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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
PATRICIA ALLAN DODSON,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
CALN TOWNSHIP	:	
POLICE DEPARTMENT,	:	DA-RTKL-A NO. 2016-004
Respondent	:	

**INTRODUCTION**

On December 31, 2015, Patricia Allan Dodson, Requester, filed a right-to-know request with the Caln Township Police Department, Respondent, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*. The request was denied. On January 27, 2016, Requester appealed to the Office of Open Records. On February 19, 2016, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office, which was received on February 24, 2016.

For the reasons set forth in this Final Determination, the appeal is **DENIED** and the Respondent is not required to take any further action.

### **FACTUAL BACKGROUND**

On December 31, 2015, Requester submitted a right-to-know request with the Respondent, requesting the identity of the handgun used in a suicide, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*. Respondent denied the request stating that the records requested related to a criminal investigation. On January 27, 2016, Requester appealed to the Office of Open Records. On February 19, 2016, Kyle Applegate, Esquire, Appeals Officer for the Office of Open Records transferred the appeal to the Chester County District Attorney's Office, which was received on February 24, 2016. Patricia Allan Dodson v. Caln Township Police Department, Docket No. AP 2016-0107.

On February 24, 2016, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

On December 31, 2015, 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.*. The request was denied. On January 27, 2016, Requester appealed to the Office of Open Records. On February 19, 2016, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office, which was received on February 24, 2016.

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 February 24, 2016, which is March 25, 2016.** 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 must do so on or before **March 4, 2016**.

If the Requester wishes to submit a response, it must do so on or before **March 11, 2016**.

**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.

February 24, 2016 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

Neither party submitted an additional response. Consequently, this decision will be based upon the submissions to the Office of Open Records.

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

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

The Respondent bears the burden of proving, by a preponderance of the evidence, that the document requested is exempt from public access. 65 P.S. § 67.708(a)(1). A preponderance of the evidence standard is the lowest evidentiary standard. The preponderance of evidence standard is defined as the greater weight of the evidence, *i.e.*, to tip a scale slightly is the criteria or requirement for preponderance of the evidence. Commonwealth v. Brown, 567 Pa. 272, 284, 786 A.2d 961, 968 (2001),

*cert. denied*, 537 U.S. 1187, 123 S.Ct. 1351, 154 L.Ed.2d 1018 (2003). “A ‘preponderance of the evidence’ is defined as ‘the greater weight of the evidence ... evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other...’ Black’s Law Dictionary 1301 (9th ed. 2009).” Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 n.3 (Pa. Cmwlth. 2010); *See also Commonwealth v. Williams*, 532 Pa. 265, 284-286, 615 A.2d 716, 726 (1992) (preponderance of the evidence in essence is proof that something is more likely than not). There is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure.

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

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

...

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

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

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

(iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised.

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

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

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

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

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

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

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

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

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

65 P.S. § 67.708(b).

18 Pa.C.S.A. § 9102 (relating to definitions) states in part: **“Police blotter.”** A chronological listing of arrests, usually documented contemporaneous with the incident, which may include, but is not limited to, the name and address of the individual charged and the alleged offenses.”

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

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

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

In Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011), the Commonwealth Court stated in part:

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

DOC v. OOR at 434.

In a response to the Office of Open Records, Respondent summarized its position in part as follows:

As stated previously, this Request stems from Mr. Dodson's suicide. Although this investigation was handled by the Police Department, suicides are not considered to be a criminal investigation because suicides will not result in criminal charges. As Dodson indicates in her Appeal, her husband committed suicide with a handgun, which was not registered to him. As part of a noncriminal investigation into the ownership of the gun, the Police Department submitted a gun ownership trace request to the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives (the "ATF"). The ATF provided a firearms trace summary report, which included the name of the owner (the "ATF Report"). As such, the ATF Report constitutes an investigative record into a noncriminal investigation. Thus, pursuant to Section 708(b)(17)(ii) of the Right to Know Law. The ATF Report is not a public record, and the Police Department is not required to disclose the ATF Report.

In addition to the ATF Report, the other responsive record to the Request is an incident report which was prepared as a result of Mr. Dodson's suicide (the "Incident Report"). The Incident Report is exempt under the Right to Know Law as an investigative report. 65 P.S. § 67.708(b)(17)(ii); *See generally, Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Commw. Ct. 2010).

To the extent that this matter is viewed as a criminal investigation, the Police Department asserts that both the ATF Report and the Incident Report are exempt from disclosure pursuant to Section 708(b)(16)(ii) of the Right to Know Law. If determined that this investigation was criminal in nature, then both the ATF Report and the Incident Report constitute criminal investigative records, which are exempt from public disclosure. 65 P.S. § 67.708(b)(16)(ii); *See generally, Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Commw. Ct. 2010).

February 8, 2016 Response of Alexandra Trunzo, Esquire.

In a letter to the Office of Open Records, Requester summarized her position in part as follows:



Attached, please find my request and denial letter along with other documentation, of information pertaining to the ownership of a handgun that my husband, E. Griffith Dodson III, used to commit suicide on February 24, 2014.

My husband, E. Griffith Dodson III, was found deceased in an automobile on our property, on February 24, 2014. At the time of his suicide, our son was 13 and our daughter 16 years old. I had believed that all weapons had been removed from our home at the time our first child's birth and believed all that remained was an antique BB Gun given to my husband by his Grandfather. I was wrong. Our children have informed me that their Dad, who had colon cancer and a history of bipolar disorder, had indeed shown them a hand gun (Glock) he had kept hidden in our home. The weapon he used to commit suicide (a Glock) was collected for investigation by the Cain Township Police along with personal effects found on his body. The Cain Township Police have been absolutely wonderful to me and my family and managed this crisis both professionally and with great respect and care toward me and my children.

The cause of my husband's death was ruled a suicide. When I went to the Cain Police Station to collect my husband's personal effects, I was told that the weapon would be destroyed as it was found to have been registered to another individual. At that time, in 2014, they were still in the process of identifying the origin of the weapon.

My children and my husband's family seek closure and I requested that I be provided the information about the origin of the handgun. My request was denied citing Section 708 of the Right to Know Law as it relates to an active investigation. Almost two years later, I believed this case to be closed and have no knowledge, as his spouse, of any ongoing investigation relating to my husband's suicide. We believe that we are entitled to know to whom this weapon was registered. We do not seek that this information be made public. We seek only to be informed privately as survivors.

I respectfully request an appeal of the denial for information as to the ownership of the weapon that was found in my husband's hand and that he used to end his life.

January 27, 2016 Letter of Patricia Dobson.

The Requester does not dispute that the documents requested are investigative records and exempt from disclosure. When a party seeks to challenge an agency's refusal to release information by appealing that party must address any grounds stated by the agency for denying the request. The Requester's position is in essence that she has a need for these documents because of who she is and her relationship to the deceased. The Requester states: "We believe that we are entitled to know to whom this weapon was registered. We do not seek that this information be made public. We seek only to be informed privately as survivors."

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 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

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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.

the former Right-to-Know Act, the right to examine a public record is not based on whether the person requesting the disclosure is affected by the records or if her motives are pure in seeking them, but whether any person's rights are fixed); Furin v. Pittsburgh Sch. Dist., OOR Dkt. No. AP 2010-0181, 2010 PA OORD LEXIS 212 (Pa. OOR 2010) (finding records exempt under Section 708(b) regardless of status of person requesting them); Wheelock v. Dep't of Corr., OOR Dkt. No. AP 2009-0997, 2009 PA OORD LEXIS 725 (Pa. OOR 2009) (stating the only information available under the RTKL is a "public record" available to all citizens regardless of personal status or stake in requested information).

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

In Hunsicker v. Pennsylvania State Police, 93 A.3d 911 (Pa. Cmwlth. 2014), Requester (Hunsicker) appealed a Determination of the Office of Open Records 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. 18 Pa.C.S.A. § 9102. The size, scope, or formality, of police inquiries are not relevant in determining if something is a criminal investigative record. While the event at issue was eventually determined to be a noncriminal event, the Respondent necessarily had to conduct a criminal investigation to arrive at this conclusion. An event initially believed to be a suicide or homicide may ultimately be classified as the opposite of the initial belief after an investigation. Even if an event is classified as a suicide there can be criminal consequences. *See* 18 Pa.C.S.A. § 2505, titled, “Causing or aiding suicide”.

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). As in Padgett, this decision does not involve whether or not Requester would be entitled to these criminal investigative records under an alternate legal mechanism. This decision only involves the RTKL.

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

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9. [65 P.S. § 67.901 *et seq.*]

65 P.S. § 67.706.



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

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

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

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

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

“public record.” Dept. of Health v. Office of Open Records, 4 A.3d 803 (Pa. Cmwlth. 2010).

Saunders at 542-543 (footnote omitted).

In Heavens v. Pennsylvania Department of Environmental Protection, 65 A.3d 1069 (Pa. Cmwlth. 2013), the Commonwealth Court stated in part:

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

Heavens at 1077.

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 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: March 23, 2016**

APPEALS OFFICER:

*Nicholas J. Casenta, Jr.*

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## INDEX OF APPENDICES

- APPENDIX "A"** Documents transferred from Office of Open Records
- APPENDIX "B"** February 24, 2016 Letter of CDDA Nicholas J. Casenta, Jr., Esquire  
Appeals Officer for District Attorney's Office of Chester County