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| IN THE MATTER OF | : | DISTRICT ATTORNEY'S OFFICE |
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| PETER J. ROHANA, JR., ESQUIRE, | : | CHESTER COUNTY, PENNSYLVANIA |
| Requester | : | |
| | : | RIGHT TO KNOW APPEAL |
| v. | : | |
| | : | FINAL DETERMINATION |
| WESTTOWN-EAST GOSHEN | : | |
| REGIONAL POLICE DEPARTMENT, | : | DA-RTKL-A NO. 2015-003 |
| Respondent | : | |

INTRODUCTION

On June 10, 2015, Peter J. Rohana, Jr., Esquire ("Requester"), on behalf of Melanie Laudenslager, filed a right-to-know request with the Westtown-East Goshen Regional Police Department ("Respondent"), pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*, seeking a written statement and photographs of Melanie Laudenslager from the Westtown-East Goshen Regional Police Department concerning an incident involving her ex-boyfriend, Thomas McHugh. On June 10, 2015, the Respondent denied the request *citing* 65 P.S. § 67.708(b)(16)(i) and (ii). On June 22, 2015,

Requester appealed to the Office of Open Records. Peter Rohana, Jr., Esquire (Requester) v. Westtown-East Goshen Regional Police Department (Respondent), Docket No. AP 2015-1089. On July 22, 2015, Kathleen A. Higgins, Esquire, issued a final determination transferring the appeal to the Chester County District Attorney's Office, which received the transfer on July 27, 2015.

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

FACTUAL BACKGROUND

On June 10, 2015, Peter J. Rohana, Jr., Esquire ("Requester"), on behalf of Melanie Laudenslager, filed a right-to-know request with the Westtown-East Goshen Regional Police Department ("Respondent"), pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*, seeking a written statement and photographs of Melanie Laudenslager from the Westtown-East Goshen Regional Police Department concerning an incident involving her ex-boyfriend, Thomas McHugh. On June 10, 2015, the Respondent denied the request *citing* 65 P.S. § 67.708(b)(16)(i) and (ii). On June 22, 2015, Requester appealed to the Office of Open Records. On July 22, 2015, a final determination was issued transferring the appeal to the Chester County District Attorney's Office, which received the transfer on July 27, 2015.

On July 28, 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 July 27, 2015, which is August 26, 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 August 4, 2015.

If the Requester wishes to submit a response, it must do so on or before August 11, 2015.

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

July 28, 2015 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

On August 10, 2015, Requester submitted a letter in response to the July 28, 2015 letter of this Appeals Officer. Respondent did not submit an additional response.

LEGAL ANALYSIS

The Chester County District Attorney's Office is authorized to hear appeals relating to access to criminal investigative records in the possession of a local agency located within Chester County. 65 P.S. § 67.503(d)(2) ("The district attorney of a county shall designate one or more appeals officers to hear appeals under Chapter 11 relating to access to criminal investigative records in possession of a local agency of that county. The appeals officer designated by the district attorney shall determine if the record requested is a criminal investigative record.").

The Westtown-East Goshen Regional 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 10, 2015, Requester filed a RTKL request with the Respondent. Exhibit "A" of the RTKL request stated the following:

I am the attorney for Melanie Laudenslager concerning criminal charges which she wished to file against her ex-boyfriend, Thomas McHugh (T.J.), on April 10, 2015. I am requesting copies of both Melanie's written statement and photographs of her injuries taken by Sergeant Leahy on April 10, 2015.

Although Melanie was charged as a Defendant by her ex-boyfriend, we came to the station to provide information for your department to file criminal charges against the ex-boyfriend since Melanie has always maintained that T.J. attacked her. We presented her as a victim who wanted to press charges against him and provided both the statement and photos as proof of this assault on her. Sergeant Leahy never read her her rights against self-incrimination before giving the statement since she was NOT there as a Defendant but as a victim. Therefore we should have no problem getting a copy of her own statement and the photos. Thank you for your help.

June 10, 2015 Right-To-Know Request, Exhibit "A".

On June 10, 2015, Respondent denied the request *citing* 65 P.S. § 67.708(b)(16)(i)(ii). On June 22, 2015, Requester appealed to the Office of Open Records. In the letter, dated June 17, 2015, to the Office of Open Records initiating the appeal, Requester stated in part:

They assert Section 708 b (16)(i)(ii) as an exception to the Right to Know. They base this denial on the above cited Section which refers to "a record of an agency relating to or resulting in a criminal investigation, including: (i) which say complaints of potential criminal conduct other than a private criminal complaint (ii) "investigative materials, notes, correspondence, videos and reports".

The agency has the burden of proving that this meets the definition of an exception to the Right to Know law. What is requested, as indicated on Exhibit "A" of our Right to Know request was that Melanie was charged with a criminal complaint and wished to file charges against her ex-boyfriend since she believed that she was attacked by him and she only defended herself. After her criminal arraignment in the District Court, I

accompanied Melanie back to the Police Department to give a statement pertaining to her version of the facts and also to have photographs of her injuries taken by the Police Dept. on April 10th. These were clearly provided to the Police by Melanie, as a victim, and not as a Defendant. Subsequent to that event we requested copies of Melanie's statement and photos of her injuries which were taken by the police. This is what the denial refers to. I question whether these even come under the Right to Know law since they are statements and photographs of her own condition and were done voluntarily as a victim and she should have a proprietary right to these. She was never informed of her right against self-incrimination and clearly these statements were not provided in any form of proceeding where she was a Defendant in the case. The Township Police Department has no basis for withholding this information from my client.

June 17, 2015 Letter of Peter J. Rohana, Jr., Esquire, at 1-2.

In response to Requester's appeal to the Office of Open Records, the Respondent sent a letter, dated July 1, 2015, with an attached Affidavit. The letter, dated July 1, 2015, stated in part:

This letter and the attached affidavit are submitted in response to the above-referenced appeal on behalf of the Westtown-East Goshen Regional Police Department (the "Police Department").

The requisite background in the attached affidavit and appeal is not extensive. Ms. Melanie Laudenslager was involved in an incident with her ex-boyfriend. This incident is the subject of a criminal investigation by the Police Department (OTN: MJ - 15102 - CR - 0000070 - 2015). In connection therewith, Ms. Laudenslager voluntarily provided a written statement on April 10, 2015 describing the incident and offered to be photographed by the Police Department. The written statement and photographs were then retained by the Police Department as part of the criminal investigation into the original incident between Ms. Laudenslager and her ex-boyfriend.

As such, it should be clear that the requested records relate to a criminal investigation and are exempt from disclosure under 65 P.S. 67.708(b)(16). There is no victim exception in the Right-to-Know

and therefore any argument whether Ms. Laudenslager is the victim or Defendant is irrelevant to this appeal.

July 1, 2015 Letter of Michael D. Fabius, Esquire.

The Affidavit attached to the letter, dated July 1, 2015, stated the following:

I, Brenda M. Bernot, being duly sworn according to law, do depose and say:

1. I am the Chief of Police at the Westtown-East Goshen Regional Police Department (the "Police Department").

2. I have reviewed the June 10, 2015 letter, the Standard Right-to-Know Request Form from Peter J. Rohana, Jr., Esquire (the "Right-to-Know Law Request") and the requested records, which consist of a written statement by Melanie Laudenslager and photographs of her taken contemporaneously with the statement ("Statement and Photos").

3. The Statement and Photos relate to an incident between Ms. Laudenslager and her ex-boyfriend which has been under investigation by the Police Department and has resulted in criminal charges against Ms. Laudenslager.

4. The Offender Tracking Number ("OTN") for the Police Department's criminal investigation into the relevant incident between Ms. Laudenslager and her ex-boyfriend is MJ-15102-CR-0000070-2015.

I hereby verify that the statements contained herein are true and correct to the best of my knowledge, information and belief.

July 1, 2015 Letter of Michael D. Fabius, Esquire; Affidavit of Brendz M. Bernot.

On August 10, 2015, Requester, submitted a letter in response to the July 28, 2015 letter of this Appeals Officer. The letter, dated August 10, 2015, stated in part:

We still maintain that the requested statement and photographs are not exempt from disclosure since 65 P .S. §67.708(b)(16)(i) excludes from exemption complaints "other than a private criminal complaint". Melanie Laudenslager was charged

on April 9, 2015 for an altercation which occurred on April 8, 2015. After her preliminary arraignment on April 10th, she voluntarily went to the police station to provide her statement and to have photographs of her injuries taken. Contrary to what Chief of Police Bemot stated in her June 26th Affidavit, the statement and photographs were not part of the police investigation of this incident since charges had already been filed against Melanie a day before. It is clear that the purpose of Melanie's statement and photographs was to bring separate charges versus her ex-boyfriend. This is tantamount to the filing of a private criminal complaint which is excluded from exemption.

As was stated by Senior Judge Collins, in the recent case of Pennsylvania State Police v. Michelle Grove, No. 1146 C.D. (Cmwlth Court filed July 7, 2015) "We do not agree that these facts make 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 §708(b)(16)." Just because Melanie's statement and photos have some connection to this criminal proceeding does not make it exempt.

August 10, 2015 Letter of Peter J. Rohana, Jr., Esquire.

The Respondent bears the burden of proving, by a preponderance of the evidence, that the document requested is exempt from public access. 65 P.S. § 67.708(a)(1).¹ There is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure.

¹ A preponderance of the evidence, means, by a greater weight of the evidence. Commonwealth v. Brown, 567 Pa. 272, 284, 786 A.2d 961, 968 (2001). "A 'preponderance of the evidence' is defined as 'the greater weight of the evidence ... evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other....' Black's Law Dictionary 1301 (9th ed. 2009)." Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 n.3 (Pa. Cmwlth. 2010); *See also* Commonwealth v. Williams, 532 Pa. 265, 284-286, 615 A.2d 716, 726 (1992) (preponderance of the evidence in essence is proof that something is more likely than not).

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

65 P.S. § 67.708(b).

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

In Pennsylvania State Police v. Office of Open Records, 5 A.3d 473 (Pa. Cmwlth. 2010), the *en banc* Commonwealth Court found an incident report exempt from disclosure pursuant to 65 P.S. § 67.708(b)(16). The Court held that the incident report was not a public record because the incident report was not the equivalent of a police blotter under the RTKL and the Criminal History Records Information Act (“CHRIA”). The incident report contained notes of interviews with the alleged victims / perpetrators, as well as another witness. This information contained within the incident report was assembled as a result of an investigation into a criminal incident or an allegation of criminal wrongdoing. Consequently, the incident report was not a public record subject to disclosure. The Court also held that a victim's name and address is “victim information,” *i.e.* information about the victim, and that the unwanted

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

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

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

DOC v. OOR at 434.

Requester makes several points in support of his position that Melanie Laudenslager's statement to the police and the photographs taken by the police are not criminal investigative records that are exempt from disclosure pursuant to a RTKL request. Requester argues that Melanie Laudenslager is the true victim in the incident between Melanie Laudenslager and Thomas McHugh, as evidenced by the allegation

that Melanie Laudenslager voluntarily went to the police and was never informed of her right against self-incrimination.

A requester's identity and motivation for making a request is not relevant, and his or her intended use for the information may not be grounds for granting or denying a request. *See* 65 P.S. § 67.301(b), 65 P.S. § 67.703. Moreover, Requester's explanation of events supports Respondent's denial of the request in that the records requested are in fact criminal investigative records.

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

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

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.

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).

Requester argues that, “the statement and photographs were not part of the police investigation of this incident since charges had already been filed against Melanie [Laudenslager] a day before.” This argument fails for several reasons. While criminal investigations can lead to arrests, not all criminal investigations lead to arrests.

Moreover, the arrest is often the beginning of the next phase of a criminal investigation. A good criminal investigation is ongoing and does not end with an arrest. Whether an arrest has occurred or whether a criminal investigation is ongoing or closed, are not relevant factors in determining if something is a criminal investigative record.

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

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

Also, a record is not considered a public record under Section 102 of the RTKL if it is "exempt under any other State or Federal Law," including the CHRIA. See Coley, 77 A.3d at 697. Section 9106(c)(4) of the CHRIA, 18 Pa.C.S. § 9106(c)(4), provides that "investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency." The CHRIA defines "investigative information" as "information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information." Section 9102 of the CHRIA, 18 Pa.C.S. § 9102.

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

Barros v. Martin at 1250.

Requester argues that, “the purpose of Melanie’s statement and photographs was to bring separate charges versus her ex-boyfriend. This is tantamount to the filing of a private criminal complaint which is excluded from exemption.” 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.”

The Comments to Pa.R.Crim.P. 504 (Contents of Complaint) and Pa.R.Crim.P. 506 (Approval of Private Complaints) set forth the procedures concerning private criminal complaints. Pa.R.Crim.P. 503 requires that in every court case a complaint shall be filed with the appropriate issuing authority. Pa.R.Crim.P. 504 sets forth the contents of all complaints whether the affiant is a law enforcement officer or a private citizen. Pa.R.Crim.P. 506 requires that a private criminal complaint must be submitted to an attorney for the Commonwealth for approval. A private criminal complaint is a very specific type of filing pursuant to the Pennsylvania Rules of Criminal Procedure.

Requester argues that the purpose of Melanie Laudenslager’s statement and photographs was to bring charges against Thomas McHugh. Assuming, *arguendo*, that this is true, it is in fact a complaint of potential criminal conduct made to the police. It is not a private criminal complaint made pursuant to the Pennsylvania Rules of Criminal

Procedure. It was not a complaint filed with the issuing authority for review by the District Attorney's Office.

It is important to note that the courts of this Commonwealth have not discussed what can be requested with respect to a private criminal complaint. A private criminal complaint differs from a complaint to a police department as it has public aspect to it, as it is filed with an issuing authority. However, it is logical to assume that if criminal investigative records are created as a result of a private criminal complaint they are still exempt from disclosure pursuant to a RTKL request, as each of the exceptions for public records set forth in 65 P.S. § 67.708(b) are independent of each other.

Requester also argues that a recent Commonwealth Court decision has some relevance to the current request. In Pennsylvania State Police v. Grove, 2015 WL 4078727, ___ A.3d ___ (Pa. Cmwlth. 07/07/2015), the Commonwealth Court stated:

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.

Pennsylvania State Police v. Grove, at 2015 WL 4078727, *4 - *5, ___ A.3d at ___ (footnote omitted). A Petition for Allowance of Appeal was filed from this decision on August 6, 2015, and docketed at 595 MAL 2015.

Requester's reliance upon Pennsylvania State Police v. Grove is misplaced. Pennsylvania State Police v. Grove supports 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 discussion concerning the purpose of MVRs is not relevant to the current request.

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. This decision only involves the RTKL. However, while it does not affect, and it is not relevant to, the analysis under the RTKL, the Pennsylvania Rules of Criminal Procedure do appear to cover what Requester is seeking. Pa.R.Crim.P. 573, titled, "Pretrial Discovery and Inspection", provides in part:

(A) Informal. Before any disclosure or discovery can be sought under these rules by either party, counsel for the parties shall make a good faith effort to resolve all questions of discovery, and to provide information required or requested under these rules as to which there is no dispute. When there are items requested by one

party which the other party has refused to disclose, the demanding party may make appropriate motion. Such motion shall be made within 14 days after arraignment, unless the time for filing is extended by the court. In such motion the party must set forth the fact that a good faith effort to discuss the requested material has taken place and proved unsuccessful. Nothing in this provision shall delay the disclosure of any items agreed upon by the parties pending resolution of any motion for discovery.

(B) Disclosure by the Commonwealth.

(1) *Mandatory.* In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.

(a) Any evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth;

(b) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made that is in the possession or control of the attorney for the Commonwealth;

(c) the defendant's prior criminal record;

(d) the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;

(e) any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant that are within the possession or control of the attorney for the Commonwealth;

(f) any tangible objects, including documents, photographs, fingerprints, or other tangible evidence; and

(g) the transcripts and recordings of any electronic surveillance, and the authority by which the said transcripts and recordings were obtained.

(2) *Discretionary With the Court.*

(a) In all court cases, except as otherwise provided in Rules 230 (Disclosure of Testimony Before Investigating Grand Jury) and 556.10 (Secrecy; Disclosure), if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable:

(i) the names and addresses of eyewitnesses;

(ii) all written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial;

(iii) all written and recorded statements, and substantially verbatim oral statements, made by co-defendants, and by co-conspirators or accomplices, whether such individuals have been charged or not; and

(iv) any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice.

...

Pa.R.Crim.P. 573.

As previously stated, this decision does not involve whether Requester would be entitled to these criminal investigative records under an alternate legal mechanism. This decision only involves the RTKL. Moreover, the RTKL cannot be used to obtain record a Requester believes they are entitled to pursuant to Pa.R.Crim.P. 573.

In Barros v. Martin, 92 A.3d 1243 (Pa. Cmwlth. 2014), *appeal denied*, ___ Pa. ___, 97

A.3d 745 (2014), the Commonwealth Court stated in part:

To the extent that Barros seeks to characterize this action as a declaratory judgment action to obtain records that he believes should have been turned over to him pursuant to Pa.R.Crim.P. 573(B)(1)(e) during the course of his criminal proceedings, we agree with the trial court that the “Post Conviction Relief Act ... is the exclusive vehicle through which any relief in relation to a criminal conviction may be sought,” and Barros “cannot use this civil proceeding to collaterally attack any alleged irregularities in a criminal prosecution for which he apparently remains incarcerated.” (Trial court 1925(a) opinion at 2, n. 1 (*citing Guarrasi*, 25 A.3d at 402); and Keller v. Kinsley, 415 Pa. Super. 366, 609 A.2d 567, 568 (1992).)

Barros v. Martin at 1252.

The RTKL provides that records of an agency relating to or resulting in a criminal investigation may be withheld as exempt. 65 P.S. § 67.708(b). The Respondent bears the burden of proving, by a preponderance of the evidence, that the documents requested are exempt from public access. 65 P.S. § 67.708(a)(1). There is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure.

CONCLUSION

For the foregoing reasons, the appeal is **DENIED**, and the Respondent is not required to take any further action. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may petition for review, to the Chester County Court of Common Pleas, pursuant to 65 P.S. §

67.1302(a). All parties must be served with a copy of the petition for review. The Chester County District Attorney's Office shall also be served with a copy of the petition for review, pursuant to 65 P.S. § 67.1303(a), for the purpose of transmitting the record to the reviewing court. See East Stroudsburg University Foundation v. Office of Open Records, 995 A.2d 496, 507 (Pa. Cmwlth. 2010).

FINAL DETERMINATION ISSUED AND MAILED ON: August 25, 2015

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INDEX OF APPENDICES

- APPENDIX "A"** July 22, 2015 Letter of Charles Rees Brown
Transferring Appeal Proceedings from Office of Open Records
- APPENDIX "B"** July 28, 2015 Letter of CDDA Nicholas J. Casenta, Jr., Esquire
Appeals Officer for District Attorney's Office of Chester County
- APPENDIX "C"** August 10, 2015 Letter of Peter J. Rohana, Jr., Esquire