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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
ERIC FRIEDMAN,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
WESTTOWN-EAST GOSHIN	:	
POLICE DEPARTMENT,	:	DA-RTKL-A NO. 2021-008
Respondent	:	

**INTRODUCTION**

On August 21, 2021, Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et seq.* On August 26, 2021, the request was denied in part. On September 7, 2021, Requester appealed to the Office of Open Records. On October 7, 2021, the Office of Open Records issued a decision which denied in part and transferred in part the

appeal to the Chester County District Attorney's Office [AP 2021-1862], which was received by mail on October 13, 2021.

For the reasons set forth in this Final Determination, the appeal is **DENIED** and the Respondent is not required to take any further action.

### **FACTUAL BACKGROUND**

On August 21, 2021, Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.* On August 26, 2021, the request was denied in part. On September 7, 2021, Requester appealed to the Office of Open Records. On October 7, 2021, the Office of Open Records issued a decision which stated in part:

On August 21, 2021, the Request was filed, stating:

This [Request] covers the time period January 1, 2021 through August 21, 2021. [] All correspondence sent or received during the time period specified above between any representative of [the Department] and any representative of Zorion Enterprises (including any related or affiliated entity). [] A search for responsive electronic communication is specifically requested in the [Department] email account bbernot@wegopd.org as well as all official and personal cell phones and email accounts issued to or used by [Department] Chief Brenda Bernot.

If any of the foregoing records exist in electronic form, I request them in the original, native electronic form in which they exist, including all metadata.

On August 26, 2021, the Department denied the Request in part, arguing that no responsive non-email records exist. The Department provided a redacted email exchange between an officer of the Department and representatives of Zorion Enterprises, but denied the Request in part as relating to a criminal investigation. 65 P.S. § 67.708(b)(16). The Department also withheld a crash report under 75 P.S. § 3751.

On September 7, 2021, the Requester appealed to the OOR, arguing that the denial did not address whether the Department had sought deleted electronic communications and that the redacted email was not provided in its original electronic format. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On September 13, 2021, the Department submitted a position statement, arguing that it did not possess any responsive records other than emails and that the redacted attachment related to a criminal investigation and required redaction, and so could not be provided in native format.<sup>1</sup> In support of these arguments, the Department submitted the verification of Chief Brenda Bernot, who attests that a search was conducted, and redactions were properly applied to the responsive email.

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<sup>1</sup>. On appeal, the Requester also argued that the Department's RTKL response policy is deficient and does not comport with the requirements of the RTKL, and that the Department's online RTKL page is deceptively or unhelpfully worded. The Department responded to those arguments, arguing that the policy was justified, and the Department's website is accurate. Since none of those arguments are relevant to the instant appeal, the OOR will not consider them for the purposes of this Final Determination.

In the Matter of Eric Friedman v. Westtown-East Goshen Police Department,

Docket No. AP- 2021-1862 (footnote in original), at 1-2.

On October 7, 2021, the Office of Open Records issued a decision which denied in part and transferred in part the appeal to the Chester County District Attorney's Office, which stated in part:

**1. The Department has demonstrated that no additional records exist**

On appeal, the Requester challenges the Department's argument that only a few emails are responsive to the Request. The Department argues that no other responsive records exist. In support of this argument, the Department submitted the verification of Chief Bernot, who attests that:

1. All map drives accessible to departmental personnel on the departmental server were searched - no written communication involving Zorion Enterprises were located.
2. An email was sent to all personnel requesting written communication between them and Zorion Enterprises personnel - all personnel who worked during the specified time period indicated that they had not prepared any written communication such as letters involving Zorion Enterprises.
3. The Department's server was examined utilizing the Microsoft 365 Compliance Center to locate any emails (sent, received, deleted) that contained the phrase "Zorion" or "Zorion Enterprises" and involved communication with representatives of Zorion Enterprises.
4. Three emails were located and involved communication regarding a DUI crash that occurred on property served by Zorion Enterprises and which was witnessed by personnel employed by Zorion Enterprises. A redacted version of these emails (with the names, addresses, email addresses, etc. of the victims and witnesses was provided to [the Requester] []).

5. Chief Bernot did not send or receive any email communications involving Zorion Enterprise on either a work or personal device.

6. An email was sent to all personnel requesting whether they had received a voice message/mail from a representative of Zorion Enterprises. Only one officer (Officer J. Micun) indicated that he had received a voice message from a representative of Zorion Enterprise on the [D]epartment's voice mail system in January regarding a crash that he investigated. He indicated that he deleted the message after returning the call.

7. Consultation was conducted with Sam Genova, Technical Engineering Specialist/Consultant of Candlestick Communications (the telephone technology utilized by the Department). Mr. Genova indicates that the Department's voice message system permanently deletes messages from the system when a message is deleted; it cannot be retrieved. []

8. Chief Bernot did not receive any voice mails from representatives of Zorion Enterprises on either a work or personal device.

9. An email was sent to all personnel requesting whether they had sent or received a text message from a representative of Zorion Enterprises. All personnel working during the time period specified indicated that they had not sent or received text messages from a Zorion Enterprises representative.

10. Chief Bernot did not send or receive any text messages from Zorion Enterprises representatives on either a work or personal device.

Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa.

Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith, or that additional responsive records exist, “the averments in [the statement] should be accepted as true.” McGowan v. Pa. Dep’t of Env’tl. Prot., 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (*citing* Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Here, the Department has met its burden by demonstrating that it conducted a good-faith search for responsive records by explaining who was contacted and by outlining its search of locations where responsive records would be reasonably likely to be saved or stored. This included searching for deleted messages and finding that only the identified responsive records exist. Hodges, 29 A.3d at 1192. The Requester has not provided any evidence that contradicts the Department’s statement.

## **2. The appeal must be transferred in part**

The Department redacted certain information from the emails and incident report provided to the Requester. Section 708(b)(16) of the RTKL exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation, including: ... [i]nvestigative materials ... and reports” and “[a] record that, if disclosed, would ... [r]eveal the institution, progress, or result of a criminal investigation...” 65 P.S. §§ 67.708(b)(16)(ii), (vi)(A). The Requester asks that the OOR determine whether the redacted information is exempt from disclosure.

The OOR does not have jurisdiction over records related to a criminal investigation in the possession of a local agency, but a claim that records are exempt under Section 708(b)(16) does not automatically divest the OOR of jurisdiction over an appeal. Section 503(d) creates a two-step analysis for determining when cases should be heard by the OOR and when they should be heard by the appeals officer appointed by a District Attorney.

First, jurisdiction is properly transferred from the OOR to the District Attorney’s Office when an appeal on its face involves records that relate to a criminal investigation (*e.g.*, search

warrants, witness statements, etc.). *See* Porter v. Allegheny County Sheriff's Office, OOR Dkt. AP 2014-1910, 2014 PA O.O.R.D. LEXIS 1444 (transferring an appeal where the request for a search warrant was on its face related to a criminal investigation).

Second, when it is unclear whether the requested records relate to a criminal investigation, the local agency must provide some evidence showing how the records relate to a specific criminal investigation. While a low threshold for transferring a case is needed, an agency must provide more than a conclusory affidavit that merely repeats the language of Sections 503(d) and 708(b)(16). *See* Bush v. Westtown-East Goshen Police Dep't, OOR Dkt. AP 2016-1869, 2016 PA O.O.R.D. LEXIS 1708 (transferring a case where the agency demonstrated how the requested records related to a specific criminal investigation); Burgess v. Willistown Twp. Police Dep't, OOR Dkt. AP 2013-1511, 2013 PA O.O.R.D. LEXIS 868 (holding that where a local agency made a preliminary showing that records relate to a criminal investigation, the OOR lacked jurisdiction to consider the merits of the appeal).

Here, the responsive emails facially relate to a non-official incident report filed by an employee of Zorion Enterprises, a private security firm, explaining that they had witnessed part of a vehicle crash, which they believed to be a DUI, and follow-up email from Officer Micun seeking witness contact information so that he could follow-up on the investigation. The OOR has repeatedly found that investigations into crashes which might have been caused by driving while intoxicated may constitute criminal investigations. *See, e.g.,* Tucker v. Pa. State Police, OOR Dkt. AP 2015-0361, 2015 PA O.O.R.D. LEXIS 377. Therefore, because these records facially appear to relate to a criminal investigation, the OOR does not have jurisdiction to decide the appeal, and it is hereby transferred to the Appeals Officer for the Chester County District Attorney's Office to determine whether those records relate to a criminal investigation. Pa. Game Comm'n v. Fennell, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements when construing exemptions).<sup>2</sup>

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2. Because the OOR does not have jurisdiction to determine whether the Department's redactions were valid, the OOR cannot rule on the Requester's argument that the record should have been provided in its native format. To the extent that the redactions are permitted under the RTKL, however, the Department has submitted evidence showing that it cannot redact files in their native format and that providing the email metadata would reveal the identities of the witnesses involved in the case.

In the Matter of Eric Friedman v. Westtown-East Goshen Police Department, Docket No. AP- 2021-1862 (footnote in original), at 4-7.

On October 13, 2021, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

On August 21, 2021, Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*. On August 26, 2021, the request was denied in part. On September 7, 2021, Requester appealed to the Office of Open Records. On October 7, 2021, the Office of Open Records issued a decision which denied in part and transferred in part the appeal to the Chester County District Attorney's Office [AP 2021-1862], which was received by mail on October 13, 2021.

Unless the Requester agrees otherwise, as the appeals officer, I shall make a final determination, which shall be mailed to the Requester and the Respondent, **within 30 days of October 13, 2021, which is November 12, 2021**. 65 P.S. § 67.1101(b)(1). If a final determination is not made within 30 days, the appeal is deemed denied by operation of law. 65 P.S. § 67.1101(b)(2). Prior to issuing a final determination, a hearing may be conducted. However, a hearing is generally not needed to make a final determination. The final determination shall be a final appealable order, and shall include a written explanation of the reason for the decision. 65 P.S. § 67.1101(b)(3).



**The Respondent should submit any response on or before October 22, 2021.**

**The Respondent should note:** The Supreme Court has held that a Respondent is permitted to assert exemptions on appeal, even if the agency did not assert them when the request was originally denied. Levy v. Senate of Pennsylvania, 619 Pa. 586, 65 A.3d 361 (2013). **Merely citing exceptions to the required disclosure of public records or conclusory statements are not sufficient to justify the exemption of public records.** Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013).

**The Requester should submit any response on or before October 29, 2021.**

**The Requester should note:** The Commonwealth Court has held that, pursuant to 65 P.S. § 67.1101(a), the appeal shall state the grounds upon which the Requester asserts that the record is a public record and shall address any grounds stated by the agency for denying the request. **When a Requester fails to state the records sought are public, or fails to address an agency's grounds for denial, the appeal may be dismissed.** Padgett v. Pennsylvania State Police, 73 A.3d 644 (Pa. Cmwlth. 2013); Saunders v. Department of Correction, 48 A. 3d 540 (Pa. Cmwlth. 2012); Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011).

**Any statements of fact must be supported by an Affidavit made under penalty of perjury by a person with actual knowledge.** However, legal arguments and citation to authority do not require Affidavits.

October 13, 2021 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.,  
Appeals Officer.

Respondent filed a response with this Appeals Officer. The Requester did not submit a response. Consequently, this decision is based on the initial request and response, the appeal documents, and the additional response of the Respondent.

### **LEGAL ANALYSIS**

The Chester County District Attorney's Office is authorized to hear appeals relating to access to criminal investigative records in the possession of a local agency located within Chester County. 65 P.S. § 67.503(d)(2) ("The district attorney of a county shall designate one or more appeals officers to hear appeals under Chapter 11 relating to access to criminal investigative records in possession of a local agency of that county. The appeals officer designated by the district attorney shall determine if the record requested is a criminal investigative record.").

The Westtown-East Goshen Police Department ("Respondent") is a local agency subject to the RTKL that is required to disclose public documents. 65 P.S. § 67.302. Records of a local agency are presumed "public" unless the record: (1) is exempt under 65 P.S. § 67.708(b); (2) is protected by privilege; or (3) is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. § 67.305. "Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree." 65 P.S. § 67.306.

The Respondent bears the burden of proving, by a preponderance of the evidence, that the document requested is exempt from public access. 65 P.S. § 67.708(a)(1). A preponderance of the evidence standard is the lowest evidentiary standard. The preponderance of evidence standard is defined as the greater weight of the evidence, *i.e.*, to tip a scale slightly is the criteria or requirement for preponderance of the evidence. Commonwealth v. Brown, 567 Pa. 272, 284, 786 A.2d 961, 968 (2001), *cert. denied*, 537 U.S. 1187, 123 S.Ct. 1351, 154 L.Ed.2d 1018 (2003). “A ‘preponderance of the evidence’ is defined as ‘the greater weight of the evidence ... evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other....’ Black’s Law Dictionary 1301 (9th ed. 2009).” Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 n.3 (Pa. Cmwlth. 2010); *See also Commonwealth v. Williams*, 532 Pa. 265, 284-286, 615 A.2d 716, 726 (1992) (preponderance of the evidence in essence is proof that something is more likely than not).

On October 13, 2021, Respondent submitted a response which included an affidavit from Dr. Brenda M. Bernot, Chief of Police, dated October 13, 2021, who serves as the Open Records Officer for Westtown-East Goshen Police Department. The affidavit stated:

## **ATTESTATION REGARDING RTK APPEAL**

I, Brenda M. Bernot, hereby declare, pursuant to 18 Pa.C.S. § 4904, that the following statements are true and correct based upon my personal knowledge information and belief:

1. I serve as the Open Records Officer for the Westtown-East Goshen Regional Police Department (“Department”) and am responsible for responding to Right-to- Know requests filed with the Agency.

2. In my capacity as the Open Records Officer, I am familiar with the records of the Agency.

3. Upon receipt of the request, I conducted a thorough examination of files in the possession, custody and control of the Agency for records responsive to the request underlying this appeal.

4. A review of the emails for Department members indicated that only one officer (Officer J. Micun) had email communications with a representative of Zorion Enterprises, a company affiliated with the Sunoco pipeline, during the specified time period. The email communication included three separate email exchanges (constituting a chain).

5. The email exchange concerned a DUI crash investigation (OTN: R-108309-5, Docket No: CP-15-CR-000141 7-202) that occurred on January 29, 2021, in which the operator was arrested and charged with multiple offenses including DUI, Reckless Driving, Careless Driving, and Driving Without a License. Therefore, the incident clearly constitutes a criminal investigation.

6. When the officer arrived at the scene of the DUI crash, he was made aware that several employees of Zorion Enterprises had witnessed the crash and that property owned by Sunoco had been damaged as a result of the crash. Due to the officer’s inability to conduct interviews with these individuals at the scene, email communication was later initiated (as indicated in

my response). The resulting email exchange constituted communication regarding a criminal investigation between the investigating officer and representatives of Zorion Enterprises (because they were either eyewitnesses to a criminal incident and/or authorized representatives for an involved property owner involved in a crash investigation).

7. Although the Department could have asserted that the entire email exchange could be denied to the Requestor based upon it being correspondence associated with a criminal investigation (which is exempt from disclosure under Section 708 (b) (16) (ii) of the Right to Know Law), a decision to provide a redacted version of the exchange was made because the majority of the material included in the exchange was similar to that generally included in a police blotter (which is public information).

8. The only information which was redacted from the email chain was nonpublic information including the names, addresses, and email addresses for the eyewitnesses, the perpetrator, and the property owner/representatives. This redaction was completed in accordance with Section 708 (b) (16) of the Right to Know Law.

Under the RTKL, an affidavit may serve as sufficient evidence to support an appeals officer's decision. Office of Governor v. Davis, 122 A.3d 1185, 1194 (Pa.Cmwlt. 2015); Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (affidavit suffices to establish nonexistence of records). In the absence of any evidence that a Respondent has acted in bad faith the averments in an affidavit should be accepted as true. McGowan v. Pa. Dep't of Env'tl. Prot., 103

A.3d 374, 382-83 (Pa. Commw. Ct. 2014); Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013).

Based on the evidence provided, the Respondent has met its burden of proof as to what documents it possesses, and that they are criminal investigative records and exempt from disclosure.

The RTKL provides that records of an agency (**relating to**) or (**resulting in**) a criminal investigation, such as investigative materials, notes, correspondence, videos, reports, and records, may be withheld as exempt. 65 P.S. § 67.708(b), titled, “Exceptions for public records”, provides in part as follows:

**(b) Exceptions.** -- Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

...

(16) A record of an agency relating to or resulting in a criminal investigation, including:

- (i) Complaints of potential criminal conduct other than a private criminal complaint.
- (ii) Investigative materials, notes, correspondence, videos and reports.
- (iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised.
- (iv) A record that includes information made confidential by law or court order.

(v) Victim information, including any information that would jeopardize the safety of the victim.

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.

(B) Deprive a person of the right to a fair trial or an impartial adjudication.

(C) Impair the ability to locate a defendant or codefendant.

(D) Hinder an agency's ability to secure an arrest, prosecution or conviction.

(E) Endanger the life or physical safety of an individual.

This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b)(relating to accident prevention investigations).

65 P.S. § 67.708(b).

18 Pa.C.S.A. § 9102 (relating to definitions) states in part: “**Police blotter.**’

A chronological listing of arrests, usually documented contemporaneous with the incident, which may include, but is not limited to, the name and address of the individual charged and the alleged offenses.”

18 Pa.C.S.A. § 9102 (relating to definitions) states in part: “**Investigative information.**’ Information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.”

In Pennsylvania State Police v. Office of Open Records, 5 A.3d 473 (Pa. Cmwlth. 2010), the *en banc* Commonwealth Court found an incident report exempt from disclosure pursuant to 65 P.S. § 67.708(b)(16). The Court held that the incident report was not a public record because the incident report was not the equivalent of a police blotter under the RTKL and the Criminal History Records Information Act (“CHRIA”).

In Pennsylvania State Police v. Grove, 640 Pa. 1, 161 A.3d 877 (2017), the Supreme Court discussed the definition of “criminal investigative records”, in part:

The RTKL requires Commonwealth agencies to provide access to public records upon request. 65 P.S. § 67.301 (“A Commonwealth agency shall provide public records in accordance with this act.”). Section 102 of the RTKL defines a “public record” as: “A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.” 65 P.S. § 67.102. A “record” is further defined under the RTKL as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map,



book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

Id. There is no dispute that MVRs are public records of an agency as defined in the RTKL and thus subject to public disclosure unless some exemption applies. We consider whether MVRs generally, and the video portions of Trooper Vanorden and Trooper Thomas’s MVRs in this matter specifically, qualify under an enumerated exemption to disclosure described in Section 708(b)(16) of the RTKL regarding “criminal investigative records.”

...

Under the Statutory Construction Act, where the words or phrases at issue are undefined by the statute itself, we must construe the words and phrases according to their plain meaning and common usage. 1 Pa.C.S. § 1903(a). The RTKL does not define the central phrase “criminal investigation” as used in Section 708(16)(b)(ii). *The plain meaning of a “criminal investigation” clearly and obviously refers to an official inquiry into a possible crime.* See, e.g., <https://www.merriamwebster.com/dictionary/criminal> (last visited Jan. 17, 2017) (“*relating to crime or to the prosecution of suspects in a crime*”); <https://www.merriamwebster.com/dictionary/investigation> (last visited Jan. 17, 2017) (“*to investigate*” is “*to observe or study by close examination and systematic inquiry,*” “*to make a systematic examination;*” or “*to conduct an official inquiry*”).

The Commonwealth Court has previously opined that material exempt from disclosure as “criminal investigative information” under the RTKL includes: statements compiled by district attorneys, forensic reports, and reports of police, including notes of interviews with victims, suspects and witnesses assembled for the specific purpose of investigation. See, e.g., Barros v. Martin, 92 A.3d 1243, 1250 (Pa. Cmwlth. 2014) (criminal complaint file, forensic lab reports, polygraph reports and witness statements rise to level of criminal investigative information exempt from disclosure); Coley, 77 A.3d at 697 (witness statements compiled

by District Attorney's office are criminal investigative records exempt from disclosure); Pennsylvania State Police v. Office of Open Records, 5 A.3d 473, 478–79 (Pa. Cmwlth. 2010) (incident report prepared by police with notes of interviews of alleged victims and perpetrators assembled during investigation exempt as criminal investigative information); Mitchell v. Office of Open Records, 997 A.2d 1262, 1265–66 (Pa. Cmwlth. 2010) (record pertaining to PSP's execution of search warrant was criminal investigation exempt from disclosure under Section 708 of the RTKL). With regard to the MVRs requested by Grove in this case, we must determine whether the video aspects generally depict a systematic inquiry or examination into a potential crime.

Grove at 24-26, 161 A.3d at 891–893 (emphasis added).

In Grove, as the RTKL does not define “criminal investigation” as used in § 708(16)(b)(ii), the Supreme Court held that the term “criminal investigation” refers to an official inquiry into a possible crime. Grove at 24-26, 161 A.3d at 891–893. In Grove, the Supreme Court agreed with the Commonwealth Court and reaffirmed that witness interviews, interrogations, testing and other investigative work, are investigative information exempt from disclosure by § 708(b)(16) of the RTKL and CHRIA. The Supreme Court also cited Commonwealth Court cases as some examples of “criminal investigative information” under the RTKL, which included, but is not limited to: (1) statements compiled by district attorneys, (2) forensic reports, (3) police reports - including notes of interviews with victims, suspects, and witnesses assembled for the specific purpose of investigation, (4) criminal complaint file, (5) lab reports, (6) polygraph reports, (7) witness statements, and (8) records

pertaining to execution of search warrant.<sup>1</sup>

Pursuant to 65 P.S. § 67.708(b)(16), records of an agency are exempt from access by a requester if the records relate to or result in a criminal investigation. When a party seeks to challenge an agency's refusal to release information by appealing that party must address any grounds stated by the agency for denying the request. Department of Corrections v. Office of Open Records, 18 A.3d 429, 434 (Pa. Cmwlth. 2011); Padgett v. Pennsylvania State Police, 73 A.3d 644, 647-648 (Pa. Cmwlth. 2013).

In Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011), the Commonwealth Court stated in part:

Consequently, we agree with DOC that when a party seeks to challenge an agency's refusal to release information by appealing to Open Records, that party must "address any grounds stated by the agency for ... denying the request." This is a typical requirement in any process that aims to provide a forum for error correction. We do not see it as a particularly onerous requirement, whether the requester has the benefit of legal counsel or is *pro se*.

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<sup>1</sup> See also 65 P.S. § 67.708(b) (i)-(vi) [A record of an agency relating to or resulting in a criminal investigation, includes: (i) Complaints of potential criminal conduct other than a private criminal complaint; (ii) Investigative materials, notes, correspondence, videos and reports; (iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised; (iv) A record that includes information made confidential by law or court order; (v) Victim information, including any information that would jeopardize the safety of the victim; (vi) A record that, if disclosed, would do any of the following - (A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges, (B) Deprive a person of the right to a fair trial or an impartial adjudication, (C) Impair the ability to locate a defendant or codefendant, (D) Hinder an agency's ability to secure an arrest, prosecution or conviction, (E) Endanger the life or physical safety of an individual.].

DOC v. OOR at 434.

As previously stated, Respondent, pursuant to 65 P.S. § 67.708(b)(16)(i)(ii), stated the requested records are exempt from access as the records relate to or result in a criminal investigation. When a party seeks to challenge an agency's refusal to release information by appealing that party must address any grounds stated by the agency for denying the request. Requester has not provided anything that the records do not relate to or have resulted in a criminal investigation.

It is important to note that a requester's identity and motivation for making a request is not relevant, and his or her intended use for the information may not be grounds for granting or denying a request. *See* 65 P.S. § 67.301(b), 65 P.S. § 67.703. For example, although a criminal defendant may be entitled to receive certain criminal investigative records in discovery, he or she would not be entitled to receive the same criminal investigative record by a RTKL request. Moreover, civil and criminal discovery law is not relevant to RTKL requests. The rights afforded a requester under the RTKL are constrained by the presumption and exemptions contained in the law itself. *See* 65 P.S. § 67.305, 67.708. Discovery conducted in a civil or criminal case and a request made under the RTKL are wholly separate processes. Office of the Dist. Attorney of Philadelphia v. Bagwell, 155 A.3d 1119, 1139 (Pa. Cmwlth. 2017).

Civil and criminal discovery law provides their own procedures and safeguards for the acquisition and use of potential evidence. However, once something is ruled available pursuant to a RTKL request, it is available to everyone, not just the current requesting party. Under the RTKL, the question is whether or not the requested documents are criminal investigative records. The requester and purpose for the request are irrelevant under the RTKL.

In DiMartino v. Pennsylvania State Police, 2011 WL 10841570 (Pa. Cmwlth. 2011), the Commonwealth Court, in a memorandum opinion,<sup>2</sup> stated in part:

As a final point, we note that, the requester’s status as representative of Decedent’s family has no bearing on whether the requested records are accessible through a RTKL request. We agree with the OOR that the RTKL must be construed without regard to the requester’s identity. *See, e.g.*, Section 301(b) of the RTKL, 65 P.S. § 67.301(b) (stating that an agency “may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law”); Weaver v. Dep’t of Corr., 702 A.2d 370 (Pa. Cmwlth. 1997) (under the former Right-to-Know Act, the right to examine a public record is not based on whether the person requesting the disclosure is affected by the records or if her motives are pure in seeking them, but whether any person’s rights are fixed); Furin v. Pittsburgh Sch. Dist., OOR Dkt. No. AP 2010–0181, 2010 PA OORD LEXIS 212 (Pa. OOR 2010) (finding records exempt under Section 708(b) regardless of status of person requesting them); Wheelock v. Dep’t of Corr., OOR Dkt. No. AP 2009–0997, 2009 PA OORD LEXIS 725 (Pa. OOR 2009) (stating the only information available under the

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<sup>2</sup> DiMartino v. Pennsylvania State Police, 340 C.D. 2011, 2011 WL 10841570 (Pa. Cmwlth. 2011) is an unreported panel decision of the Commonwealth Court. As such, it may be cited for its persuasive value, but not as binding precedent. *See* Section 414 of the Commonwealth Court’s Internal Operating Procedures.

RTKL is a “public record” available to all citizens regardless of personal status or stake in requested information).

DiMartino at \*6 (footnote omitted). *See also Mahoney v. Pennsylvania State Police*, 339 C.D. 2011, 2011 WL 10841247 (Pa. Cmwlth. 2011).

In Hunsicker v. Pennsylvania State Police, 93 A.3d 911 (Pa. Cmwlth. 2014), Requester (Hunsicker) appealed a Determination of the Office of Open Records denying her request under the RTKL for access to Pennsylvania State Police records regarding an investigation surrounding her brother’s death, which involved a State Trooper. In affirming the denial, the Commonwealth Court stated in part:

Requestor appealed the PSP’s denial to the OOR contending that she lived with her brother for 35 years, that she was not a member of the general public but his sister, and that she should have special access to the information. The OOR denied her appeal because it failed to address agency grounds for denial of access and the appeal did not challenge the confidentiality of the records under CHRIA. This appeal followed.

On appeal, Requestor first contends that the materials she is requesting are referred to as an “incident” report, not an “investigative” report, implying that those records fall outside of the investigative exemption. An incident report normally refers to a report filed by the responding officers, not the entire investigative file, although, here, it appears that the investigative report was filed at the incident report number. In any event, no matter what is contained in an incident report, incident reports are considered investigative materials and are covered by that exemption. Pennsylvania State Police v. Office of Open Records, 5 A.3d 473, 479 (Pa. Cmwlth. 2010), *appeal denied*, [621] Pa. [685], 76 A.3d 540 (2013).

Even if the requested records fall within the investigative exception, Requestor contends that she is entitled to those

records because she has a special need for them because, as Mr. Rotkewicz's sister, she needs to know what her brother did to cause a PSP Trooper to shoot him and to investigate a possible PSP "cover up." While we are sympathetic to Requestor's desire to understand her brother's death, her status as his sister and her reasons for requesting the records do not render records that fall within the investigative exemption accessible. Under the RTKL, whether the document is accessible is based only on whether a document is a public record, and, if so, whether it falls within an exemption that allows that it not be disclosed. The status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b). *See* 65 P.S. § 67.301(b) (stating that an agency "may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law.").

As a corollary to this argument, Requestor contends that the investigative file should be made accessible because portions of the withheld documents are already known to her, and that if any of the record contains information that falls within an exemption to disclosure, that information should be redacted and the records then be given to her. Again, for the reasons stated above, just because she purportedly knows some of the information contained in the documents is irrelevant as to whether a document must be made accessible. Moreover, her request that the documents be redacted to the extent the records contain exempt information is based on a premise that only certain information is exempt from disclosure when, under the investigative exemption, the entire investigative report falls within the investigative exemption. 65 P.S. § 67.706(b)(16); *see also* Pennsylvania State Police.

Finally Requestor contends that the PSP Trooper who investigated the incident assured her that she would receive that information. Even assuming that the assertion is true, an individual State Trooper does not have the authority to authorize the release of documents or make PSP RTKL determinations pursuant to Section 1102, 65 P.S. § 67.1102.

Hunsicker v. Pennsylvania State Police at 913-914 (footnote omitted).

A criminal investigative record is anything that contains information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing. The size, scope, or formality, of police inquiries are not relevant in determining if something is a criminal investigative record. Whether an arrest has occurred or whether a criminal investigation is ongoing or closed, are not relevant factors in determining if something is a criminal investigative record. Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed. Also, a record is not considered a public record if it is exempt under any other State or Federal Law, including the Criminal History Records Information Act. Moreover, the release of the requested documents also violates CHRIA. CHRIA prohibits “investigative information” “assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident” from disclosure. 18 Pa.C.S.A. § 9102. Pennsylvania State Police v. Kim, 150 A.3d 155, 160 (Pa. Cmwlth. 2016).

In Barros v. Martin, 92 A.3d 1243 (Pa. Cloth. 2014), *appeal denied*, 626 Pa. 701, 97 A.3d 745 (2014), the Commonwealth Court stated in part:

Thus, if a record, on its face, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(ii). *See* Coley v. Philadelphia Dist. Attorney’s Office, 77 A.3d 694, 697 (Pa. Cmwlth. 2013); Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 (Pa. Cmwlth. 2010). ***Criminal investigative records remain exempt from disclosure under the***



***RTKL even after the investigation is completed.*** Sullivan v. City of Pittsburgh, Dep't of Pub. Safety, 127 Pa. Cmwlth. 339, 561 A.2d 863, 865 (1989).

***Also, a record is not considered a public record under Section 102 of the RTKL if it is “exempt under any other State or Federal Law,” including the CHRIA. See Coley***, 77 A.3d at 697. Section 9106(c)(4) of the CHRIA, 18 Pa.C.S. § 9106(c)(4), provides that “investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency.” ***The CHRIA defines “investigative information” as “information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.”*** Section 9102 of the CHRIA, 18 Pa.C.S. § 9102.

Thus, the records requested by Barros - *i.e.*, the criminal complaint file, forensic lab reports, any confession and record of polygraph of Quinones, the “Communication Center Incident Review,” the “Internal Police Wanted Notice,” “Reports on individual mistakenly apprehended,” and three signed witness statements - are protected from disclosure under both the RTKL and the CHRIA as records “relating to ... a criminal investigation” and “investigative information,” respectively.

Barros v. Martin at 1250 (emphasis added).

In Padgett v. Pennsylvania State Police, 73 A.3d 644 (Pa. Cmwlth. 2013), the

Commonwealth Court stated in part:

Pursuant to Section 1101(a) of the RTKL, “[t]he appeal shall state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a). When a requester fails to state the records sought are public, or fails to address an agency’s grounds for denial, the OOR properly dismisses the appeal. See Saunders v. Dep’t of

Corr., 48 A. 3d 540 (Pa. Cmwlth. 2012) (affirming OOR dismissal); Dep't of Corr. v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011) (holding an appeal that fails to sufficiently specify the reasons for appeal should be dismissed rather than addressed by OOR).

In Department of Corrections, we outlined the sufficiency requirements for an appeal under Section 1101(a) of the RTKL. At a minimum, a requester's appeal "must address any grounds stated by the agency ... for denying the request." Dep't of Corr., 18 A.3d at 434. We reasoned a minimally sufficient appeal is a condition precedent for OOR to consider a requester's challenge to an agency denial.

More recently, in Saunders, we explained Section 1101(a) of the RTKL requires a requester "to state why the records did not fall under the asserted exemptions and, thus, were public records subject to access." Id. at 543 (agency's citation to various subsections of the RTKL, without explanation or application of exceptions, triggers requester's burden to address exemption). Because Saunders failed to address the exemptions, we affirmed OOR's dismissal of the appeal.

In this case, Requester did not state the records are public, or address the exemptions PSP cited in its response and verification. Requester stated merely that the RTKL exceptions do not apply without further explication. That does not satisfy the requirements of Section 1101(a) as we interpret that provision. Id.

Requester also did not address the agency's cited exemptions pertaining to the police report. Most notably, Requester did not discuss CHRIA, which pertains to criminal records. In fact, when he explained the reason he sought the records, Requester described them as criminal investigation records.

Requester emphasized he is entitled to the records as a party involved in the criminal investigation to which his Request relates. However, a requester's motivation for making a request is not relevant, and his intended use for the information may not

be grounds for denial. *See* Section 301(b) of the RTKL, 65 P.S. § 67.301(b); Section 703 of the RTKL, 65 P.S. § 67.703. An explanation of why a requester believes an agency should disclose records to him does not satisfy the requirement in Section 1101(a) to explain why the requested records are public and available to everyone. To the contrary, Requester's explanation underscores PSP's criminal investigative defenses here.

We make no decision regarding Requester's alleged entitlement to the records under an alternate legal mechanism. Entitlement does not arise under the RTKL through which citizens have a right to access public records "open to the entire public at large." *See, e.g., Coulter v. Pa. Bd. of Prob. & Parole*, 48 A.3d 516, 519 (Pa. Cmwlth. 2012) ("home plans" of parolee requester are not accessible to her under RTKL though she is subject of records; to be accessible under the RTKL, identity of the requester is irrelevant).

Padgett at 647-648 (footnote omitted).

The Respondent has provided redacted copies of certain documents. The Respondent has established that these documents and the redacted portions of these documents relate to or resulted in a criminal investigation. The Respondent has provided more than the Requester is entitled to under the RTKL. Where a record falls within an exemption under 67.708(b), it is not a public record as defined by the RTKL, and an agency is not required to redact the record and provide the remainder.

65 P.S. § 67.706, titled, "Redaction", provides:

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not

subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9. [65 P.S. § 67.901 *et seq.*]

65 P.S. § 67.706.

In Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540 (Pa. Cmwlth. 2012), the Commonwealth Court stated in part:

Petitioner's first argument addresses the sufficiency of the Department's denial of his request. Petitioner contends that because the Department's denial merely parroted the statutory language he was unable to properly respond to the Department's assertion of exemption from disclosure. Section 903 of the RTKL, 65 P.S. § 67.903, states that a denial of access shall include, *inter alia*, a description of the record requested and the specific reasons for the denial, including a citation of the supporting legal authority. Correspondingly, Section 1101 of the RTKL, 65 P.S. § 67.1101, requires that a party appealing a denial shall "state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for ... denying the request." See Dep't of Corr. v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011).

The Department asserted that the requested records were exempt from disclosure under five different subsections of Section 708. Petitioner is correct in noting that the Department merely parroted the statutory language. However, the Department's citations to the various subsections of Section 708 were sufficient to give him notice of the grounds for denial. Once the Department asserted that the requested records were exempt from disclosure under Section 708, Petitioner was required by

Section 1101 to state why the records did not fall under the asserted exemptions and, thus, were public records subject to access. Petitioner failed to do so.

Petitioner's argument that the Department was required to produce the requested records subject to redaction of the exempt information is without merit. Section 706 provides that if an agency determines that a public record contains information that is both subject to disclosure and exempt from the disclosure, the agency shall grant access and redact from the record the information which is subject to disclosure. Pursuant to Section 706, the redaction requirement only applies to records that are determined to be "public records." A "public record" is defined in part as "a record, including a financial record, of a Commonwealth ... agency that: (1) is not exempt under section 708." Section 102, 65 P.S. § 67.102 (emphasis added). Thus, a record that falls within one of the exemptions set forth in Section 708 does not constitute a "public record." Dept. of Health v. Office of Open Records, 4 A.3d 803 (Pa. Cmwlth. 2010).

Saunders at 542-543 (footnote omitted).

In Heavens v. Pennsylvania Department of Environmental Protection, 65 A.3d 1069 (Pa. Cmwlth. 2013), the Commonwealth Court stated in part:

Furthermore, under the RTKL, records that are exempt under Section 708 or privileged are not considered public records and are therefore not subject to the redaction requirement contained in Section 706, which applies only to records that are public and contain information that is not subject to access. 65 P.S. § 67.706; Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540, 543 (Pa. Cmwlth. 2012).

Heavens at 1077.

The RTKL provides that records of an agency relating to or resulting in a criminal investigation may be withheld as exempt. 65 P.S. § 67.708(b). The

Respondent bears the burden of proving, by a preponderance of the evidence, that the documents requested are exempt from public access. 65 P.S. § 67.708(a)(1). A criminal investigative record is anything that contains information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing. 18 Pa.C.S.A. § 9102. Whether an arrest has occurred or whether a criminal investigation is ongoing or closed, are not relevant factors in determining if something is a criminal investigative record. Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed. There is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure.

The release of the requested documents also violates CHRIA, which prohibits “investigative information” “assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident” from disclosure. 18 Pa.C.S.A. § 9102. Pennsylvania State Police v. Kim, 150 A.3d 155, 160 (Pa.Cmwlth. 2016).

There is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure.

## **CONCLUSION**

For the foregoing reasons, the appeal is **DENIED**, and the Respondent is not required to take any further action. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may petition for review, to the Chester County Court of Common Pleas, pursuant to 65 P.S. § 67.1302(a). All parties must be served with a copy of the petition. The Chester County District Attorney's Office shall also be served with a copy of the petition, pursuant to 65 P.S. § 67.1303(a), for the purpose of transmitting the record to the reviewing court. *See* East Stroudsburg University Foundation v. Office of Open Records, 995 A.2d 496, 507 (Pa. Cmwlth. 2010).

**FINAL DETERMINATION ISSUED AND EMAILED ON: November 3, 2021**

*Nicholas J. Casenta, Jr.*

APPEALS OFFICER:

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Appeals Officer for DA’s Office of Chester County

**APPENDIX “C”** Response of Respondent