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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
RZUCIDLO AND	:	
AVONDALE BOROUGH,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
	:	
SOUTHERN CHESTER COUNTY	:	DA-RTKL-A NO. 2023-003
REGIONAL POLICE DEPART.	:	
Respondent	:	

INTRODUCTION

On December 21, 2022, Requester filed a right-to-know requests with the Respondent, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, et. seq.. On December 23, 2022, the requests were denied. On December 28, 2022, Requester appealed to the Office of Open Records. On March 13, 2023, the Office of Open Records issued a decision which transferred the appeals to the Chester

County District Attorney's Office [AP 2022-2864], which was received by email on March 13, 2023.

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 December 21, 2022, Requester submitted a right-to-know requests pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.* In the December 21, 2022 request, the Respondent requested:

[a]ll records including correspondence, reports, notes, emails, telephone call transcripts, minutes and any other documentation regarding the Borough's complaint about the Borough's missing emails. I am requesting correspondence, reports, notes, emails, telephone call transcripts, minutes and any and all documentation from all parties, including but not limited to Chief Jerry Simpson, Investigator Kevin Dykes, Lt[.] Joe Greenwalt, Det[.] Greg Smith, and anyone else who was involved in this investigation.

On December 23, 2022, that request was denied. The Respondent claimed that records relate to criminal and noncriminal investigations, 65 P.S. §§ 67.708(b)(16) – (17), that certain records are exempt from disclosure under the Criminal History Record Information Act ("CHRIA"), 18 Pa.C.S. §§ 9101-9183, and that certain records are protected by the attorney-client privilege and the attorney work-product doctrine.

On December 28, 2022, the Requester appealed to the Office of Open Records (“OOR”) challenging the denial. On March 13, 2023, the Office of Open Records issued a decision which denied the appeal in part and transferred the appeal in part to the Chester County District Attorney’s Office [AP 2022-2864], which was received by email on March 13, 2023. This Appeals Officer will only address the portion of the appeal that was transferred.

On March 15, 2023, this Appeals Officer for the Chester County District Attorney’s Office gave Notice to the parties of the following:

On December 21, 2022, Requester filed a right-to-know requests with the Respondent, pursuant to the Right to Know Law (“RTKL”), 65 P.S. § 67.101, *et. seq.*. On December 23, 2022, the requests were denied. On December 28, 2022, Requester appealed to the Office of Open Records. On March 13, 2023, the Office of Open Records issued a decision which transferred the appeals to the Chester County District Attorney’s Office [AP 2022-2864], which was received by email on March 13, 2023.

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 March 13, 2023, which is April 12, 2023.** 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 Friday, March 24, 2023.

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 Friday, March 31, 2023.

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.

March 15, 2023 Letter of Deputy District Attorney Emily R. Provencher, Appeals Officer.

On March 22, 2023, Respondent submitted a response. On March 24, 2023, Requester submitted a response. This decision is based on the initial request, response, the OOR filings, and the responses of the Respondent and Requester.

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 Southern Chester County Regional Police Department ("Respondent") is a local agency subject to the RTKL that is required to disclose public documents. 65 P.S. § 67.302. Records of a local agency are presumed "public" unless the record: (1) is exempt under 65 P.S. § 67.708(b); (2) is protected by privilege; or (3) is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. § 67.305.

"Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree." 65 P.S. § 67.306.

The Respondent bears the burden of proving, by a preponderance of the evidence, that the document requested is exempt from public access. 65 P.S. § 67.708(a)(1). A preponderance of the evidence standard is the lowest evidentiary

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

On March 22, 2023, the Respondent sent a response to this Appeals Officer. The response included an affidavit, originally sent to the Office of Open Records, from Officer Gregory McCummings, who serves as the Open Records Officer for Southern Chester County Regional Police Department. The affidavit stated:

Attestation of Open Records Officer Gregory McCummings

Name of Requester: *Susan F. Rzucidlo*

Records Requested: *I am requesting copies of all records including correspondence, reports, notes, emails, telephone*

call transcripts, minutes and any other documentation regarding the Borough's complaint about the Borough's missing emails. I am requesting correspondence, reports, notes, emails, telephone call transcripts, minutes and any and all documentation from all parties, including but not limited to Chief Jerry Simpson, Investigator Kevin Dykes, Lt Joe Greenwalt, Det Greg Smith, and anyone else who was involved in this investigation.

Appeal Caption: *Rzucidlo and Avondale Borough v. Southern Chester County Regional Police Department, OOR Docket No. AP 2022-2864*

I, Gregory McCummings, Open Records Officer for the Southern Chester County Regional Police Department Public Safety Commission, hereby declare, pursuant to 18 Pa.C.S. § 4904, that the following statements are true and correct based upon my personal knowledge, information and belief:

1. I serve as the Agency Open Records Officer for the Southern Chester County Regional Police Department Public Safety Commission ("Commission") and am responsible for responding to Right-to-Know requests filed with the Commission.

2. The Commission provides police services to various municipalities in the southern Chester County, Pennsylvania area and, in those municipalities, is charged with the responsibility to keep the peace and enforce the law. As part of its duties, the Commission is charged with the duty to investigate criminal and potential criminal activity. It has also the duty to ensure that its police personnel perform their duties in accordance with law and with prevailing law enforcement standards.

3. In my capacity as the AORO, I am familiar with the records of the Agency.

4. Upon receipt of the Request on December 21, 2022, I was able to ascertain the records sought because the Requester is the mayor of Avondale Borough and, in June 2022, she asked the Commission to conduct a criminal investigation into possible illegal tampering with Avondale Borough's electronic files, claiming that approximately 30,000 Borough emails had been improperly deleted from its computer network.

5. I also understood that the Requester sought records of a second investigation that she asked the Commission to conduct in August 2022. This second investigation was not criminal in nature, but an inquiry into whether the officer who conducted the criminal investigation of the deleted Avondale Borough emails was derelict in conducting that investigation. I was able to ascertain that the records of this second investigation were among the records sought because the request included records from Special Investigator Kevin Dykes, who was investigator assigned to conduct the Internal Affairs investigation into the thoroughness of the criminal investigation.

6. I conducted a thorough search of files in the possession, custody and control of the Commission for records responsive to the request. This included a search of the Commission's electronic and physical files maintained on the two investigations referenced in the request. I also searched the Commission's electronic server to locate any email communications within the Commission's possession and responsive to the request.

7. Further, I communicated with the individual officers and agents involved in the two investigations that were the subject of the Request, to determine whether additional records existed within the Commission's possession, but which had not been stored in its electronic or physical files.

8. After conducting a good faith search of the Commission's files and inquiring with the relevant Commission personnel, I identified all records within the Commission's possession, custody, or control and responsive to the Request.

9. Each of the responsive records withheld are described in the Exemption Log attached hereto as Exhibit "A".

10. Because the request sought records of two separate investigations, the first being a criminal investigation and the second a non-criminal investigation, all records responsive to the request related to either or both of those investigations, and consisted of investigative materials, including complaints, summaries, reports, an affidavit in support of a search warrant, a transcript of a witness interview, and email communications between and among the complainant, law enforcement officials, witnesses relating to the investigations and the office of the district attorney.

11. The responsive records also included records of the communications between the Commission and the Special Legal Counsel it retained, Neil Morris, Esquire, and the law firm of Offet Kurman to provide legal advice to the Commission during the course of the Internal Affairs investigation. Those communications were limited to representatives of the Commission and their legal counsel and did not include any third-parties. They conveyed information that the Commission relayed to its legal counsel for the purpose of securing legal advice and the legal advice and recommendations it received from its legal counsel about the investigations.

12. The records responsive to the request did not include information that normally would be contained in a police blotter or in a traffic report.

13. By letter dated December 23, 2022, the Commission denied the Request and cited several bases for the denial,

including that the records responsive to the Request were exempt from production under the criminal investigations exception, the non-criminal investigations exception and the attorney-client privilege.

14. I have reviewed each of the records withheld and verify that the information stated in the attached exemption log is true and correct.

15. Each of the facts stated in the Commission's Position Letter submitted in opposition to the above-captioned appeal is also true and correct to the best of my knowledge, information and belief.

January 18, 2023, Letter from Open Records Officer Gregory McCummings.

Under the RTKL, an affidavit may serve as sufficient evidence to support an appeals officer's decision. Office of Governor v. Davis, 122 A.3d 1185, 1194 (Pa.Cmwlt. 2015); Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (affidavit suffices to establish nonexistence of records). In the absence of any evidence that a Respondent has acted in bad faith the averments in an affidavit should be accepted as true. McGowan v. Pa. Dep't of Env'tl. Prot., 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014); Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013).

Based on a preponderance of the evidence provided, 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”).

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

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

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

Id. There is no dispute that MVRs are public records of an agency as defined in the RTKL and thus subject to public disclosure unless some exemption applies. We consider whether MVRs generally, and the video portions of Trooper Vanorden

and Trooper Thomas's MVRs in this matter specifically, qualify under an enumerated exemption to disclosure described in Section 708(b)(16) of the RTKL regarding "criminal investigative records."

...

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

The Commonwealth Court has previously opined that material exempt from disclosure as "criminal investigative information" under the RTKL includes: statements compiled by district attorneys, forensic reports, and reports of police, including notes of interviews with victims, suspects and witnesses assembled for the specific purpose of investigation. See, e.g., Barros v. Martin, 92 A.3d 1243, 1250 (Pa. Cmwlth. 2014) (criminal complaint file, forensic lab reports, polygraph reports and witness statements rise to level of criminal investigative information exempt from disclosure); Coley, 77 A.3d at 697 (witness statements compiled by District Attorney's office are criminal investigative records exempt from disclosure); Pennsylvania State Police v. Office of Open Records, 5 A.3d 473, 478–79 (Pa. Cmwlth. 2010) (incident report prepared by police with notes of interviews of alleged victims and perpetrators assembled during investigation exempt as criminal investigative information); Mitchell v. Office of Open Records, 997 A.2d 1262, 1265–66 (Pa. Cmwlth. 2010) (record pertaining to PSP's execution of search warrant was

criminal investigation exempt from disclosure under Section 708 of the RTKL). With regard to the MVRs requested by Grove in this case, we must determine whether the video aspects generally depict a systematic inquiry or examination into a potential crime.

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

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

¹ 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

- Footnote continued -

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.

As previously stated, Respondent, pursuant to 65 P.S. § 67.708(b)(16)(i)(ii), stated the requested records are exempt from access as the records relate to or result

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 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 refuted the grounds stated by the Respondent. The information requested was obtained by the Respondent through a criminal investigation.

On March 24, 2023, the Requester filed a Response stating:

A written statement explaining the grounds on which the requester asserts that the record is a public record.

On December 22, 2022, I submitted a RTK request for a copy of an investigation requested by Avondale Borough. On December 23, the very next day, I received notification that the Public Safety Commission denied my RTK request of copies of this investigation. I disagree with the determination that my request is not valid. I am asking the Right to Know Law Request Office to reconsider my request.

I submitted a RTK request for the records concerning the investigation of the misrepresentation by two officers about a case Avondale Borough brought forward for investigation. I have attached the timeline for this case.

I am the person who filed the complaint about the way the Lieutenant and the Detective handled our case. I was told I would receive a report on the investigator's findings, and I am still waiting to receive it. I was repeatedly told their attorney would contact me, but that has not happened either.

In their denial, the Commission said that there were no reports from the now-former Chief. I question this, and if it is correct, then I question why not. I want to see the notes and reports for the entire investigation.

The Borough has a contract with the commission for police services, as such we should have access to all related work and notes because we are not only clients of the commission, but we are also its employers. Our contract with the Public Safety Commission states that the police shall provide reporting to Borough Council regarding complaints and investigations and thoroughly investigate all citizen complaints. These have yet to be provided.

Avondale Borough pays for the services of the SCCRPD (Southern Chester County Regional Police Dept). The Borough should have access to the record of closed investigations or crimes that affect Avondale Borough. As Mayor, I am the contact person for police communication.

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,² 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.,

² 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.

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 at 913-914 (footnote omitted).

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

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

Thus, if a record, on its face, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(ii). *See* Coley v. Philadelphia Dist. Attorney’s Office, 77 A.3d 694,

697 (Pa. Cmwlth. 2013); Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 (Pa. Cmwlth. 2010). ***Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed.*** Sullivan v. City of Pittsburgh, Dep't of Pub. Safety, 127 Pa. Cmwlth. 339, 561 A.2d 863, 865 (1989).

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

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

Barros v. Martin at 1250 (emphasis added).

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

Commonwealth Court stated in part:

Pursuant to Section 1101(a) of the RTKL, “[t]he appeal shall state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for delaying or denying the request.” 65 P.S. §

67.1101(a). When a requester fails to state the records sought are public, or fails to address an agency's grounds for denial, the OOR properly dismisses the appeal. *See Saunders v. Dep't of Corr.*, 48 A. 3d 540 (Pa. Cmwlth. 2012) (affirming OOR dismissal); *Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Cmwlth. 2011) (holding an appeal that fails to sufficiently specify the reasons for appeal should be dismissed rather than addressed by OOR).

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

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

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

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

Requester emphasized he is entitled to the records as a party involved in the criminal investigation to which his Request relates. However, a requester's motivation for making a request is not relevant, and his intended use for the information may not be grounds for denial. *See* Section 301(b) of the RTKL, 65 P.S. § 67.301(b); Section 703 of the RTKL, 65 P.S. § 67.703. An explanation of why a requester believes an agency should disclose records to him does not satisfy the requirement in Section 1101(a) to explain why the requested records are public and available to everyone. To the contrary, Requester's explanation underscores PSP's criminal investigative defenses here.

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

Padgett at 647-648 (footnote omitted).

Where a record falls within an exemption under 67.708(b), it is not a public record as defined by the RTKL, and an agency is not required to redact the record and provide the remainder. 65 P.S. § 67.706, titled, "Redaction", provides:

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to

access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9. [65 P.S. § 67.901 *et seq.*]

65 P.S. § 67.706.

In Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540 (Pa.

Cmwlth. 2012), the Commonwealth Court stated in part:

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

The Department asserted that the requested records were exempt from disclosure under five different subsections of Section 708. Petitioner is correct in noting that the Department merely parroted the statutory language. However, the Department's citations to the various subsections of Section 708 were sufficient to give him notice of the grounds for denial. Once the Department asserted that the requested records were exempt from disclosure under Section 708, Petitioner was required by Section 1101 to state why the records did not fall under the asserted exemptions and, thus, were public records subject to access. Petitioner failed to do so.

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

Saunders at 542-543 (footnote omitted).

In Heavens v. Pennsylvania Department of Environmental Protection, 65

A.3d 1069 (Pa. Cmwlth. 2013), the Commonwealth Court stated in part:

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

Heavens at 1077.

The RTKL provides that records of an agency relating to or resulting in a criminal investigation may be withheld as exempt. 65 P.S. § 67.708(b). The Respondent bears the burden of proving, by a preponderance of the evidence, that the documents requested are exempt from public access. 65 P.S. § 67.708(a)(1). A

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

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

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. Cmwlt. 2010).*

FINAL DETERMINATION ISSUED AND EMAILED ON: April 12, 2023

Emily R. Provencher

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Appeals Officer for DA’s Office of Chester County

APPENDIX “C” March 22, 2023 Response of Respondent

APPENDIX “D” March 24, 2023 Response of Requester