

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,
PENNSYLVANIA – CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : NO. 6239-15
 : NO. 8423-15
 v. :
 :
 KATHLEEN G. KANE :

**COMMONWEALTH'S MEMORANDUM OF LAW IN SUPPORT OF ITS
RESPONSE TO MOTION TO QUASH SUBPOENA DIRECTED TO MICHAEL A.
SCHWARTZ, COUNSEL TO REPORTER CHRISTOPHER BRENNAN AND
PHILADELPHIA MEDIA NETWORK, PBC**

The District Attorney of Montgomery County, Kevin R. Steele, by and through his Assistant District Attorney, M. Stewart Ryan, hereby moves the Court to enforce the Commonwealth's Subpoena Duces Tecum against Philadelphia Media Network, PBC.

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MONTGOMERY COUNTY
PENNSYLVANIA

I. STATEMENT OF FACTS

1. On December 19, 2014, the Honorable William R. Carpenter, the Supervising Judge for the Thirty-Fifth Statewide Investigating Grand Jury, made an investigative referral to then-Montgomery County District Attorney Risa Vetri Ferman. The referral involved possible violations of Grand Jury secrecy and related crimes that were alleged to have occurred in Montgomery, Dauphin, and Philadelphia Counties, Pennsylvania. In addition, Judge Carpenter issued a disclosure order permitting District Attorney Ferman and her designees to use information gathered in the Thirty-Fifth Statewide Investigating Grand Jury, Notice #123, to investigate the matter.

2. The Thirty-Fifth Statewide Investigating Grand Jury, Notice #123, examined the improper release of secret Grand Jury information from a prior 2009 Statewide Grand Jury Investigation. The 2009 Grand Jury Investigation included, amongst other probes, an inquiry into the finances of former NAACP head J. Whyatt Mondesire. Detailed information from the 2009 Grand Jury Investigation was published by the Philadelphia Daily News in an article on June 6, 2014. (Friday, June 6, 2014: Daily News article written by Chris Brennan: "Wonder Bread" State A.G. is curious about that big 2009 probe of ex-NAACP boss finances.")
3. The Thirty-Fifth Statewide Investigating Grand Jury, Notice #123, received evidence and heard testimony concerning the possible violation of Grand Jury secrecy and related crimes. Following an eight month investigation, the Grand Jury issued a Presentment recommending that Pennsylvania Attorney General Kathleen G. Kane be charged with Perjury, False Swearing, Abuse of Office/Official Oppression, Obstructing Administration of Law or Other Governmental Function, and Contempt of Court.
4. Pursuant to the investigative referral from Judge Carpenter, the Montgomery County District Attorney's Office began an independent investigation into the matter. At the conclusion of that independent investigation, investigators determined that Kane violated the criminal laws of Pennsylvania and the solemn oath she swore upon assuming the

office of Attorney General by engaging in a pattern of unlawful acts and deceit through the release of confidential investigative information and secret Grand Jury information and then testifying falsely during her appearance before the Grand Jury to conceal her crimes.

5. During the course of the 35th Statewide Investigating Grand Jury investigation into the leak of secret Grand Jury information to the Philadelphia Daily News, it was learned that original documents had been turned over to a Daily News reporter, Christopher Brennan, by Joshua Morrow, political aide to Attorney General Kane. Four documents were turned over to the Daily News: two emails, a transcribed copy of a 2014 interview with Special Agent Michael Miletto, and a 2009 memo prepared by Deputy Attorney General Bill Davis addressed to Chief Deputy Attorney General Frank Fina.
6. Investigators determined that, on Tuesday April 22, 2014, Former First Assistant Attorney General Adrian R. King, Jr., informed Kane that he would be working out of the Philadelphia office on April 23, 2014, instead of his office in Harrisburg. King testified that Kane informed him that she had a package that she needed to have delivered to Morrow in Philadelphia. King testified that he agreed to deliver the package and that, later that day, he found a plain, sealed envelope on his desk. Investigators later determined that this package contained the documents leaked to Brennan.

7. Investigators interviewed Morrow who stated that he had a phone conversation with Kane on the afternoon of April 22, 2014. Morrow stated that Kane “asked me to do her a favor, and to give Adrian King a call because he had something that she wanted me to get to a reporter, I asked her what it was and she told me that it involved an investigation into Jerry Mondesire by Frank Fina and that he had shut it down.” Morrow testified that, after Kane called him, he placed a call to King. During that conversation, Morrow testified, King said he would call Morrow back later. According to both King and Morrow, on the evening of April 22, 2014, they had a telephone conversation concerning the delivery of the envelope, and it was agreed that King would leave the envelope between the front doors of his home for Morrow to retrieve on April 23, 2014.
8. According to Morrow, at approximately 10:30 AM on April 23, 2014, he retrieved the envelope left for him at King’s residence. Morrow described the envelope as an 8 ½ x 11 clasped envelope. Morrow further explained that, when he opened the envelope by releasing the metal clasp, he discovered its contents were a manila file folder marked on the front with “JOSH” in blue ink. Morrow stated that the file contained a transcript, two emails, and what appeared to him to be an interoffice memorandum. One of these documents was inside a folder with a clear cover and a blue backing.

9. Morrow decided to deliver the contents of the package to Brennan, author of the June 6, 2014, article. Morrow testified that Brennan was a reporter whom he had known for years and considered him to be “friendly.” According to Morrow, he did not immediately deliver the package to Brennan. Morrow stated that he waited several weeks before giving the documents to Brennan. Morrow stated that he made redactions to the documents before delivering them. These redactions were designed to ensure that the only Attorney General employee’s names evident in the documents were those of Fina and Costanzo. In early May 2014, Morrow contacted Brennan to arrange for the delivery of the redacted documents. The documents were then personally provided to Brennan by Morrow in Philadelphia.
10. The memorandum and transcript provided by Morrow to Brennan were in fact the 2009 Memorandum and the Miletto Transcript cited in the June 6, 2014, Daily News Article written by Brennan. During testimony in front of the Grand Jury, Morrow identified three exhibits which he indicated were the same documents delivered to him by King. These same documents were identified by Brennan during his Grand Jury testimony as the documents delivered to him by Morrow. These documents were the 2009 Memo, the Miletto Transcript, and the two emails.

11. Ultimately, Brennan authored the June 6, 2014, Daily News article using the confidential investigative information and secret Grand Jury information given to him by Morrow through Kane and King.
12. During the course of the investigation Special Prosecutor Thomas Carluccio attempted to obtain these original documents by way of Grand Jury Subpoena. Counsel for Philadelphia Media Network, PBC. (“the Newspaper”), Michael Schwartz, argued that the original documents would reveal confidential sources. Ultimately, the Daily News, through Schwartz, turned over redacted copies of the original documents to Special Prosecutor Carluccio. These redacted copies were the same exhibits identified by both Morrow and Brennan. Transcripts from the in camera hearing indicate that Schwartz and Carluccio were going to further litigate the matter and submit briefs for Judge Carpenter’s review as to whether or not the original documents must be turned over without redactions. Briefs, however, were never filed, and the issue apparently was not further litigated.
13. On January 27, 2016, the Montgomery County District Attorney’s Office served a subpoena for the original, unredacted documents on Mr. Schwartz, as counsel for Brennan and the Newspaper. Mr. Schwartz replied by letter and declined to provide said documents. Mr. Schwartz cited the Pennsylvania Shield Law and the Qualified Reporter’s Privilege, found through the First Amendment to the United States Constitution.

14. The protection sought by the Newspaper does not apply. For the reasons stated below, both avenues pursued by the Newspaper fail under the specific facts of this case.

II. Legal Argument

1. Two separate privileges arguably apply to the four documents at issue in the instant case. The first is the Qualified Reporters Privilege rooted in the First Amendment to the United States Constitution. U.S. CONST. amend. I. The second is the Pennsylvania Shield Law. 42 Pa. C.S.A. § 5942(a).

2. Qualified Reporters Privilege

- A. The Qualified Reporters Privilege is rooted in the First Amendment to the United States Constitution. U.S. CONST. amend. I. The privilege, however, is not absolute, and in fact fails under the facts of the instant case.

- B. Under the Qualified Reporters Privilege, a court may compel disclosure of documents allegedly protected by the First Amendment if: (1) the information sought is material, relevant, and necessary; (2) there is a strong showing that it cannot be obtained by alternative means; and (3) the information is crucial to the case. *Commonwealth v. Bowden*, 838 A.2d 740, 745 (Pa. 2003) (citing *Commonwealth v. Tyson*, 800 A.2d 327, 331-32 (Pa. Super. 2002)).

- C. *Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003), is instructive. In *Bowden*, an individual named Brian Tyson, who was charged with

murder, gave multiple interviews to two news reporters from the Philadelphia Inquirer. It was expected that Tyson would claim self-defense at trial, and indeed the interviews revealed as much. After a series of articles reporting on the interviews with Tyson, the Commonwealth subpoenaed the news reporters' interview notes. *Id.* at 742-43. The reporters challenged the subpoenas in part on the basis that their notes fell under the qualified reporters privilege found in the First Amendment to the United States Constitution. *Id.* at 745.

D. In *Bowden*, the court found that the qualified reporter's privilege did not apply. The court stated that, as to the first prong, the information was clearly material in that it spoke directly to Tyson's defense at trial. The Court further noted, as to the second prong, that there were no alternative means to obtain the information other than through Tyson or the two reporters. The court also noted that, as it relates to Tyson, he had a Fifth Amendment privilege and, therefore, the Commonwealth could gather the information sought *only* through the reporters. *Id.* at 755-57. Finally, as to the third prong, the court found that the information sought was indeed "crucial." *Id.* at 757. Importantly, the court noted that the word "crucial" should not be read in its most restrictive sense. The court found that the information sought was simply "relevant and important" and therefore crucial. *Id.* at 757, n.12.

- E. In the instant case, in both motions filed by the Newspaper, dated February 12, 2016, and February 16, 2016, respectively, the Newspaper apparently concedes the first and second prongs of the above cited analysis, as the Newspaper makes no argument as to those two prongs. In order to ensure completeness, however, the Commonwealth will detail why the Newspaper's attempts to seek refuge through the Qualified Reporter's Privilege fails under all three prongs.
- F. As it relates to the first prong, in the instant case the information is clearly material, relevant, and necessary as it could identify individuals who viewed, read, or printed the documents as well as individuals that delivered and/or assisted in the delivery of the documents to the Daily News. This possible universe of individuals includes not only the Newspaper's lone "confidential source," who by the Newspaper's own admission is a single person, but others as well. It is also worth noting at this stage that the "confidential source" the newspaper seeks to protect is known to be Joshua Morrow, through the investigation by the 35th Statewide Investigating Grand Jury Notice #123, the independent investigation by the Montgomery County District Attorney's Office, and through reporting done by the Newspaper itself.
- G. As for the second prong, clearly there are no alternative means to obtain the documents or information currently being protected by

redactions to the documents. The documents held by the Daily News are originals and should bear evidence of individuals who viewed, read, or printed the documents as well as individuals that delivered and/or assisted in the delivery of the documents to the Daily News that would otherwise be impossible to obtain. Obviously, the sort of evidence contained within *original* documents cannot be obtained through other means, which is perhaps why the Newspaper has apparently conceded as much.

- H. Finally, identifying individuals who printed, and/or delivered, and/or assisted in the delivery of the documents to the Daily News is crucial to the investigation. Without citing to the actual standard for what qualifies as “crucial,” the newspaper summarily determines in its motion that the Commonwealth has failed to cite a “specific need” for the documents. That is not the standard. *See Bowden*, 838 at 757, n.12 (to qualify as “crucial” the information sought must simply be “relevant and important”).
- I. Indeed the documents sought are crucial on many levels. As an initial matter, and as previously detailed, the documents could be tested forensically. This includes more than just fingerprint and DNA testing, as claimed by the Newspaper. Forensic testing could also include the analysis of any handwriting on the documents or the analysis of any other markings made by digital printers or copiers utilized in the preparation of the documents. To this day, it is of course unknown to

the Commonwealth exactly what is behind the redactions made by the Newspaper, and so in considering the need for forensic testing, this Court cannot limit its consideration to the value of fingerprint and DNA testing.

J. Beyond the above, the Commonwealth finds itself at a different potential disadvantage. The Commonwealth has thus far been unable to submit any of the original documents, documents that were necessarily handled by the individual(s) that collected them and transferred them to Morrow, for forensic testing. The specter of the lack of forensic testing was something counsel for Attorney General Kane raised at the first of two preliminary hearings for perjury and related charges. Notes of Testimony, Preliminary Hearing 8/24/15, 148:13 - 152:7. The Attorney General may also ask this Court for a jury instruction on missing evidence. These two aspects may be critical during a criminal trial, and the Commonwealth must have access to the documents to prevent these avenues of attack by the criminal defendant in this matter.

K. Finally, the Newspaper presumes that because other individuals may be available to testify at trial to certain aspects of the preparation and transference of these documents, that the need for the original documents is somehow less crucial. This premise is faulty. The need for corroboration in a criminal trial can be critical and to short-change the Commonwealth's ability to present the full scope of this

defendant's criminal culpability by denying access to potentially incriminating evidence simply because there may be other, different evidence available, is not in the interests of justice.

L. Therefore, under the instant facts and just as in *Bowden*, the Qualified Reporters Privilege is not applicable.

3. Pennsylvania Shield Law

A. The Shield Law protects the identity of a reporter's confidential source. *In re Taylor*, 193 A.2d 181, 186-87 (Pa. 1963). The Shield Law protects not only any confidential source, but also any item, tangible or intangible, that may lead to the revelation of that source. That of course would include items like the original documents sought here. The Newspaper's argument fails, however, under the Shield law for two reasons. First, the Newspaper has waived the Shield Law. Second, this case should qualify under a crime-fraud exception to the Shield Law.

B. The Newspaper Has Waived Any Shield Law Protection

i. It is important to note at the outset that, in the instant case, this Court is not dealing any longer with confidential sources. The Newspaper's only "source," by their own admission in their filed motions, is a single individual. That individual is already known to the instant litigants, and the public generally, as Joshua Morrow.

- ii. Therefore, and as an initial matter, the Shield Law is not applicable in this case because it has already been waived. In the seminal case on the Pennsylvania Shield Law, *In re Taylor, supra*, the Pennsylvania Supreme Court discussed the waiver of the privilege. In that case, and as it relates to waiver, the court held that “waiver by a newsman applies only to the statements made by the informer which are actually published or publicly disclosed and not to other statements made by the informer to the newspaper.” *In re Taylor*, 193 A.2d at 186.
- iii. In the instant case, the presentment made by the 35th Statewide Investigating Grand Jury has been unsealed, and its details published in various articles by multiple news outlets, including The Daily News and its sister newspaper, the Philadelphia Inquirer. These articles have detailed the entirety of the criminal case against Attorney General Kathleen Kane. This includes reporting on Kane’s authorizing former First Deputy King to deliver an envelope containing the original documents to Morrow who was to then deliver them to the Daily News. With the publishing of these articles, the Newspaper identified and revealed their confidential source for the documents, Morrow, who would have been otherwise protected by the Shield Law.

- iv. The Newspaper attempts to dodge and weave this reality by noting that the above information has not been published by “*Brennan*” (emphasis by the Newspaper); as is clear from *Taylor*, however, waiver applies to information publicly disclosed. The specific holding, though cited above, bears repetition: “waiver by a newsman applies only to the statements made by the informer which are actually published or publicly disclosed and not to other statements made by the informer *to the newspaper.*” *In re Taylor*, 193 A.2d at 186 (emphasis added). The plain language of this quotation makes clear that it is the publication *by the newspaper* that acts to waive the privilege, not publication by the specific news reporter.
- v. Morrow, the “confidential source” for the Newspaper, has also been identified through testimony in front of the 35th Statewide Investigating Grand Jury, and that testimony has been publicly disclosed through charging documents. There is no longer any mystery as to who the confidential source for the Daily News was; the mystery was dispelled through multiple sources, including the Newspaper itself.¹

1. *Bowden* is also instructive as it relates to waiver. Though the court in *Bowden* ultimately rejected the application of the Shield Law in that case without specifically noting it was waived, a waiver analysis was made in resolving that case. See *Bowden*, 838 at 747-750. As noted above, *Bowden* involved the Commonwealth’s attempt to obtain notes from a press interview with an accused murderer whose identity was known. In concluding that the Shield Law did not apply, the court noted that the only “source” being revealed would be the murderer. *Id.* at 749. The court contrasted that with *Taylor*, a case where multiple confidential sources may have been revealed should the new outlet in that case have been compelled to reveal the

C. In Any Event, The Facts Of This Case Should Qualify Under A Crime-Fraud Exception To The Shield Law

- i. Aside from the clear waiver in the instant case, the disclosure of the original documents should also be compelled under a crime-fraud exception to the Shield Law. While there currently is no crime-fraud exception to the Pennsylvania Shield Law specifically recognized through case law, the Pennsylvania Supreme Court has indicated that such an exception could be applied under a specific set of facts. *See Castellani v. Scranton Times*, 956 A.2d 937, 950 (Pa. 2008) (quoting *Sprague v. Walter*, 543 A.2d 1078, 1082 (Pa. 1988)) (holding that there is no crime-fraud exception in *defamation* cases). The instant case contains exactly that set of facts.
- ii. The Pennsylvania Supreme Court has signaled that the Shield Law may have to yield in situations where a prosecutorial agency is seeking evidence in a case involving an alleged breach of grand jury secrecy. In *Castellani*, the Supreme Court first addressed the prospect of an exception to the Shield Law for breaches of grand jury secrecy. It noted that the Shield Law and the grand jury secrecy laws conflict in instances where someone violates grand jury secrecy by leaking information to the media.

information sought. As noted before, the newspaper concedes in its motion that their source is a singular individual. It is now known that that individual is Morrow. Therefore, just as in *Bowden*, the Shield cannot now be used by the Newspaper because it has been waived.

The Court declined to address the issue in that case *because it was a civil matter, not a criminal prosecution*. The Court's footnote, however, suggested that there might be such an exception in a criminal case.² It stated as follows:

Were a situation to arise, such as that hypothesized by the concurrence below, *where the Commonwealth sought a reporter's evidence concerning the source of a grand jury leak in a criminal investigation or prosecution of that leak*, then the Shield Law and the secrecy provision of the Grand Jury Act would be more directly in conflict. . . . Put another way, we need not determine whether there is any situation where the absolute language of the Shield Law would have to yield to a competing, constitutional value.

Id., 956 A.2d at 953 n. 14 (emphasis added).

- iii. In its motion, the Newspaper quickly dismisses this concept as *dicta* without noting the clear distinction made by the Supreme Court: that *Castelleni* involved a civil matter and therefore the need for such an exception did not exist under those facts. The fact that *Castelleni* involved a civil matter is a critical distinction and must be recognized by this Court when evaluating the efficacy of using a crime-fraud exception in this case, which contains the exact factual scenario envisioned by the Pennsylvania Supreme Court when discussing the crime-fraud exception.

2. Then-Superior Court Justice Deborah Todd discussed the potential for a crime-fraud exception in the Superior Court opinion that preceded this Supreme Court opinion. She has since been elevated to the Pennsylvania Supreme Court and joined in the opinion for *In Re Dauphin County*, discussed *infra*.

iv. The Supreme Court revisited the issue in *In re Dauphin County Fourth Investigating Grand Jury*, 19 A.3d 491, 509 (Pa. 2011). Again, it noted the possibility that the Shield Law may have to yield where “the Commonwealth sought to obtain a reporter’s evidence concerning the source of a grand jury leak in a criminal investigation or prosecution of that leak[.]” *Id.* The Court again found, however, that the issue was not properly before it because the issue was not directly involved in that case. It again included a footnote, which read as follows:

This Court acknowledges the role of a vigorous free press and its importance in our society, harking back to the seminal case of John Peter Zenger in the eighteenth century. But, we would be remiss if we did not recognize that *the improper disclosure of grand jury testimony constitutes criminal conduct and that by seeking protected grand jury information, members of the free press are encouraging, if not abetting, conduct that is criminal in nature.* As a consequence, the important policies pertaining to the powerful investigative tool of the grand jury are being undermined.

Id. at 509 n.6 (emphasis added).³

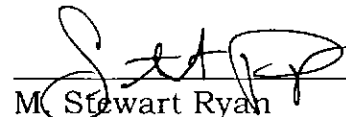
v. Thus, the Supreme Court has repeatedly indicated that the Shield Law might have “to yield to a competing, constitutional value” in precisely the circumstances that exist in the instant case. *Castellani*, 956 A.2d at 953 n. 14. This is a criminal

3. Arguably this quote from the court speaks to potential criminal liability for a reporter in that it uses language that could be construed to establish accomplice liability for a reporter who knowingly releases grand jury information. However, the Commonwealth notes that it sees absolutely no criminal liability for Mr. Brennan, who was, at best, an unwitting accomplice in the scheme hatched by the criminal defendant in this matter.

prosecution arising out of a leak that violated Grand Jury secrecy laws and the identity of the leak is directly at issue in this case. The instant case is the exact scenario contemplated in *Castellani* and *In re Dauphin County*. Therefore, this Court should compel compliance with the Commonwealth's subpoena and order the disclosure of the original documents.

WHEREFORE, The Commonwealth requests this Court to Order The Newspaper to Comply with the Subpoena Duces Tecum.

Respectfully Submitted,



M. Stewart Ryan
Assistant District Attorney

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,
PENNSYLVANIA – CRIMINAL DIVISION

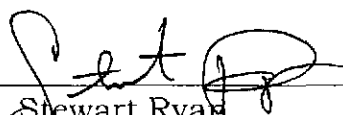
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VERIFICATION

I verify that the statements made in the foregoing response are true and correct to the best of my knowledge, information, and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. § 4904, relating to unsworn falsification to authorities.



M. Stewart Ryan
Assistant District Attorney

CERTIFICATE OF SERVICE

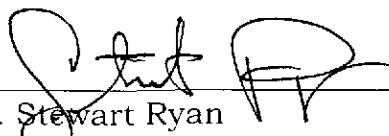
I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. § 4904, relating to unsworn falsification to authorities. I, Kevin R. Steele, District Attorney, being duly sworn according to law, depose and say that a true and correct copy of the Commonwealth's Memorandum of Law in Support of Its Response to Motion to Quash Subpoena Directed to Michael A. Schwartz, Counsel to Reporter Christopher Brenna and Philadelphia Media Network, PBC., was delivered to the following:

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