

September 1, 2010

Mr. Terry Mutchler, Executive Director  
Office of Open Records  
Commonwealth Keystone Building  
400 North Street, 4<sup>th</sup> Floor  
Harrisburg, PA 17120-0225

Re: Joseph Cap v. County of Lehigh  
Docket No: AP20100701

Dear Mr. Mutchler:

#### REQUEST FOR RECONSIDERATION OF FINAL DETERMINATION

This is a request for reconsideration of final determination issued on August 26, 2010, by Appeals Officer Audrey Buglione, finding that a county employee's affidavit, by itself, is preponderance of evidence that a public record video that is continuously created daily not exist for it was never recorded the unethical, if not criminal activities, of a county employee, District Magistrate Murphy, who ordered the confiscation of Requester's digital voice recorder at the start of a summary trial on July 15, 2010, of serving a assistant store manager with a civil complaint. The final determination should be reconsider for the following reasons:

Preponderance of evidence that the requested video was recorded of the July 15 event is 1,100 to 1,800 times greater than that the video was not recorded. This preponderance of evidence is lack of equipment failure is  $1/(365 \text{ days of operation} * 3 \text{ years since last failure at mall})$  to  $1/(365 * 5 \text{ very conservative life of electronic equipment})$  these probabilities of 1 out 1100, 1 out of 1800 is preponderance of evidence that there was not any equipment failure and that a recording was created and destroyed by county employee Ms. Denise M. Halal, who is a clerk in the magisterial district. This preponderance of evidence can only be over come by producing the preserved hard drive and a video depicting the last video recorded on May 3 overwriting an older recorded video file, that was weeks, if not months older. That is preponderances of evidence of failure to record since May 3. Not an affidavit by Ms. Halal, as the present evidence illustrates was specially directed by her supervisor to destroy all evidence of the public record. Also, the DVR creates an historical log of the CCTV surveillance systems various activities and configurations. Ms. Halal neglected to affix this history log record to support her affidavit. I will be requesting this record through the RTKL.

Failure of affidavit to offer any explanation for failure to record the requested activities of Magistrate Murphy ordering the confiscation of Requester/Defendant voice recorder at the start of of a summary trial of Requester\Defendant charged with trespassing at a public store while servicing a civil

complaint upon store management.

Failure to offer an explanation of the district magistrate office staff and the magistrate to notice for three months, or about 60 consecutive working days, that the surveillance video recorder with its video monitor mounted on top of the recorder in plain sight of all in the office was not recording,

Most video system surveillance DVR have mode indicating lights and audible alarms that indicate whether recording or not and also the video monitor would of indicated video feed failure.

Some surveillance DVR have automatic reset function that automatically reset to record should there be power malfunctions and/or switch to alternative battery power.

Ms. Halal stated in her affidavit that other district magistrate offices, that are miles apart, experienced similar video recoding failures at the same time, while no business in the mall, in which the district magistrate office is located, experienced failures.

Ms. Halal failed to substantiate her affidavit by attaching supportive affidavits by staff of other magistrate districts in which alleged recording failures occurred.

Ms. Halal failed to attach supportive affidavits by magistrate district Murphy and office staff of the alleged the video recording apparatus failure.

Failure to include affidavits by district magistrate Murphy's office staff, Murphy himself, Price Rite representatives, and prosecuting cop James Kelshaw, that the July 15 event never occurred, Therefore, the events were never recorded and the video record never existed to be destroyed.

Ms. Halal, the county employee who destroyed the evidence on the hard drive, failure to provide confirmation letters with her affidavits that she spoke to the manufacture and others and the subject matter of the conversations

Failure to utilizes county union IT employees to preserve hard drive and download the video.

The office manager refused to answer question above the event and the visit by Ms. Halal.

The office manager and attorney Ashcraft to provide model and manufacture of the DVR. Ashcraft instructed that I should go to the purchasing department for the information.

Failure to contact a single investigative agency. Upon being informed of the alleged criminal activities of Judge Murphy, Attorney Ashcraft was mandated to secure the recording equipment at Judge Murphy's office. And notify investigative agencies. Attorney Ashcraft failed to do both.

Had he, the investigating agency's forensic IT person, with certification in the software being employed, would of created an exact duplicated copy of the incriminating hard drive, commonly referred to as a "mirror image". The original recording equipment, in its original state, files, settings, etc, would be placed in a secure "evidence facilities". The created duplicated "mirror image" contains all data on hard drive, such as log, activities, settings and other files. The "mirror image" will be

working drive used to analysis all of data germane to the incriminating activities of Judge Murphy. Copies of the incriminating activities would have been created from the mirror image. This was not done.

Attorney Ashcraft never intended to provide a copy of the incriminating video. For if he intended, Attorney Ashcraft would of instructed any one of three clerks at Murphy's office or better, instructed a county IT person to run over to DJ Murphy's office to down load a copy.

Instead, Attorney Ashcraft instructed a filing clerk, from another judges office, without any formal certification in forensic recovery, to proceed to judge Murphy office to temper with and destroy the incriminating evidence.<sup>1</sup> The county has unionized IT personnel. Attorney Ashcraft alleges that incriminating video was never created. If true, the data on the original hard drive and its mirror image would substantiate this claim by depicting the complete sequent of video files recorded that remained on the hard disk including the last video allegedly recorded on May 3, 2010. Also, it would show the lack of any video files being recorded since May 3. But, that proof is being destroyed by Ms. Halal, when she allegedly re-activated the recording sequence. Notwithstanding that it is commonly known that recording over prior recorded video destroys the underlying video. Activating the recording sequence after counseling with presumably experts from the court system, a security firm and the manufacturer, all whom would of warn her that prior record videos would be destroyed.

Ms. Halal fails to state who she allegedly spoke to and the subject matter nor had she append letters of confirmation as to the alleged conversations. Ms. Halal failed to console with county IT personnel. Ms. Halal fails to state any facts and diagnostic procedures that she preformed to arrive at her conclusion that since May 3 or approximately three months the surveillance system was not recording. Most recording equipment have LED light indicators that indicate that a mode is activated and functioning. Also, they have automatic reset function, similar to a computer's "Hibernate" mode that automatic self resets to the prior state due to power failures.

County IT personnel know that specialized recovery programs and procedures exist that are able to recover destroyed data that has been re-recorded over numerous of times, as in this situation and is unrecoverable by common procedure available to the general public. The sooner the J. Murphy incriminating hard drive is stopped from recording non eventful images, the greater likely hood of recovering all of incriminating evidence; or the lack of any data being recorded from May 3 to July 21, which would exonerate Ms. Halal and Attorney Ashcraft.

Ms. Halal allegedly reactivated the recording sequence that was allegedly mysterious

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<sup>1</sup> Ms. Denise Halal work address is 3404 Hamilton blvd, which is the address of Magisterial District 31-2-.2, presided by District Judge Jacob E. Hammond. Thus, Ms. Halal is a file clerk for J. Hammond.

deactivated, which she falsely alleged was due to a “disk problem” or “power surge”. Since, the hard drive was not replaced, it was not “disk problem”. Nor was it a “power surge”. I spoke to the majority of store managers in the mall in which J. Murphy office is located. None experienced any power equipment failure from May 3 to July 21. The last power failure at the mall was three years ago when a vehicle snapped a pole.

The mirror image would substantiated the assertion as to deactivation of recording to the exact date and time of alleged deactivation in the log, settings and activity files. It would also depict the last person entering the office and those present in the office at the time of deactivation.

All of this purposefully negligence is evidence that the chain of criminality that originated with J. Murphy, extends to Ms. Halal, and Attorney Ashcraft and the county solicitor office.

Attorney Ashcraft misleads by citing § 705, for 705 pertains to creations of records that are not customary created by the agency. In the present matter the county continuously creates he video of individuals entering and exiting the various district judges offices throughout the county. The county failed to offer any evidence, credible or otherwise, that incriminating video of Judge Murphy was never created and therefore never existed. That evidence would be “mirror image” from which a “dish map” would show the location on the hard drive disk the last alleged video of May 3 and first video of July 21, 2010. The dish map would show the sequence of video files on the disk. The being of July 21 video should begin at the termination of the May 3 file, without any video files between the two.

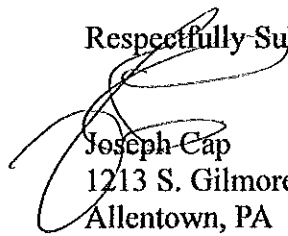
Attorney Ashcraft cites P.S. § 67.708, without explaining how the incriminating video of Judge Murphy should be excepted from disclosure due the incriminating video will some how endanger the building, or that it may “potential be used in a criminal or non-criminal investigation“. Astonishingly, Attorney Ashcraft neglect to cite any investigative agency that he contacted or any agency that may be or is conducting any investigation. But, this is understandable for he assigned a filing clerk to destroy the incriminating video of Judge Murphy; or did Ms. Halal destroyed the alleged self serving evidence - that the incriminating video never was recorded?

In Coley v. Pa. State Police,(PSP) involved a disputed traffic stop, which PSP alleged was not recorded by the cruiser’s dash board camera due to some unspecified equipment failure. Police Officers, truck drivers, cabbies and others are responsible to their employers for damages that they caused to vehicles. The drivers inspect the vehicle for physical damage and test the various systems for functionality. Consequently, accepting the cruiser attests to the functionality of the equipment. Thus, PSP, was obligated to prove with a preponderances of evidence that sometime after accepting the cruiser and the disputed stop that the video equipment failed. This could have been accomplished by creating “mirror image” of the cruiser’s video hard drive; and providing the requester a copy of the

“mirror imaged“ hard drive to be independently analyzed. Either the agency provides the requested video or provide a mirror image of the defective hard drive to substantiate the agency claim of malfunctioning of equipment. Stating in an affidavit that a file does not exist due to equipment failure, in which the equipment is in possession of affdavitior and unavailable to the requester is a simple trick that agencies employ to circumvent the RTKL.

Wherefore the Office of Open Records should reconsider it final determination in light that the agency failed to provide any evidence that the requested record was not created and destroyed and order the County of Lehigh to provide affidavits by the various county employees who are involved or mention this motion; and to provide the a copy of the video of the activities of Magistrate District Murphy on July 15, 2010, and/or in the alternate re-create a written record of the events of July 15, 2010, with swore affidavits by Officer James Kelshaw, district magistrate Murphy, and his office staff, Price Rite representative, and the two mysterious unidentifiable individual that exited the magistrate office with Officer Kelshaw.

Respectfully Submitted,



Joseph Cap  
1213 S. Gilmore St  
Allentown, PA 18103  
610-797-3833

cc: John Ashcraft, Esquire



September 13, 2010

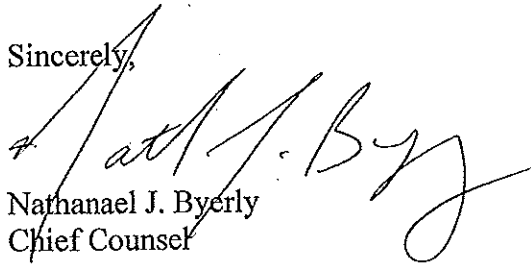
Joseph Cap  
1213 S. Gilmore Street  
Allentown, PA 18103

RE: Petition for Reconsideration received September 3, 2010, OOR Dkt. AP 2010-0701

Dear Mr. Cap:

We are in receipt of your Petition for Reconsideration dated September 1, 2010, that was received by this office on September 3, 2010, in connection with the Office of Open Records Final Determination in *Cap v. Lehigh County*, OOR Dkt. AP 2010-0710. We hereby deny your Petition.

Sincerely,

  
Nathanael J. Byerly  
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records  
M. Judith Johnson