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Franklin County Legal Journal

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Taray Wilkerson, Plaintiff vs.

Dara and Jack's Place, Carley's Neighborhood Bar and Grill, LLC, Jack's Place, and Esau Lashow Scott, Defendants

Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Civil Action No. 2017-4092

HOLDING: Within thirty (30) days of the date of this Order, the parties and the Franklin County District Attorney's Office shall confer and attempt to resolve any discovery disputes without further Court intervention. To the extent that the parties and the Franklin County District Attorney's Office are unable to reach a private resolution, any party may thereafter file a motion to have this Court perform an *in camera* review of the FCDAO file in question to determine whether all or any of the file's contents are protected from dissemination under CHRIA.

a. The Franklin County District Attorney's Office (FCDAO) is considered a criminal justice agency under §9102 of Criminal History Record Information Act (CHRIA) and is therefore bound by CHRIA's limitations on dissemination of investigative information.

b. Where Plaintiff and Moving Defendants seek discovery of the FCDAO file regarding the underlying criminal incident which caused Plaintiff's injuries, the Court adopts the reasoning of the Superior Court's non-precedential decision in In re: Subpoenas in Case of Mielcarz v. Pietzsch, et al., Civil Case No. 160700066 Served by Toyota Motor Corporation on Bucks County District Attorney's Office, which states that the Court should perform an *in camera* review of the FCDAO criminal file to determine what materials are considered investigative information and are therefore barred from dissemination to the parties to this civil action under CHRIA.

HEADNOTES

Dissemination of Investigative Information by District Attorney's Office

1. CHRIA governs the categorization and distribution of information by criminal justice agencies. See 18 Pa. C.S.A. §9101 *et seq.*
2. Under §9121(b) of CHRIA, criminal history record information, which includes any information collected by a criminal justice agency which comes from initiating criminal proceedings against an individual, shall be disseminated to any individual or noncriminal justice agency upon request.
3. Under CHRIA, investigative information, defined as "information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing," can *only* be disseminated where "the department, agency or individual requesting the information is a criminal justice agency which requests the information in connection with its duties, and the request is based upon . . . [an] identifying characteristic." 18 Pa. C.S.A. §§9102, 9106(c)(4).
4. CHRIA is intended to protect all investigative information from dissemination to third parties, but not all information related to a criminal proceeding is considered investigative information. Pennsylvania State Police v. Grove, 119 A.3d 1102, 1108 (Pa. Cmwlth. 2015) *aff'd in part, rev'd in part*, 161 A.3d 877 (Pa. 2017) (citing Coley v. Philadelphia District Attorney's Office, 77 A.3d 694, 697-98 (Pa. Cmwlth. 2013)).
5. The Pennsylvania Superior Court stated in a non-precedential decision that non-investigative information is discoverable under Rule 4003.1 of the Rules of Civil Procedure" because "the plain language of CHRIA does not bar disclosure of information gathered

during a noncriminal investigation.” In re: Subpoenas in Case of Mielcarz v. Pietzsch, et al., Civil Case No. 160700066 Served by Toyota Motor Corporation on Bucks County District Attorney’s Office, 2018 WL 3113916, *4 (Pa. Super. June 22, 2018).

6. Because the Pennsylvania General Assembly clearly intended to protect dissemination of investigative information, such information is not discoverable via civil discovery. In re: Subpoenas in Case of Mielcarz v. Pietzsch, et al., Civil Case No. 160700066 Served by Toyota Motor Corporation on Bucks County District Attorney’s Office, 2018 WL 3113916, *4 (Pa. Super. June 22, 2018).

7. The trial court should perform an *in camera* review of the District Attorney’s file to determine what information is considered investigative and therefore barred from dissemination under CHRIA. In re: Subpoenas in Case of Mielcarz v. Pietzsch, et al., Civil Case No. 160700066 Served by Toyota Motor Corporation on Bucks County District Attorney’s Office, 2018 WL 3113916, *4 (Pa. Super. June 22, 2018).

Appearances:

Timothy McMahon, Esquire *for the Defendants Dara & Jack’s Place, Carley’s Neighborhood Bar and Grill, LLC, and Jack’s Place*

Michael W. Landis, Esquire *for Plaintiff*

Esau Lashow Scott, *pro se Defendant*

Eric Augustine, Esquire *on behalf of Respondent Franklin County District Attorney’s Office*

ORDER OF COURT

Before Meyers, J.

AND NOW THIS 11th day of July, 2018, upon review of Moving Defendants Dara and Jack’s Place, Carley’s Neighborhood Bar and Grill, LLC, and Jack’s Place’s *Motion to Compel Compliance with Subpoena Directed to Franklin County District Attorney’s Office* and corresponding *Brief in Support*, both filed on April 23, 2018, upon review of the Commonwealth’s *Answer to Defendant’s Motion to Compel*, filed on May 11, 2018, upon review of the Plaintiff’s *Response in Support of Defendants’ Motion to Compel Compliance with Subpoena Directed to Franklin County District Attorney’s Office*, filed on June 8, 2018, and after a hearing on this matter before the undersigned on June 22, 2018,

WHEREAS the Court makes the following findings:

1. The Criminal History Record Information Act (CHRIA) governs the categorization and distribution of information by criminal justice

agencies. See 18 Pa. C.S.A. §9101 et seq.

2. The Franklin County District Attorney’s Office (FCDAO) is considered a criminal justice agency under §9102 of CHRIA.

3. Therefore, CHRIA governs the dissemination of information gathered and held by the FCDAO.

4. “CHRIA’s general purpose is to control the collection, maintenance, dissemination or receipt of criminal history record information.” Garner v. Bureau of Professional and Occupational Affairs, State Bd. Of Optometry, 97 A.3d 437 (Pa. Cmwlth. 2014).

5. Section 9102 of CHRIA defines “criminal history record information” as any information collected by a criminal justice agency about individuals, which comes from the initiation of a criminal proceeding against that person, such as descriptions, dates and notations of arrest, indictments, and any charges brought therefrom; criminal history record information does not include investigative or treatment information.

6. Under §9121(b) of CHRIA, criminal history record information shall be disseminated to any individual or noncriminal justice agency upon request.

7. However, if criminal history record information is stored with investigative, intelligence, or treatment information, the criminal justice agency can extract and distribute only the criminal history record information to a noncriminal justice agency or individual. See 18 Pa. C.S.A. §9121(d).

8. Section 9102 of CHRIA defines “investigate information” as “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.”

9. Under CHRIA, investigative information can *only* be disseminated where “the department, agency or individual requesting the information is a criminal justice agency which requests the information in connection with its duties, and the request is based upon . . . [an] identifying characteristic.” 18 Pa. C.S.A. §9106(c)(4)

10. Stated otherwise, investigative information cannot be disseminated under any circumstances to an individual or organization which is not considered a criminal justice agency under §9102 of CHRIA.

11. “The mere fact that a record has some connection to a criminal proceeding does not automatically exempt it under . . . CHRIA.” Pennsylvania State Police v. Grove, 119 A.3d 1102, 1108 (Pa. Cmwlth. 2015) aff’d in part, rev’d in part, 161 A.3d 877 (Pa. 2017) (citing Coley v.

Philadelphia District Attorney's Office, 77 A.3d 694, 697-98 (Pa. Cmwlth. 2013)).

12. CHRIA protects the dissemination of “records created to report on a criminal investigation or set forth or document evidence in a criminal investigation or steps carried out in a criminal investigation,” such as death investigations, criminal complaints, confession, polygraph test results, forensic lab reports, internal police review documents, witness statements, and police reports with notes about the progress of an investigation. Id. at 1108.

13. In a non-precedential opinion, the Pennsylvania Superior Court held that under Grove, “non-investigative information is discoverable under Rule 4003.1 of the Rules of Civil Procedure” because “the plain language of CHRIA does not bar disclosure of information gathered during a noncriminal investigation.” In re: Subpoenas in Case of Mielcarz v. Pietzsch, et al., Civil Case No. 160700066 Served by Toyota Motor Corporation on Bucks County District Attorney's Office, 2018 WL 3113916, *4 (Pa. Super. June 22, 2018).

14. The Superior Court further explained that CHRIA permits the dissemination of criminal history record information to the public because it is generally available to the public, but “categorically” prohibits the dissemination of investigative information to noncriminal justice agencies. Id.

15. The Superior Court also refused to allow public policy arguments to unseat the intent of the General Assembly’s clear and unambiguous language in CHRIA. Id. at *5.

16. Comparing CHRIA with the Pennsylvania Right to Know Law, the Superior Court concluded that the General Assembly intended to protect investigative information under CHRIA, but otherwise intended non-investigative information to be disclosed pursuant to a lawful subpoena. Id.

17. Relying on the Supreme Court’s case-by-case analysis in Grove, the Superior Court ultimately determined that the record required further development to determine whether information in the District Attorney’s file could be considered investigative information and therefore be barred from dissemination under CHRIA. Id. at *6 (“CHRIA protects information based on the circumstances under which it was gathered. Information obtained as a result of an investigation into criminal activity is protected. Information gathered as a result of a different inquiry or for a different reason is not protected.”).

18. The Moving Defendants inaccurately represent that CHRIA does

not plainly prohibit the release of investigation information to noncriminal justice agencies; however, the Superior Court of Pennsylvania, and this Court disagree and find that CHRIA quite explicitly prohibits investigative information from being disseminated to parties which are not considered criminal justice agencies.

19. The requesting parties in this instance, the Moving Defendants are clearly not a criminal justice agency and FCDAO is therefore barred from disseminating investigative information to them under CHRIA.

20. Therefore, the question before this Court is whether the information and documents in the possession of the FCDAO which the Moving Defendants seek to discover are in fact investigative information which is protected by CHRIA.

21. Although the Superior Court's decision in In re Subpoenas is non-precedential, this Court accepts and adopts the Superior Court's reasoning as directly on point in this case.

22. Therefore, in accordance with the directives to the trial court in In re Subpoenas, this Court will perform an *in camera* review of the FCDAO's entire file on the named Defendant Esau Lashow Scott, docket No. 2047-2015 to determine what, if any, information in that file is considered investigative information and is therefore barred from dissemination under CHRIA.¹

IT IS HEREBY ORDERED that in light of the Court's foregoing findings, within thirty (30) days of the date of this Order, the parties and the Franklin County District Attorney's Office shall confer and attempt to resolve any discovery disputes without further Court intervention. To the extent that the parties and the Franklin County District Attorney's Office are unable to reach a private resolution, any party may thereafter file a motion to have this Court perform an *in camera* review of the FCDAO file in question to determine whether all or any of the file's contents are protected from dissemination under CHRIA.

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.

¹ "The trial court must undertake this analysis for the remaining materials in the investigative file. In other words, after receiving the full investigative file from DA's Office, the trial court must determine whether those materials were created during the course of an investigation into possible criminal activity. Although the trial court may review the relevant materials *in camera*, it must provide Issuers an opportunity to challenge evidence that DA's Office offers to satisfy its burden of proof. For example, if DA's Office offers an affidavit from a police officer regarding the normal process of investigating an automobile accident, Issuers may seek to depose that police officer and/or offer an affidavit from a different police officer. Hence, although the review of the investigative file may be *in camera*, the proceedings may not be conducted *ex parte*. We leave it to the sound discretion of the trial court to fashion an appropriate mechanism by which to conduct this review." In re Subpoenas, 2018 WL 3113916 at *7.