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IN THE MATTER OF : DISTRICT ATTORNEY'S OFFICE
:
NICHOLAS HUBNER, : CHESTER COUNTY, PENNSYLVANIA
Requester :
:
: RIGHT TO KNOW APPEAL
v. :
:
: FINAL DETERMINATION
WEST FALLOWFIELD TOWNSHIP:
POLICE DEPARTMENT, : DA-RTKL-A NO. 2022-003
Respondent :

INTRODUCTION

On November 10, 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 November 16, 2021, the request was denied. On the same date, Requester appealed to the Office of Open Records. On January 18, 2022, the Office of Open Records issued a decision which transferred the appeal to the Chester County District Attorney's Office [AP 2021-2494], which was received on January 25, 2022.

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 November 10, 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.*, requesting:

record(s) related to the [death of Sullivan DeStefano on September 13, 2021, hereinafter the “Incident”] in West Fallowfield Township Police Department’s possession, custody, or control, including information, regardless of physical form or characteristics, that documents a transaction or activity of the West Fallowfield Township Police Department and that is created, received, or retained pursuant to law or in connection with a transaction, business, or activity of the West Fallowfield Township Police Department related to the investigation of the above-mentioned Incident. Specifically, any documents related to the cause of death or investigation into the Gap Power lawn mower equipment at the Incident are requested. The term "record" 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.

November 10, 2021, Letter of Nicholas Hubner (Requestor), at 1. On November 16, 2021, the request was denied by letter, stating in part:

On November 10, 2021, you requested records related to an incident that occurred on 09/13/2021 that resulted in the death of Sullivan Destefano. Your request is denied for the following reasons, as permitted by the RTKL.

Records that are exempt from disclosure by law have been withheld pursuant to the RTKL. We withheld all records pertaining to the investigation of the death of Sullivan Destefano.

Such information pertaining to police investigations or incidents is exempt under Section 708(b)(16) and 708(b)(17) of the Right to Know Act.

November 16, 2021, Letter of West Fallowfield Police Chief Eric Hughes, at 1.

On November 16, 2021, Requester appealed to the Office of Open Records. On January 18, 2022, the Office of Open Records issued a decision which transferred the appeal to the Chester County District Attorney's Office [AP 2021-2494], which was received on January 25, 2022. The Office of Open Records decision stated in part:

Here, the Department asserts that the records requested relate to a criminal and noncriminal investigation. In support, Chief Hughes attests that the Department conducted a criminal and noncriminal investigation into the use of a lawn mower that resulted in the death of an identified individual. (See Affidavit at ¶¶ 4, 5). Further, Chief Hughes attests that "[a]s part of the investigations, the Department took pictures of the subject lawn mower and incident scene, investigated the underlying incident, and produced an Investigative Report." (See id. at ¶ 6). Chief Hughes also attests that the only records that are responsive to the Request "are investigative materials, notes, and reports related to criminal and non-criminal investigations." (see id. at ¶ 10).

In his supplemental affidavit, Chief Hughes attests that the investigation began as a noncriminal investigation but turned into a criminal investigation as new information developed. (See Supplemental Affidavit at ¶1, 2). Chief Hughes further attests that only one incident report was created as a result of the investigation, and that the report is comprised of notes of the

officer, victim information, photographs of the scene and would reveal the progress of the investigation. (See id. at ¶ 3, 4).

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). Here, Chief Hughes attests that the investigation began as a noncriminal investigation, but later, after new information developed, turned into a criminal investigation. Moreover, Chief Hughes also demonstrated that as part of that investigation, officers took photographs and produced a single report as a result. Though the Requester argues that Chief Hughes' s attestations are conclusory and fail to identify a report by number, this is not enough to overcome the evidence presented by the Department.

Because the responsive records contain information that may relate to a criminal investigation, the OOR does not have jurisdiction over the appeal. Accordingly, the appeal is hereby transferred to the Appeals Officer for the Chester County District Attorney's Office ("District Attorney's Office") to determine whether the responsive records relate to a criminal investigation.² A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the District Attorney's Office.

CONCLUSION

For the foregoing reasons, the appeal is transferred, and the Department is not required to take any further action at this time

² The Commonwealth Court has noted that the OOR has the authority to transfer an appeal to “where [a requester] should have initially appealed.” See Phila. Dist. Attorney’s Office v. Williams, 204 A.3d 1062, *4 n.5 (Pa. Commw. Ct. 2019) (“... [A]lthough the onus for appealing from an RTKL denial to the proper appeals officer is on the requester, the OOR did not

violate the law or any procedure in redirecting the appeal in this case”).

In the Matter of Nicholas Hubner v. West Fallowfield Township Police Department,

Docket No. AP- 2021-2494 (footnote in original), at 5 – 6.

On January 26, 2022, this Appeals Officer gave Notice to the parties of the following:

On November 10, 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 November 16, 2021, the request was denied. On the same date, Requestor appealed to the Office of Open Records. On January 18, 2022, the Office of Open Records issued a decision which transferred the appeal to the Chester County District Attorney’s Office [AP 2021-2494], which was received on January 25, 2022.

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 January 25, 2022, which is February 24, 2022.** 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 February 4, 2022.

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 February 10, 2022.

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.

January 26, 2022, Letter of Chief Deputy District Attorney Erik T. Walschburger, Appeals Officer.

On February 4, 2022, Respondent filed a response with this Appeals Officer.

On February 10, 2022, Requestor filed a response with this Appeals officer.¹

¹ In its Response of Requestor, attorney Hubner indicated that he had submitted the original request on behalf of his client, Gap Power. Whether the request was from Hubner or Gap Power has no bearing on the analysis of this appeal. Therefore, consistent with the OOR's Final Determination, attorney Hubner will remain listed as the Requestor for purposes of this appeal.

- Footnote continued -

Consequently, this decision is based on the initial request and response, the appeal documents, the additional response of the Respondent, and the additional response of requestor.

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 West Fallowfield Township 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

Requestor also requested that a hearing be conducted prior to a Final Determination being issued by this Appeals Officer. A hearing is not necessary, nor would it change the ultimate outcome of this appeal. Consequently, no hearing will be held.

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 February 4, 2022, the Respondent submitted a response which included two affidavits from West Fallowfield Township Police Chief Erich Hughes, who

serves as the Deputy Open Records Officer for the Downingtown Borough Police Department.² The first affidavit, dated November 23, 2021, stated:

I, Eric Hughes, Police Chief, as the Open Records Officer of the West Fallowfield Township Police Department (“Department”), Chester County, make this statement under penalty of perjury as more set forth in 18 Pa.C.S. § 4904.

I attest that:

1. I serve as Police Chief of the Department and the Open Records Officer of the Department, through which I have knowledge of and access to any documents potentially responsive to the underlying request.
2. The Department is a law enforcement agency.
3. Part of my and the Department’s official duties is to investigate incidents that result in death within the Township.
4. On or about September 13, 2021, an incident occurred involving Sullivan DeStefano and a low mower rented from Gap Power Rentals Plus, LLC, resulting in the death of Mr. DeStefano.
5. The Department conducted criminal and non-criminal investigations into this incident.
6. As part of the investigations, the Department took pictures of the subject law mower and incident scene, investigated the underlying incident, and produced an Investigative Report.
7. On November 10, 2021, I received Nicholas Hubner’s request for records related to the September 13, 2021 incident.
8. In receiving Mr. Hubner’s request, I performed a good faith search of Department records for documentation that would

² Both affidavits were originally submitted to the Office of Open Records.

fit within the scope of the request that were not exempt from disclosure pursuant to the Right-to-Know Law (“RTKL”).

9. I provided a written decision to Mr. Hubner on November 16, 2021, noting that his request was denied as any documents are exempt pursuant to Sections 708(b)(16) and 708(b)(17) of the RTKL.

10. The only documents responsive to Mr. Hubner’s request are investigative materials, notes, and reports related to criminal and non-criminal investigations, which are specifically exempt from disclosure pursuant to Sections 708(b)(16) and 708(b)(17) of the RTKL.

11. The Department has no other documents responsive to the request that could be located after a good faith search.

November 23, 2021, Affidavit of Open Records Officer Chief Eric Hughes, at 1 – 2.

The second supplemental affidavit stated:

I, Eric Hughes, Police Chief, as the Open Records Officer of the West Fallowfield Township Police Department (“Department”), Chester County, make this statement under penalty of perjury as more set forth in 18 Pa.C.S. § 4904.

I attest that:

1. The Department’s investigation into the September 13, 2021 incident began as a non-criminal investigation.

2. The Department’s non-criminal investigation was converted into a criminal investigation as the matter progressed, given the information learned during the investigation.

3. Only one Investigative Report was prepared as part of the Department’s investigation into the September 13, 2021 incident.

4. The Report is comprised of the notes of the officer, the investigative materials and photos, victim information, etc.,

which would reveal the institution, progress and result of the Department's investigation.

January 12, 2022, Supplemental Affidavit of Open Records Officer Chief Eric Hughes, at 1.

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).

On February 10, 2022, Requestor submitted a response which stated in part:

The objective of the Right to Know Law ("RTKL," 65 P.S. 67.101, *et. seq.*) is to empower citizens by affording them access to information concerning the activities of their government. *West v. City of Allentown*, OOR Docket No. AP 2021-1924, p. 2. Moreover, "this important open-government law is designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Id.* (internal citations omitted). But the Department denied Gap Power's request for records submitted under the RTKL and refused to produce any documents

...

In support of the exception, the Department submitted an Affidavit of Chief Eric Hughes (Nov. 23, 2021) and a Supplemental Affidavit from Chief Hughes (Jan. 12, 2022). While affidavits are acceptable, “an agency must provide more than a conclusory affidavit that merely repeats that language of Sections 503(d) and 708(b)16.” *West v. City of Allentown*, OOR Docket No. AP 2021-1924, p. 4. Importantly, Chief Hughes’ Supplemental Affidavit states, “[t]he Report is comprised of the notes of the officer, the investigative materials and photos, victim information, etc.” Hughes, Supp. Aff. ¶ 4 (emphasis added). Setting aside the fact that the affidavit simply repeats the statutory language, we are left to speculate at what else it contains based on the inclusion of “etc.” or whether a searching inquiry was made. It is also unclear whether the Report, or other documents, contain non-criminal witness statements or interviews of Gap Power representatives; statements that Gap Power are entitled to review. For the same reasons, the Department’s reliance on the Criminal History Record Information Act, (“CHRIA”), 18 Pa.C.S. §§ 9101-99183, is misplaced. Without knowing the full contents of the Record, or other documents relied upon in creating the Record, it is not correct to claim exemption from disclosure under the CHRIA. *See Coley v. Phila. Dist. Attorney’s Office*, 77 A.3d 694, 697-699 (Pa. Commw. Ct. Oct. 7, 2013).

The Department must, at the very least, produce a redacted version of the “Report.” Section 706 of the RTKL expressly requires an agency to redact information not subject to public access from a public record. 65 P.S. § 67.706. In other words, even if the unredacted Report contains documentation of a criminal investigation, a redacted version would not, and it must be produced. *See Pa. State Police v. Grove*, 640 Pa. 1, 31-32 (Pa. 2017).

...

Additionally, any information or documents that the Department failed to disclose based on the non-criminal investigation exception is no longer applicable and must be produced.

Moreover, Gap Power's request was broad enough to include more than just reports or photographs. Gap Power's request can reasonably be interpreted to include personnel logs, blotter information, 911 records, or any other record related to the September 13, 2021 incident in the possession of the Department that did not necessarily make its way into the "Report" or, if it did, that is not protected from dissemination.

February 10, 2022, Response of Requestor, at 1 – 3 (emphasis in original).

Based on a careful review of all of 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). A ‘Police Blotter’ is defined as “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 (“Police blotter”). ‘Investigative Information’ is defined as “Information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.” 18 Pa. C.S.A. §9102 (“Investigative 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, 640 Pa. 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, 640 Pa. 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.³

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).

³ 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.].

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*.

DOC v. OOR, 18 A.3d at 434.

As previously stated, Respondent, pursuant to 65 P.S. §67.708(b)(16)(ii) and 65 P.S. §67.708(b)(16)(vi)(A), 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,⁴ 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

⁴ 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.

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 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, 93 A.3d 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; see also Pennsylvania State Police v. Kim, 150 A.3d 155, 160 (Pa. Cmwlth. 2016).

In Barros v. Martin, 92 A.3d 1243 (Pa. Cmwlth. 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, 92 A.3d 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, 73 A.3d at 647-648 (footnote omitted).

Despite Requestor's contention that Respondent "must, at the very least, produce a redacted version of the [responsive records]," 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, 48 A.3d 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, 65 A.3d 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; see also 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: February 16, 2022

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INDEX OF APPENDICES

APPENDIX “A” Appeal Documents

APPENDIX “B” January 26, 2022, Letter of Chief Deputy District Attorney Erik T. Walschburger, Esquire, Appeals Officer for District Attorney’s Office of Chester County

APPENDIX “C” February 4, 2022, Response of Respondent

APPENDIX “D” February 10, 2022, Response of Requestor