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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
JENIFER KIEFER,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
EASTTOWN	:	
POLICE DEPARTMENT,	:	DA-RTKL-A NO. 2015-002
Respondent	:	

INTRODUCTION

Jenifer Kiefer ("Requester") filed a right-to-know request with the Easttown Police Department ("Respondent"), pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*, seeking a copy of "Complaint(s) filed against Jeremy Hare (2201 Cherry Street Philadelphia, PA) by Jennifer Schofield (626 Ethan Allen Road Berwyn, PA) in May 2015 involving threats." Respondent granted the request in part providing Requester with police blotters relevant to the request. Respondent denied the request in part *citing* 65 P.S. § 67.708(b)(16). Requester filed an appeal with the Chester County

District Attorney's Office, pursuant to 65 P.S. § 67.503(d) and 65 P.S. § 67.1101(a). 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 June 1, 2015, Jenifer Kiefer ("Requester") filed a right-to-know request with the Easttown Township Police Department ("Respondent"), pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, et. seq., seeking documents from the Easttown Township Police Department concerning complaints made against Jeremy Hare involving threats in May of 2015. On June 3, 2015, the Respondent granted the request in part giving Requester the police blotters concerning the incident, but denied the request for incident reports citing 65 P.S. § 67.708(b)(16). On June 8, 2015, the District Attorney's Office received a Right-To-Know Law Appeal Form from the Requester.

On June 9, 2015, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

Unless the Requester agrees otherwise, as the appeals officer, I shall make a final determination which shall be mailed to the Requester and the Respondent within 30 days of June 8, 2015, which is July 8, 2015. 65 P.S. § 67.1101(b)(1). If a final determination is not made within 30 days, the appeal is deemed denied by operation of law. 65 P.S. § 67.1101(b)(2). Prior to issuing a final determination, a hearing may be conducted. However, a hearing is generally not needed to make a final determination. The final determination shall be a final appealable order, and shall include a written explanation of the reason for the decision. 65 P.S. § 67.1101(b)(3).

The Supreme Court of Pennsylvania has held that a Respondent is permitted to assert exemptions on appeal, even if the agency did not assert them when the request was originally denied. *Levy v. Senate of Pennsylvania*, 619 Pa. 586, 65 A.3d 361 (2013).

The Commonwealth Court of Pennsylvania has held that, pursuant to 65 P.S. § 67.1101(a), the appeal shall state the grounds upon which the Requester asserts that the record is a public record and shall address any grounds stated by the agency for denying the request. When a Requester fails to state the records sought are public, or fails to address an agency's grounds for denial, the appeal may be dismissed. *Padgett v. Pennsylvania State Police*, 73 A.3d 644 (Pa. Cmwlth. 2013); *Saunders v. Department of Correction*, 48 A. 3d 540 (Pa. Cmwlth. 2012); *Department of Corrections v. Office of Open Records*, 18 A.3d 429 (Pa. Cmwlth. 2011).

If the Respondent wishes to supplement the reasons for the denial of the Right to Know request it must do so on or before June 16, 2015.

If the Requester wishes to submit a response, she must do so on or before June 23, 2015. The Requester shall provide a copy of the original right-to-know request filed with the Easttown Township Police Department.

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.

June 9, 2015 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

On June 11, 2015, Amanda J. Sundquist, Esquire, representing Easttown Police Department (Respondent), submitted a letter that Respondent would not be supplementing its Response. Requester did not respond or provide a copy of the original right-to-know request filed with the Easttown Township Police Department, as requested in the June 9, 2015 Letter.

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 Easttown Police Department ("Respondent") is a local agency subject to the RTKL that is required to disclose public documents. 65 P.S. § 67.302. Records of a local agency are presumed "public" unless the record: (1) is exempt under 65 P.S. § 67.708(b); (2) is protected by privilege; or (3) is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. § 67.305. "Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree." 65 P.S. § 67.306.

On June 1, 2015, Requester filed a right-to-know request with the Respondent. On June 3, 2015, David Obzud, Right-To-Know Officer for the Easttown Police Department, submitted a Response on behalf of Respondent. This Response set forth the reasons for the request denial:

Thank you for writing to us with your request for information pursuant to the Pennsylvania Right Know Law. On June 1, 2015, you requested from the Easttown Township Police Department copies of a "Complaint(s) filed against Jeremy Hare (2201 Cherry Street Philadelphia, PA) by Jennifer Schofield (626 Ethan Allen Road Berwyn, PA) in May 2015 involving threats."

Your request is granted, in part. Enclosed please find police blotters relevant to your request.

Your request is denied, in part, as to incident reports. Incident reports are protected from release as a record relating to or resulting in a criminal investigation. *See* 65 P.S. 67. 708(b)(16). *See also* Pennsylvania State Police v. Office of Open Records, 5 A.3d 473 (Pa. Cmwlth. 2010).

You have a right to appeal this partial denial in writing to Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120 and/or the County District Attorney, 201 West Markel Street Suite 4450, P.O. Box 2746, West Chester, PA 19380. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response. For more information, please see the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*

Please be advised that this correspondence will serve to close this record request with our office as permitted by law.

June 3, 2015 Letter of Respondent [David Obzud].

The Respondent has denied the request *citing* 65 P.S. § 67.708(b)(16). The Respondent bears the burden of proving, by a preponderance of the evidence, that the document requested is exempt from public access. 65 P.S. § 67.708(a)(1).¹

¹ A preponderance of the evidence, means, by a greater weight of the evidence. Commonwealth v. Brown, 567 Pa. 272, 284, 786 A.2d 961, 968 (2001). "A 'preponderance of the evidence' is defined as 'the greater weight of the evidence ... evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other....' Black's

In this case, there is sufficient evidence to support the determination that the documents requested are criminal investigative records that are 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:

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).

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

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

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

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

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

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

65 P.S. § 67.708(b).

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

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

perpetrators, as well as another witness. This information contained within the incident report was assembled as a result of an investigation into a criminal incident or an allegation of criminal wrongdoing. Consequently, the incident report was not a public record subject to disclosure. The Court also held that a victim's name and address is "victim information," *i.e.* information about the victim, and that the unwanted disclosure of a victim's name may prove to be a second victimization, whether due to retaliation, the fear of retaliation, stigma, embarrassment, or other reasons.

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. It is important to note that Requester does not dispute that the records requested are criminal investigative records. Requester states that she is in fact seeking criminal investigative records. Consequently, Requester does not dispute or address the grounds stated by Respondent for denying the request. When a party seeks to challenge an agency's refusal to release information by appealing that party must address any grounds stated by the agency for denying the request. Department of Corrections v. Office of Open Records, 18 A.3d 429, 434 (Pa. Cmwlth. 2011); Padgett v. Pennsylvania State Police, 73 A.3d 644, 647-648 (Pa. Cmwlth. 2013). In Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011), the Commonwealth Court stated in part:

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

DOC v. OOR at 434.

Requester states in the Right-To-Know Law Appeal Form: “This record can be helpful in keeping my children safe from their father - Jeremy Hare. I am not sure it is still a criminal investigation.” The Requester states that she is a crime victim in another case concerning Jeremy Hare. Whether or not a requester is or is not a crime victim is irrelevant to this analysis. 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. Requester’s explanation supports Respondent’s denial of her request in that the records requested are in fact criminal investigative records.

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

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

² DiMartino v. Pennsylvania State Police, 340 C.D. 2011, 2011 WL 10841570 (Pa. Cmwlth. 2011) is an unreported panel decision of the Commonwealth Court. As such, it may be cited for its persuasive value, but not as binding precedent. *See* Section 414 of the Commonwealth Court’s Internal Operating Procedures.

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 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 *648 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.

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: June 29, 2015

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Representing Easttown Police Department (Respondent)