



DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
215-686-8000

November 4, 2020

By electronic mail to:

Simran Dhillon, Esq.
Open Records Officer
Simran.G.Dhillon@phila.gov
Zehava Robbins, Esq.
Assistant District Attorney
Zehava.Robbins@phila.gov

Andrew Christy, Esquire
achristy@aclupa.org

Re: Final Determination of RTKL Appeal by ACLU

Dear Ms. Dhillon, Ms. Robbins and Mr. Christy,

This letter constitutes the final determination of the Appeals Officer for the Philadelphia District Attorney's Office concerning Mr. Christy's appeal from the denial of his request for records under Pennsylvania's Right-to-Know Law.

BACKGROUND

On August 6, 2020, Jessica Li of the ACLU ("the Requester") submitted a request to the Philadelphia District Attorney's Office ("the DAO") under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101-67.3104, seeking:

All criminal complaints the District Attorney's Office filed with the court, including any supporting statements of probable cause or other factual averments that are filed with the court, from January 2020 to the present, with the charge of "solicitation."

(Right-to-Know Law Request Form, 8/6/20).

A final response was issued by the DAO on August 10, 2020, denying the request pursuant to the RTKL's criminal investigative records exemption, 65 P.S. § 67.708(b)(16), and the Criminal History Record Information Act (CHRIA), 18 Pa.C.S. §§ 9101-9106.

The instant appeal was received via electronic mail on August 21, 2020. On August 26, 2020, the DAO Appeals Officer issued a Notice and Scheduling Order to both parties staying the appeal until October 21, 2020.¹ On September 1, 2020, Mr. Andrew Christy, Esquire, [of the ACLU] contacted the DAO Appeals Officer via electronic mail – copying Ms. Dhillon and Ms. Robbins – requesting time to submit a response to any appellate submissions by the DAO. The DAO Appeals Officer granted the request. On October 2, 2020, Ms. Robbins submitted a letter supplementing the DAO's response.² Mr. Christy submitted a response on October 16, 2020.³ The DAO Appeals Officer notified the parties [via electronic mail] that a final determination would be issued by November 5, 2020.⁴

¹ In the Notice and Order, the undersigned appeals officer noted that many agencies had reduced or ceased operations in response to the spread of the coronavirus (COVID-19), and stayed the appeal to provide adequate time for all parties to sufficiently develop the issues before the DAO.

² In its supplemental response, the DAO reasserts that the requested records are exempt under the RTKL's criminal investigative records exemption, 65 P.S. § 67.708(b)(16), and further states that the records requested are “non-financial judicial records of the First Judicial District,” which are “not discoverable through the RTKL, and must be sought from the judiciary.” The agency acknowledges that “CHRIA does not apply to the requested records” (DAO Submission on Appeal, 10/2/20, 1-2).

³ The ACLU contends that the records sought are not exempt under Section 708(b)(16) of the RTKL, and also challenges the DAO's argument that the requested records are non-financial judicial records (ACLU Response to DAO Submission on Appeal, 10/16/20, 3).

⁴ The Appeals Officer notified the parties via electronic mail that a final determination would be sent by November 5, 2020; the ACLU replied in accordance with the extended deadline. See 65 P.S. § 67.1101(b)(1) (the appeals officer may extend the deadline to submit a final determination if the requester is notified and agrees to the extension).

For the reasons set forth below, the appeal is denied in part and redirected in part, and the DAO is not required to take any further action at this time.

LEGAL ANALYSIS

The RTKL grants the DAO Appeals Officer exclusive jurisdiction to hear and decide appeals pertaining to access to criminal investigative records. 65 P.S. §§ 67.503(d)(2); see Barros v. Martin, 92 A.3d 1243, 1246 n.2 (Pa. Commw. 2014) (explaining that where “the appeal... relates to access to criminal investigative records, the appeal is heard by an appeals officer designated by the District Attorney and not [the Office of Open Records]”).

Pursuant to 65 P.S. § 67.503(d)(2), the DAO Appeals Officer is authorized to “determine if the record requested is a criminal investigative record” of a local agency in Philadelphia County. The DAO is a local agency subject to the RTKL and is required to disclose public records. Id. § 67.302. However, any record “relating to or resulting in a criminal investigation, id. § 67.708(b)(16), is—by definition—not a public record subject to disclosure through the RTKL. See id. § 67.102 (defining “public record” as a record “not exempt under section 708”); Allegheny County Dept. of Administrative Services v. A Second Chance, Inc., 13 A.3d 1025, 1037 (Pa. Commw. 2011) (“[A] ‘public record’ is, by definition under Section 102, a ‘record’ that is *not exempt*.”) (emphasis in original).

1. The Request seeks records exempt under Section 708(b)(16) of the RTKL

As a threshold matter, the records sought are plainly exempt under Section 708(b)(16) of the RTKL as “criminal investigative records” that are not public. The RTKL contains an exemption for any records “relating to or resulting in a criminal investigation.” 65 P.S. § 67.708(b)(16). See, e.g., Barros, 92 A.3d at 1250 (“[I]f a record, on its face, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(ii).”). That exemption continues to apply following the completion of an investigation. See Coley v. Philadelphia District Attorney’s Office, 77 A.3d 694, 697 (Pa. Commw. 2013) (“[C]riminal investigative records are still exempt from disclosure under the Right-to-Know Law after the investigation is completed[.]”); Pennsylvania State Police v. Office of Open Records, 5 A.3d 473, 479 (Pa. Commw. 2010) (*en banc*) (holding that RTKL’s criminal-investigative-

record exemption exempts records of “whether certain investigative tasks have been carried out or whether certain information was discovered”).

The Requester asserts that the records sought “are not investigative records” pursuant to Section 708(b)(16). (ACLU Submission on Appeal, 8/21/20, 2.) However, the statute plainly states that “records relating to or resulting in a criminal investigation, including...[c]omplaints of potential criminal conduct other than a private criminal complaint” are exempt from disclosure. 65 P.S. § 67.708(b)(16)(i) (emphasis added). In Barros, the Commonwealth Court found that all the requested records, including, *inter alia*, “the criminal complaint file” were expressly exempted under Section 708(b)(16). See Barros, 92 A.3d at 1250 (“the records requested... – i.e. the criminal complaint file... – are protected from disclosure under both the RTKL and CHRIA as records ‘relating to...a criminal investigation’ and ‘investigative information, respectively’”); Soto v. Pennsylvania Police, 2018 WL 2089882 (Pa. Commw. No. 1119 C.D. 2017, filed May 7, 2018) (reaffirming holding in Barros, where the Court “[s]pecifically...determined that the RTKL and CHRIA prohibited release of...the **criminal complaint** file...”).

The ACLU argues that Barros is inapplicable because the requester in that case sought a “criminal complaint file,” rather than a “[criminal] complaint filed with a court” (ACLU Response to DAO Submission on Appeal, 10/16/20, 2). However, the “criminal complaint” is a document included in a “criminal complaint file.” Further, the Court in Barros did not create a separate non-exemption for the complaint; it found that the entire criminal complaint file constituted records “relating to a criminal investigation,” and were, therefore, exempt from disclosure. Barros, *supra* at 1250.⁵ For these reasons, the Requester is not entitled to the requested records.

⁵ The Requester states that the records sought in Barros differed from those requested in the instant matter because the Court “found that there was no evidence that any of the documents sought... ‘were actually entered into the judicial record’” (ACLU Response to DAO Submission on Appeal, 3). However, the Court was addressing the issue of whether two specific documents – the confession and record of polygraph of his co-defendant – were included in the judicial record; it was these two requested records – *not* the criminal complaint file – the Court found were not public judicial documents. Barros, *supra* at 1251, citing Barros v. City of Allentown and Allentown Police Department, 2013 WL 335872 (Pa. Commw., No. 2129 C.D. 2012, filed July 3 2013).

2. The DAO Appeals Officer lacks jurisdiction over requests that are unrelated to the access of criminal investigative records.

The DAO Appeals Officer does not have jurisdiction to hear appeals unrelated to the access of a criminal investigative record. See 65 P.S. § 67.503(d)(2) (The designated appeals officer to a district attorney's office shall "hear appeals...relating to access to criminal investigative records in possession of a local agency of that county" and "shall determine if the record requested is a criminal investigative record."); Barros v. Martin, supra, at 1246, n.2 (where "the appeal ...relates to access to criminal investigative records, the appeal is heard by an appeals officer designated by the District Attorney and not [the Office of Open Records]"). Thus, to the extent the ACLU challenges the denial of the request on grounds unrelated to the access of criminal investigative records, the undersigned Appeals Officer would redirect the appeal to the Office of Open Records for further consideration.⁶ See 65 P.S. § 67.503(a) (The OOR is authorized to hear appeals for all Commonwealth and local agencies).

⁶ "[T]he onus for appealing from an RTKL denial to the proper appeals officer is on the Requester..." Phila. Dist. Attorney's Office v. Williams, 204 A.3d 1062 *4 n.5.

CONCLUSION

For the foregoing reasons, this appeal is denied in part and redirected in part. This final determination is binding on all parties. Within thirty days of the date of this letter, either party may appeal to the Court of Common Pleas of Philadelphia County. 65 P.S. § 67.1302(a). All parties must be served notice of the appeal. The DAO Appeals Officer shall also be served notice and have an opportunity to respond in accordance with applicable court rules. Id. § 67.1303.

Sincerely,

/s/ *Jennifer Lin*

JENNIFER LIN
Appeals Officer
Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107-3499
(215) 686-9899
Jennifer.Lin@phila.gov