IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 2113 CD 2013

PAINT TOWNSHIP, CLARION COUNTY, Appellant

v.

ROBERT L. CLARK, Appellee

BRIEF OF *AMICUS CURIAE*, PENNSYLVANIA FREEDOM OF INFORMATION COALITION, IN SUPPORT OF APPELLEE, ROBERT L. CLARK

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I. INTEREST OF *AMICUS CURIAE*

The Pennsylvania Freedom of Information Coalition (Coalition) is a Pennsylvania non-profit corporation founded in 2005 and headquartered in Harrisburg, Pennsylvania. The Coalition consists of journalists, librarians, attorneys, educators, community and business leaders and is dedicated to protect the right of all Pennsylvania citizens to open and unfettered access to all levels of Commonwealth, county and local government. Access to public records, guaranteed by the Pennsylvania Right-to-Know Law (RTKL), 65 P.S. § 67.101 et seq., is of particular concern to the Coalition. The Coalition is also a member of the National Freedom of Information Coalition, an alliance of non-profit, state, freedom of information and First Amendment organizations and academic centers concentrating on First Amendment related issues. Another of the Coalition's primary goals is the education of Pennsylvanians on the various rights of access to government proceedings and records under the Sunshine Act and the RTKL.

The case currently before the Court raises the question of whether metadata constitutes a public record, which is a serious and important issue concerning access to public records of government agencies throughout the Commonwealth. The Coalition asks this Court to follow an emerging national consensus and conclude that metadata constitutes a public record under the RTKL.

II. COUNTER-STATEMENT OF THE QUESTION INVOLVED

A. Whether the trial court committed an error of law or an abuse of discretion by requiring the Township to retrieve metadata from a cell phone that had been used by a Township Supervisor to conduct Township business, to redact non-public information, and to disclose public records in response to an RTKL request?

Suggested Answer in the **Negative.**[1]

[1] The Township also asserts that the Trial Court erred by requiring the Township to produce "personal" cell phone records. Beyond this footnote, the *amici* does not address this issue because the Trial Court did not order the Township to disclose the Township Supervisor's personal communications. Contrary to the Township's characterizations, the Court ordered the Township to disclose records that are related to the business of the Township, even if such records are located on the Township Supervisor's personal phone, pursuant to the Commonwealth Court's holding in Barkeyville Borough v. Stearns, 35 A.3d 91 (Pa.Cmwlth. 2012).

III. COUNTER-STATEMENT OF THE FACTS

The Appellant, Paint Township, Clarion County (Township), appeals from the Order of the Court of Common Pleas of Clarion County (Trial Court), entered on October 21, 2013, which required the Township to retrieve data and/or metadata from a cell phone that had been used by a Township Supervisor to conduct Township business, to redact non-public information, and to disclose public records in response to an RTKL request filed by the Appellee, Robert L. Clark (Requester).

A. Procedural History

1. The Request for Public Records

The request for public records, submitted November 28, 2012, sought, among other things,

> ... records dated on or after January 1, 2012, pertaining to township supplied cell phones ... The content of all incoming or outgoing text, picture and video messages. The content of application related data stored on the cell phone ..., including browser history, address books, and internet connection logs for the phone assigned the number 814-220-2700.

Appellant Brief, p. 7. The Request was deemed denied because the Township failed to respond. Id.

2. Appellate Proceedings in OOR and Court of Common Pleas

The Requester appealed to the Office of Open Records, which issued a Final Determination granting the appeal and directing "the Township is required to

provide all responsive records to the Requester within thirty (30) days." Opinion pursuant to Pa. R.A.P. 1925(b), p. 5, attached as Exhibit "A" to Appellant's Brief.

The Township appealed the Final Determination by filing a Petition for Review with the Trial Court. Trial Court Opinion dated October 21, 2013, p. 1, attached as Exhibit "D" to Appellant's Brief. Following a hearing the Trial Court affirmed the Final Determination of the Office of Open Records. Id.

The Trial Court ordered the Township to provide the Requester with records for the period between January 1, 2012 through November 28, 2012, including:

> The content of all incoming and outgoing text, picture, or video messages which relate to the business of the Township. The Township is not required to provide the content of communications which do not relate to Township business.
>
> The content of all application related data stored on the cell phone ..., including browser history, address books, and internet connection logs for the phone assigned the number 814-229-2700, except the Township shall redact any information that would identify other parties.

Order of the Court, June 7, 2013, attached to Appellant's Brief on Exhibit "E."[2]

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[2] The order addresses two separate cell phones. The first cell phone is locked in a safe in the Township's office. Trial Court's 1925(a) Opinion, p. 4. That cell phone was used by Township Supervisor Randy Vossburg to conduct Township Business prior to August 28, 2012. On that date, the Township transferred the account for the telephone number 814-220-2700 to Supervisor Vossburg. Id., p. 8. At the time of the transfer of the account, the Township approved a weekly allowance for Supervisor Vossburg's continued use of the telephone number on the second cellphone at issue in this appeal, which is in Supervisor Vossburg's physical possession. Id.

3. Enforcement Proceedings

Thirty days after the entry of the Order dated June 7, 2013, the Township's Open Records Officer supplied the Requester with an affidavit alleging, in part, that responsive records do not exist the Township's custody, possession or control. Appellant Brief, p. 12. The Requester responded by filing a petition to hold the Township in contempt for failure to comply with the Order dated June 7, 2013. Id.

Following an evidentiary hearing, the Trial Court issued an order to enforce the Order dated June 7, 2013 by requiring the Township to:

1. Retrieve the data from the cellphone that is being held by the Township and redact information pursuant to the June 7, 2013 Court Order and provide the records to Clark, and

2. Provide redacted phone records for 814-226-2700 after the time the number was transferred to Randy Vossburg, but only for calls among the Supervisors dealing with Township Business.

Order dated October 21, 2013. The Court further instructed that the parties "must follow the Right to Know Law and any applicable regulations regarding release of the information and assessment and payment of costs." Id. The Court denied the Township's subsequent motion for reconsideration by Order dated December 19, 2013, copy attached to Appellant's brief as Exhibit "C."

B. The Trial Court's responses to the Township's allegations of error

1. Sufficiency of Evidence

The Township argues that the Trial Court erred in determining that the Township failed to meets its burden of proving that responsive records were not within the Township's possession, custody or control. Appellant Brief, p. 5. In response to this issue, the Trial Court noted:

> ... the only conclusive proof regarding the contents of the cell phone is the testimony of the Open Records Officer that the phone had been "reset." No technical information was provided to the court, nor has her testimony conclusively demonstrated that information has actually been cleared. The Officer has not seen the phone. It is true that the Open Records Officer testified under oath about the contents of the phone, but that testimony only covered what someone *told her* was deleted. The Court does not mean to question the Officer's motivations and believes she testified truthfully about what the Supervisor told her. However, such testimony is unconvincing when it does not receive support from other sources.

1925(a) Opinion dated February 27, 2014, pp. 2-3. The Trial Court explained:

> ... the Open Records Officer Testified under oath that "[n]o one had accessed the phone, touched the phone or done anything." Under cross examination from the Appellee, the Officer also testified that "no one has verified" that the phone was deleted and that someone from outside the Township would need to verify that information. The court does not believe the Office is lying, just that she and others in the Township have not inspected the content of the reset phone. At best, the record supports a contradiction on the part of the witness and a lack of effort in determining what is on the phone locked away in the Township offices.

Id., p. 12.

2. Existence of Responsive Public Records

The Township argues that the Trial Court erred in concluding that a record exists in the possession of the Township. Township Brief, p. 5. In response to that issue, the Trial Court noted, "[e]ven if that phone was reset, it is still very likely that a record, regardless of form, exists somewhere on that phone." 1925 (b) Opinion, p. 4. As the Trial Court had previously explained, "... a record exists and is stored in the Township offices in a locked safe." Opinion dated December 19, 2013, p. 4, attached to Appellant's Brief as Exhibit "C." "Just because something is deleted on a cellular phone does not mean it actually is permanently gone, and it is most certainly true that absent a professional deletion by a digital forensic analyst, there is still data, along with metadata, on the phone." Opinion dated October 21, 2014, p., attached to Appellant's Brief as Exhibit "D".

3. Creation of a Record

The Township argues the Trial Court abused its discretion by ordering the Township to create a record that does not exist. Appellant Brief, p. 22. The Township alleges:

> A forensic search of the cell phone device is beyond the abilities of the Township employees and its counsel to extract any existing data/metadata, interpret the data/metadata, and create a document of the transactions, all of which would require specialized expertise, software and/or tools, and would also expose private, personal communications of a private citizen to outside individual(s) conducting the forensic search. Content information pertaining to Supervisor communications was not stored or maintained

> electronically in a database by [the Township] in the course of its business, and there was no policy requiring the information to be saved or preserved.

Appellant Brief, p. 23.

The Trial Court responded that the Township is required to disclose records in the format available. 1925(b) Opinion, p. 15, citing Com. Dept. of Environmental Protection v. Cole, 52 A.3d 541, 548. The Trial Court explained:

> [The Requester] should receive information in the form it is available. No one has asked the [Township] to create a record that does not exist. The Court has simply ordered that the Township turn over a phone that contains data. At no juncture in this lengthy, litigious process has the court direct any party to create something out of nothing. True, the record inside of the phone may not be as simple to locate as switching on the device, but relative difficulty does not factor into an analysis of providing members of the public with records from public officials. 65 P.S. § 67.705 does not serve as a shield even if a public official does not know where a record is located.

The Court's 1925(b) Opinion, p. 15-16. The Court previously explained:

> The Order calls for the content of all application related data stored on the cell phone. That Order must be complied with even if it means opening up the safe in the Township office and using a program or other technical device to remove the data from the cellphone itself. Though it is still the responsibility of the Township to redact that information, [the Requester] must have the opportunity to access the phone content pursuant to the terms of the Court Order. The parties must follow the Right-to-Know Law and any applicable regulations regarding release of the information and assessment and payment of costs.

Opinion dated October 21, 2014, p. 9, attached to Appellant's Brief as Exhibit "D".

IV. SUMMARY OF ARGUMENT

The trial court did not commit an error of law or an abuse of discretion when it ordered the Township to retrieve metadata from a cell phone that had been used by a Township Supervisor to conduct Township business, to redact non-public information, and to disclose public records in response to an RTKL request.

The Township received a request for public records including data on a cellular phone that a Township Supervisor used to conduct Township business. The cellular phone is currently stored in a safe at the Township offices. The Township has refused to examine the phone to determine if the phone contains responsive public records. The Trial Court rejected hearsay testimony that the phone was "reset" and that all data was deleted from the phone. The Trial Court ordered the Township to retrieve responsive data, including metadata, from the phone, to redact non-public information, and to disclose public records that are responsive to the open records request.

The Trial Court's order must be affirmed. Metadata is an indelible part of a "public record" that is created or maintained in an electronic medium. There is an emerging national consensus that metadata is a public record under open records laws. To the extent metadata exists on the phone in question, and the metadata documents Township business, the metadata must be retrieved and disclosed.

V. ARGUMENT

A. The trial court did not commit an error of law or an abuse of discretion when it ordered the Township to retrieve metadata from a cell phone that had been used by a Township Supervisor to conduct Township business, to redact non-public information, and to disclose public records in response to an RTKL request.

1. The Trial Court did not err when it ordered the Township to retrieve metadata from the cell phone in the Township's possession because the Township must examine the contents of the phone in order to comply with its duty to determine whether the requested information is a public record.

The Township argues that the Trial Court erred by ordering the Township to retrieve metadata from the cell phone in the Township's safe because "the Open Records Officer conducted an inquiry in good faith regarding the availability of records on the cell phone itself and was informed that the contents had been deleted." Appellant Brief, pp. 17-18. The Trial Court did not err by ordering the Township to retrieve metadata from the cell phone because the Township did not comply with its statutory duty to make a good faith effort to determine whether the requested records are public records. 65 P.S. § 67.901.

The Township did not comply with this duty because it did not examine the phone in question to determine if responsive records exist on the phone. There is a cell phone in a locked safe in the Township offices. 1925(a) Opinion, p. 4. Prior to the placement of the phone in the safe, a significant number of phone calls were made. Id., p. 7. No one from the Township has accessed the phone. Id., p. 2. The

Trial Court was not persuaded by hearsay testimony that the phone had been "reset" or that data had been cleared. Id. The Township's Open Records Officer admitted that "no one has verified" that the phone was deleted. Id., p. 12.

Under these circumstances, where there is no evidence that the phone has been examined for responsive records, the Trial Court did not err by ordering the Township to "[r]etrieve the data from the cellphone that is being held by the Township." Order dated October 21, 2013. The Trial Court's Order merely requires the Township to perform the prerequisite step so that it can comply with its duty to determine whether the requested records are public records.

The Commonwealth Court's decision in Moore v. Office of Open Records, 992 A.2d 907 (Pa. Cmwlth. 2010) does not support the Township's argument that it submitted sufficient evidence to prove that responsive records do not exist. In Moore, the Commonwealth Court held the Department of Corrections presented sufficient evidence to prove the non-existence of a record via an unsworn attestation made subject to the penalty of perjury. Id., 992 A.2d at 908-09. Notably, the unsworn attestation was made by the employee who personally searched the Department's files for any records which would be responsive to Moore's request. Id., 992 A.2d at fn. 3. The instant case is not controlled by Moore because the Township did not search the phone in question for responsive records.

2. The Trial Court did not err when it ordered the Township to disclose metadata from the cell phone in the Township's possession because metadata is an indelible part of a "public record" that is created or maintained in an electronic medium.

The Township also argues that the Trial Court erred in concluding that a record exists in the possession of the Township. Township Brief, p. 5. In response to that issue, the Trial Court noted, "[e]ven if that phone was reset, it is still very likely that a record, regardless of form, exists somewhere on that phone." 1925 (a) Opinion, p. 4. As the Trial Court had previously explained, "... a record exists and is stored in the Township offices in a locked safe." Opinion dated December 19, 2013, p. 4, attached to Appellant's Brief as Exhibit "C." "Just because something is deleted on a cellular phone does not mean it actually is permanently gone, and it is most certainly true that absent a professional deletion by a digital forensic analyst, there is still data, along with metadata, on the phone." Opinion dated October 21, 2014, p., attached to Appellant's Brief as Exhibit "D".

The resolution of this allegation of error requires this Court to decide whether metadata constitutes a public record under the RTKL. The appellate courts in Pennsylvania have not addressed this issue. However, Judge Idee C. Fox, of the Philadelphia Court of Common Pleas, has held that metadata is an indelible part of a "public record" contained in a computer file. Scott v. Southeastern Pennsylvania Transportation Authority, Docket No. 1600-2011, (Phila. C.P.

8/3/12), p. 8, copy attached hereto as Exhibit "A."[3] "Metadata" is "data about data" that is encoded in computer files at the time they are created. Id., p. citing Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 646 (D. Kansas 2006).

Judge Fox surveyed cases from three other states that addressed metadata in the context of public records disclosure, along with federal cases that addressed metadata in the context of discovery in litigation, and found there is an emerging national consensus that metadata is fundamentally part of the computer file in which it is embedded. Id. Courts in three other states have concluded that metadata constitutes a public record under the irrespective open-records laws. Lake v. City of Phoenix, 222 Ariz. 547, 551-52, 5218 P.3d 1004, 1007-08 (Ariz. 2009)("The metadata in an electronic document is part of the underlying document; it does not stand on its own ... When a public officer uses a computer to make a public record, the metadata forms part of the document as much as the words on the page"); O'Neill v. City of Shoreline, 240 P.3d 1149, 1154 (Wash. 2010)("[w]e agree with the Supreme Court of Arizona that an electronic version of a record, including its embedded metadata, is a public record subject to disclosure."); Matter of Irwin, 72 A.D. 3d 314 (N.Y. App. Div. 4th Dep't 2010)("at its core the electronic equivalent of notes on a file folder indicating when the

[3] Although this case does not establish binding precedence on this Court, the case may be cited for its persuasiveness.

documents stored therein were created or filed, [and therefore] constitutes a 'record' subject to disclosure.")

Judge Fox's holding that metadata is an indelible part of a "public record" that is created or maintained in an electronic medium is supported by the plain language of the RTKL. Under the RTKL, a "record" includes "information stored or maintained electronically." 65 P.S. § 67.102. A record in the possession of a local agency is presumed to be a "public record" unless the record is exempt or privileged. 65 P.S. § 67.305(a).

This Court should adopt the reasoning from Judge Fox's opinion in Scott and hold that metadata is a public record under the RTKL. The Trial Court did not err by requiring the Township to retrieve metadata from the phone that the Township Supervisor used to conduct Township business. To the extent metadata exists on the phone in question, the Township must retrieve and disclose the public portions of the metadata to the Requester.

3. The Trial Court did not require the Township to create a record when it ordered the Township to retrieve and disclose public records in their native format.

The Township argues the Trial Court abused its discretion by ordering the Township to create a record that does not exist. Appellant Brief, p. 22. The Trial Court did not require the Township to create a record, rather it required to disclose records in the format available after an examination of the cell phone.

Section 701 of the RTKL requires an agency to provide public records in the medium requested if it exists in that medium, or otherwise, in the medium in which the public records exists. 65 P.S. § 67.701(a). The Township argues that it is beyond the capabilities of its employees to extract metadata from the phone and that Section 705 of the RTKL does not require the Township to create a record. The Commonwealth Court has already decided that Section 705 cannot be used as a means to avoid conducting a search for records. Com., Dep't of Envtl. Prot. v. Legere, 50 A.3d 260, 267 (Pa.Cmwlth. 2012), reconsideration denied (Aug. 30, 2012)("[I]t cannot be inferred from Section 705 of the RTKL that the General Assembly intended to permit an agency to avoid disclosing existing public records by claiming, in the absence of a detailed search, that it does not know where the documents are, and that to require the agency to locate and produce them would implicate Section 705 of the RTKL.")

If this Court were to adopt the position by the Township, the Township could shield all of its public records by allowing its officials and employees to conduct Township Business on smart phones or other electronic devices. The Township alleges [content information pertaining to Supervisor communications was not stored or maintained electronically in a database by [the Township] in the course of its business, and there was no policy requiring the information to be saved or preserved." Appellant Brief, p. 23. This admission that the Township

allegedly does not preserve public records related to the conduct of Township business in disturbing.

Public records may be disposed of if the disposition is in conformity with schedules and regulations which are promulgated by the Local Government Records Committee (Committee). 53 Pa.C.S.A. § 1383. The Historical and Museum Commission (Commission) of the Commonwealth is designated as the agency responsible for administering the records management program for the Committee. 46 Pa. Adm. Code § 15.51(c)(2). The Commission has promulgated regulations to inform municipal officials of the opportunity to legally dispose of records in accordance with the provisions of the Records Retention and Disposition Schedule approved by the Committee. 46 Pa. Adm. Code § 15.51(b).

The fact that information is created and stored electronically or on microfilm rather than on paper has no bearing on its retention status under the Records Retention and Disposition Schedule. 46 Pa. Code § 15.51(d)(1). Information included under the definition of a municipal record may be disposed of in accordance with the act and disposition procedures approved by the Committee. Id. Files related to administration, including general correspondence, needs to be retained for at least as long as the correspondence has administrative value, and, in some circumstances, are required to be retained permanently. 46 Pa. Code § 15.53. This Court cannot allow the Township to justify it failure to comply with the

RTKL by admitting that it fails to preserve its public records in compliance with state law.

The Trial Court did not order the Township to create a record. It ordered the Township to examine a phone in its possession and to retrieve public records that exist on the phone. The electronic files on that phone contain metadata. Like the underlying electronic file, the metadata documents a transaction of the Township. The Trial Court did not require the Township to create a record because the metadata already exists. Thus, this Court should affirm the order that the Trial Court issued to enforce its previous order that directed the Township to retrieve and disclose public records, including metadata, from the phone in question.

VI. CONCLUSION

WHEREFORE, the *amici*, Pennsylvania Freedom on Information Coalition respectfully requests that the Order of the Court of Common Pleas of Clarion County dated October 21, 2013 be AFFIRMED.

By: _____

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Date: May 19, 2014

CERTIFICATE OF SERVICE

AND NOW, on the date stated below, I, **Craig J. Staudenmaier, Esquire**, of the firm of Nauman, Smith, Shissler & Hall, LLP, hereby certify that I this day served the foregoing "**Brief of *Amicus Curiae*, Pennsylvania Freedom of Information Coalition, in Support of Appellee, Robert L. Clark**", by depositing a copy of the same in the United States Mail, first class, postage prepaid, at Harrisburg, Pennsylvania, addressed to the following:

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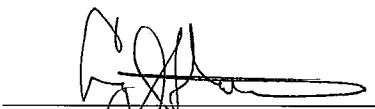

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Date: May 19, 2014