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IN THE MATTER OF : DISTRICT ATTORNEY'S OFFICE  
:   
BRIAN McCORMICK, : CHESTER COUNTY, PENNSYLVANIA  
Requester :   
: RIGHT TO KNOW APPEAL  
v. :   
: FINAL DETERMINATION  
CHESTER COUNTY :   
DISTRICT ATTORNEY'S OFFICE, : DA-RTKL-A NO. 2017-007  
Respondent :

**INTRODUCTION**

On July 7, 2017, Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et seq.* On July 13, 2017, the request was denied. On August 1, 2017, Requester appealed to the Office of Open Records. On August 2, 2017, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office [AP 2017-1477], which was received on August 7, 2017.

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 7, 2017, Requester submitted a right-to-know request pursuant to the Right to Know Law (“RTKL”), 65 P.S. § 67.101, et. seq., with the Respondent, requesting: “Complete Investigation File of Chester County District Attorney and / or Chester County Detectives, including but not limited to reports, photos, videos and evidence log pertaining to the April 2017 arrest of Arthur E. Phillips.” On July 13, 2017, the request was denied. The Respondent stated in part:

Your request is denied. The records you request pertain to criminal investigation records which are not subject to public access via the RTKL.

Investigative information is exempt from disclosure under Section 708(b)(16) of the RTKL as relating to or resulting in a criminal investigation. 65 P.S. § 67.708(b)(16). Your request for the complete investigation file of the District Attorney and/or County Detectives including reports, photos, videos and evidence log constitute investigative information which falls squarely within the exemption of Section 708(b)(16). The applicable exemptions from disclosure include:

- Complaints of potential criminal conduct .... Section 708(b)(16)(i);
- Investigative materials, notes, correspondence, videos and reports. Section 708(b)(16)(ii);
- A record that, if disclosed, would reveal the institution,

progress or result of a criminal investigation, except the filing of criminal charges. Section 708(b)(16)(vi)(A).

On August 1, 2017, Requester appealed to the Office of Open Records. On August 2, 2017, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office. The Office of Open Records stated:

On July 7, 2017, Brian J. McCormick, Jr., Esq. ("Requester") filed a request ("Request") with the Chester County District Attorney's Office ("DA's Office") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking the complete investigative file regarding a specified individual. The Chester County solicitor's office responded on July 13, 2017, denying access to the records, arguing that they are criminal investigative records. *See* 65 P.S. § 67.708(b)(16). On August 1, 2017, the Requester appealed to the Office of Open Records ("OOR").

The DA's Office is a local law enforcement agency. *See Sawicki v. Centre County District Attorney's Office*, OOR Dkt. AP 2015-0757, 2015 PA O.O.R.D LEXIS 885. The OOR does not have jurisdiction to hear appeals related to criminal investigative records held by local law enforcement agencies. *See* 65 P.S. 67.503(d)(2). Instead, appeals involving records alleged to be criminal investigative records held by a local law enforcement agency are to be heard by an appeals officer designated by the local district attorney. *See id.* Accordingly, the appeal is hereby transferred to the Appeals Officer for the DA's Office".<sup>1</sup> A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the DA's Office.

For the foregoing reasons, Requester's appeal is **transferred** to the Appeals Officer for the DA's Office. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, either party may appeal to the Chester County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with

notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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1. While the Requester argues that certain records should not be considered “investigative information,” the Requester sought the “Complete Investigation File” from the DA’s Office regarding an identified criminal incident.

2. Padgett v. Pa. State Police, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

In the Matter of Brian McCormick v. Chester County District Attorney’s Office,

Docket No. AP-2017-1477 (emphasis in original) (footnotes in original), at 1-2.

On August 7, 2017, this Appeals Officer for the Chester County District Attorney’s Office gave Notice to the parties of the following:

On July 6, 2017, Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law (“RTKL”), 65 P.S. § 67.101, *et. seq.*. On July 13, 2017, the request was denied. On August 1, 2017, Requester appealed to the Office of Open Records. On August 2, 2017, the Office of Open Records transferred the appeal to the Chester County District Attorney’s Office [AP 2017-1476 - *attached*], which was received on August 7, 2017.

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 7, 2017, which is September 6, 2017.** 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 submit a response, it should do so on or before **August 16, 2017**.

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

**Any statements of fact must be supported by an Affidavit made under penalty of perjury by a person with actual knowledge.** However, legal arguments and citation to authority do not require Affidavits. All parties must be served with a copy of any responses submitted to this appeal officer.

August 7, 2017 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

On August 16, 2017, the Respondent submitted an additional response,

which included the Affidavit of Detective Lieutenant Michael McGinnis. On August 23, 2017, the Requester filed 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 Chester County District Attorney's Office ("Respondent") is a local agency subject to the RTKL that is required to disclose public documents. 65 P.S. § 67.302. Records of a local agency are presumed "public" unless the record: (1) is exempt under 65 P.S. § 67.708(b); (2) is protected by privilege; or (3) is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. § 67.305.

"Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial

order or decree.” 65 P.S. § 67.306.

The Respondent bears the burden of proving, by a preponderance of the evidence, that the document requested is exempt from public access. 65 P.S. § 67.708(a)(1). A preponderance of the evidence standard is the lowest evidentiary standard. The preponderance of evidence standard is defined as the greater weight of the evidence, *i.e.*, to tip a scale slightly is the criteria or requirement for preponderance of the evidence. Commonwealth v. Brown, 567 Pa. 272, 284, 786 A.2d 961, 968 (2001), *cert. denied*, 537 U.S. 1187, 123 S.Ct. 1351, 154 L.Ed.2d 1018 (2003). “A ‘preponderance of the evidence’ is defined as ‘the greater weight of the evidence ... evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other....’ Black’s Law Dictionary 1301 (9th ed. 2009).” Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 n.3 (Pa. Cmwlth. 2010); *See also* Commonwealth v. Williams, 532 Pa. 265, 284-286, 615 A.2d 716, 726 (1992) (preponderance of the evidence in essence is proof that something is more likely than not). There is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure.

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 or that the records do, in fact, exist, the averments in an affidavit should be accepted as true. McGowan v. Pa. Dep't of Env'tl. Prot., 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014); Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013). On August 16, 2017, the Respondent submitted an additional response, which included an Affidavit. The Affidavit stated the following:

I, Detective Lieutenant Michael McGinnis, an employee of Chester County, Pennsylvania, am authorized to make this Affidavit and declare under oath the following:

1. I am aware of a request made by Brian J. McCormick, Jr., Esq., pursuant to the Pennsylvania Right to Know Law, 65 P.S. § 67.101, et. seq.
2. Mr. McCormick has requested the “[c]omplete investigation file of Chester County District Attorney and / or Chester County Detectives, including but not limited to, reports, photos, videos and evidence log pertaining to the April 2017 arrest of Arthur E. Phillips.”
3. In my capacity as Detective Lieutenant of the Chester County Detectives’ Office, I am aware that we maintain a file of information which contains detailed records of the detectives’ systematic investigation leading to Mr. Phillips’ arrest.



4. This information consists of confidential interviews, information, materials, notes, correspondence, photos, videos, evidence log, reports and victim information which all constitute criminal investigative information.

5. The investigative file does not contain any police motor vehicle recordings or police motor vehicle videos of the April 2017 arrest of Arthur E. Phillips.

I, Michael McGinnis, being duly sworn (affirm) according to law, depose and say that the statements set forth in this Affidavit are true and correct to the best of my knowledge, information and belief.

Affidavit of Detective Lieutenant Michael McGinnis.

The RTKL provides that records of an agency relating to or resulting in a criminal investigation, such as investigative materials, notes, correspondence, videos, reports, and records, may be withheld as exempt. 65 P.S. § 67.708(b), titled, "Exceptions for public records", provides in part as follows:

**(b) Exceptions.** -- Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

...

(16) A record of an agency relating to or resulting in a criminal investigation, including:

(i) Complaints of potential criminal conduct other than a private criminal complaint.

(ii) Investigative materials, notes, correspondence, videos and reports.

(iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been

charged with an offense to whom confidentiality has been promised.

(iv) A record that includes information made confidential by law or court order.

(v) Victim information, including any information that would jeopardize the safety of the victim.

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.

(B) Deprive a person of the right to a fair trial or an impartial adjudication.

(C) Impair the ability to locate a defendant or codefendant.

(D) Hinder an agency's ability to secure an arrest, prosecution or conviction.

(E) Endanger the life or physical safety of an individual.

This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b)(relating to accident prevention investigations).

65 P.S. § 67.708(b).

18 Pa.C.S.A. § 9102 (relating to definitions) states in part: “**Police blotter.**’

A chronological listing of arrests, usually documented contemporaneous with the incident, which may include, but is not limited to, the name and address of the individual charged and the alleged offenses.”

18 Pa.C.S.A. § 9102 (relating to definitions) states in part: “**Investigative information.**’ Information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.”

In Pennsylvania State Police v. Office of Open Records, 5 A.3d 473 (Pa. Cmwlth. 2010), the *en banc* Commonwealth Court found an incident report exempt from disclosure pursuant to 65 P.S. § 67.708(b)(16). The Court held that the incident report was not a public record because the incident report was not the equivalent of a police blotter under the RTKL and the Criminal History Records Information Act (“CHRIA”).

Pursuant to 65 P.S. § 67.708(b)(16), records of an agency are exempt from access by a requester if the records relate to or result in a criminal investigation. When a party seeks to challenge an agency’s refusal to release information by appealing that party must address any grounds stated by the agency for denying the request. Department of Corrections v. Office of Open Records, 18 A.3d 429, 434 (Pa. Cmwlth. 2011); Padgett v. Pennsylvania State Police, 73 A.3d 644, 647-648 (Pa. Cmwlth. 2013).

In Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa.

Cmwlth. 2011), the Commonwealth Court stated in part:

Consequently, we agree with DOC that when a party seeks to challenge an agency's refusal to release information by appealing to Open Records, that party must "address any grounds stated by the agency for ... denying the request." This is a typical requirement in any process that aims to provide a forum for error correction. We do not see it as a particularly onerous requirement, whether the requester has the benefit of legal counsel or is *pro se*.

DOC v. OOR at 434.

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 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 argues that the recent Supreme Court in Pennsylvania State Police v. Grove, \_\_\_ Pa. \_\_\_, 161 A.3d 877 (2017) has some relevance to the current request. Requester stated in his appeal to the Office of Open Records: "PSP v. Grove, ... should be read to exclude items such as photographs, video, emails between the perpetrator and third parties or victim from "investigative information" pursuant to RTKL and CHRIA."

Initially it is important to note that a requester's identity and motivation for making a request is not relevant, and his or her intended use for the information may not be grounds for granting or denying a request. *See* 65 P.S. § 67.301(b), 65

P.S. § 67.703. In DiMartino v. Pennsylvania State Police, 2011 WL 10841570 (Pa. Cmwlth. 2011), the Commonwealth Court, in a memorandum opinion,<sup>1</sup> stated in pertinent part:

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

DiMartino at \*6 (footnote omitted). *See also* Mahoney v. Pennsylvania State Police, 339 C.D. 2011, 2011 WL 10841247 (Pa. Cmwlth. 2011).

In Hunsicker v. Pennsylvania State Police, 93 A.3d 911 (Pa. Cmwlth. 2014),

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<sup>1</sup> 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.

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.

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

Thus, if a record, on its face, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(ii). See Coley v. Philadelphia Dist. Attorney's Office, 77 A.3d 694, 697 (Pa. Cmwlth. 2013); Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 (Pa. Cmwlth. 2010). ***Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed.*** Sullivan v. City of Pittsburgh, Dep't of Pub. Safety, 127 Pa. Cmwlth. 339, 561 A.2d 863, 865 (1989).

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



*inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.”* Section 9102 of the CHRIA, 18 Pa.C.S. § 9102.

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

Barros v. Martin at 1250 (emphasis added).

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.

Requester argues that the recent Supreme Court in Pennsylvania State Police v. Grove, \_\_\_ Pa. \_\_\_, 161 A.3d 877 (2017) has some relevance to the current request. Requester states in his appeal to the Office of Open Records: “PSP v. Grove, ... should be read to exclude items such as photographs, video, emails between the perpetrator and third parties or victim from “investigative information” pursuant to RTKL and CHRIA.” However, as observed by the Office of Open Records: “While the Requester argues that certain records should not be considered ‘investigative information,’ the Request sought the ‘Complete Investigation File’ from the DA’s Office regarding an identified criminal incident.” In the Matter of Brian McCormick v. Chester County District Attorney’s Office, Docket No. AP-2017-1477 (emphasis in original) (footnotes in original), at 2 n.1.

Initially a review of the Commonwealth and Courts’ decisions in that Grove

is appropriate. In Pennsylvania State Police v. Grove, 119 A.3d 1102 (Pa. Cmwlth. 2015), the Commonwealth Court stated in part:

PSP argues that both MVRs are criminal investigative records because the motor vehicle accident to which they relate resulted in traffic citations, which are summary criminal offenses, and because one of the troopers investigated the accident before issuing the citations. We do not agree that these facts make the recordings investigative or exempt them as records “relating to or resulting in a criminal investigation.” The mere fact that a record has some connection to a criminal proceeding does not automatically exempt it under Section 708(b)(16) of the RTKL or CHRIA. Coley v. Philadelphia District Attorney’s Office, 77 A.3d 694, 697–98 (Pa. Cmwlth. 2013) (while witness statements were exempt as investigative under Section 708(b)(16) and CHRIA, immunity agreement with witness was not exempt unless its contents were shown to be investigative information). *The types of records that we have held protected from RTKL disclosure under Section 708(b)(16) and CHRIA as investigative are records created to report on a criminal investigation or set forth or document evidence in a criminal investigation or steps carried out in a criminal investigation. See Hunsicker, 93 A.3d at 912 (report of death investigation); Barros v. Martin, 92 A.3d 1243, 1245–46, 1249–50 (Pa. Cmwlth. 2014) (criminal complaint file, confession, polygraph test, forensic lab reports, internal police review documents and witness statements); Coley, 77 A.3d at 697 (witness statements); Pennsylvania State Police v. Office of Open Records, 5 A.3d 473, 479 (Pa. Cmwlth. 2010) (police incident report setting forth notes of witness interviews and reporting whether investigative tasks had been carried out); Mitchell v. Office of Open Records, 997 A.2d 1262, 1263, 1266 (Pa. Cmwlth. 2010) (memorandum setting forth facts concerning execution of search warrant).*

*In contrast, PSP’s evidence demonstrates that the MVRs are created to document troopers’ performance of their duties in responding to emergencies and in their interactions with members of the public, not merely or primarily to document,*

*assemble or report on evidence of a crime or possible crime.* The MVR equipment is activated when an officer's siren or emergency lights are turned on, a non-investigative event. (Rozier Affidavit ¶ 14.) Moreover, PSP uses MVRs to document the entire interaction and actions of the trooper, including actions which have no investigative content, such as directions to motorists in a traffic stop or at an accident scene, police pursuits, and prisoner transports. (Id. ¶¶ 10, 16.) MVRs themselves are therefore not investigative material or videos, investigative information, or records relating or resulting in a criminal investigation exempt from disclosure under Section 708(b)(16) of the RTKL or CHRIA. Indeed, as documentation of law enforcement officers' conduct in carrying out their duties, MVRs are records at the core to the RTKL's purpose of enabling the public to "scrutinize the actions of public officials, and make public officials accountable for their actions." McGill, 83 A.3d at 479.

*PSP has shown that MVRs can contain witness interviews, interrogations, intoxication testing and other investigative work, and that a portion of one of the two MVRs here, the Thomas MVR, includes witness interviews. (Rozier Affidavit ¶¶ 11, 16.) We agree that such portions of an MVR are investigative information exempt from disclosure by Section 708(b)(16) of the RTKL and CHRIA. The fact that parts of a public record contain exempt information does not, however, immunize the non-exempt portions from disclosure; rather, in such circumstances, the agency must produce the record with the exempt information redacted.* Section 706 of the RTKL, 65 P.S. § 67.706; Advancement Project v. Pennsylvania Department of Transportation, 60 A.3d 891, 894 (Pa. Cmwlth. 2013). Section 706 of the RTKL 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. § 67.706. *See also Advancement Project*, 60 A.3d at 894 (“an agency cannot deny access to a record that contains non-disclosable information if that information can be redacted”). ***Therefore, PSP is entitled to redact the portions of MVRs that contain actual investigative information, such as witness interviews, but may not withhold an entire MVR on the basis that part of it is investigative.***

Applying these principles to the two MVRs at issue here, we conclude that PSP has not shown that the Vanorden MVR has any investigative content. This MVR has only a video component and the Rozier Affidavit describes it as depicting the trooper “speaking with the operators of the vehicles,” “observing the crash scene and the damage to the vehicles,” and “directing the operator of the truck involved in the accident to move his vehicle to a safer area.” (Rozier Affidavit ¶ 10.) PSP does not contend that this MVR shows any measurements, collection of evidence, physical inspection or analysis of what the accident scene showed. PSP has therefore not shown that this MVR contains any investigative information that it could be entitled to redact. Accordingly, OOR did not err in ordering PSP to provide a copy of this MVR in its entirety to Requester.

PSP has shown that some portions of the Thomas MVR contain investigative records and information. Unlike the Vanorden MVR, this MVR contains an audio recording that the Rozier Affidavit describes as including the trooper “interviewing the operators of the vehicles” and having “an extensive conversation with the operator of the truck concerning the status of his truck classification, with assistance from Trooper



Vanorden via the telephone.” (Rozier Affidavit ¶ 11.) PSP has not provided any evidence that the video depiction of these conversations contains any information as to their contents or that the video component of this MVR contains any other information that is investigative in nature. The audio of those conversations, however, are recordings of witness interviews. (Id.). ***Because those recorded interviews are part of an investigation of the accident that included possible criminal charges, they are records “relating to or resulting in a criminal investigation” and “investigative materials” exempt from disclosure under Section 708(b)(16) of the RTKL and “investigative information” under CHRIA. Accordingly, PSP must be permitted to redact the witness interviews from the audio component of the Thomas MVR prior to providing that MVR to Requester.***

PSP also argues that disclosure of MVRs under the RTKL could violate the Wiretapping and Electronic Surveillance Control Act (Wiretap Act). PSP did not raise this argument before OOR. Ordinarily, failure to raise a ground for non-disclosure before OOR constitutes a waiver of that issue. Levy v. Senate of Pennsylvania, 94 A.3d 436, 441–42 (Pa. Cmwlth. 2014) (although agency failure to raise an exemption in its denial of a request does not waive its right to argue that ground, grounds for nondisclosure not raised before the fact-finder in the appeal from its denial are waived). An agency, however, cannot waive third parties’ privacy rights. Cole, 52 A.3d at 551. We therefore address this belatedly raised issue.

As PSP concedes, the Wiretap Act restricts audio and other recordings of the contents of oral communications and electronic and wire communications, not video recordings that do not capture the content of any oral communication. 18 Pa.C.S. §§ 5702, 5703. The Wiretap Act is thus inapplicable to both the Vanorden MVR and the video portion of the Thomas MVR and cannot constitute grounds denying access to those video recordings. In addition, because these MVRs are recordings of events in a public place, disclosure of their video components does not raise issues of infringement of individuals’ reasonable expectations of privacy. Tagouma v.

Investigative Consultant Services, Inc., 4 A.3d 170, 177–78 (Pa. Super. 2010).

While the audio portion of the Thomas MVR does include the contents of conversations, that fact by itself does not make it subject to the Wiretap Act. The Wiretap Act does not apply to non-wire oral communications where the speaker has notice that the conversation may be recorded. 18 Pa.C.S. § 5702 (defining “oral communication” as “Any oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation”); Commonwealth v. Henlen, 522 Pa. 514, 564 A.2d 905, 906–07 (1989); Gunderman v. Unemployment Compensation Board of Review, 95 Pa. Cmwlth. 479, 505 A.2d 1112, 1115 (1986). Because the troopers clearly had reason to believe that they were being recorded by their MVR equipment, audio recordings capturing their communications are not protected from disclosure by the Wiretap Act. None of the troopers’ communications therefore can be redacted from the Thomas MVR audio based on the Wiretap Act.

With respect to the drivers and any other private citizens whose communications may have been recorded by the audio portion of the Thomas MVR, the record is unclear as to whether they had notice of the recording or any expectation that the interview was not subject to recording. We therefore do not rule on whether the audio portions of the Thomas MVR recording their utterances are subject to the Wiretap Act. On remand, if PSP concludes that the drivers or any other private citizens who were recorded had no notice of the recording or reason to believe they were being recorded, it may redact their utterances from the audio portion of the Thomas MVR prior to providing it to Requester. If PSP makes such redactions and Requester believes that the communications are not protected by the Wiretap Act, she may appeal those redactions to OOR.

For the foregoing reasons, we affirm OOR’s final determination to the extent that it concluded that the video and audio recordings at issue are public records subject to disclosure

under the RTKL and ordered PSP to provide Requester with unredacted copies of the Vanorden MVR and video component of the Thomas MVR. We reverse OOR's decision to the extent that it required PSP to provide the audio component of the Thomas MVR without redaction and remand this matter to permit PSP, before providing that MVR to Requester, to redact from its audio component witness interviews and utterances of private citizens who had no notice of the recording.

### **ORDER**

AND NOW, this 7th day of July, 2015, the Application of Petitioner Pennsylvania State Police (PSP) to Supplement the Record is GRANTED. The final determination of the Office of Open Records (OOR) is AFFIRMED insofar as it held that the requested video and audio recordings at issue are public records and insofar as it ordered PSP to provide an unredacted copy to Respondent of the requested video recording made by Trooper Vanorden. The final determination of the OOR is REVERSED insofar as it ordered PSP to provide an unredacted copy to Respondent of the requested video and audio recording made by Trooper Thomas. This matter is REMANDED to OOR with instructions to permit PSP to redact the portions of the audio component of the Thomas recording that contain witness interviews and utterances of private citizens who had no notice of the recording prior to providing that recording to Respondent.

Grove, 119 A.3d at 1108-1111 (footnotes omitted) (emphasis added).

A Petition for Allowance of Appeal was filed from the Commonwealth Court's decision, in Grove, by the Pennsylvania State Police, which was granted by the Supreme Court of Pennsylvania. Ultimately, the Commonwealth Court was affirmed in part and reversed in part by the Supreme Court.

In Pennsylvania State Police v. Grove, \_\_\_ Pa. \_\_\_, 161 A.3d 877 (2017),

the Supreme Court stated in part:

*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.*

In arguing such video recordings generally should be exempt from public disclosure as “criminal investigative records,” PSP relies on its duty to “enforce the laws regulating the use of the highways of this Commonwealth.” Brief of Appellant at 18, quoting 71 P.S. § 250(g). PSP concludes its inquiry into whether a violation of the Vehicle Code occurred is an investigation, and any MVR capturing such investigation is a “criminal investigative record” exempt from disclosure under Section 708 of the RTKL. Id.

The Rozier Affidavit presented by PSP explains the use of MVRs is widespread, noting “MVRs are typically activated when a trooper activates his or her emergency lights or siren.”

Rozier Affidavit at ¶ 14. There are situations when a trooper will activate lights and sirens in non-investigative situations, including: “directions to motorists in a traffic stop or at an accident scene, police pursuits and prisoner transports.” Grove, 119 A.3d at 1108, *citing* the Rozier Affidavit at ¶¶ 10, 16. Furthermore, in describing the reasons for retaining MVR files PSP acknowledges it anticipates using its MVRs in various situations, including civil, criminal, quasi-criminal, administrative enforcement or disciplinary proceedings. Rozier Affidavit at ¶ 17. Moreover, the Rozier Affidavit specifically provides an MVR will be retained when a person captured on the recording notifies PSP of her intent to use it in civil proceedings. Id. This latter point supports a conclusion that MVRs do not always “relate to” or “result in” criminal investigations such that they should be per se exempt from disclosure under Section 708 of the RTKL. ***The Commonwealth Court therefore correctly determined the MVRs are not exempt from disclosure as a general rule. See Grove, 119 A.3d at 1108 (“MVRs themselves are therefore not investigative material or videos, investigative information, or records relating or resulting in a criminal investigation exempt from disclosure under Section 708 of the RTKL....”).***

We recognize MVRs will likely also capture criminal investigations, such as “In-progress Vehicle and Crimes Code violations;” “Field interviews, interrogations, and intoxication testing;” and “Searches of vehicles and/or persons.” Rozier Affidavit at ¶ 16. However, the RTKL specifically places the burden on PSP as the agency seeking an exemption to demonstrate a record falls within such exemption. 65 P.S. § 67.708(a)(1). PSP’s position that MVRs are generally exempt and always contain criminal investigative material essentially ignores that burden. ***Accordingly, we hold whether an MVR contains criminal investigative material must be determined on a case-by-case basis.***

We now consider the more specific question of whether Trooper Vanorden’s MVR and the video aspects of Trooper Thomas’s MVR relate to or result in a criminal investigation and are thus protected from disclosure. It is clear from PSP’s

own evidence the “MVRs at issue do not depict the accident itself,” and instead show the troopers observing the crash scene and engaging with the drivers and bystanders. Rozier Affidavit at ¶¶ 10–11, 19. The video depiction presents nothing more than what a bystander would observe. PSP describes the depiction as a criminal investigation because it resulted in the issuance of citations for failure to wear a seatbelt and failure to yield the right of way when entering or crossing a roadway. But PSP acknowledges the citations were based upon the “statements and accounts of the individuals involved in, or witness to the accident.” Brief of Appellant at 18 (emphasis added); *see also* Rozier Affidavit at ¶¶ 9, 13, 19–20 (Trooper Thomas spoke to operators and bystanders before issuing citations). It is thus clear Trooper Thomas acquired the information necessary to issue the citations through his conversations with witnesses and drivers, and the fact and nature of the Vehicle Code violations could not have been garnered from the video-only aspect of the MVRs.

PSP simply does not explain how the video portion of the MVRs captured any criminal investigation. In fact, PSP concedes the only potentially investigative information consisted of the verbal statements captured on Trooper Thomas’s MVR, which the Commonwealth Court expressly ordered should be redacted prior to release of the MVRs. Accordingly, we find no error in the Commonwealth Court’s decision that Trooper Vanorden’s MVR and the video aspects of Trooper Thomas’s MVR are not exempt from release to Grove pursuant to Section 708(b)(16) of the RTKL, and affirm that portion of the court’s order.

## ii. CHRIA

*We now consider whether disclosure of the MVRs, both generally and specifically, is prohibited by CHRIA. CHRIA prevents the disclosure of “investigative information” to the public. 18 Pa.C.S. § 9106(c)(4). 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.” 18 Pa.C.S. § 9102. To determine if CHRIA prevents disclosure, we first consider if MVRs always constitute “investigative information” as defined by CHRIA.*

*PSP’s own evidence established MVRs are created when a light or siren is activated, and capture many events, including routine traffic stops, patrol vehicle travel and any other event a state trooper deems appropriate to record. Rozier Affidavit at ¶¶ 14–16. In addition, the Rozier Affidavit clearly states MVRs are created in many instances that plainly do not involve criminal activity, and may ultimately be used in civil proceedings, administrative enforcement and disciplinary actions. Rozier Affidavit at ¶ 17. Thus, MVRs do not, generally, constitute per se protected “investigative information,” and therefore the question of whether information captured on a particular MVR is to be excluded from public access under CHRIA must be determined on a case-by case basis.*

*With respect to the specific MVRs at issue here, our inquiry is whether the video portions contain investigative information under CHRIA such that they should be exempt from disclosure. As we have determined with respect to PSP’s claims under the RTKL, we hold the Commonwealth Court did not err in concluding the CHRIA does not preclude disclosure either. The court correctly determined the only potential “investigative information” on these MVRs is contained in the audio portion of witness interviews on Trooper Thomas’s MVR. As this potentially investigative aspect of the MVRs was ordered redacted, and neither PSP nor Grove challenged that order before this Court, we affirm the Commonwealth Court’s decision on this issue.*

...

#### IV. Wiretap Act

...

In considering the application of the Wiretap Act to the MVRs at issue here, we note the Commonwealth Court focused on

whether the individuals recorded “had notice of the recording or any expectation that the interview was not subject to recording.” 119 A.3d at 1111. In doing so, the court combined two different provisions of the Wiretap Act, *i.e.*, the definition of protected “oral communications” which requires an “expectation that such communication is not subject to interception under circumstances justifying such expectation,” 18 Pa.C.S. § 5702, and a statutory exception to the prohibition of interception where an individual has notice her oral communications are being recorded. 18 Pa.C.S. § 5704(16)(ii)(D). The proper analysis, however, must begin with a showing that “oral communications” are involved in the first instance; we need not reach the second question regarding notice if the individuals recorded could not have had a justifiable expectation the communications would not be intercepted. *See, e.g., Henlen*, 564 A.2d 905 (no violation of Wiretap Act where state trooper could not have had justifiable expectation conversation would not be intercepted when he interrogated prison guard suspected of theft and prison guard secretly recorded interrogation; recording was not oral communication subject to Wiretap Act); *Gunderman*, 505 A.2d 1112 (no violation of Wiretap Act where claimant surreptitiously recorded unemployment compensation hearing; no “legitimate expectation of privacy” existed at such proceedings).

In *Agnew*, this Court summarized the inquiry as follows: “whether the speaker had a specific expectation that the contents of the discussion would not be intercepted and whether that expectation was justifiable under the existing circumstances.” 717 A.2d at 523. The Court further noted, in “determining whether the expectation of non-interception was justified under the circumstances of a particular case, it is necessary for a reviewing court to examine the expectation in accordance with the principles surrounding the right to privacy, for one cannot have an expectation of non-interception absent a finding of a reasonable expectation of privacy.” *Id.* In this case, we must decide whether: (1) the MVR contains an oral communication; (2) the individuals whose communication is captured on the MVR had an expectation the communication



would not be intercepted; (3) the individuals' expectation was justifiable under the circumstances; and (4) there was an attempt to intercept or a successful interception of the communication. See Agnew, 717 A.2d at 522 (claimant alleging Wiretap Act violation must show: "(1) that he engaged in a communication; (2) that he possessed an expectation that the communication would not be intercepted; (3) that his expectation was justifiable under the circumstances; and (4) that the defendant attempted to, or successfully intercepted the communication, or encouraged another to do so").

Trooper Thomas's MVR included communications between the troopers themselves (who cannot possibly have had an expectation their conversations were not subject to interception), and between the troopers and the witnesses and drivers. Our review of the record demonstrates these other speakers also could not have had a justifiable expectation their conversations would not be intercepted, and accordingly, the MVRs do not contain any "oral communications" protected under the Wiretap Act. The conversations occurred in broad daylight at the scene of an accident on a public roadway, to which state police officers responded. The conversations took place within earshot and easy view of bystanders or passersby. In fact, Grove's position statement submitted to the OOR includes her own observations and even her paraphrasing of the conversations between the drivers and the troopers. Position Statement of Michelle Grove, dated May 30, 2014 (discussing troopers' actions and conversations at the accident scene, including recounting Trooper Thomas's statements to one of the drivers, about what "he 'thought' happened and tried to convince [the driver] that she was at fault."). It is clear the individuals at the scene could have had no reasonable expectation of privacy, or any justifiable expectation that their statements and images were not being captured on MVRs, or by any number of cellphones for that matter. Under the circumstances, we conclude disclosure of the MVRs pursuant to the RTKL does not violate the Wiretap Act. Accordingly, we reverse that portion of the Commonwealth Court's order that suggested additional findings with respect to notice are warranted on remand. We affirm the Commonwealth Court's

order in all other respects.

Grove, at \_\_\_\_, 161 A.3d at 893-896, 901-902 (footnotes omitted) (emphasis added).

Requester's reliance upon Pennsylvania State Police v. Grove is misplaced. Pennsylvania State Police v. Grove supports the Respondent's position. In Pennsylvania State Police v. Grove, the Commonwealth Court 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 agreed with the Commonwealth Court as to what is exempt from disclosure as criminal investigative information:

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.

In contrast, PSP's evidence demonstrates that the MVRs are created to document troopers' performance of their duties in responding to emergencies and in their interactions with members of the public, not merely or primarily to document, assemble or report on evidence of a crime or possible crime. ...

...

... The Commonwealth Court therefore correctly determined the MVRs are not exempt from disclosure as a general rule. *See Grove*, 119 A.3d at 1108 ("MVRs themselves are therefore not investigative material or videos, investigative information, or records relating or resulting in a criminal investigation exempt from disclosure under Section 708 of the RTKL....").

Grove, at \_\_\_, 161 A.3d at 893-894.

In Grove, both the Supreme and Commonwealth Courts discussed the purpose of MVRs. These Courts found that MVRs are created to document a trooper's performance of their duties in responding to emergencies and in their interactions with members of the public, not merely or primarily to document, assemble or report on evidence of a crime or possible crime. Consequently, MVRs are not *per se* criminal investigation information. However, when an MVR captures criminal investigative information that can part can be redacted.

In Grove, both the Supreme and Commonwealth Courts discussed the potential redaction of MVRs. However, it is important to note that redaction is only appropriate where a public record subject to disclosure is involved. Nothing

in the Grove decisions changes the discussion above that 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. *See* 65 P.S. § 67.706; Heavens v. Pennsylvania Department of Environmental Protection, 65 A.3d 1069, 1077 (Pa. Cmwlth. 2013); Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540, 543 (Pa. Cmwlth. 2012).

In Grove, Both the Supreme and Commonwealth Courts reaffirmed prior holdings that material exempt from disclosure as “criminal investigative information” under the RTKL includes at the very least the following: statements compiled by district attorneys; forensic reports; reports of police; notes, interviews, and statements of victims, suspects and witnesses; criminal complaint file; forensic lab reports; polygraph reports; records pertaining to execution of search warrant.

Requester seeks: “Complete Investigation File of Chester County District Attorney and / or Chester County Detectives, including but not limited to reports, photos, videos and evidence log pertaining to the April 2017 arrest of Arthur E. Phillips.” Requester seeks the very records that are exempt from disclosure pursuant to the RTKL. Unlike a MVR, the investigative file only exists because of a criminal investigation.

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.

...

65 P.S. § 67.708(b).

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.

The RTKL provides that records of an agency relating to or resulting in a criminal investigation may be withheld as exempt. 65 P.S. § 67.708(b). The Respondent bears the burden of proving, by a preponderance of the evidence, that the documents requested are exempt from public access. 65 P.S. § 67.708(a)(1). A criminal investigative record is anything that contains information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing. 18 Pa.C.S.A. § 9102. There is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure.

### **CONCLUSION**

For the foregoing reasons, the appeal is **DENIED**, and the Respondent is not required to take any further action. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may petition for review, to the Chester County Court of Common Pleas, pursuant to 65 P.S. § 67.1302(a). All parties must be served with a copy of the petition. The Chester County District Attorney's Office shall also be served with a copy of the petition, pursuant to 65 P.S. § 67.1303(a), for the purpose of transmitting the record to the reviewing court. *See* East Stroudsburg University

Foundation v. Office of Open Records, 995 A.2d 496, 507 (Pa. Cmwlth. 2010).

**FINAL DETERMINATION ISSUED AND MAILED ON: August 31, 2017**

APPEALS OFFICER:

*Nicholas J. Casenta, Jr.*

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## **INDEX OF APPENDICES**

**APPENDIX “A”** Appeal Documents Transferred from Office of Open Records.

**APPENDIX “B”** August 7, 2017 Letter of Nicholas J. Casenta, Jr., Esquire  
Appeals Officer for DA’s Office of Chester County

**APPENDIX “C”** August 16, 2017 Response of Respondent.

**APPENDIX “D”** August 23, 2017 Response of Requester.