

FINAL DETERMINATION

IN THE MATTER OF :
 : AP 2019-0386
JOHN DEBARTOLA, :
 Requester, :
 :
 v. :
 :
CITY OF JOHNSTOWN, :
 Respondent. :
 :
 :



This Right to Know Law [“RTKL”] appeal has been appropriately transferred by the Office of Open Records to the Appeals Officer for the Office of the District Attorney of Cambria County as the RTKL request pertains to investigative records from a local law enforcement agency within the confines of Cambria County, Pennsylvania. 65 P.S. § 67.503(d)(2). For the reasons stated below, the appeal is **DENIED**.

Factual Background

On February 6, 2019, John DeBartola [“Requester”] requested records from the City of Johnstown [the “City”]. Requester sought:

[Item 1] . . . [A]ccess to all drug forfeiture records and all DUI records in possession of the City . . . from January 1, 2017 to present. This includes, but is not limited to all work papers, receipts, check registr[ies], and any other responsive records that show income, seizures, expenditures, & Accounting of these accounts. [Item 2] . . . Access to all overtime records paid to city employees from January 1, 2010 to present.

On March 15, 2019, the City partially denied the request, stating that certain records requested related to a criminal investigation pursuant to 65 P.S. §67.708(b)(16). Although denying in part, the City granted the Requester access to “Police – Deposit Forms” and “overtime records paid to City employee[s] from January 1, 2010 to present.”

On March 15, 2019 Requester appealed to the Office of Open Records [“OOR”] challenging the denial for the reasons stated by the City. The OOR determined that Item 1 as set out by Requester was partially specific, finding that “work papers” as indicated by the Requester was insufficiently specific while all other contents requested at Item 1 met the requisite level of specificity.

Next, the OOR determined that it lacked jurisdiction to make a Determination as to some of the records requested in Item 1 as, “The OOR does not have jurisdiction to hear appeals related to criminal investigative records held by local law enforcement agencies.” *Citing* 65 P.S. §67.503(d)(2). Since the OOR found that the City was a local law enforcement agency, the Requester’s appeal, specifically whether, “the records responsive to Item 1 relate to a criminal investigation or, with respect to financial records, what if any criminal investigative information is contained on and may be redacted from the records before their disclosure to the Requester,” was transferred to the Appeals Officer for the Cambria County District Attorney’s Office [the “Appeals Officer”] to determine the issue set out *supra*.

The City submitted an April 3, 2019 Attestation from Frank Kusher, the City’s Open Records Officer in which Kusher indicated that the City of Johnstown Police Department is a “Law Enforcement Agency” and that any records which were denied were criminal investigative records not subject to disclosure. The City later submitted another Attestation from Kusher dated April 18, 2019 in which Kusher indicated that the overtime records which were provided to the Requester constituted all overtime records which he believed to be responsive to the Right to Know Request in question.

The Appeals Officer allowed both Parties to submit position statements and any additional record which the City believed responsive and subject to disclosure. In his position statement dated

June 11, 2019, the Requester reiterates that he is “looking for an accounting of all drug forfeiture and DUI records in the city’s possession from January 1, 2017 to present.” Requester further specifies that, “[He wants] to emphasize that [he] is not looking for names or places that would compromise any criminal investigations or informants,” but instead is, “looking for an accounting of the drug forfeiture and DUI funds through the documents that [he] has requested; any information regarding confidential informants can be redacted.”

On June 19, 2019, the City, through a letter by Attorney Benjamin, indicated that the City does not and cannot seize money or tangible assets relative to drug forfeiture funds referenced by Requester, but only receives forfeiture funds through the District Attorney’s Office. Attorney Benjamin advised that this did not occur in 2017. Attorney Benjamin further indicated that the City was releasing additional records to the Requester which included records of receipt and expenditure of drug forfeiture funds forwarded to the City of Johnstown Police Department from the District Attorney’s Office with specific names and case numbers redacted.

The City also indicated that it recently identified records responsive to the request regarding drug forfeiture funds and provided said responsive records to Requester. The City then redacted information relating to criminal investigatory material from these responsive records and produced them to the Requester. The records include deposits from the Cambria County Drug Forfeiture Account to the City as well as the City’s expenditures of said funds from 2018 to present.

Attorney Benjamin continued to state that no records exist in the City’s possession relating to seizures, expenditures, and income from a DUI account. However, Attorney Benjamin advised that the City was able to, “uncover additional records of reimbursed overtime pertinent to DUIs in 2017 and 2018.” The City provided these overtime records relative to 2017 and 2018 DUIs to the Requester with Attorney Benjamin’s June 19, 2019 letter.

Although Attorney Benjamin did indicate the information discussed *supra* and did provide additional records on behalf of the City, the City included no Attestations stating the same. On July 19, 2019, the undersigned emailed the parties indicating that the undersigned would allow the City until July 26, 2019 to submit any Attestations it deemed necessary to support assertions made by Attorney Benjamin in her June 19, 2019 letter so long as the Requester had no objection to said extension. Requester indicated that he did not object to the extension.

On July 26, 2019, the City submitted two additional Attestations, one from the City's Open Records Officer, Frank Kusher, and the second from Chief Robert Johnson of the Johnstown Police Department. Kusher stated that the documents attached to Attorney Benjamin's June 19, 2019 letter (statements showing transactions including receipt by the City and expenditure by the City of drug forfeiture funds forwarded to the City of Johnstown Police Department by the District Attorney's Office.) Kusher further states that all information redacted on said transaction statements consists only of specific names and case numbers deemed exempt from disclosure as records of a criminal investigation and/or protected by the Criminal History Record Information Act. Kusher confirms that no records exist within the City's possession showing the information requested in relation to DUIs similar to the information disclosed pertaining to the drug forfeiture accounts.

The City also submitted an Attestation from the City of Johnstown's Chief of Police, Robert F. Johnson dated July 26, 2019. Johnson states in said Attestation that, the City of Johnstown is a "law enforcement agency," and attested to the following: (1) the records attached to Attorney Benjamin's June 19, 2019 letter showing receipt and expenditure of drug forfeiture funds forwarded to the City by the District Attorney's Office are true and correct copies, (2) only information related to criminal investigative information consisting of specific names and cases

are redacted, (3) The City does not and cannot seize money or tangible assets relative to drug forfeiture funds, (4) The City only receives forfeiture money through the District Attorney's Office, (5) No forfeiture funds were received in calendar year 2017, and (6) Records released to Requester as of June 19, 2019 consist of all responsive records in the possession of the City to the best of Johnson's knowledge.

The undersigned received and reviewed all records, attestations, and arguments of parties. This Decision followed.

Discussion

The issue at hand is narrow as the OOR issued a Final Determination subsequent to Requester's appeal challenging the City's denial and stating grounds for disclosure. The OOR determined that Item 1 of the Request was partially specific, as discussed *supra*. The OOR determined that, as it pertains to Item 1, the Requester sought records relating to the City's drug forfeiture and DUI *accounts*, not every conceivable drug forfeiture and DUI record possessed by the City. The OOR then found that the City was given sufficient detail to guide its search for records which amounted to, "financial documentation about the drug forfeiture and DUI accounts." Finally, the OOR determined that "work papers" as requested was insufficiently specific. The OOR also determined that the City has provided all responsive records pertaining to Item 2, records reflecting overtime paid to all City employees.

Thus, the OOR has issued a binding Final Determination as to the specificity of Item 1 and has ruled on all issues regarding Item 2 as it found the City disclosed all responsive records. However, the OOR found it lacked jurisdiction over some records or parts of records requested in Item 1 and transferred this Appeal to the undersigned for a determination. The specific issues transferred to be considered in the instant Determination are: (1) Whether records responsive to

Item 1 relate to a criminal investigation, and (2) With respect to financial records, what, if any, criminal investigative information is contained on and may be redacted from the records before their disclosure to the Requester. The undersigned finds that records responsive to Item 1 do relate to a criminal investigation, but that these records must be disclosed after redacting any information pertaining to a criminal investigation.

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). However, even if a record is public, there exist certain statutory exceptions to disclosure. “If a record, on its face, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(ii).” *Barros v. Martin*, 92 A.3d 1243, 1250 (Pa. Cmwlth. Ct. 2014) (citing, *inter alia*, *Coley v. Philadelphia District Attorney's Office*, 77 A.3d 694, 697 (Pa. Cmwlth. Ct. 2013)). “Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed.” *Id.* (citing *Sullivan v. City of Pittsburgh*, 127 Pa.Cmwlth. 339, 561 A.2d 863, 865 (Pa. Cmwlth. Ct. 1989)).

The investigative record exclusion from the RTKL is defined as follows:

- (b)... the following are exempt from access by a requester under [the RTKL] ...
- (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.

65 P.S. § 67.708(b)(16).

The Cambria County Court of Common Pleas recently ruled on similar issues. *See Debartola v. Cambria County District Attorney's Office*, No. 2017-2524 (Cambria Cnty. C.C.P. Nov. 19, 2018) ; *See also Cambria County v. Debartola*, No. 2017-2877 (Cambria Cnty. C.C.P. Nov. 19, 2019) (*attached*). In these decisions, the Court held that criminal investigative material may be redacted from financial records relating to drug forfeiture accounts but the records may not be withheld in their entirety.

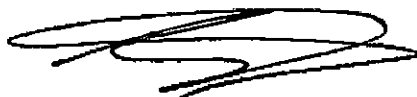
Here, the Requester has requested financial records which contain criminal investigative materials. In its June 19, 2019 disclosure, the City's provided additional responsive records in which the City redacted criminal investigative materials. Requester sought, "Access to all drug forfeiture records and all DUI records in possession of the City . . . from January 1, 2017 to present." July 26, 2019 Attestations from Kusher and Johnson show that all responsive records relating to records of drug forfeiture funds have been disclosed to the Requester. Attestations further prove that no forfeiture funds were received in the year of 2017. Finally, the Attestations show that no DUI records exist similar to the transaction histories which were disclosed to the Requester. However, Kusher does state that the City has disclosed overtime records pertinent to DUIs in 2017 and 2018 as part of Attorney Benjamin's June 19, 2019 letter. Thus, the City has disclosed all records responsive to the request in Item 1 and has appropriately redacted any information relating to criminal investigations.

As such, the City has complied with the requirements of the Pennsylvania Right to Know Law (RTKL) and has complied with relevant case law including *Debartola v. Cambria County District Attorney's Office*, No. 2017-2524 and *Cambria County v. Debartola*, No. 2017-2887. Although the City had not fully complied with such at the time of Requester's Appeal, subsequent disclosure and Attestations show that the City has provided all responsive records with permissible redactions.

Conclusion

For the reasons stated above, Requester's appeal is **DENIED** as the City has provided all responsive records to the Requester. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Cambria County Court of Common Pleas. 65 P.S. §67.1302(A). All parties must be served with notice of the appeal. The Appeals Officer for the Office of the District Attorney must also be served notice and have an opportunity to respond as per Section 1303 of the RTKL.

Final Determination Issued and Mailed August 2, 2019.



MATTHEW A. GRIBLER, ESQUIRE
ASSISTANT DISTRICT ATTORNEY
INTERIM RIGHT TO KNOW LAW APPEALS OFFICER

Sent to John DeBartola (via email and first class mail)
 Elizabeth Benjamin, Esquire (via email and intracounty mail)
 Joshua Young, Esquire (via email and first class mail)

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IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA
CIVIL DIVISION

OFFICE OF OPEN RECORDS

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CAMBRIA COUNTY, PA

CAMBRIA COUNTY,

Petitioner,

No. 2017-2877

vs.

Opinion and Order

JOHN DEBARTOLA,

Respondent.

Petition for Judicial Review Under the
Pennsylvania Right to Know Law

OPINION

Krumenacker, P.J.: Presently before the Court is Cambria County's (County) Petition for Judicial Review from the final determination of the Office of Open Records (OOR) relative to a Right to Know Law (RTKL), 65 P.S. §§ 67.101 - 67.3104, request John DeBartola (DeBartola) filed with the County.

FACTUAL AND PROCEDURAL HISTORY

The RTKL, in pertinent part, provides that "[t]he record before a court shall consist of the request, the agency's response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer." 65 P.S. § 67.1303. Further, trial courts are permitted "to expand their record to fulfill their statutory role" under the RTKL as fact-finders and thereby consider matters beyond the record that is certified by the OOR. Bowling v. Office of Open Records, 621 Pa. 133, 173, 75 A.3d 453, 476 (2013). Accordingly, the record before the Court consists of DeBartola's Request, the County's

response, the position statements and affidavits filed with the OOR, the final written determination of the OOR, and the evidence presented at the May 16th hearing on this matter.

This record establishes the following facts and procedural history. On March 17, 2017, DeBartola filed a request seeking all monthly reports filed by the Cambria County District Attorney's Office¹ (Office) with the Cambria County Controller's Office for the purpose of providing and assembling the annual audit of the drug forfeiture accounts from January 1, 2000, to March 17, 2017.

On March 23, 2017, the County responded that the records are confidential under the Controlled Substances Forfeiture Act (CSFA). 42 Pa. C.S. §§ 6801-6802. On March 23, 2017, DeBartola appealed to the OOR, challenging the denial. The OOR invited both parties to supplement the record through position statements and affidavits. The County submitted a position statement, along with the affidavit of Melissa Kestermont (Kestermont), the County's Open Records Officer, asserting that the annual audit submitted to the Pennsylvania Office of Attorney General (OAG) and work papers underlying that audit are confidential under the CSFA. On May 12, 2017, following a request for clarification from the OOR, the County provided a submission stating that it does not possess the audit reports and that work papers and other documents relating to the audit are confidential.

On June 22, 2017, the OOR issued its Final Determination granting DeBartola's appeal and directing the County to provide the requested records. Debartola v. Cambria County, AP 2017-0534 (OOR 2017). Specifically, the OOR concluded that the County failed to prove the records were confidential under the CSFA.

¹ DeBartola became aware of these monthly reports due to an attestation filed in Debartola v. Cambria County Dist. Atty. Off., AP 2017-0399 (OOR 2017), which was an appeal from the denial by the Office of his request for the annual audit and other records.

The County filed the incident Petition on July 21, 2017, pursuant to section 1302 of the RTKL, 65 P.S. § 67.1302. Review of the matter was stayed at request of the parties in order to permit the Pennsylvania Supreme Court to address the question of whether a district attorney's office was a judicial office not subject to the RTKL. In Miller v. County of Centre, 173 A.3d 1162 (Pa. 2017), the Court concluded that district attorneys are not judicial agencies but rather local agencies for purposes of the application of the RTKL and were thus subject to its disclosure provisions. Following a conference, this matter was consolidated with three other related cases², a hearing was set for on May 16, 2018, and the parties were permitted to file pre-hearing briefs. For the reasons contained herein the decision of the OOR is affirmed.

DISCUSSION

I. RTKL general principles

Section 302(a) of the RTKL obligates all local agencies to provide public access to "public records," 65 P.S. § 67.302(a), and, following Miller, there is no question that the Office is a "local agency" subject to the RTKL as is the County. It is well settled that "[t]he objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." SWB Yankees LLC v. Wintermantel, 615 Pa. 640, 662, 45 A.3d 1029, 1042 (2012). "[T]he [RTKL] is remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for

² The related cases are DeBartola v. Cambria County District Attorney's Office, 2017-2524, Cambria County District Attorney's Office v. DeBartola, 2017-2980 and DeBartola v. Cambria County District Attorney's Office, 2018-0095. The parties filed consolidated briefs but, due to the complexity of the issues involved in some of the cases, separate opinions have been entered.

their actions." Bowling v. Office of Open Records, 990 A.2d 813, 824 (Pa. Cmwlth. 2010), aff'd, 621 Pa. 133, 75 A.3d 453 (2013). The RTKL affords greater access to public records than did the prior Right to Know Act (RTKA), resulting in "a dramatic expansion of the public's access to government documents." Levy v. Senate of Pa., 619 Pa. 586, 65 A.3d 361, 381 (2013).

The RTKL thus "demonstrate a legislative purpose of expanded government transparency through public access to documents." Barnett v. Pennsylvania Department of Public Welfare, 71 A.3d 399, 403 (Pa. Cmwlth. 2013). As a result, "courts should liberally construe the RTKL to effectuate its purpose of promoting 'access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.'" Levy, 619 Pa. at 618-619, 65 A.3d at 381 (quoting Allegheny County Dept. of Admin. Services v. A Second Chance, Inc., 13 A.3d 1025, 1034 (Pa. Cmwlth. 2011)). Section 102 defines a public record as any "document, paper ... tape ... or ... information stored or maintained electronically and a data-processed or image-processed document" that is not (a) exempt from disclosure under RTKL Section 708 or any other federal or state law or regulation or judicial order or decree, or (b) protected by some privilege. 65 P.S. § 67.102. Further, the RTKL defines "financial records" as

Any of the following:

(1) Any account, voucher or contract dealing with:

- (i) the receipt or disbursement of funds by an agency; or
- (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.

(2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.

(3) A financial audit report. The term does not include work papers underlying an audit.

65 P.S. § 67.102. See also, Department of Public Welfare v. Eiseman, 633 Pa. 366, 125 A.3d 19 (Pa. 2015) (“financial records” must be read broadly to encompass records “dealing with” the disbursement of funds and acquisition of services); Pennsylvania State University v. State Employees’ Retirement Board, 594 Pa. 244, 935 A.2d 530, 534 (2007) (“[T]he term ‘account’ is to be broadly construed for the benefit of the public, encompassing, at minimum, the Commonwealth’s financial records of debit and credit entries, as well as monetary receipts and disbursements.”); LaValle v. Office of General Counsel, 564 Pa. 482, 769 A.2d 449, 456 (2001) (“[T]he [RTKL] reaches some class of materials that are not facially accounts, vouchers, contracts, minutes, orders or decisions. The general constraint upon this expanded class that became relevant in N. Hills News Record v. Town of McCandless, 555 Pa. 51, 722 A.2d 1037, 1039 (Pa. 1999)] was that the party seeking to inspect government records must establish some close connection between one of the statutory categories and the materials sought.”).

“Under the [RTKL] agency records are presumed to be public records, accessible for inspection and copying by anyone requesting them, and must be made available to a requester unless they fall within specific, enumerated exceptions or are privileged.” 65 P.S. § 67.305(a); Bowling, 621 Pa. 133, 140, 75 A.3d 453, 457. No such presumption exists if the records are: (1) exempt under one of the thirty listed exceptions in section 708 of the RTKL; (2) protected by a privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. § 67.305(a). “[C]ourts should liberally construe the RTKL to effectuate its purpose of promoting ‘access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public

officials accountable for their actions.” Levy, 619 Pa. at 618-619, 65 A.3d at 381 (quoting Allegheny County Dept. of Admin. Services v. A Second Chance, Inc., 13 A.3d 1025, 1034 (Pa. Cmwlth. 2011)). See also, Office of Governor v. Scolforo, 65 A.3d 1095, 1100 (Pa. Cmwlth. 2013) (“Exemptions from disclosure must be narrowly construed due to the RTKL’s remedial nature”). When invoking an exception to disclosure the “agency bears the burden of proving, by a preponderance of the evidence, that a record is exempt from disclosure under one of the enumerated exceptions.” 65 P.S. § 67.708(a)(1); Brown v. Pennsylvania Department of State, 123 A.3d 801, 804 (Pa. Cmwlth. 2015).

“A preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry.” Delaware County v. Schaefer ex rel. Philadelphia Inquirer, 45 A.3d 1149, 1156 (Pa. Cmwlth. 2012). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” Pa. State Troopers Ass’n v. Scolforo, 18 A.3d 435, 439 (Pa. Cmwlth. 2011) (quoting Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd., 5 A.3d 821, 827 (Pa. Cmwlth. 2010)). Finally the “burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” Hodges v. Pa. Dep’t of Health, 29 A.3d 1190, 1192 (Pa. Cmwlth. 2011). An agency is not, however, required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record. 65 P.S. § 67.705; Commonwealth Dep’t of Ervtl. Prot. v. Cole, 52 A.3d 541, 547 (Pa. Cmwlth. 2012).

II. Principles of statutory construction

The questions presented here require the Court to engage in statutory interpretation to properly apply the RTKL to the requested records in light of the County's assertions that they are protected from disclosure by statute. The Statutory Construction Act, 1 Pa. C.S. §§ 1501–1991, recognizes that the objective of all interpretation is to ascertain and effectuate the General Assembly's intent. 1 Pa. C.S. § 1921(a). “[W]e must accept that when the General Assembly selects words to use in a statute, it has chosen them purposefully.” Commonwealth v. Scolieri, 571 Pa. 658, 813 A.2d 672, 673 (2002) (citing 1 Pa. C.S. § 1921(b)). A statute's plain language generally provides the best indication of legislative intent. 1 Pa. C.S. § 1921(b). However, if the words of the statute are not free from ambiguity, the intention of the General Assembly may be ascertained by considering, *inter alia*, the occasion and necessity for the statute, the object or policy goals to be obtained, and the consequences of a particular interpretation. 1 Pa.C.S. § 1921(c).

Under the Statutory Construction Act, where the words or phrases at issue are undefined by the statute itself, we must construe the words and phrases according to their plain meaning and common usage. 1 Pa. C.S. § 1903. Our Supreme Court has explained that “[g]enerally, words and phrases are construed according to their common usage, and technical words and phrases that have acquired peculiar and appropriate meaning are accorded that meaning.” Coleman v. W.C.A.B., 577 Pa. 38, 44, 842 A.2d 349, 353 (2004). See also, Takacs v. Indian Lake Borough, Zoning Hearing Bd., 18 A.3d 354, 357 (Pa. Cmwlth. 2011).

III. Application of the RTKL

DeBartola sought access to the monthly reports filed with the County Controller by District Attorney Kelly Callihan (Callihan), related to the drug forfeiture account managed by

the Office. The County and Office argues that these records are not public records under section 305(a) as they are either exempt from disclosure under state law or are within one of section 708's enumerated exceptions. Specifically, the County argues that the monthly reports are: protected by statute as investigative records, 18 Pa. C.S. § 9106; the underlying records utilized to prepare the annual audit required by the CSFA and are thus protected by CSFA, 42 Pa. C.S. §§ 6801-6802; are protected by the RTKL's criminal investigation exception, 65 P.S. 67.708(b)(16); and are protected by the RTKL's noncriminal investigation exception, 65 P.S. 67.708(b)(17). DeBartola argues that none of these exceptions are applicable to the records sought. In its Final Determination the OOR concluded that the County had failed to establish that the CSFA applied and that the records were subject to disclosure under the RTKL.

A. Application of CHRIA

The County first argues that the monthly reports are exempt under the provisions of the Criminal History Record Information Act (CHRIA), 18 Pa. C.S. §§ 9101- 9183, as they contain criminal investigative information the release of which poses a risk to the safety of police officers, the public, and would disrupt ongoing criminal investigations.

Generally, CHRIA governs the collection, maintenance, dissemination, disclosure and receipt of criminal history record information. As a matter of law, CHRIA prohibits disseminating "investigative information" to any persons or entities other than criminal justice agents and agencies. 18 Pa. C.S. § 9106(c)(4). Section 9106(c)(4) of CHRIA provides:

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 which requests the information in connection with its duties, and the request is based upon a name, fingerprints, modus operandi, genetic typing, voice print or other identifying characteristic.

18 Pa. C.S. § 9106(c)(4) (emphasis added). CHRIA defines “[i]nvestigative information” as “[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.” 18 Pa.C.S. § 9102. The County argues that the monthly reports and underlying records are investigatory records as they contain details of police drug investigations including, but not limited to: dates and times of controlled buys; identities of suspects; identities of confidential informants (CI); identities of undercover officers; descriptions of unmarked surveillance vehicles; surveillance methods and equipment; and descriptions of buy money including serial numbers.

The mere fact that a record has some connection to a criminal proceeding does not automatically exempt it under the CHRIA or the RTKL. Pennsylvania State Police v. Grove, 119 A.3d 1102, 1108 (Pa. Cmwlth. 2015) (Grove I), *affirmed in part, reversed in part*, 640 Pa. 1, 161 A.3d 877; 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 our courts have held protected from RTKL disclosure pursuant to CHRIA as investigative records, 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 v. Pennsylvania State Police, 93 A.3d 911, 912 (Pa. Cmwlth. 2014) (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).

The records at issue are financial records detailing transactions related to the drug forfeiture accounts. Callihan states that among these records are "account statements, deposits, checks or disbursements, and monthly reports maintained or prepared by [the] Office relative to drug forfeiture accounts." Cam. Co. Mem. in Supp. Sum. Relief Ex. A p. 2. These records are not created as part of the investigation but rather detail the use of funds forfeited to the Office. The Office has not explained the rationale for including detailed investigatory information in these records where the best practice may be a notation in the financial record linking it to a specific, and separate, criminal investigation file. Further, there is no indication that the monthly reports contain the same level of information as the underlying records. The questionable inclusion of investigatory information in some of the records does not convert them from financial to investigatory records. Instead they remain financial records that contain investigatory materials that are ancillary to the primary purpose of the record which is to detail financial transactions.

While the investigatory information within the records is protected by the CHRIA, and as discussed *infra* the RTKL, the mere inclusion of this information does not convert the nature of the records from financial to investigative or preclude their release in a redacted form. Our Supreme Court recently addressed the question of whether the inclusion of CHRIA protected information and non-protected information in a single non-investigatory record precludes the release of the record. In Pennsylvania State Police v. Grove, 640 Pa. 1, 161

A.3d 877 (2017) (Grove I), an individual requested motor vehicle recordings (MVRs) from the Pennsylvania State Police (PSP). The PSP denied the request and argued that disclosing MVRs violated CHRIA. Our Supreme Court disagreed in part. It noted that MVRs “are created when a light or siren is activated, and capture many events, including routine traffic stops, patrol vehicle travel[,] and any other event a state trooper deems appropriate to record.” Id. at 29, 161 A.3d at 895 (citation omitted). Thus, MVRs “are created in many instances that plainly do not involve criminal activity, and may ultimately be used in civil proceedings, administrative enforcement[,] and disciplinary actions.” Id. (citation omitted). Our Supreme Court held that “the question of whether information captured on a particular MVR is to be excluded from public access under CHRIA must be determined on a case-by case basis.” Id. (footnote omitted).

Ultimately, our Supreme Court determined that the video portions of the MVRs were not investigative information protected by CHRIA as MVRs are not solely created for investigative purposes; however, the audio portions of the MVRs were investigative information protected by CHRIA because they contained recordings of witness interviews. Id. The Court authorized the release of the video portions of the MVRs but required the audio portions to be redacted. Id. The Court concluded that redacting the audio portions of the recording was consistent with section 706 of the RTKL, 65 P.S. § 67.706, and did not constitute the creation of a new record under RTKL section 705. 65 P.S. § 67.705. Grove II draws a distinction between records that are investigatory in nature, *i.e.* records that are created for the purpose of or during a criminal investigation, and non-investigatory records, *i.e.* records that are created for some purpose other than a criminal investigation, but that contain some investigatory information. Grove I establishes that investigatory records are

shielded from the RTKL by CHRIA while a non-investigatory record that contains both CHRIA protected information and non-protected information within the record is subject to release with the protected material redacted.

Here the financial records at issue are not created as part of an investigation. Instead they reflect account statements, deposits, checks or disbursements, and monthly reports maintained or prepared by the Office relative to drug forfeiture accounts that are created in many instances unrelated to criminal activity and, as such, they bear only a tangential connection to the criminal investigations. Indeed the account statements, checks, disbursements, and monthly reports will also reflect funding of various law enforcement activities from the funds including: purchasing vehicles for use by undercover officers; purchasing equipment for undercover investigations and local law enforcement departments; funding patrols in high drug areas; community based police initiatives; training for local law enforcement departments; funding community based prevention programs; funding to support county wide drug awareness initiatives; and housing CIs and witnesses. Cam. Co. Mem. in Supp. Sum. Relief Ex. A ¶ 6.

Again, it is unclear which records are in possession of the County via the Controller's Office, as the joint brief is unclear on this point, but no investigative records or investigative information should be in the Controller's care. The Office would be in violation of the CHRIA if they shared any investigative information with the Controller which is not a criminal justice agency as defined in the CHRIA. 18 Pa. C.S. § 9106(c)(4). Further, as discussed *infra*, both the forfeiture act, 42 Pa. C.S. §§ 6801(j), 5803(k), and the related OAG guidance are clear no investigative materials should be shared with the Controller as doing so may jeopardize drug enforcement activities. Cam. Co. Mem. in Supp. Sum. Relief Ex. K

unnumbered pp.2, 3 ¶¶ I. B, III. C. Accordingly, the records in the Controller's care are financial records that may contain some investigative materials and, consistent with Grove II, they are subject to release with the investigatory material redacted. In his briefs and at argument DeBartola has indicated that he is not interested in the investigative material and agreed that it should be redacted from the records.

Finally, the County has offered no evidence showing that the monthly reports requested in this matter were primarily generated as part of an investigation. The only evidence related to records that are investigative records is found in the sworn attestation of Thomas Owens (Owens), the County's Chief Detective and the Field Supervisor of the Cambria County Drug Task Force, which was filed on October 12, 2017, in the companion case DeBartola v. Cambria County District Attorney's Office, 2018-0095 (DeBartola II).

Owens's attestation is limited to the records requested in DeBartola II as noted in the heading of the attestation which indicates it was filed in regard to "APPEAL DOCKET NO.: AP 2017-1713" which is the OOR docket number in that matter. The limited nature of Owens attestation is evident in the document itself which, in part, reads

3. The records withheld from the above-captioned Right-to-Know-Request are work reports and confidential informant/case expense sheets maintained by Cambria County Drug Task Force officers which, in addition to the notation of how much buy money was spent in a particular case, contain the following:

- a. Identification of confidential informants;**
- b. Dates and times of drug transactions;**
- c. Identification of undercover law enforcement officers and their assignments;**
- d. Identification of law enforcement equipment;**
- e. Identification of undercover vehicles and surveillance locations;**
- f. Specific delineations of currency used in drug transactions;**
- g. Specific descriptions of controlled substances purchased – including details of packaging equipment;**
- h. Synopsis of undercover law enforcement officers' work during drug transaction;**

- i. Whether search warrants were executed and the specific location that was searched;
- j. Receipts from purchases identifying dates, times and locations of drug transactions and locations of confidential informants;
- k. Subject or target of investigation;
- l. Type of detail being performed by law enforcement;
- m. Description of evidence seized during drug transaction.

Cam. Co. Mem. in Supp. Sum. Relief Ex. B ¶ 3 (emphasis added). Owens continued that releasing this information would jeopardize investigations, officer safety, and public safety by, *inter alia*, identifying confidential informants and undercover officers exposing them to retaliation by drug dealers. Id. ¶ 4. As Owens' attestation does not relate to the records sought here the Office has failed to establish monthly reports are shielded by CHRIA.³ The Court concludes that the records sought here are non-investigative financial records as evidence by the language of DeBartola's request and paragraphs 5, 6, 7, 8, and 9 of Callihan's attestation.

Cam. Co. Mem. in Supp. Sum. Relief Ex. A.

Accordingly, the Court concludes that the monthly reports and underlying financial records are not investigative records protected from release by the CHRIA but rather are subject to release under Grove II, unless protected by the CSFA or the RTKL as discussed *infra*, subsequent to the redaction of any investigative material to include but not limited to: dates and times of controlled buys; identities of suspects; identities of CIs; identities of undercover officers; descriptions of unmarked surveillance vehicles; surveillance methods and equipment; and descriptions of buy money including serial numbers but not the amounts of the transactions.

³ As discussed in DeBartola II the work reports and confidential informant/case expense sheets that are the subject of Owens' attestation are protected by CHRIA.

B. Application of CSFA

The County argues that in addition to being shielded from release by the CHRIA, the release of the monthly reports and the financial records are protected by the CSFA which bars the release of statutorily mandated annual audit of the drug forfeiture account. The Court notes that section 6801 of the CSFA, 42 Pa. C.S. §§ 6801 (i) and (j), relied on by the County was repealed and replaced on July 1, 2017, with section 5803 governing asset forfeiture. 42 Pa. C.S. §§ 5803 (j) and (k). The amendments were made in response to growing concerns over the existing forfeiture laws and are intended to increase reporting requirements and oversight of the forfeiture process while affording greater protections to defendant's in forfeiture actions. See, <https://www.governor.pa.gov/governor-wolf-signs-civil-asset-forfeiture-reform-bill-into-law/>; <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20170&cosponId=21223>; <https://www.aclupa.org/issues/forfeiture>. While this action was filed when the CSFA was in effect, the analysis under either provision is the same as the controlling language is identical with the new asset forfeiture statute adding additional reporting requirements.

Sections 6801(i) and 5803(j) require each county, through the controller and district attorney, to conduct an annual audit of all drug related forfeited property and to provide the audit to the OAG by September 30 of each year. 42 Pa. C.S. §§ 6801(i), 5803(j). In addition these sections provide that the audit "shall not be made public." *Id.* Sections 6801(j) and 5803(k) require the OAG to submit an annual report to the Legislature specifying the forfeited property or proceeds thereof based on the audits provided by the various counties. 42 Pa. C.S. §§ 6801(j), 5803(k). In addition, sections 6801(j) and 5803(k) require the OAG to adopt

procedures and guidelines governing the release of information by the district attorney to protect the confidentiality of forfeited property or proceeds used in ongoing drug enforcement activities. *Id.* In its Final Determination the OOR concluded that section 6801(j) did not preclude the release of the audit based on prior OOR decisions and the failure of the Office to provide any guidelines promulgated by the OAG.

The County has provided the OAG guidelines issued in 2007 as part of their Petition and Motion for Summary Relief and, while the guidance may need updating in light of the passage of section 5803, the current version provides guidance to the Commonwealth's district attorneys and county controllers as to the release of information related to drug forfeitures. The OAG guidelines require that district attorneys or controllers, in addition to the statutorily required audit, provide the OAG with a report in a format generated by the OAG. Cam. Co. Mem. in Supp. Sum. Relief Ex. K. This additional report is a "general in/out accounting of forfeited and sold/used property along with a categorization of expenses. Any income placed into the district attorney's drug fund(s) shall be noted in the report." *Id.* K. unnumbered p. 2 Sec. III. B. The purpose of the report appears to be to provide the OAG with the information necessary to complete its annual report in a uniform manner from all 67 counties. The guidance is clear that the report is required in addition to the annual audit.

The guidance instructs district attorneys to provide the controller and auditor with the information necessary to complete the audit excepting any information that, in the district attorney's judgment, may jeopardize drug enforcement activities. *Id.* K. unnumbered p. 2 Sec.

III. C. The guidance further provides that

The district attorney may release all other forfeiture matters which will not jeopardize drug enforcement activities in his/her county or in any other county. At the discretion of the district attorney their respective annual report may be

published only after the Attorney General delivers the cumulative report to the Legislature.

Id. K. unnumbered p. 3 Sec. III.C.5. In addition to the OAG's guidance, the County provided letters sent March 30, 2007, from the OAG to the Berks County District Attorney and the Beaver County Controller providing further guidance. Id. K. unnumbered pp. 10-13. The letters contain identical language and advise, *inter alia*, that the OAG use the reports provided by the counties to compile its annual report for the Legislature and that "[t]he Office of Attorney General has taken the position that the report and the audit are two different documents. The audit, by statute, is to remain confidential." Id.

The OAG's guidance comports with the statutory language that shields only the annual audit from public release and not any other records related to drug forfeiture accounts including the OAG's aggregate annual report. See, 42 Pa. C.S. §§ 6801(i), 5803(j) ("The audit shall not be made public but shall be submitted to the Office of Attorney General."). Neither section 6801(i) nor section 5803(j) contains language authorizing the release of the annual audit at any time and thus the audit is exempt from disclosure under the RTKL pursuant to both definition of public record contained in section 102 and the exclusionary language of section 305 which exempts records protected from disclosure by statute. Accordingly, the annual audit is not subject to release under the RTKL and may not be voluntarily released by the Controller or Office.

Neither section 6801(i) nor section 5803(j) contains any provision protecting records other than the annual audit from disclosure. Sections 6801(i) and 5803(j) provide, in part, that "[t]he audit shall not be made public but shall be submitted to the Office of Attorney General." 42 Pa. C.S. §§ 6801(i), 5803(j). This language limits the protection to only the audit and not any other financial records related to the forfeiture accounts. Had the Legislature

intended to prevent the release of any records related to the forfeiture accounts they would have used language indicating such intent. As such the limited protection of these sections does not extend to other financial records related to the forfeiture accounts including, but not limited to: account statements; deposit records; checks or disbursements; audits conducted that are not the required annual audit; the monthly reports maintained or prepared by Office relative to drug forfeiture accounts submitted to the County Controller; and the OAG's annual report. Further, as noted in the OAG guidance, the annual report required by the OAG is not protected from disclosure and may be released by a district attorney at their discretion. That these reports are public records is clear from the OAG guidance as demonstrated by the recent decision of the District Attorney of Centre County to make available to the public all OAG forfeiture reports from 2014 to the present. See,

<http://centrecountypa.gov/index.aspx?NID=899>;

<https://www.centredaily.com/news/local/crime/article216887515.html>. Accordingly, unless protected by a section 708 exception, as discussed *infra*, the monthly reports prepared by the Office and submitted to the Controller are public records that, subject to redaction as discussed *supra*, are required to be released under the RTKL.

C. Section 708 exceptions

Section 708(b) of the RTKL provides 30 enumerated exceptions to the release of records that are otherwise public records as defined in section 102. 65 P.S. § 67.708(b). The County argues that the records sought by DeBartola are exempted under section 708(b)(16)'s criminal investigation provision and section 708(b)(17)'s noncriminal investigation provision.

Section 708(b)(16) exempts

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.

65 P.S. § 67.708(b)(16).

Section 708(b)(17), in part, exempts

A record of an agency relating to a noncriminal investigation, including:

- (i) Complaints submitted to an agency.
- (ii) Investigative materials, notes, correspondence and reports.
- (iii) A record that includes the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L. 1559, No. 169), known as the Whistleblower Law.
- (iv) A record that includes information made confidential by law.
- (v) Work papers underlying an audit.
- (vi) A record that, if disclosed, would do any of the following:
 - (A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.
 - (B) Deprive a person of the right to an impartial adjudication.
 - (C) Constitute an unwarranted invasion of privacy.
 - (D) Hinder an agency's ability to secure an administrative or civil sanction.
 - (E) Endanger the life or physical safety of an individual.

65 P.S. § 67.708.

As discussed in Part I, our Supreme Court has directed the courts of the Commonwealth to "liberally construe the RTKL to effectuate its purpose of promoting 'access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions.'" Levy, 619 Pa. at 618-619, 65 A.3d at 381 (quoting Allegheny County Dept. of Admin. Services v. A Second Chance, Inc., 13 A.3d 1025, 1034 (Pa. Cmwlth. 2011)). Further, "[e]xemptions from disclosure must be narrowly construed due to the RTKL's remedial nature". Scolforo, 65 A.3d 1095, 1100. When invoking an exception to disclosure the "agency bears the burden of proving, by a preponderance of the evidence, that a record is exempt from disclosure under one of the enumerated exceptions." 65 P.S. § 67.708(a)(1). "Preponderance of the evidence has been defined as "such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence." Pa. State Troopers Ass'n v. Scolforo, 18 A.3d 435, 439 (Pa. Cmwlth. 2011) (quoting Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd., 5 A.3d 821, 827 (Pa. Cmwlth. 2010)).

D. Application of section 708(c)

Although not addressed by either party, section 708(c) of the RTKL is controlling as to the protection afforded by the RTKL to financial records, such as those at issue here.

Section 708(c) provides that

The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17). An agency shall not disclose the identity of an individual performing an undercover or covert law enforcement activity.

65 P.S. § 67.708(c). Section 102 of the RTKL defines "financial records" as

Any of the following:

(1) Any account, voucher or contract dealing with:

- (i) the receipt or disbursement of funds by an agency; or
- (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.

(2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.

(3) A financial audit report. The term does not include work papers underlying an audit.

65 P.S. § 67.102. Our Supreme Court has explained that "financial records" must be read broadly to encompass records "dealing with" the disbursement of funds and acquisition of services. Department of Public Welfare v. Eiseman, 633 Pa. 366, 125 A.3d 19 (Pa. 2015). See also, City of Harrisburg v. Prince, 186 A.3d 544, 554-55 (Pa. Cmwlth. 2018) ((records relating to the actual receipt and disbursement of privately donated nongovernmental funds by a city into and from a city account are "financial records" for purposes of the RTKL; documents unrelated to the foregoing financial transactions are not "financial records" and are subject to exemption)). Further, "the term 'account' is to be broadly construed for the benefit of the public, encompassing, at minimum, the Commonwealth's financial records of debit and credit entries, as well as monetary receipts and disbursements." Pennsylvania State University v. State Employees' Retirement Board, 594 Pa. 244, 935 A.2d 530, 534 (2007).

Here the records sought are clearly financial records as they deal with the Office's drug forfeiture account in the form of monthly reports prepared by Office relative to drug forfeiture accounts and submitted to the County Controller to use in preparing the annual audit. As discussed in Part III A *supra*, the inclusion of criminal investigative information in some of these records does not transform them from financial records to criminal records.

Indeed section 708(c) recognizes that some financial records may contain criminal investigative information by specifically authorizing the redaction of those portions of a financial record protected under subsections (b) (16) or (17) and by prohibiting the disclosure of the identity of any individual performing an undercover or covert law enforcement activity. 65 P.S. § 67.708(c). This redaction authorization is in addition to section 706 that expressly requires an agency to redact information not subject to public access from a public record. 65 P.S. § 67.706 ("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.... The agency may not deny access to the record if the information which is not subject to access is able to be redacted.").

Section 708(c) acts as a savings clause to shield financial records, like the monthly report, from being exempted from disclosure for any of the 30 exemptions contained in section 708 and instead requires their release to the public subject to redaction. Accordingly, the monthly reports sought by DeBartola related to the drug forfeiture account are not subject to either the section 708(b)(16) or (b)(17) exemptions and must be disclosed subsequent to the necessary redactions. The annual audit is not covered by the section 708(c) saving provision as it is not a public record as defined in section 102 since it is shielded from release by another statute and is thus not subject to release under the RTKL.

E. Application of section 708(b)(16)

As discussed in Part III D *supra*, section 708(c) removes the financial records sought from the 708(b)(16) exemptions, however, even in the absence of 708(c) the monthly reports

would not be exempt under (b)(16). The (b)(16) applies only to records related to or resulting in a criminal investigation, here the financial records sought may broadly be categorized as relating to a criminal investigation given the amount of criminal investigative information the Office includes in some of them, although it is unclear how much investigative information is in the monthly reports. However, section 706 provides that

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 (emphasis added). Here the records sought are public records as defined by section 102 and thus the County cannot deny access merely because some information contained within them is protected by section 708(b)(16). Instead the County must redact any nonpublic information and provide the redacted records. See, Grove II, 640 Pa. 1, 161 A.3d 877; Department of Corrections v. St. Hilaire, 128 A.3d 859, 866 (Pa. Cmwlth. 2015) (fact that public records contained some exempt medical information did not transform records into non-public records; records can be redacted to exclude exempt information under Section . 706).

F. Application of section 708(b)(17)

Similarly, even in the absence of section 708(c) section 708(b)(17) would not exempt the release of the records since section 706 would require the redaction and release of the records. Even the absence of section 706 would not exempt the records since the (b)(17)

exemptions apply only to records relating to a noncriminal investigation and the Office has not established that the records at issue are the result of such an investigation.

In the absence of definitions in the RTKL for either "noncriminal" or "investigation," our courts have concluded that "noncriminal" applies to investigations other than those which are criminal in nature and that "investigation" means "a systematic or searching inquiry, a detailed examination, or an official probe." Department of Health v. Office of Open Records, 4 A.3d 803, 810-811 (Pa. Cmwlth. 2010). For the County to assert successfully the noncriminal investigation exemption, it must as a threshold matter have authority to conduct the investigation at issue. Compare Department of Pub. Welfare v. Chawaga, 91 A.3d 257, 259 (noncriminal investigation exemption did not preclude disclosure of DPW performance audit report as "DPW's performance audit was not part of the DPW's legislatively granted fact-finding or investigative powers."), and Coulter v. Dep't of Pub. Welfare, 65 A.3d 1085, 1089-1090 (Pa. Cmwlth. 2013) (records pertaining to DPW's official probe of county children and youth services are within noncriminal investigation exemption as DPW possessed statutory and regulatory authority to investigate children and youth social service agencies, and its investigation was carried out pursuant "to DPW's duty to investigate complaints to determine whether an agency is compliant with applicable laws and its power to compel acceptable plans of correction."). Thus the inquiry, examination, or probe must be "conducted as part of the agency's official duties." Department of Health, 4 A.3d at 814; Chawaga, 91 A.3d at 259 (holding that, an official probe must be conducted pursuant to an agency's legislatively granted fact-finding and investigative powers). "[T]he agency asserting the [exemption] must show that a searching inquiry or detailed examination was undertaken as part of an agency's official duties. Stating that an investigation occurred ... does not

suffice." Pennsylvania Department of Education v. Bagwell; 131 A.3d 638, 659-60 (Pa. Cmwlth. 2015) (citations omitted).

Here the records sought relate to the County Controller's preparation of the annual audit an act within that office's authority. While the compilation of the audit is within the duties of the Controller, the records sought are not exempted by section 708(b)(17). Contrary to the County's position, section 708(b)(17)(v) does not provide an exemption for a record that has been reviewed or utilized by a controller or an auditor conducting a routine audit. Section 708(b)(17)(v) provides that where a noncriminal investigation occurs the "work papers underlying an audit" are exempt from disclosure. 65 P.S. § 67.708 (b)(17)(v). The County broadly reads this exemption to apply to any records reviewed by an auditor. However such a reading would carve out a significant exemption that would be contrary to the "legislative purpose of expanded government transparency through public access to documents." Barnett, 71 A.3d 399, 403. As discussed *supra* we are to narrowly construe the exemptions contained in section 708 and the reading suggested by the County would exempt all financial records that were reviewed as part of an audit. Given that agencies conduct routine annual financial audits the Office's position would shield practically every agency in the Commonwealth's financial records from disclosure. Clearly this is contrary to the legislative intent of the RTKL.

In addition to the policy concerns generated by the County's position, application of the rules of statutory construction demonstrate the fallacy of this position. The Statutory Construction Act requires that where the words or phrases of a statute are undefined by the statute itself, we must construe the words and phrases according to their plain meaning and common usage and that technical words and phrases that have acquired peculiar and

appropriate meaning are accorded that meaning. 1 Pa. C.S. § 1903. See also, Coleman v. W.C.A.B., 577 Pa. 38, 44, 842 A.2d 349, 353 (2004) (“[g]enerally, words and phrases are construed according to their common usage, and technical words and phrases that have acquired peculiar and appropriate meaning are accorded that meaning.”). The phrase “work papers underlying an audit” is a term of art within the auditing profession and must be interpreted consistent with the meaning afforded by that profession since the RTKL does not define the term.

In defining the term we first look for guidance to other areas of Pennsylvania law. The Insurance Code defines “workpapers” as

Workpapers are the records kept by an independent certified public accountant of the procedures followed, the tests performed, the information obtained and the conclusions reached pertinent to audit of the financial statements of an insurer. For purposes of this chapter, workpapers include audit planning documentation, audit programs, permanent files, internal control and electronic data processing questionnaires, analyses, memoranda, letters of confirmation and representation, abstracts of company documents and schedules or commentaries which are prepared or obtained by the independent certified public accountant in the course of the independent certified public accountant’s audit of the financial statements of an insurer and which support the opinion thereon.

31 Pa. Code § 147.11 (emphasis added). Further, the Auditors Guide prepared by the Governor’s Center for Local Government Services defines audit work papers as

The handwritten or typed records, lists and schedules that show the auditing work itself. Specifically, they show how the audit examination supports figures included in the published Concise Financial Statement and in the Annual Audit and Financial Report submitted to DCED. Work papers should be kept as official records by the auditors because they indicate the extent of their work, and are the property of the auditors. They may be considered evidence in court proceedings.

Pa. Gov.’s Ctr, for Loc. Gov. Svcs. Auditors Guide (12th ed. 2017) (emphasis added). Finally, Black’s Law Dictionary defines working papers, in pertinent part, as “[t]he records kept by an

independent auditor of the procedures followed, tests performed, information obtained, and conclusions reached in an audit." Black's Law Dictionary (10th ed. 2014) (emphasis in original). These definitions show that "work papers" are not documents provided by the auditee but rather constitute the work product of the auditors consisting of the auditor's notes and other records showing how the audit was conducted. This is consistent with section 9.11 of the CPA Law which provides that working papers are the property of the auditor. 63 P.S. § 9.11. If all the records reviewed by an auditor were work papers, then an agency's records would, once the audit was completed, no longer be the property of the agency resulting in an absurd situation.

Turning to the definition utilized within the auditing profession requires a review of the sources establishing the standards of the profession. In Pennsylvania auditors are required to "comply with other technical standards promulgated by bodies of the [American Institute of Certified Public Accountants (AICPA)], [Public Company Accounting Oversight Board (PCAOB)] or other recognized authorities designated to establish the standards." 49 Pa. Code § 11.27(b). Further, auditors are to comply "with applicable [Generally Accepted Auditing Standards (GAAS)]. Statements on auditing standards issued by the AICPA or other pronouncements having similar generally recognized authority are considered to be interpretations of GAAS." Id.

The AICPA standards define workpapers within the category of audit documentation as "[t]he record of audit procedures performed, relevant audit evidence obtained, and conclusions the auditor reached (terms such as working papers or workpapers are also sometimes used)." AICPA AU-C § 230.06. The AICPA standards state that the "auditor should prepare audit documentation that is sufficient" to permit review or completion of the

audit by an auditor with no prior connection to the audit. AICPA AU-C § 230.08. Similarly the PCAOB standards define audit documentation as

Audit documentation is the written record of the basis for the auditor's conclusions that provides the support for the auditor's representations, whether those representations are contained in the auditor's report or otherwise. Audit documentation also facilitates the planning, performance, and supervision of the engagement, and is the basis for the review of the quality of the work because it provides the reviewer with written documentation of the evidence supporting the auditor's significant conclusions. Among other things, audit documentation includes records of the planning and performance of the work, the procedures performed, evidence obtained, and conclusions reached by the auditor. Audit documentation also may be referred to as work papers or working papers.

PCAOB AS 1215.02. PCAOB AS 1215.04 requires that "auditors must prepare audit documentation" in connection with each audit consistent with PCAOB standards. PCAOB AS 1215.04. The Government Accountability Office's "Yellow Book," which sets standards and practices to be followed by auditors of government entities, is consistent with the AICPA and PCAOB standards in defining work papers as audit documentation created by the auditor as a record of the audit. See Gov. Auditing Stds. GAO12-331G §§ 6.79-6.83. These standards establish that the phrase "work papers underlying an audit" refers not to the records provided by an agency to their auditors but rather the documents generated by the auditors as they conduct the audit. As such even if routine audits could be viewed as noncriminal investigations the records provided by an agency to the auditor are not shielded from disclosure by section 708(b)(17)(v). Accordingly, even in the absence of section 708(e)'s exclusion of financial records from the section 708(b) exemptions, the monthly reports would be subject to release pursuant to a RTKL request such as was filed here.

For the foregoing reasons the following Order is entered:

IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA
CIVIL DIVISION

CAMBRIA COUNTY,

Petitioner,

vs.

JOHN DEBARTOLA,

Respondent.

No. 2017-2877

Petition for Judicial Review Under
Pennsylvania Right to Know Law

FILED FOR RECORD
2018 NOV 19 AM 11:23
PROTHONOTARY
CAMBRIA COUNTY, PENN.

ORDER

AND NOW, this 19 day of November 2018, for the reasons contained in the foregoing Opinion, it is hereby **ORDERED, DIRECTED, AND DECREED** that the Final Determination of the Office of Open Records entered to OOR docket number AP 2017-0534 is **AFFIRMED**.

It is **FURTHER ORDERED, DIRECTED, AND DECREED** that

- 1) The annual audit of the drug forfeiture accounts is not a public record and shall not be released.
- 2) Cambria County shall comply with the OOR Final Determination and this Opinion by providing the responsive documents, in redacted form where appropriate, within sixty (60) days.

BY THE COURT:


Norman A. Krumenacker, III, P.J.