercise control over the records generated by personnel of a judicial agency**". Lackawanna County, at p. 814. (Emphasis added.)

The RTKL dovetails with Article 5, Section 10, of the Pennsylvania Constitution by recognizing that it is the exclusive province of the judiciary to manage its affairs without interference from other branches of government. Accordingly, Plaintiffs' right to relief in these cases is founded on both statutory and constitutional grounds, and appears clear. We would note that Plaintiffs proffered additional, compelling reasons for the issuance of a preliminary injunction and ultimately a permanent injunction which we will address at a later time if that becomes necessary. But for now, we are satisfied that Plaintiffs have established a right to relief.

The next question is whether Plaintiff Grine has established a right to preliminary relief against The McShane Firm. This inquiry does not involve the RTKL but focuses on whether this Defendant, who lawfully obtained documents and information from Centre County, can be preliminarily and ultimately, permanently prohibited from disclosing or publishing the information. Not

surprisingly, Defendant McShane claims the relief sought is a prior restraint in violation of the First Amendment to the United States Constitution.

The rule against prior restraint finds its origin in Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed 1357 (1931). In that case, the court struck down a statute that permitted public officials from seeking an injunction to stop publication of any "malicious, scandalous and defamatory newspaper, magazine or other periodical". Chief Justice Charles Evan Hughes called the law "the essence of censorship" and declared it unconstitutional. The court incorporated the First Amendment freedom of the press into the due process clause of the Fourteenth Amendment.

While most prior restraint cases involve newspapers, the Supreme Court has made clear that individuals enjoy the same First Amendment right. See Bartnicki v. Vopper, 532 U.S. 514, 525 n8 (2001). See also New York Times Co. v. Sullivan, 376 U.S. 254, 265-266 (1964); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

Pennsylvania law on the subject of prior restraint was summarized by the Superior Court in Commonwealth v. Genovese, 337 Pa.Super. 485, 492, 487 A.2d 364 (Pa.Super. 1985), as follows:

> "'Any system of prior restraints of expression comes to this [or any] Court bearing a heavy presumption against its constitutional validity;'" the State "'carries a heavy burden of showing justification for the imposition of such a restraint.'" 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) (per curiam), quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1, 5-6 (1971). See also: Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). As a general rule, the press is free to publish that which transpires during a public hearing and cannot be subjected to prior restraint with respect thereto. Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 311, 97 S.Ct. 1045, 1047, 51 L.Ed.2d 355, 358 (1977). That which occurs in a public courtroom is public property. Sheppard v. Maxwell, 384 U.S. 333, 350, 86 S.Ct. 1507, 1516, 16 l.Ed.2d 600, 613 (1966); Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546, 1551 (1947). **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 v. Daily Mail Publishing Co., 443 U.S. 97, 101-102, 99 S.Ct. 2667, 2670, 61 L.Ed.2d 399, 404 (1979). "[E]ven 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, supra 463 U.S. at 1304, 103 S.Ct. at 3525, 77 L.Ed.2d at 1287. Thus, even a temporary delay in publication which causes no serious injury can be tolerated only under the most compelling circumstances. See: Nebraska Press Association v.

Stuart, 427 U.S. 539, 560-561, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683, 698 (1976).'" (Emphasis added.)

Given the law recited above, the burden of Plaintiff Grine to rebut the presumption against continuation of the special injunction prohibiting publication of the documents obtained is daunting. Nonetheless, he posits correctly that he enjoys a constitutional right of privacy under Article 1, Sections 1, 8, of the Pennsylvania Constitution. In Pa.State Educ. Ass'n et rel. Wilson v. Pa. Office of Open Records, 981 A.2d 383, 385 (Pa.Cmthw. 2009), the Commonwealth Court acknowledged that ". . . an independent constitutional right of privacy arises under . . . the Pennsylvania Constitution" and that "this constitutionally protected right to privacy includes protection against disclosure of personal matters in which a person has a legitimate expectation of privacy". On this point, the same court has held that a person's home address, home telephone number and social security number are not subject to disclosure under the RTKL because the benefits of disclosing such information are outweighed by a person's privacy interest in the information. See Cypress Median v. Hazleton Area Sch. Dist., 708 A.2d 866, 870 (Pa.Cmmw. 1996).

The Wilson court held that "A person has a constitutionally-protected expectation of privacy in cases where (1) the person has an expectation of privacy; and (2) society is prepared to recognize the expectation of privacy as reasonable". Wilson, at p. 385. Plaintiff Grine argues persuasively that the Legislature recognized this right of privacy in drafting the RTKL by recognizing as an exemption from access "A record containing all or part of a person's social security number, driver's license number, personal financial information, home, cellular or personal telephone numbers . . .".[8]

However, the United States Supreme Court has substantially tempered the claim of privacy. In Bartnicki v. Vopper, 532 U.S. 514 (2001), the court was clear that ". . . privacy concerns give way when balanced against the interest on publishing matters of public importance. As Warren and Brandeis stated in their classic law review article: "'The right of privacy does not prohibit any publication of matter which is of public or general interest'. (Citation omitted.) One of the costs associated with participation in public affairs is an attendant loss of privacy." Bartnicki, at p. 534.

[8] 65 P.S. 67.708(b)(6)(i)(A).

In this case, Plaintiff is a public person; the documents were lawfully obtained; the content of the private communications is not implicated, and, contrary to Plaintiff's assertion, there is public concern about the judiciary. Accordingly, we cannot conclude that Plaintiff has sustained his almost impossible burden of establishing a likelihood of success in his case against the McShane Firm. Therefore we will vacate the special injunction as to Defendant McShane Law Firm.

The conclusion that Plaintiffs have established a right to relief does not end the matter since, as we noted at the outset, there are five prerequisites for preliminary injunctive relief.

Thus, Plaintiffs must also establish that preliminary relief is necessary to prevent immediate and irreparable harm. In our view, Plaintiffs have established that their constitutional right of privacy under Article 1, Sections 1 and 8, of the Pennsylvania Constitution has been violated. And while we have not enjoined publication of the information obtained since we found that the First Amendment trumped Plaintiff Grine's right of privacy, we believe that further disclosure of the phone communications of the Plaintiffs would cause

them immediate and irreparable harm. In other words, we cannot countenance a continuation of conduct that violates the constitutional rights of these Plaintiffs.

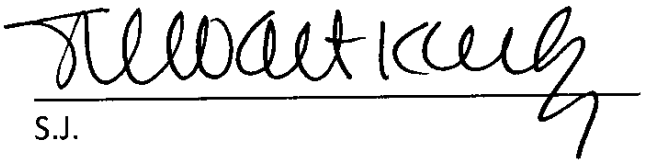
Next, Plaintiffs must prove that greater injury will result from denial of the injunction. Again, it would be unconscionable for this Court to permit continued violations of the RTKL and the Pennsylvania Constitution. We have no doubt that without injunctive relief, the Centre County Administrator will be swamped with RTKL requests similar to the ones made in this case.

A fourth requisite for relief is that the injunction will restore the parties to the status quo. Here, the status quo will not be restored, but an injunction will guarantee that the conduct which precipitated this litigation will not continue during the pendency of this action.

Finally, we are satisfied that an injunction will abate the offending activity of Centre County until the issues in the case are litigated.

An order consistent with the views expressed will be entered.

BY THE COURT,



S.J.

DATED: May 5, 2015