

SOMERSET COUNTY COMMISSIONERS

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Gerald Walker, Chairman
John P. Terlingo, Vice Chairman

February 13, 2019

Via Electronic Mailing Only

Mr. David R. Meiswinkle
Post Office Box 1673
New Brunswick, New Jersey 08903
drmeiswinkle@aol.com

Re: ***September 6, 2017 Right-to-Know Law Request***

Dear Mr. Meiswinkle:

As you know, I serve as Solicitor for the County of Somerset, Pennsylvania (the “County”) and the Somerset County Coroner (the “Coroner”) and in said capacity, I am acting for the designated Open-Records Officer relative to your Right-to-Know Law request dated September 6, 2017 which was received by the Open-Records Officer by facsimile on September 7, 2017. Specifically, your September 6, 2017 correspondence requested access to:

All records in any format (including, but not limited to maps, diagrams, GPS coordinates, data bases) related to the recovery of human remains from the crash site of United Airlines Flight 93 in/near Shanksville, PA on/after September 11, 2001.

Upon receipt and initial review of your request, by letter dated September 15, 2017, the designated Open Records Officer asserted the Coroner’s right to a thirty (30)-day extension to further review and process your request. On October 12, 2017, the former Solicitor for the County and Coroner responded to your request by e-mail by providing you with two sketches in the Coroner’s possession deemed responsive to your request. Thereafter, recognizing the Coroner’s limited resources, the parties began to work cooperatively to allow you identify additional records in the Coroner’s possession desired by you but which were beyond the scope of your original request. On October 19, 2017 you were even granted the opportunity to inspect the Coroner’s records and, on October 25, 2017, you developed an extensive list of additional

records that you were requesting; however, failing to reduce the list to a formal Right-to-Know Law Request.

By e-mail dated October 31, 2017, you informed the former Solicitor that you were filing a prophylactic appeal to the Office of Open Records relative to your original request while the parties continued to cooperate in the fashion aforesaid. You filed the appeal on November 1, 2017 but also attempted to bootstrap your nearly forty (40) additional requests into said appeal, albeit improperly so. *See e.g. Advancement Project v. Dep't of Tranp.*, 60 A.3d 891, 894 fn. 9 (Pa. Commw. Ct. 2013) (acknowledging that “a Right-to-Know request cannot be modified before either Open Records or this Court”).

Following the filing of the appeal, the parties entered into an OOR Mediation Agreement at Docket No. AP 2017-2015 which was executed by the Appellant on November 7, 2017 and executed by the Appellee on November 30, 2017. The parties continued on in their cooperative efforts to allow you to identify additional records in the Coroner's possession desired by you but, again, which were beyond the scope of your original request. Ultimately, you appeared in Somerset County on at least two additional occasions to inspect the Coroner's records. In fact, the Coroner and the County made special arrangements to relocate the Coroner's Flight 93 records from their stored location in Rockwood, Pennsylvania to the County's Office Building in Somerset Borough. Thereafter, you and your colleagues were permitted to further inspect the Coroner's records on June 27th and 28th, 2018 at the County Office Building.

The basic ground rules for the above-described inspection were set forth in an e-mail from myself to you dated June 20, 2018:

The requested records are available for inspection on June 27th and 28th. As explained in a prior e-mail, no photographs, scans, or other reproduction methods may be used at that time. You will be permitted to review the records as they are kept at the Somerset County Office Building and tab the records that you desire to have reproduced. Those records will then be submitted for legal review and, if they are accessible under the Right-to-Know Law, they will be marked for reproduction. Prior to final reproduction, however, we will provide you with a reasonable cost estimate. No reproduction will take place until we receive your approval relative to the cost figures.

As we also repeatedly discussed, you would not be permitted to receive: 1) photographs of human remains; 2) personal information; or 3) DNA or RNA information.

Following the above inspection, it was revealed that you had tabbed quite a volume of records. As you know, the Coroner has limited resources and has no administrative support staff. With the help of the County, each record had to be reviewed and further subjected to legal review. On October 15, 2018, I wrote you via e-mail explaining that:

Unfortunately, some of the materials for which you seek copies fall outside of the bounds of the parameters that we set prior to your inspection (i.e. no photos of remains, no personal information, and no DNA or RNA records). I am happy to

work through these issues with you directly to reach an amicable resolution or, perhaps, we can call upon Delene's services to mediate these issues. Feel free to call me to discuss this matter further.

In subsequent correspondence you confirmed your understanding of the parameters previously set and, hence, began the tedious effort of parsing out records and information (via redaction as permitted by Section 706 of the Right-to-Know Law, 65 P.S. § 67.706) that is protected from disclosure.

The documents that you have tabbed for reproduction are identified by each "Batch No." ascribed herein or as otherwise designated and are hereby specifically addressed herein as follows:

Batch No. 1

The volume of documents which we identify as Batch No. 1 herein largely contain records pertaining to matters which were pending in the Court of Common Pleas of Somerset County, Pennsylvania. Batch No. 1, however, also contains a number of death certificates which are not subject to disclosure under Pennsylvania's Right-to-Know Law. Section 31.101 of the Right-to-Know Law expressly provides that "[i]f the provisions of this act regarding access to records conflict with any other Federal or State law, the provisions of this act shall not apply." 65 Pa. Stat. Ann. § 67.3101.1. This must be read in tandem with Pennsylvania's Vital Statistics Law which also expressly provides that:

The vital statistics records of the department and of local registrars shall not be open to public inspection except as authorized by the provisions of this act and the regulations of the Advisory Health Board. Neither the department nor local registrars shall issue copies of or disclose any vital statistics record or part thereof created under the provisions of this or prior acts except in compliance with the provisions of this act and the regulations of the Advisory Health Board. When one hundred five (105) years have elapsed after the date of birth or fifty (50) years have elapsed after the date of death, the records shall become public records. To ensure the proper safekeeping of original birth records after one hundred five (105) years and death records after fifty (50) years the records shall be maintained by the State Archives.

35 P.S. § 450.801. "In order to request a death certificate a person must establish that he is the legal representative of a decedent's estate; an immediate family member; an extended family member with a direct relationship to the decedent; or have power of attorney for a person qualified to request the certificate." *Com., Pennsylvania Gaming Control Bd. v. Office of Open Records*, 48 A.3d 503, 512 (Pa. Commw. Ct. 2012), *rev'd on other grounds sub nom. Com. v. Office of Open Records*, 103 A.3d 1276 (Pa. 2014) (citing Pennsylvania Department of Health website: http://www.portal.state.pa.us/portal/server.pt/community/death_certificates/14122). As appropriately recognized by the Commonwealth Court in this respect: "The Right-to-Know Law does not set aside or alter the well-established procedures of the Department of Health for handling routine requests for documents in its custody." *Id.* Thus, the death certificates that you

have identified for reproduction are not subject to disclosure under Pennsylvania's Right-to-Know Law. *See also Gries v. Dept' of Health*, 2011 WL 4437328 (Pa.Off.Open Rec. Docket No. AP 2011-1124) ("The OOR agrees, as the Request facially seeks death certificate information that, pursuant to the Vital Statistics Law, may only be released upon following the course outlined in 35 P.S. § 450.804. Consequently, the OOR finds that the Department has established that the requested information is not subject to public access in the present appeal").

Batch No. 1 also contains certain personal identification information which is also exempt from disclosure as per Section 708(6)(i) of the Right-to-Know Law, 65 P.S. § 67.708(6)(i), the Pennsylvania Supreme Court's decision as announced in *PSEA v. DCED*, 148 A.3d 142 (Pa. 2016) (holding that there is a constitutional right to privacy in one's home address), and as otherwise per our agreement. Under the circumstances, however, such information was able to be redacted as expressly authorized by Section 706 of the Right-to-Know Law. *See* 65 P.S. § 67.706.

Finally, Batch No. 1 contains certain DNA and RNA records that are expressly exempt from disclosure under Section 708(19) of the Right-to-Know Law, 65 P.S. § 67.708(19), and as otherwise per our agreement.

Save for the above-identified exclusions, Batch No. 1 is enclosed herewith and identified as such by file name.

Batch No. 2

The volume of documents which we identify as Batch No. 2 herein appears to primarily contain records pertaining to the collection of evidence. To the extent that protected personal identification information was contained in such records, it has been redacted for the reasons discussed above. This Batch also inadvertently contained one record protected by attorney-client privilege:

Under the RTKL, records in possession of a Commonwealth agency are presumed to be public unless they are: (1) *exempt under Section 708 of the RTKL*; (2) "*protected by a privilege*;" or, (3) exempt under any other Federal or State law or regulation or judicial order or decree. Section 305 of the RTKL, 65 P.S. § 67.305 (emphasis added). Section 102 of the RTKL defines "privilege" as:

The attorney work-product doctrine, the *attorney-client privilege*, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court incorporating the laws of this Commonwealth.

65 P.S. § 67.102 (emphasis added).

Office of Governor v. Davis, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015). Therefore, the privileged document was removed from this Batch.

Save for the above-identified exclusions, Batch No. 2 is enclosed herewith and identified as such by file name.

Batch No. 3

The volume of documents which we identify as Batch No. 3 herein contain both personal identification information which has been redacted and certain DNA and RNA records which have been removed for the reasons discussed above.

Save for the above-identified exclusions, Batch No. 3 is enclosed herewith and identified as such by file name.

Batch No. 4

The volume of documents which we identify as Batch No. 4 herein appears to contain records pertaining to the collection of evidence. No redactions or omissions exist relative to this batch and, as such, Batch No. 4 is enclosed herewith in its entirety and identified as such by file name.

Batch No. 5

The volume of documents which we identify as Batch No. 5 herein appears to contain records pertaining to the collection of evidence. No redactions or omissions exist relative to this batch and, as such, Batch No. 5 is enclosed herewith in its entirety and identified as such by file name.

Batch No. 6

The volume of documents which we identify as Batch No. 6 herein appears to contain records pertaining to the collection of evidence. No redactions or omissions exist relative to this batch and, as such, Batch No. 6 is enclosed herewith in its entirety and identified as such by file name.

Batch No. 7

The volume of documents which we identify as Batch No. 7 herein appears to contain records pertaining to the collection of evidence. No redactions or omissions exist relative to this batch and, as such, Batch No. 7 is enclosed herewith in its entirety and identified as such by file name.

Batch No. 8

The volume of documents which we identify as Batch No. 8 herein appears to contain records pertaining to the collection of evidence. No redactions or omissions exist relative to this batch and, as such, Batch No. 8 is enclosed herewith in its entirety and identified as such by file name.

Compact Disc

During your inspection of the Coroner's records, you will recall that you had also tabbed a single compact disc ("CD") for reproduction. Upon review of the data stored on the CD, it was

revealed to contain photographs of apparent recovery operations. Notably, however, these photographs do not capture images of human remains and, as such, they are enclosed herewith in their entirety under the file name identified as "Compact Disc."

Floppy Disk

During your inspection of the Coroner's records, you will recall that you had also tabbed a single floppy disk for reproduction. Obviously, such form of data storage has long been obsolete rendering the extraction of the data contained thereon difficult. With the assistance of the County's IT Department, however, we were able to successfully review the data stored on the floppy disk which was found to contain photographs of human remains. I wrote you concerning this matter via e-mail dated December 6, 2018 wherein I reminded you that such records were beyond the parameters that we established for disclosure and reproduction prior to your inspection and, further, that "photographs of human remains are off limits and not accessible under the Right-to-Know Law. (See 65 P.S. § 67.708(20))." I reaffirm the aforementioned sentiments herein.

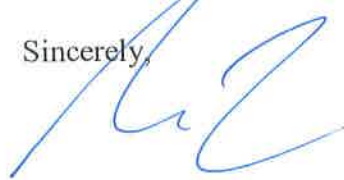
Other Photographs of Human Remains

Some of the files that you tabbed during your inspection contained photographs of human remains. Again, these items are beyond the parameters that we established for disclosures and reproduction prior to your inspection and are, further, exempt from disclosure under the Right-to-Know Law as described above. See 65 P.S. § 67.708(20).

Conclusion

This concludes our disclosure and reproduction of records concerning the matters referenced herein. Please note that, because these items are being transmitted to you electronically, they are being provided to you gratis as required under the Office of Open Records Official Right-to-Know Law Fee Schedule. Thank you for your time and patience in this matter, David. Should you have any questions, comments or concerns, please do not hesitate to contact me.

Sincerely,



Michael P. Barbera, Esq.
Solicitor

cc: Sonya K. Augustine, Chief Clerk (via electronic mailing only)
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