



DISTRICT ATTORNEY'S OFFICE OF CHESTER COUNTY
201 WEST MARKET STREET, SUITE 4450
POST OFFICE BOX 2746
WEST CHESTER, PENNSYLVANIA 19380-0989

TELEPHONE: 610-344-6801
FAX: 610-344-5905

IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
NATASHA HENRY,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
	:	
PHOENIXVILLE BOROUGH	:	DA-RTKL-A NO. 2019-002
POLICE DEPARTMENT,	:	
Respondent	:	
	:	

INTRODUCTION

On January 14, 2019, Requester, Natasha Henry, filed a right-to-know request with the Respondent, the Phoenixville Police Department, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, et. seq.. On January 22, 2019, the request was denied. On January 24, 2019, Requester appealed to the Office of Open Records. On April 3, 2019, the Office of Open Records transferred the

appeal to the Chester County District Attorney's Office [AP 2019-0099], which was received on April 17, 2019.

For the reasons set forth in this Final Determination, the appeal is **GRANTED** and the Respondent is required to take further action.

FACTUAL BACKGROUND

On January 14, 2019, the Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law, seeking: "Request Kevin B. Heck ... arrests and conviction records within last 10 years." On January 22, 2019, the request was denied. The Respondent stated in part as follows:

The Phoenixville Borough Police Department arrest and conviction records are exempt from public record. As such accordance with "Public Records" per 65 P.S. § 67.708(b) of the Right to Known Law and your request for a copy of any arrest or conviction records is denied.

January 22, 2019 Letter of Lieutenant Brian Marshall.

On January 24, 2019, Requester appealed to the Office of Open Records. On April 3, 2019, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office [AP 2019-0099], which was received on April 17, 2019. On April 17, 2019, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

On January 14, 2019, Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know

Law (“RTKL”), 65 P.S. § 67.101, *et. seq.*. On January 22, 2019, the request was denied. On January 24, 2019, Requester appealed to the Office of Open Records. On April 3, 2019, the Office of Open Records transferred the appeal to the Chester County District Attorney’s Office [AP 2019-0099], which was received on April 17, 2019.

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 April 17, 2019, which is May 17, 2019.** 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 Respondent should submit its response, if any, on or before April 26 2019.

The Respondent should note: The Supreme Court 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). **Merely citing exceptions to the required disclosure of public records or conclusory statements are not sufficient to justify the exemption of public records.** Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013).

The Requester should submit its response, if any, on or before May 3, 2019.

The Requester should note: The Commonwealth Court 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).

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.

April 17, 2019 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

Neither the Respondent nor Requester filed anything in response to the April 17, 2019 Letter of this Appeal Officer. Consequently, this appeal will be decided on the record as transferred from the Office of Open Records.

LEGAL ANALYSIS

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

record.”). The Phoenixville Borough Police Department, Respondent, is a local agency subject to the RTKL that is required to disclose public documents. 65 P.S. § 67.302.

Records of a local agency are presumed “public” unless the record: (1) is exempt under 65 P.S. § 67.708(b); (2) is protected by privilege; or (3) is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. § 67.305. “Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree.” 65 P.S. § 67.306.

The Respondent bears the burden of proving, by a preponderance of the evidence, that the document requested is exempt from public access. 65 P.S. § 67.708(a)(1). A preponderance of the evidence standard is the lowest evidentiary standard. The preponderance of evidence standard is defined as the greater weight of the evidence, *i.e.*, to tip a scale slightly is the criteria or requirement for preponderance of the evidence. Commonwealth v. Brown, 567 Pa. 272, 284, 786 A.2d 961, 968 (2001), *cert. denied*, 537 U.S. 1187, 123 S.Ct. 1351, 154 L.Ed.2d 1018 (2003). “A ‘preponderance of the evidence’ is defined as ‘the greater weight of the evidence ... evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side

of the issue rather than the other....’ Black’s Law Dictionary 1301 (9th ed. 2009).”
Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 n.3 (Pa. Cmwlth. 2010);
See also Commonwealth v. Williams, 532 Pa. 265, 284-286, 615 A.2d 716, 726
(1992) (preponderance of the evidence in essence is proof that something is more
likely than not).

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).

(17) 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), [43 P.S. § 1421 et seq.] 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.

(18) (i) Records or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.

(ii) This paragraph shall not apply to a 911 recording, or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure.

65 P.S. § 67.708(b).

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

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

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

On February 12, 2019, the Respondent submitted a response to the Office of Open Records, which included an affidavit from Thomas Sjostrom, Chief of Police of Phoenixville Borough Police Department. The Affidavit stated the following:

I, Thomas Sjostrom, hereby declare, pursuant to 18 Pa.C.S. § 4904, that the following statements are true and correct based upon my personal knowledge information and belief:

1. I serve as the Open Records Officer for Phoenixville Borough Police Dept. (“Agency”).
2. I am responsible for responding to Right-to-Know requests filed with the Agency.
3. In my capacity as the Open Records Officer, I am familiar with the records of the Agency.
4. On 01/14/19, we received the requester’s request for information pursuant to the Pennsylvania Right-to-Know Law. Upon receipt of the request, we conducted a thorough examination of files in the possession, custody and control of the Agency for records responsive to the request underlying this appeal.
5. Additionally, we have inquired with relevant Agency personnel and, if applicable, relevant third party contractors as to whether the requested records exist in their possession.
6. We denied the request because the information requested is exempt from public record. In accordance with “Public Records” per 65 P.S. 67.708 of the 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.***
7. On 01/22/19, we notified the requester that this request was denied and the reason for the denial of the request.
8. On or about 01/24/19, I received the Appeal which was received by OOR on 01/23/19.
9. A copy of this Attestation is being provided to the Appeals Officer, Jordan Davis, Esq by Email.
10. A copy of this Attestation is being provided to the Requester by First Class Mail Only.

Date: 02/12/19 Thomas S. Sjostrom Chief of Police
 Open Records Officer
 Borough of Phoenixville Police Department

Under the RTKL, an affidavit may serve as sufficient evidence to support an appeals officer's decision. Office of Governor v. Davis, 122 A.3d 1185, 1194 (Pa.Cmwlth. 2015); Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (affidavit suffices to establish nonexistence of records). In the absence of any evidence that a Respondent has acted in bad faith the averments in an affidavit should be accepted as true. McGowan v. Pa. Dep't of Env'tl. Prot., 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014); Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013).

In McGowan v. Pennsylvania Dep't of Env'tl. Prot., 103 A.3d 374, 381 (Pa. Cmwlth. 2014), the Commonwealth Court stated in part:

“Testimonial affidavits found to be relevant and credible may provide sufficient evidence in support of a claimed exemption.” Heavens v. Department of Environmental Protection, 65 A.3d 1069, 1073 (Pa. Cmwlth. 2013).

Affidavits are the means through which a governmental agency ... justifies nondisclosure of the requested documents under each exemption upon which it relied upon. The affidavits must be detailed, nonconclusory, and submitted in good faith.... Absent evidence of bad faith, the veracity of an agency's submissions explaining reasons for nondisclosure should not be questioned.

Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013) (en banc) (citation omitted).

McGowan v. Pennsylvania Dep't of Env'tl. Prot., at 381.

The February 12, 2019 Affidavit submitted is not detailed and is purely conclusory; merely citing an exception to the required disclosure of public records. “A generic determination or conclusory statements are not sufficient to justify the exemption of public records.” Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013).

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.

On January 23, 2019, the Requester submitted a response to the Office of Open Records. The Letter stated the following:

I submitted a written request to view Kevin Heck (contractor license #PA079217) past arrest and conviction records at the Borough of Phoenixville Police Department. This request was denied (see attachment letter from Lieutenant Brian Marshall). Mr. Heck performed work in my home exceeding costs of \$5000.00, caused property damages and has taken items from my home without my consent. Due to the stolen items, I am therefore petitioning an override of this decision. As a consumer / customer I have a right to know this contractor's past convictions and arrest as this was not made available. Had I known this, damages to my property and thief of my personal items would not have transpired.

I believe that Mr. Heck is in violation of the Home Improvement Consumer Protection Act 73 P.S. 517.4 (a) as it is a requirement to disclose convictions of a criminal offense related to a home improvement transaction, fraud, theft, a crime of deception or a crime involving fraudulent business practices. I believe that he failed to disclose his past convictions as required by law. Homeowners have the right to know if someone is distrustful before allowing that individual access to their home.

Mr. Heck has stolen both expensive collectibles to random household items such as my bathroom plunger. I believe that this man is a polished "con man" who likes to take advantage of home owners not versed in home repair issues or laws.

January 23, 2019 Letter of Natasha Henry (Requester).

Requester does not address the grounds stated by the agency for denying the request, but merely explains why she wants the records. It is also important to note that a requester's identity and motivation for making a request is not relevant, and his or her intended use for the information may not be grounds for granting or denying a request. *See* 65 P.S. § 67.301(b), 65 P.S. § 67.703. In DiMartino v. Pennsylvania State Police, 2011 WL 10841570 (Pa. Cmwlth. 2011), the Commonwealth Court, in a memorandum opinion,¹ stated in pertinent part:

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

¹ 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.

citizens regardless of personal status or stake in requested information).

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

In Hunsicker v. Pennsylvania State Police, 93 A.3d 911 (Pa. Cmwlth. 2014), Requester (Hunsicker) appealed a Determination of the Office of Open Records denying her request under the RTKL for access to Pennsylvania State Police records regarding an investigation surrounding her brother's death, which involved a State Trooper. In affirming the denial, the Commonwealth Court stated in part:

Requestor appealed the PSP's denial to the OOR contending that she lived with her brother for 35 years, that she was not a member of the general public but his sister, and that she should have special access to the information. The OOR denied her appeal because it failed to address agency grounds for denial of access and the appeal did not challenge the confidentiality of the records under CHRIA. This appeal followed.

On appeal, Requestor first contends that the materials she is requesting are referred to as an "incident" report, not an "investigative" report, implying that those records fall outside of the investigative exemption. An incident report normally refers to a report filed by the responding officers, not the entire investigative file, although, here, it appears that the investigative report was filed at the incident report number. In any event, no matter what is contained in an incident report, incident reports are considered investigative materials and are covered by that exemption. Pennsylvania State Police v. Office of Open Records, 5 A.3d 473, 479 (Pa. Cmwlth. 2010), *appeal denied*, [621] Pa. [685], 76 A.3d 540 (2013).

Even if the requested records fall within the investigative exception, Requestor contends that she is entitled to those

records because she has a special need for them because, as Mr. Rotkewicz's sister, she needs to know what her brother did to cause a PSP Trooper to shoot him and to investigate a possible PSP "cover up." While we are sympathetic to Requestor's desire to understand her brother's death, her status as his sister and her reasons for requesting the records do not render records that fall within the investigative exemption accessible. Under the RTKL, whether the document is accessible is based only on whether a document is a public record, and, if so, whether it falls within an exemption that allows that it not be disclosed. The status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b). *See* 65 P.S. § 67.301(b) (stating that an agency "may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law.").

As a corollary to this argument, Requestor contends that the investigative file should be made accessible because portions of the withheld documents are already known to her, and that if any of the record contains information that falls within an exemption to disclosure, that information should be redacted and the records then be given to her. Again, for the reasons stated above, just because she purportedly knows some of the information contained in the documents is irrelevant as to whether a document must be made accessible. Moreover, her request that the documents be redacted to the extent the records contain exempt information is based on a premise that only certain information is exempt from disclosure when, under the investigative exemption, the entire investigative report falls within the investigative exemption. 65 P.S. § 67.706(b)(16); *see also* Pennsylvania State Police.

Finally Requestor contends that the PSP Trooper who investigated the incident assured her that she would receive that information. Even assuming that the assertion is true, an individual State Trooper does not have the authority to authorize the release of documents or make PSP RTKL determinations pursuant to Section 1102, 65 P.S. § 67.1102.

Hunsicker v. Pennsylvania State Police at 913-914 (footnote omitted).

A criminal investigative record is anything that contains information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing. The size, scope, or formality, of police inquiries are not relevant in determining if something is a criminal investigative record. Whether an arrest has occurred or whether a criminal investigation is ongoing or closed, are not relevant factors in determining if something is a criminal investigative record. Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed. Also, a record is not considered a public record if it is exempt under any other State or Federal Law, including the Criminal History Records Information Act.

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

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

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

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

Barros v. Martin at 1250 (emphasis added).

In Padgett v. Pennsylvania State Police, 73 A.3d 644 (Pa. Cmwlth. 2013),

the Commonwealth Court stated in part:

Pursuant to Section 1101(a) of the RTKL, “[t]he appeal shall state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a). When a requester fails to state the records sought are public, or fails to address an agency’s grounds for denial, the OOR properly dismisses the appeal. See Saunders v. Dep’t of Corr., 48 A. 3d 540 (Pa. Cmwlth. 2012) (affirming OOR dismissal); Dep’t of Corr. v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011) (holding an appeal that fails to

sufficiently specify the reasons for appeal should be dismissed rather than addressed by OOR).

In Department of Corrections, we outlined the sufficiency requirements for an appeal under Section 1101(a) of the RTKL. At a minimum, a requester's appeal "must address any grounds stated by the agency ... for denying the request." Dep't of Corr., 18 A.3d at 434. We reasoned a minimally sufficient appeal is a condition precedent for OOR to consider a requester's challenge to an agency denial.

More recently, in Saunders, we explained Section 1101(a) of the RTKL requires a requester "to state why the records did not fall under the asserted exemptions and, thus, were public records subject to access." Id. at 543 (agency's citation to various subsections of the RTKL, without explanation or application of exceptions, triggers requester's burden to address exemption). Because Saunders failed to address the exemptions, we affirmed OOR's dismissal of the appeal.

In this case, Requester did not state the records are public, or address the exemptions PSP cited in its response and verification. Requester stated merely that the RTKL exceptions do not apply without further explication. That does not satisfy the requirements of Section 1101(a) as we interpret that provision. Id.

Requester also did not address the agency's cited exemptions pertaining to the police report. Most notably, Requester did not discuss CHRIA, which pertains to criminal records. In fact, when he explained the reason he sought the records, Requester described them as criminal investigation records.

Requester emphasized he is entitled to the records as a party involved in the criminal investigation to which his Request relates. However, a requester's motivation for making a request is not relevant, and his intended use for the information may not be grounds for denial. *See* Section 301(b) of the RTKL, 65 P.S. § 67.301(b); Section 703 of the RTKL, 65 P.S. § 67.703. An explanation of why a requester believes an agency should

disclose records to him does not satisfy the requirement in Section 1101(a) to explain why the requested records are public and available to everyone. To the contrary, Requester's explanation underscores PSP's criminal investigative defenses here.

We make no decision regarding Requester's alleged entitlement to the records under an alternate legal mechanism. Entitlement does not arise under the RTKL through which citizens have a right to access public records "open to the entire public at large." *See, e.g., Coulter v. Pa. Bd. of Prob. & Parole*, 48 A.3d 516, 519 (Pa. Cmwlth. 2012) ("home plans" of parolee requester are not accessible to her under RTKL though she is subject of records; to be accessible under the RTKL, identity of the requester is irrelevant).

Padgett at 647-648 (footnote omitted).

The Affidavit of Respondent is not detailed and is purely conclusory; merely citing an exception to the required disclosure of public records. Requester does not address the grounds stated by the agency for denying the request, but merely explains why she wants the records. Consequently, neither the Respondent nor the Requester has provided this Appeals Officer with the type of information required by the Right to Know Law. However, the Respondent bears the burden of proving, by a preponderance of the evidence, that the document requested is exempt from public access. The Respondent has not met its burden.

The Respondent cites 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.

65 P.S. § 67.708(b).

The “Complaint of potential criminal conduct” cited in 65 P.S. § 67.708(b)(16)(i) is not a Criminal Complaint filed pursuant to Chapter 5, Part B(1) of the Pennsylvania Rules of Criminal Procedure, seeking an arrest warrant or other process, but is a complaint made to law enforcement concerning potential criminal conduct seeking an investigation.

“What distinguishes ‘criminal history record information’ from ‘investigative information’ is that the former arises from the initiation of a criminal proceeding, *i.e.*, an arrest, whereas the latter is composed of information assembled as a result of the performance of an inquiry into a crime that is still under investigation.” Dep’t of Auditor Gen. v. Pennsylvania State Police, 844 A.2d 78, 82 (Pa. Cmwlth. 2004) (footnotes omitted).

The Supreme Court of Pennsylvania has recognized that arrest documents are generally open to the public. “When arrests have been made pursuant to warrants, the supporting affidavits must be deemed open to public inspection until such times as District Attorneys or defense counsel have obtained court orders that

the affidavits be sealed from public access. This places upon those wishing to seal affidavits a burden of moving swiftly to obtain the necessary court orders, but it is a burden that is necessary in order to accord due recognition to the common law right of the public to secure access to such documents.” Commonwealth v. Fenstermaker, 515 Pa. 501, 513–514, 530 A.2d 414, 420–421 (1987).

The General Assembly has put some restrictions on the dissemination of criminal history information. “[A State or local police department] may disseminate ‘criminal history record information’ to individuals or non-criminal justice agencies upon request, but, in doing so, the [State or local police department] must extract all information relating to the initiation of criminal proceedings where three years have elapsed since the arrest, where no conviction has occurred and where no proceedings are pending seeking a conviction. Section 9121(b) of the CHRIA, 18 Pa.C.S. § 9121(b).” Dep’t of Auditor Gen. v. Pennsylvania State Police, 844 A.2d 78, 81 (Pa. Cmwlth. 2004).

18 Pa.C.S.A. § 9121(b), titled, “Dissemination to noncriminal justice agencies and individuals”, provides in part:

(2) Before a State or local police department disseminates criminal history record information to an individual or noncriminal justice agency, it shall extract from the record the following:

(i) All notations of arrests, indictments or other information relating to the initiation of criminal proceedings where:

- (A) three years have elapsed from the date of arrest;
- (B) no conviction has occurred; and
- (C) no proceedings are pending seeking a conviction.

(ii) All information relating to a conviction and the arrest, indictment or other information leading thereto, which is the subject of a court order for limited access as provided in section 9122.1 (relating to order for limited access).

18 Pa.C.S.A. § 9121.

Arrest and conviction information is generally available to the public once an arrest is made. The Requester seeks: “Kevin B. Heck ... arrests and conviction records within last 10 years.” The Respondent shall provide Requester with any Phoenixville arrests of Kevin B. Heck which resulted in a conviction within the last 10 years.

CONCLUSION

For the foregoing reasons, the appeal is **GRANTED**, and the Respondent is required to take further action, and provide Requester with any Phoenixville arrest of Kevin B. Heck, which resulted in a conviction within the last 10 years, within thirty (30) days. However, the Respondent can required the payment of any fees authorized by 65 P.S. § 67.1307 before the documents are provided to Requester.

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: May 14, 2019

Nicholas J. Casenta, Jr.

APPEALS OFFICER:

Nicholas J. Casenta, Jr., Esquire
Attorney I.D. No. 43844
Chief Deputy District Attorney
District Attorney's Office
Chester County Justice Center
201 West Market Street, P.O. Box 2746
West Chester, PA 19380-0989
(610) 344-6801

FINAL DETERMINATION EMAILED AND MAILED TO:

Natasha Henry
910 Hamner Alley
Phoenixville, PA 19460
livebyfaith25@gmail.com

Chief Thomas Sjostrom
Phoenixville Police Department
351 Bridge Street
Phoenixville, PA 19460
tsjostrom@phoenixville.org

INDEX OF APPENDICES

APPENDIX “A” Appeal Documents

APPENDIX “B” 04/17/2019 Letter of CDDA Nicholas J. Casenta, Jr., Esquire
Appeals Officer for DA’s Office of Chester County