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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
SAM IACONO,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
NEW GARDEN	:	
POLICE DEPARTMENT,	:	DA-RTKL-A NO. 2015-005
Respondent	:	

INTRODUCTION

On July 9, 2015, Sam Iacono ("Requester") filed a right-to-know request with New Garden Police Department ("Respondent"), pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*, seeking "all police reports relating to incident number NG-15-001582 investigated by Sgt. Keith Cowdright and Cpl. Joseph Greenwalt of the New Garden Police Department." On July 16, 2015, the request was deemed denied. *See* 65 P.S. § 67.901. On July 22, 2015, Requester appealed to the Office of Open Records. In The Matter Of Sam Iacono (Requester) v. New Garden Police Department

(Respondent), Docket No. AP 2015-1348. On August 20, 2015, Magdalene C. Zeppos, Esquire, issued a final determination transferring the appeal to the Chester County District Attorney's Office, which received the transfer on August 24, 2015.

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 July 9, 2015, Sam Iacono ("Requester") filed a right-to-know request with New Garden Police Department ("Respondent"), pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*, seeking "all police reports relating to incident number NG-15-001582 investigated by Sgt. Keith Cowdright and Cpl. Joseph Greenwalt of the New Garden Police Department." On July 16, 2015, the request was deemed denied. *See* 65 P.S. § 67.901. On July 22, 2015, Requester appealed to the Office of Open Records. In The Matter Of Sam Iacono (Requester) v. New Garden Police Department (Respondent), Docket No. AP 2015-1348. On August 20, 2015, Magdalene C. Zeppos, Esquire, issued a final determination transferring the appeal to the Chester County District Attorney's Office, which received the transfer on August 24, 2015.

On August 25, 2015, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

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 August 24, 2015, which is September 23, 2015. 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 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 supplement the reasons for the denial of the Right to Know request it must do so on or before September 2, 2015.

If the Requester wishes to submit a response, it must do so on or before September 9, 2015.

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.

August 25, 2015 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

Requester did not submit an additional response. Respondent did not submit an additional 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 New Garden 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.

On July 9, 2015, Requester filed a RTKL request with the Respondent, which stated the following:

I'm requesting copies of all police reports relating to incident number NG-15-001582, investigated by Sgt. Keith Cowdright and Cpl. Joseph Greenwalt of the New Garden Police Department.

The incident took place on Thursday June 4, 2015 on Sunny Dell Dr. in your township. The victim in this incident is my daughter Madison Iacono and the suspect is a Carlo Gonzalez Gallardo DOB 03/31/1983. I'm requesting any and all reports relating to this incident held by your department.

I will provide you my e-mail address so you can inform me of the fees involved in getting the copies. Once I'm contacted with the cost involved I will mail out a check for that amount.

July 9, 2015 Right-To-Know Request.

On July 16, 2015, the request was deemed denied. *See* 65 P.S. § 67.901. On July 22, 2015, Requester appealed to the Office of Open Records. In The Matter Of Sam Iacono (Requester) v. New Garden Police Department (Respondent), Docket No. AP 2015-1348. On August 20, 2015, Magdalene C. Zeppos, Esquire, issued a final determination transferring the appeal to the Chester County District Attorney's Office.

In the letter, dated July 29, 2015, to the Office of Open Records initiating the appeal, Requester stated in part:

This letter is a follow-up on my appeal request for a police report under the Right to know law. It's my understanding that under some circumstances police records are determined on a case to case basis. I feel under the Victim's Rights Act my daughter has the right to certain parts of the police report involving her case. We are in need of the police report for two main reasons.

One is to fully understand why assault charges were not filed and to seek possible civil actions against the suspect. Also under section 11.213 Sub section (g) Pennsylvania victims, right laws it states that the responsibilities of the prosecutor's office on returning evidence back to the victim after the case has been closed. We have not received all the evidence taken from my daughter as of this date.

Second would be for the victim in this case to receive the proper medical therapy to help her overcome feeling like a victim for a

second time by the Commonwealth. In order for my daughter to receive the care that is needed, her therapists Eileen Starr LCSW from Mid-Atlantic Behavioral Health is also requesting to review the police report so she can give the proper medical treatment to overcome this incident.

I also feel that once you remove all personnel information for the victim, suspect and any witnesses from the police report, the report would no longer have information that is protected under (CHRIA). The report without personnel information or names would be no different than the reports that are available like 911 calls, police blotters and incident reports under the act Tapeo Inc. v. Township of Neville, 695 A. 2d 460, 465 (Pa. Commonwealth. 1997).

The prosecutor's office along with the police department in this case has the obligation to assist a sexual assault victim in seeking medical help by providing information that would assist a therapists in the treatment of the victim of a crime. We are starting to feel that victim's in sexual assault cases under the age of 18 are being pushed aside if they are not news worthy like having a teacher involved. This is a decision made by the District Attorney's office because the case is not worth their time and effort. By denying the request it keeps the information out of the public's eye and makes the victim feel that she had done something wrong for a second time.

July 29, 2015 Letter of Samuel Iacono.

In response to Requester's appeal to the Office of Open Records, the Respondent sent a letter, dated July 30, 2015, which stated:

This letter is in response to Mr. Sam Iacono's appeal of our denial of his Right to Know request, wherein he asked for criminal investigative materials and police reports created by the New Garden Township Police Department. His request was denied on July 2, 2015 under the criminal investigation records exemption. Additionally, though not noted on the original denial letter from the District Attorney's office, these records may not be released based on the criminal history record information act. Mr. Iacono's appeal does not explain why these records are to be considered public and, therefore, should be dismissed.

As the agency that denied the Right to Know request, we bear the burden of proving that the records requested are exempt from public access by a preponderance of the evidence. 65 P.S. § 67.708(a)(1). Records of an agency are presumed to be public unless they are privileged, exempted under the Right to Know Law (RTKL) or exempted under any other State or Federal law. 65 P.S. § 67.102.

The RTKL clearly details an exemption for criminal investigative materials. 65 P.S. § 67.708(b)(16). Specifically, “a record of an agency relating to or resulting in a criminal investigation” includes “investigative materials, notes, correspondence, videos and reports,” “victim information,” and “a record that, if disclosed, would ... reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.” 65 P.S. § 67.708(b)(16)(ii), (v), and (vi)(A). If a record, on its face, relates to a criminal investigation, it is exempt under this provision. Coley v. Philadelphia District Attorney’s Office, 77 A.3d 694,697 (Pa. Cmwlth. 2013) (citing Mitchell v. Office of Open Records, 997 A.2d 1262 (Pa. Cmwlth. 2010)).

The Jetter sent by Mr. Iacono requests “reports relating to a sexual assault case investigated by” the New Garden Police Department and the Chester County Detectives. This case was closed without the filing of charges against the suspect. The requested reports of this investigation fall squarely under the exemption because the reports are “investigative materials,” contain “victim information,” and would “reveal the result of a criminal investigation.” For these reasons, they cannot be disclosed to Mr. Iacono.

As previously mentioned, records are not public if they are “exempted under any other State or Federal Law.” 65 P.S. § 67.102. The Criminal History Record Information Act (CHRIA) says that “[i]nvestigative 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 which requests the information in connection with its duties.” 18 Pa.C.S. § 9106(c)(4). Furthermore, CHRIA defines “investigative information” as “[i]nformation assembled as a result of the performance of any injury, formal or informal, into a criminal incident or an allegation of criminal wrongdoing.” 18 Pa. C.S. § 9102. CHRIA also prevents witness

statements from being disseminated to private individuals. Coley, 997 A.2d at 697.

The requested records at issue here, which include a police report and incident investigation materials, are not subject to the RTKL because they are exempted from disclosure under CHRIA. Once again, these records fall squarely within CHRIA's definition of "investigative information" because these reports necessarily contain information assembled as a result of an investigation by the New Garden Police Department and Chester County Detectives. Therefore, they cannot be disclosed to Mr. Iacono under CHRIA's provisions.

The fact that the victim in the at-issue investigation is the requester's daughter has no effect on the law governing Right to Know requests. Likewise, the RTKL has no provisions that allows for disclosure of exempted records based on "victim's rights," as suggested by Mr. Iacono's letter. While Mr. Iacono's purpose may be laudable, the Right to Know request procedure is not the proper vehicle to obtain this information.

July 30, 2015 Letter of Tony, Scheivert, Township Manager.

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).¹ There is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure.

¹ A preponderance of the evidence, means, by a greater weight of the evidence. Commonwealth v. Brown, 567 Pa. 272, 284, 786 A.2d 961, 968 (2001). "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).

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: **“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”). The incident report contained notes of interviews with the alleged victims / perpetrators, as well as another witness. This information contained within the incident report was assembled as a result of an investigation into a criminal incident or an allegation of criminal wrongdoing. Consequently, the incident report was not a public record subject to disclosure. The Court also held that a victim's name and address is “victim information,” *i.e.* information about the victim, and that the unwanted

disclosure of a victim's name may prove to be a second victimization, whether due to retaliation, the fear of retaliation, stigma, embarrassment, or other reasons.

Police interviews of suspects, victims, and others witness, along with photographs, are the most traditional form of criminal investigation. 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.

Requester makes several points in support of his position that he should receive the requested documents. Requester argues that these records concern his daughter, who has rights as a crime victim, and that the documents could help with treatment and a civil law suit.

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. Moreover, Requester's explanation of events supports Respondent's denial of the request in that the records requested are in fact criminal investigative records.

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

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

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.

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).

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. In Barros v. Martin, 92 A.3d 1243 (Pa. Cmwlth. 2014), *appeal denied*, ___ Pa. ___, 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.

Requester suggests that the criminal investigative records can be redacted. 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. 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.

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). 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 for review. The Chester County District Attorney's Office shall also be served with a copy of the petition for review, 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: September 14, 2015

APPEALS OFFICER:

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INDEX OF APPENDICES

APPENDIX "A" August 25, 2015 Letter of CDDA Nicholas J. Casenta, Jr., Esquire
Appeals Officer for District Attorney's Office of Chester County

APPENDIX "B" August 20, 2015 Final Determination and Attachments
Transferring Appeal Proceedings from Office of Open Records