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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
ADAM GELLER,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
WEST CHESTER	:	
POLICE DEPARTMENT,	:	DA-RTKL-A NO. 2017-002
Respondent	:	

INTRODUCTION

On January 26, 2017, 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 May 18, 2017, the request was denied. On June 8, 2017, Requester appealed to the Chester County District Attorney's Office.

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 May 17, 2017, Requester submitted a right-to-know request pursuant to the Right to Know Law (“RTKL”), 65 P.S. § 67.101, *et. seq.*, with the Respondent, requesting “Police reports, mug shot, other info pertaining to the 9/1973 death of Ola Danenberg (purse snatching on East Market St.) and the subsequent arrest of Earl Rice Jr., charged in her death.” On May 18, 2017, the request was denied.

The Respondent stated:

Thank you for writing to the West Chester Police Department with your request for Information pursuant to the Pennsylvania Right-To-Know law.

On May 17, 2017, you requested copy of a reported, Purse snatching / Murder of Ola Danenberg and the subsequent arrest of Earl Rice Jr in September of 1973 on E. Market Street. Your request is denied for the following reasons, as permitted by Section 708 of the Right-to-Know law.

The West Chester Police Department has denied your request because it’s exempt. Any records “Relating to or resulting in a criminal investigation” under section 708(b)(16)(i), 708(b)(16)(ii), 708(b)(16)(iii), 708(b)(16)(iv), 708(b)(16)(v),708(b)(16)(vi) and 708(b)(16)(vi). **The documents are part of a criminal investigation** exempt from disclosure. Section 708(b)(16) states that the following are exempt from access by a requestor: (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 co-defendant. D. Hinder the agency's ability to secure an arrest, prosecution or conviction. e. Endanger the life or physical safety of an individual. The exemption under the RTK statute applies whether or not the investigation is open or closed. *See Barros v. Martin*, 92 A.2d 1243, 1250 (Pa. Commonwealth Ct 2014), *appeal denied*, 97 A3d 745 (Pa. 2014) (“Criminal investigative records remain exempt from disclosure under the RTKL, even after the investigation is completed.”).

May 18, 2017 Response of Respondent (Lt. Iacono) (emphasis in original).

On June 8, 2017, Requester appealed to the Chester County District Attorney's Office. The Requester stated:

I am a reporter for The Associated Press and would appreciate the Chester County District Attorney's cooperation in addressing the recent denial of my Right-to-Know request for information by the West Chester Police Department. Please consider this letter a formal appeal of that denial.

On May 17, 2017, I filed a request-for-information form with the West Chester Police Department seeking incident reports and arrest mugs shots stemming from a purse snatching / murder on East Market Street, West Chester, Pa., in September 1973 and the subsequent arrest of two individuals. The victim was Ola Danenberg. Those arrested and charged were Earl Rice Jr. and David Milburn.

In denying my request, West Chester Police Lt. Samuel J. Iacono wrote that the department was doing so because the information I sought is exempt. I am appealing this decision on the following grounds:

Lt. Iacono's letter cited an entire section of state Right-to-Know law, 708(b)16, listing all of its provisions but failing to specify which, if any, of those individual exemptions the information I requested falls under.

In a telephone conversation on 6/7/17, Lt. Iacono explained that his department's policy is to deny all Right-to-Know requests for information about murder cases, although not other crimes. He said that policy is exercised regardless of how long ago the crime occurred, the status of the investigation or legal disposition of the case, and without regard to the content of the individual records being requested. The decision amounts to a blanket denial, based on the assumption that absolutely any information related to any such crime is exempt.

The department also cited the Pa. Comm. Court ruling in Barros v. Martin 92 A.2d 1243, to back up its contention that a right-to-know exemption applies to any investigation, open or closed. In that case, however, officials rejected a request for further records only after the local police department had already provided a copy of the incident report and other materials. My request should be treated similarly.

No review has taken place to determine if disclosure of the information I requested would compromise an investigation, and no consideration given to the fact that this case was long ago closed and adjudicated.

I have included my original request and the denial letter for your review.

June 8, 2017 Appeal of Requester (Adam Geller).

On June 8, 2017, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

On May 17, 2017, 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 May 18, 2017, the request was denied. On June 8, 2017, Requester appealed to the Chester County District Attorney’s Office.

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 June 8, 2017, which is July 8, 2017. 65 P.S. § 67.1101(b)(1). As July 8, 2017, falls on a Saturday, the 30th day becomes July 10, 2017. *See* 1 Pa.C.S.A. § 1908. 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 Supreme Court of Pennsylvania 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).

The Commonwealth Court of Pennsylvania 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).

If the Respondent wishes to submit a response, it should do so on or before June 16, 2017.

If the Requester wishes to submit a response, it should do so on or before June 23, 2017.

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. All parties must be served with a copy of any responses submitted to this appeal officer.

June 8, 2017 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

Neither the Respondent nor the Requester submitted an additional response. Consequently, this decision is based on the initial request and response.

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 Chester 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). There is sufficient evidence to support the determination that the documents requested 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”).

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*.

DOC v. OOR at 434.

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. The Requester raises the following challenges to the denial:

[1] The denial response cited an entire section of state Right-to-Know law, 65 P.S. § 67.708(b)(16), but failed to specify which, if any, of those exemptions apply.

[2] Requester alleges that he had a telephone conversation with the Respondent who allegedly explained that his department’s policy is to deny all Right-to-Know requests for information about murder cases, although not for other crimes, and that this blanket denial, based on the assumption that absolutely any information related to any such crime is exempt.

[3] The Respondent cited the Commonwealth Court’s decision in Barros v. Martin, 92 A.2d 1243, which held as part of its decision: “Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed.” Requester argues that in Barros v. Martin officials rejected a request for further records only after the local police department had already provided a copy of the incident report and other materials, and that his request should be treated similarly.

[4] No review has taken place to determine if disclosure of the information would compromise an investigation.

[5] No consideration was given to the fact that this case was closed and adjudicated.

June 8, 2017 Appeal of Requester (Adam Geller).

The Requester does not appear to dispute that the documents requested are investigative records and exempt from disclosure. The Requester appears to be challenging the process of the denial. As previously stated, 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). Although this failure would be sufficient cause to reject the appeal, Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011), the challenges raised by Requester will be addressed.

Initially 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. In DiMartino v. Pennsylvania State Police, 2011 WL 10841570 (Pa.

Cmwlth. 2011), the Commonwealth Court, in a memorandum opinion,¹ stated in pertinent 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 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

¹ 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.

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).

Requester argues that Respondent cited all of the sub-sections of 65 P.S. § 67.708(b)(16) and did not specify which ones apply. Although the better practice would be to be specific, as to which sub-sections are relied upon, this shortcoming is not fatal. The Respondent’s reliance upon sub-sections 65 P.S. §

67.708(b)(16)(iii)-(vi) can be summarily rejected. 65 P.S. § 67.708(b)(16)(iii)-(vi) involve fact specific exceptions. Any statements of fact must be supported by an Affidavit made under penalty of perjury by a person with actual knowledge.

The Respondent has not provided an Affidavit indicating that: (3) the 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; (4) the record includes information made confidential by law or court order; (5) the record includes victim information, or any information that would jeopardize the safety of the victim; (6) the record if disclosed, would, reveal the progress or result of a criminal investigation, deprive a person of the right to a fair trial or an impartial adjudication, impair the ability to locate a defendant or codefendant, hinder an agency's ability to secure an arrest, prosecution or conviction, endanger the life or physical safety of an individual.

As a result of not providing the necessary factual predicate, Respondent cannot rely upon 65 P.S. § 67.708(b)(16)(iii)-(vi) for purposes of this appeal. No judgment is made as to whether any of these four (4) sub-sections could be invoked if a proper factual foundation was provided.²

² As Respondent cannot rely upon 65 P.S. § 67.708(b)(16)(iii)-(vi) for purposes of this appeal, Requester's allegation that no review has taken place to determine if disclosure of the information would compromise an investigation is moot, as this type of review is not required for 65 P.S. § 67.708(b)(16)(i)-(ii).

However, 65 P.S. § 67.708(b)(16)(i)-(ii) do not involve the same fact specific exceptions. These two (2) exceptions are: “(i) Complaints of potential criminal conduct other than a private criminal complaint, and (ii) Investigative materials, notes, correspondence, videos and reports.” Consequently, the issue that must be decided is whether the denial of the request, for police reports, mug shot, other info pertaining death of Ola Danenberg and the arrest of Earl Rice, properly falls within these two (2) exceptions.

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. 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.

Police reports, mug shot, and information pertaining to the arrest of Earl Rice clearly fall with the definition of investigative information. 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.” The Requester does not appear to dispute that the items requested are investigative records and exempt from disclosure. However, Requester argues that no consideration was given to the fact that this case was closed and adjudicated. Such considerations are not necessary.

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 at 1250 (emphasis added).³

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).

³ The Respondent cited the Commonwealth Court’s decision in Barros v. Martin, 92 A.2d 1243 in its denial. Requester argues that in Barros v. Martin officials rejected a request for further records only after the local police department had already provided a copy of the incident report and other materials, and that his request should be treated similarly. However, the fact relied upon by Requested, as cited in the procedural history of Barros v. Martin, was not relevant to and had no bearing on the Commonwealth Court’s decision, and does not provide Requester with a ground for disclosure.

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).

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 as follows:

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.

Requester also alleges that he had a telephone conversation with the Respondent who allegedly explained that his department’s policy is to deny all Right-to-Know requests for information about murder cases, although not for other crimes and that this blanket denial based on the assumption that absolutely any information related to any such crime is exempt. However, Requester has not provided an Affidavit as to this alleged conversation. Any statements of fact must be supported by an Affidavit made under penalty of perjury by a person with actual knowledge. However, ultimately this alleged conversation would be irrelevant as

there is a sufficient basis for denying the Right-to-Know request, based upon the above determination that the requested items are criminal investigative records and exempt from disclosure, irrespective of the content of the alleged conversation.

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. 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 MAILED ON: July 5, 2017

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INDEX OF APPENDICES

APPENDIX “A” June 8, 2017 Appeal Documents.

APPENDIX “B” June 8, 2017 Letter of CDDA Nicholas J. Casenta, Jr., Esquire
Appeals Officer for DA’s Office of Chester County