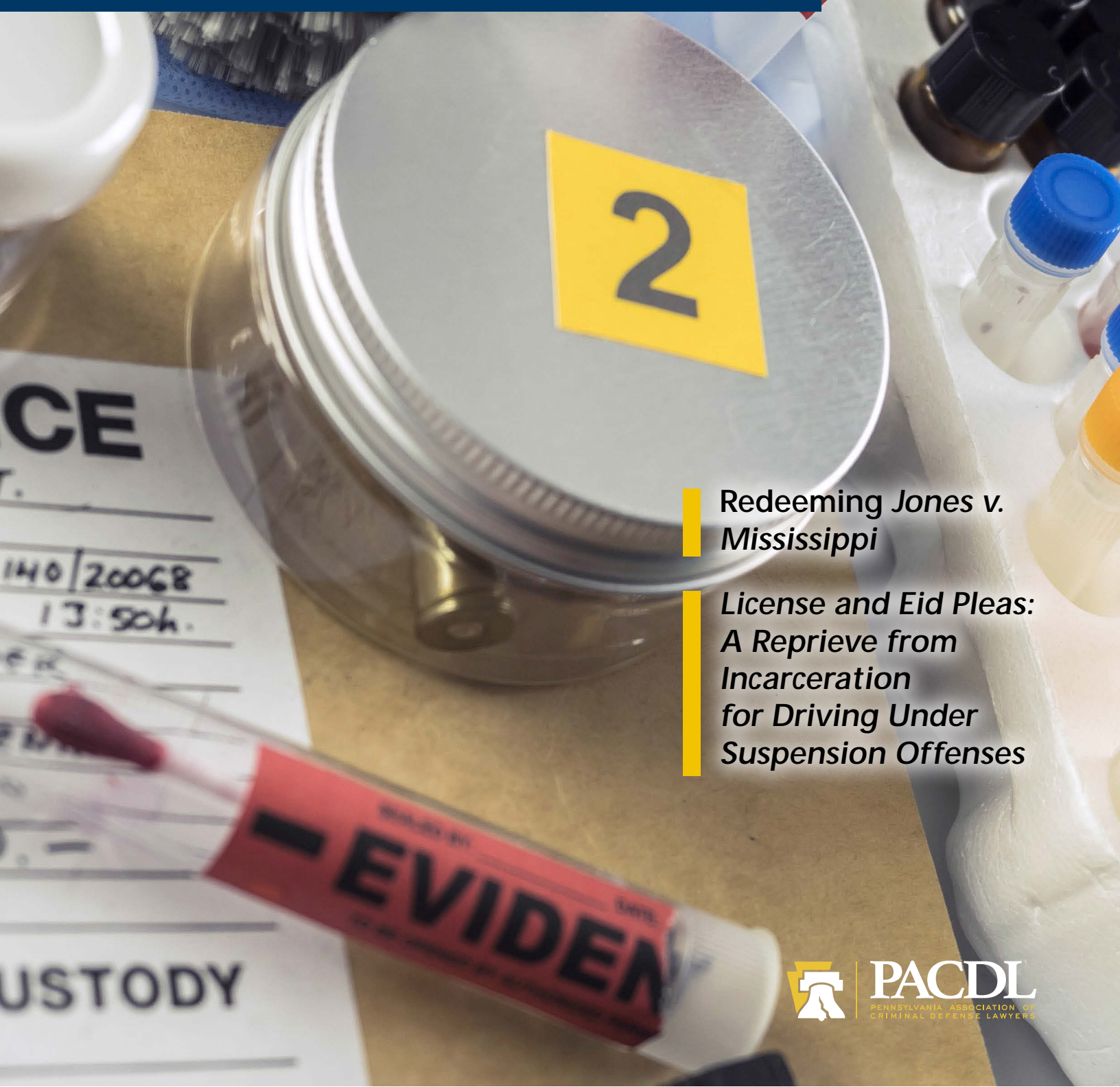


FOR THE DEFENSE

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CRIMINAL RECORDS

NAVIGATING CHRIA - OBTAINING CRIMINAL HISTORY RECORD INFORMATION AND LAW ENFORCEMENT- RELATED MATERIAL IN DISCOVERY

Carolyn H. Kendall

Law enforcement agencies are repositories of information about people and events and are in a unique position to gather and maintain information by using their power to obtain search warrants and interview witnesses. This makes them attractive targets for discovery requests both in civil and criminal cases. Indeed, law enforcement agencies often possess information that is impossible to obtain from other sources. For example, a defendant in a criminal case may seek discovery about the criminal history of the government's star witness. When investigating a possible selective enforcement claim challenging, for example, a sting operation that appears to target disproportionately racial minorities in impoverished neighborhoods, criminal defense counsel will need discovery on law enforcement investigations into similar crimes that did not result in indictment. In a civil case, a plaintiff who was injured in a car accident will want access to toxicology reports generated after police arrested the defendant driver.

Each of these requests implicates sensitive information, and prosecutors and law enforcement agencies are often reluctant or unwilling to provide it, claiming that Pennsylvania's Criminal History Record Information Act ("CHRIA") prohibits disclosure to litigants. Although CHRIA does not operate as a total bar to discovery of all criminal history record information or law enforcement-related information, it does prevent dissemination of certain types of "protected material" to non-criminal justice agencies, which can leave litigants with no way to make their case. Practitioners seeking criminal history information and law enforcement-related material through discovery, whether civil or criminal, must be familiar with CHRIA to effectively evaluate and challenge attempts to refuse production based on claimed-CHRIA protections.

CHRIA Applies to Requests Made to “Criminal Justice Agencies”

CHRIA “governs the dissemination of information by criminal justice agencies.”¹ CHRIA defines a criminal justice agency as any governmental entity whose principal function is the administration of criminal justice.² This includes local and municipal police departments, the Pennsylvania State Police, state and local prosecutors, parole boards, correctional facilities, and courts with criminal jurisdiction.³ If an entity is not a “criminal justice agency,” CHRIA’s restrictions regarding disseminating information do not apply to it.

To determine whether an entity comes within this definition, courts consider the entity’s (or person’s) official duties and responsibilities, and their relationship to law enforcement activities. For example, in *Hoffman v. Borough of Macungie*, the Commonwealth Court determined that a mayor is a member of a criminal justice agency for purposes of access to CHRIA material based on “his statutory rights and duties” and the fact that the mayor “maintains a supervisory status within the Police Department and is entitled to most information gathered and maintained by the Police Department to the same extent as any officer within the Department.”⁴

Applying this same analysis, courts have concluded that county or local governments as a whole,⁵ courts with exclusively civil jurisdiction, government entities that have no authority over the operations of criminal justice agencies (such as a police review board⁶ or the Pennsylvania Auditor General⁷), and parties to litigation⁸ are not criminal justice agencies within the meaning of CHRIA.

CHRIA Divides Information Held by Criminal Justice Agencies into Three Categories

CHRIA creates three categories of information: (1) public records; (2) criminal history record information; and (3) protected information, including law enforcement-gathered intelligence, investigative, and treatment information. Each category has distinct rules regarding when disclosure is permitted or prohibited.

1. Public Records

CHRIA defines court dockets and their equivalents, police blotters, press releases, and information contained within them as public records.⁹ Public records are not subject to CHRIA’s protections or restrictions on disclosure.¹⁰ Accordingly, public records held by criminal justice agencies must be provided freely upon request.

2. Criminal History Record Information

CHRIA defines “criminal history record information”

as information collected by a criminal justice agency concerning an individual and “arising from the initiation of a criminal proceeding, consisting of identifiable descriptions, dates and notations of arrests, indictments, criminal informations, or other formal criminal charges and any dispositions arising therefrom.”¹¹ Criminal history record information does not include identifying information, such as a name or date of birth, when it is contained in court records or other public documents, like a police blotter.¹² Importantly, an individual can only have criminal history record information after he is arrested or criminal proceedings are initiated against him.¹³ Accordingly, identifying information of individuals who are interviewed as witnesses or suspected of a crime but never arrested is not covered by CHRIA. However, such information may be considered investigative material, which is protected from disclosure to non-criminal justice agencies and individuals, as detailed below.

CHRIA provides that criminal history record information may be provided upon request¹⁴ of an individual or non-criminal justice agency, such as by subpoena or discovery request. The statute provides that a police department “shall” provide this information, and Pennsylvania courts have held that, under certain circumstances, similar disclosure obligations also apply to other criminal justice agencies, such as prosecutors.¹⁵ In *Commonwealth v. Copeland*, the Superior Court made clear that the district attorney must provide the government’s witnesses’ criminal history record information to the defense, consistent with CHRIA, and the government’s discovery obligations.¹⁶ The district attorney argued that the defendant should have sought the witness’s criminal history record information from the police, rather than the prosecutor. The court disagreed, holding that CHRIA’s instruction that police departments “shall” provide criminal history record information only placed an affirmative duty on departments and did not bar the district attorney from also providing it.¹⁷ The court also held that then-Pennsylvania Rule of Criminal Procedure 305¹⁸ and *Brady v. Maryland*¹⁹ compelled the district attorney to provide the criminal history record information of government witnesses.²⁰

However, when a criminal justice agency is producing criminal history record information to an individual or non-criminal justice agency, it must withhold criminal history record information that was expunged,²¹ is subject to a court order limiting disclosure,²² or relates to proceedings that are no longer pending, that began more than three years ago, and which did not result in a conviction.²³ This material can be redacted from a larger record containing other criminal history record information, and the remaining record produced.²⁴

A criminal justice agency’s failure to withhold these portions of criminal history record information violates CHRIA and can result in administrative

sanctions, such as the loss of access to criminal history record information, and civil penalties.²⁵ CHRIA also creates a private right of action for individuals whose information was improperly disclosed, which permits recovery of not less than \$100 for each violation, plus costs and attorney's fees.²⁶ Punitive damages are also available, up to \$10,000 per violation.²⁷ In *Taha v. Bucks County*, the Bucks County Department of Corrections published an "inmate lookup tool" on its website, which enabled any member of the public to lookup personal information about past and present inmates, including criminal history record information such as booking photographs, date of birth, and descriptive characteristics.²⁸ The tool also permitted access to the criminal history record information of inmates whose records had been expunged.²⁹ The Eastern District of Pennsylvania held that Bucks County violated CHRIA by publishing, not in response to a request, the criminal history records for incidents that took place more than three years ago and did not result in a criminal conviction or which had been expunged.³⁰ The issue of damages was submitted to the jury, which determined that Bucks County's violation was willful, which subjected them to punitive damages.³¹ While the case was pending on appeal, the County settled the case for more than \$10 million.³²

A producing criminal justice agency is also permitted to excerpt criminal history record information from records containing investigative, intelligence, and other protected information that cannot be disclosed to an individual or non-criminal justice agency, and disseminate only the criminal history record information.³³ In *Mitman v. County Commissioners of Chester County*, the court considered a request under the Pennsylvania Right to Know Law ("RTKL")³⁴ to access the District Attorney's "history file," which contained all files relating to all closed cases in the county.³⁵ The files contained criminal history information about defendants in closed cases, as well as notations about the assistant district attorney(s) assigned to each case and other administrative notes.³⁶ Because the RTKL request implicated criminal history record information, the court analyzed whether the material could be disseminated under CHRIA because "the legislature intended the generic definition of a public record contained within the [RTKL] to incorporate by implication those specific definitions of 'public record' contained in statutes allowing for public access to particular documents of particular agencies."³⁷ The court held that "information relating to the name of the accused, the date of the complaint, docket entries, and the disposition of the case [constituted] criminal history record information" under CHRIA and thus was subject to disclosure.³⁸ However, notations regarding which district attorney(s) worked on the case were not criminal history record information or public records and so were protected from disclosure.³⁹ The court then ordered that only the criminal history record information be produced.⁴⁰

3. "Protected Information": Criminal Intelligence, Investigative, and Treatment Information

CHRIA narrowly prescribes circumstances when a criminal justice agency can disseminate "protected information,"⁴¹ which includes intelligence information, investigative information, and treatment information assembled, compiled, or created for specified law enforcement or criminal justice purposes. CHRIA defines each of these terms as follows:

- "Intelligence information" is defined as information concerning an individual's habits, practices, characteristics, possessions, associations, or financial status compiled in an effort to anticipate, prevent, monitor, investigate, or prosecute criminal activity.⁴²
- "Investigative information" is 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.⁴³ This can include materials compiled by those providing services to criminal justice agencies, such as forensic laboratories.⁴⁴
- "Treatment information" is defined as information concerning medical, psychiatric, psychological, or other treatment provided, suggested, or prescribed for any individual charged with or convicted of a crime.⁴⁵

Protected information is frequently sought by litigants in both civil and criminal cases. It is generally not discoverable in civil cases, as CHRIA prohibits criminal justice agencies from disclosing any protected information to non-criminal justice agencies or individuals.⁴⁶ (It is disclosable to another criminal justice agency upon request.) Courts have recognized that CHRIA's application in these circumstances can have profound effects, including "foreclose[ing plaintiffs] from using evidence that law enforcement agencies are in a unique position to collect based on their power to obtain search warrants."⁴⁷ In *Miller v. Cecchino*, the Allegheny County Court of Common Pleas considered the civil plaintiff's subpoena to the police for a toxicology report obtained on the night that plaintiff and defendant were in a car accident. As a result of the toxicology report, defendant pled guilty to driving under the influence and plaintiff sued thereafter. The court determined that the toxicology report constituted investigative information because it was obtained by the police in connection with their investigation of defendant's suspected driving under the influence and so was not discoverable under CHRIA. The court noted that plaintiffs were "hamstrung in their discovery activities and presentation of evidence" because of CHRIA's prohibition on disseminating investigative information to anyone other than a criminal justice agency.⁴⁸ The court concluded: "The inability of Plaintiff in this case to obtain Defendant's Toxicology Report from McCandless [police department] is a powerful

example of how CHRIA can impede a party's ability to effectively prosecute its case."⁴⁹ Nevertheless, the court quashed plaintiff's subpoena and ordered that the toxicology report should not be produced.⁵⁰

CHRIA's prohibition on the dissemination of investigative and intelligence information applies regardless of whether the requestor seeks information about a third party or about himself. In *Rojas v. Lehigh County*,⁵¹ an inmate sought a video recording made by the police of him confessing to a crime. Although the request was made under the RTKL, the Commonwealth Court determined that the video constituted investigative material that was not subject to release under CHRIA. The court explained that the RTKL provides that "information restricted from disclosure under another state law is not a public record subject to disclosure under the RTKL."⁵²

However, if protected information constitutes *Brady* material,⁵³ it must be provided to the criminal defendant, even if otherwise prohibited by CHRIA. As the U.S. Supreme Court explained in *Pennsylvania v. Ritchie*, under the Supremacy Clause of the U.S. Constitution, state police and prosecutors must comply with *Brady* even when doing so violates a state statute.⁵⁴

The government bears the burden of establishing that requested material constitutes protected material under CHRIA and therefore cannot be disclosed.⁵⁵ It must demonstrate that the material is connected to a

suspected crime, a criminal proceeding, or a conviction. Bald assertions that information is investigative are not enough to satisfy an agency's burden of proving that documents are exempt from disclosure under CHRIA.⁵⁶ For example, in *Zielinski v. Mega Manufacturing*, a worker died when sheets of steel fell on him while working at a manufacturing plant. The decedent's wife brought a wrongful death claim and subpoenaed the police department's accident investigation file.⁵⁷ The police department moved for a protective order so it would not have to produce investigative information.⁵⁸ The Eastern District of Pennsylvania held that the police department's file regarding the accidental death was not exempt from discovery, because the police department failed to demonstrate with sufficient specificity that any of the information was subject to CHRIA.⁵⁹ The court held that the department's assertions based on "information and belief that the records at issue relate to an ongoing criminal matter" was insufficient to prevent disclosure, because only the police department is in a position to know for certain whether such an investigation is underway.⁶⁰ The court suggested that if such investigation did in fact exist and the department wanted to prevent disclosure of the file, a department official should have provided a sworn statement to that effect, rather than speculative and equivocal statements.⁶¹

Pennsylvania courts have made it clear that "[t]he mere fact that a record has some connection to a criminal proceeding does not automatically exempt it"



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from disclosure under CHRIA.⁶² Courts require that in order for CHRIA to prevent disclosure, the material at issue must have been “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,”⁶³ such as reporting an investigation into a death;⁶⁴ a criminal file containing defendant’s confession, polygraph test, forensic lab reports, internal police review documents, and witness statements;⁶⁵ or an incident report containing notes from witness interviews and reporting whether investigative tasks had been carried out.⁶⁶

Courts considering challenges to the government’s refusal to produce claimed investigative or intelligence information will consider the circumstances under which the material was created or acquired. For example, in *California Borough v. Rothey*,⁶⁷ the Commonwealth Court considered whether surveillance footage of a police officer assaulting a prisoner, which ultimately led to his discharge, was investigative material under CHRIA. The court explained that “[i]nvestigative information” is defined under CHRIA as “[i]nformation assembled as a result of the performance of any inquiry . . . into a criminal incident or an allegation of criminal wrongdoing. The operative word is ‘assembled.’”⁶⁸ The court then reasoned that in this case, the police chief “gathered the information on the video by downloading it and taking it to the district attorney for evaluation. Stated otherwise, [the chief] ‘assembled’ the criminal investigation information.”⁶⁹ Accordingly, CHRIA prohibited disclosure of the footage.

Conversely, information gathered by law enforcement in connection with non-criminal proceedings or activity is not protected by CHRIA. In *Pennsylvania State Police v. Grove*,⁷⁰ the Pennsylvania Supreme Court considered whether dashcam footage of a two-car accident taken by the Pennsylvania State Police was “investigative material” under CHRIA. The court explained that dashcams start recording when a police car’s light or siren is activated and “capture many events, including routine traffic stops, patrol vehicle travel and any other event a state trooper deems appropriate to record,” including “many instances that plainly do not involve criminal activity, and may ultimately be used in civil proceedings, administrative enforcement and disciplinary actions.”⁷¹ The court held that because investigative material under CHRIA only encompasses information that is created or obtained to investigate suspected criminal activity, the dashcam footage at issue – which showed the accident – did not constitute investigative material and thus was not covered by CHRIA.⁷² However, the court agreed with the lower court’s determination that the audio portion of the trooper’s interviews with witnesses to the accident was properly withheld as investigative information.⁷³ As the Superior Court stated, applying *Grove II*, information compiled by law enforcement for non-criminal use “is discoverable under Rule 4003.1 of the Rules of Civil Procedure.”⁷⁴

If the criminal justice agency possessing the protected information can demonstrate that the information is protected by CHRIA, the agency may redact the protected information and produce any responsive, non-protected information.⁷⁵ For example, in *Opitz v. Bowman*, a defendant in a civil case sought information from the Narcotics Division of the Attorney General’s Office regarding the plaintiff. The government produced copies of the criminal complaint, arrest warrant affidavit, and numerous investigative reports with various sections redacted in response to a subpoena for “any and all case files pertaining to Opitz’s arrest in January 1997.”⁷⁶ The defendant claimed that the redactions were inappropriate because he needed unrestricted access to locate potentially exculpatory material for his civil defense.⁷⁷ The Pike County Court of Common Pleas denied the defendant’s motion to compel discovery and upheld the redactions, holding that CHRIA “not only establishes and amplifies the government’s privilege against disclosure of investigatory information, it also mandates its assertion.”⁷⁸

If public interest outweighs the government’s interest in protecting the secrecy of confidential information, the court *may* compel the disclosure of investigative information. In *Caputo v. WYTV*, a police officer filed a defamation suit against a network station following a news report that accused the officer of corruption.⁷⁹ To defend its statements as truthful, the station subpoenaed the police officer’s employing department for documents related to corruption and drug investigations that were closed.⁸⁰ The attorney general moved to quash the subpoenas, claiming that the information was investigatory and exempt from discovery under CHRIA and the RTKL.⁸¹ The court held that CHRIA and the RTKL did not prohibit the disclosure of investigative documents in civil discovery.⁸² The court reasoned that “the exclusion of a particular type of public record from an act mandating disclosure cannot be construed to mean that the court may not permit disclosure in its discretion when it finds that the public interest privilege doesn’t apply.”⁸³ In this case, the court balanced the public interest with the government’s interest in protecting the secrecy of confidential information and found that the information the news station sought was necessary to defend itself and that the Commonwealth’s interest in confidentiality in a closed investigation is much less than in an active investigation. Because the news station sought only information about closed investigations, disclosure was permissible.⁸⁴

Practice Pointers for Discovery Practice

Practitioners are most likely to encounter CHRIA-issues during discovery, when trying to obtain necessary information for their cases. When and how these issues arise in discovery varies from case to case. For example, a civil litigant may serve a subpoena seeking criminal history record information from a third-party criminal

justice agency, which the agency may move to quash or seek a protective order from. The agency may also not respond, in which case a motion to enforce will be required. If serving a local or municipal police department, practitioners should consider sending a copy of the subpoena to the locality's solicitor, i.e., the lawyer for the town, borough, or city who handles civil litigation issues for the jurisdiction. If a criminal justice agency is a party to a civil or criminal case, a discovery request can be used, and the requesting party can bring a motion to compel if the material is not produced.

A RTKL request can also be used in parallel with regular discovery procedures. However, this approach is not recommended for those in litigation for several reasons. First, although not prohibited, not all courts look favorably on a litigant's decision to seek discovery through extra-judicial channels. Second, the RTKL response timeframe can be longer than those provided for under normal discovery rules, as the government is entitled to an automatic 30-day extension and can seek a longer extension, based on the relevant circumstances.⁸⁵ Third, appeals of government denials to produce materials in response to a RTKL must be pursued administratively, rather than before the court familiar with the litigation, and the need for the desired information to support the requesting party's claim or defense.⁸⁶ Finally, the RTKL's restrictions on the production of non-criminal investigative material are broader than CHRIA's,⁸⁷ which means that a litigant seeking information pursuant to a RTKL request rather than in discovery – where only CHRIA and not the RTKL applies – may not be able to obtain as much information.

No matter the procedural posture, the requesting party's response should be the same: Although the criminal justice agency bears the burden of establishing that the requested material is protected from disclosure by CHRIA, practitioners should be prepared to explain to the court why the requested material can be disclosed consistent with the agency's CHRIA obligations. To do so, practitioners should keep in mind the following:

- Clearly identify the type(s) of information being sought, i.e., public record, criminal history record information, or non-criminal investigative information, and characterize it as such in the request. Doing so will make it easier for a responding criminal justice agency (and ultimately a reviewing court) to determine how CHRIA applies to the request.
- Criminal history record information is available upon request. However, older proceedings that did not result in a conviction and expunged records will not be provided.
- Public record information is available upon request. If the material sought was made public, such as being included in an

unprotected court filing or a press release, it cannot be withheld under CHRIA.

- *Brady* obligations supersede CHRIA's protections. Prosecutors must provide investigative and intelligence information, despite CHRIA's prohibition on dissemination to individuals and non-criminal justice agencies, if it constitutes *Brady* material.
- To claim material constitutes "investigative" material that is protected from disclosure, the government bears the burden of proving that investigative material was prepared in connection with investigating a particular crime. If they cannot do so, or if the material was created in connection with a non-criminal investigation, the material is subject to disclosure.
- Inclusion of some protected information in a record does not prevent obtaining any information. If a record contains disclosable and protected material, the protected material can be redacted, and the rest of the record produced, or the disclosable material extracted and produced. Counsel should be prepared to offer suggestions on how portions of the material sought can be provided, even if other portions must be redacted. 🛡️

NOTES:

¹ *In re Pittsburgh Citizen Police Review Bd.*, 16 Pa. D. & C.5th 435, 439 (C.P. 2010).

² *Id.*

³ 18 Pa.C.S. § 9102.

⁴ 63 A.3d 461, 474 (Pa. Commw. Ct. 2013).

⁵ *O'Neal v. Bedford Cnty.*, 165 A.3d 1058 (Pa. Commw. Ct. 2017).

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About the Author



Carolyn H. Kendall is a Principal in Post & Schell, P.C.'s Internal Investigations & White Collar Defense practice in Philadelphia. She conducts internal investigations and defends corporations, officers, and other individuals facing criminal and civil investigation. Ms. Kendall can

be reached at ckendall@postschell.com.

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