



OFFICE OF THE DISTRICT ATTORNEY

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JAN 28 2019

OFFICE OF OPEN RECORDS

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Stephen Kane,	:	DA Appellate Docket:
Requester	:	2-2018
	:	
v.	:	
	:	
Office of the District Attorney of Delaware County,	:	ODR Docket No.:
Respondent	:	AP2018-0935
	:	

FINAL DETERMINATION

A. Introduction and Procedural History

On April 17, 2018, 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.*, requesting private criminal complaints. On April 23, 2018, the Respondent invoked a 30 day extension of time to respond to the request. 65 P.S. § 67.902(b). On May 24, 2018, the request was denied. On May 29, 2018, Requester appealed to the Office of Open Records (“OOR”). On June 13, 2018, the Requester filed a concurrent appeal of the denial of his request with the Appeals Officer of the Office of the

District Attorney. On July 3, 2018, the Appeals Officer issued an order staying the Requester's appeal to the Appeals Officer, pending the outcome of the Requester's appeal to the OOR.

On July 30, 2018, the OOR, dismissed the request in part, denied the request in part, and granted the request in part, holding that:

[T]o the extent that the responsive records are not found to be exempt criminal investigative records, the Office [of the District Attorney] is required to provide the records to the Requestor, subject to the redactions [outlined in the Final Determination] within thirty days of the decision of the Appeals Officer

Final Determination, AP 2018-0935, p.7.

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

B. Factual History

On April 17, 2018, the Request was filed, seeking "all private criminal complaints submitted to the District Attorney's Office within the last 5 years that are complaints of police officers – detectives and/all law enforcement park guards etc." County of Delaware Open Records Request Form, 1.

After being granted an extension to answer, the Respondent denied the request, stating: "the information that you are seeking would be included in the record of an agency relating to or resulting in a criminal investigation and/or non-criminal investigation." Ltr. to Stephen Kane from Sandra Urban, Esq., 5/24/18, 1

(citing 65 P.S. § 67.708(b)(16)(vi)(A) (record relates to or resulted from a criminal investigation and would reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges) & 65 P.S. § 67.708(b)(16)(vi)(B) (record relates to or resulted from a criminal investigation and would deprive a person of the right to a fair trial or impartial adjudication)).¹

On July 30, 2018, the Requester asked for a hearing on the instant matter, but did not state a reason for the hearing or otherwise explain the necessity for a hearing. On July 31, 2018, the Appeals Officer sent a letter to both parties advising them of the appellate process and their appellate rights. Included in that letter, the Appeals Officer denied the request for a hearing without prejudice because “the Requester failed to provide a reason as to why a hearing is necessary in this matter.” Ltr. to Kane and Urban from D. Daniel Woody, Esq., 7/31/18, 2. However, the Appeals Officer advised the Requester that he could “renew his request for a hearing is he provides information as to why testimonial evidence is needed to resolve this appeal.” *Id.* In response, the Requester, via email, stated “Here’s my reason for wanting a hearing . . . **ah because I shouldn’t even have to ask.**” Email from Kane to Woody, 8/1/18, 1 (ellipsis and emphasis in original). This second request for a hearing was denied via email the same day. The Appeals Of-

¹ The Respondent also cited to 65 P.S. § 67.708(b)(17) (relating to records that are the product of a noncriminal investigation); however, this Appeals Officer does not have jurisdiction to adjudicate a denial of a Right to Know request based on subsection (b)(17) and thus will exclude any analysis of (b)(17) from this Final Determination.

ficer advised the Requester that he could raise his request for a hearing again if the Requester could identify an issue of material fact that cannot be resolved via paper exhibits and affidavits. Email from Woody to Kane, 8/1/18, 1. Neither party made any subsequent request for a hearing and no hearing was held in this matter.

The Respondent had until August 15, 2018, and the Requester had until August 22, 2018, to submit any affidavits or attestation and any legal argument supporting its position. On August 15, 2018, the Respondent submitted a legal argument, along with an attestation by Sandra Urban, Esquire, in support of its denial of the Request. *See* Ltr. from Urban to Woody, 8/15/18. The Requester did not submit a legal argument or any affidavits or attestations to support his position.

In its submission to the Hearing Officer, the Respondent asserted that the request was barred because it related to a criminal investigation. As factual support for this argument, Ms. Urban attested that the Office of the District Attorney has seven Private Criminal Complaints that are responsive to the Request. *Id.* at 2-3. Ms. Urban reviewed each document and provided the following reasons as to why each is not a public record:

Private Criminal Complaint #1 relates to a police investigation initiated by the Delaware County Criminal Investigation Division-Special Investigations Unit in correlation with an Upper Darby Township Police Department investigation where an individual was charged with theft offenses in 2014.

Private Criminal Complaint #2 and #3 relate[] to a police investigation initiated by the Delaware County Criminal Investigation Division-

Special Investigations Unit in correlation with a Juvenile Petition alleging delinquent act(s) filed by Trainer Borough police Department.

Private Criminal Complaint #4 relates to a police investigation initiated by the Delaware County Criminal Investigation Division-Special Investigations Unit in correlation with a Pennsylvania State Police criminal investigation of [an] assault reported in 2014.

Private Criminal Complaint #5 related to a police investigation initiated by the Delaware County Investigation Division-Special Investigation Unit in correlation with a Media Borough criminal investigation of [an] assault reported in 2014.

Private Criminal Complaint #6 related to a police investigation initiated by the Delaware County Investigation Division-Special Investigation Unit involving criminal charges of theft during an eviction facilitated by the Delaware County Sheriff's Office reported in 2015.

Private Criminal Complaint #7 is Requester Stephen Kane's request to file a private criminal complaint dated March 29, 2018 which is pending appeal in the Superior Court of Pennsylvania.

Id.

Furthermore, in the Respondent's response to the Requester's appeal to the Office of Open records, the Respondent provided affidavits from Detectives Robert T. Lythgoe, Jr. and Lisa M. Demartini. In these affidavits, the detectives state that "[a]ll complaints of police misconduct submitted to the Office [of the District Attorney] through an Incident Report are handled by the Special Investigation Unit." *Id.* Once "the Incident Reports are received . . . an investigation is initiated by the Special Investigations Unit. *Id.* Both detectives are assigned to the Special Investigations Unit. *Id.*

LEGAL ANALYSIS

A. History and Intent of the Right to Know Law

“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). Further, this important open-government law is “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 their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

Initially it is 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.

Appeals involving records alleged to be criminal investigative records held by a local law enforcement agency are to be heard by an appeals officer designated by the local district attorney. *See* 65 P.S. 67.503(d)(2). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may in his or

her discretion conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence, and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; see also *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, while the Requester asked for a hearing, the Appeals Officer has the necessary information and evidence before it to properly adjudicate the matter.

The Office of the District Attorney (Respondent) is a local agency subject to the RTKL and is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order, or decree. 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. 65 P.S. § 67.708(b). Likewise, “[t]he 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. Commw. Ct. 2011).

Section 708 of the RTKL places the burden of proof on the public body to

demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 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.Comm.w.Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa.Comm.w.Ct. 2010)).

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

B. The requested record is exempt from disclosure because it is a criminal investigatory record.

A local law enforcement agency is not required to disclose documents that relate to a criminal investigation and that would reveal the institution, progress, or result of a criminal investigation, except the filing of criminal charges. 65 P.S. § 67.708(b)(16)(vi)(A).

“Investigative information” is “[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.A. § 9102 (relating to definitions). In *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Cmwlth. 2010) (*en banc*), the 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”).

“[I]f 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 (Pa.Cmwlth. 2014). Furthermore, Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed. *Id.*

Here, there is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure. A criminal investigative record is anything that contains information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing. 18 Pa.C.S.A. § 9102. The size, scope, or formality, of police inquiries are not relevant in determining if something is a criminal investigative record. 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.

Based on the information provided by the parties it is clear that the record requested is a criminal investigative record. The records requested are facially related to a criminal investigation. Furthermore, Sandra Urban, Esquire, attested to the fact that she is familiar with the records at issue and that the records relate to a criminal investigation. In addition, two detectives assigned to the unit that investigates complaints of police misconduct that are made to the Office of the District Attorney, affirmed that they conduct a criminal investigation into all complaints of police misconduct that are made pursuant to an Incident Report.

Therefore, complaints of police misconduct that are made pursuant to an Incident Report and which form the basis of a private criminal complaint relate to a criminal investigation and the disclosure of the record would reveal the institution, progress, or result of a criminal investigation.

C. This appeal can be dismissed because the Respondent failed to state why the record is a public record, failed to address the Respondent's arguments, and failed to support the Request with legal argument or a factual basis.

The Commonwealth Court of Pennsylvania has held that, pursuant to 65 P.S. § 67.1101(a), the appeal shall state the grounds upon which the Requester asserts that the record is a public record and shall address any grounds stated by the agency for denying the request. When a Requester fails to state the records sought are public, or fails to address an agency's grounds for denial, the appeal may be dismissed. *Padgett v. Pennsylvania State Police*, 73 A.3d 644, 647 (Pa. Cmwlth. 2013).

Even if the records were not records of a criminal investigation, this appeal would be dismissed because the Requester has failed "to state [that] the records sought are public, [and] has fail[ed] to address [the] agency's grounds for denial." See *Padgett, supra*, 73 A.3d at 647. As stated above, the Requester failed to provide a legal argument or factual basis in favor of granting this appeal. In *Department of Corrections v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Cmwlth. 2011), the Commonwealth Court held that "a party seek[ing] to challenge an agency's refusal to release information by appealing to Open Records . . . must address any grounds stated by the agency for . . . denying the request." The Commonwealth Court held that this is a necessary function in order to permit the appellate error-correcting function. *Id.* The court concluded that "[w]e do not see it as a par-

ticularly onerous requirement, whether the requester has the benefit of legal counsel or is *pro se*.” *Id.*

CONCLUSION

For the foregoing reasons, the appeal is **DENIED**, and the Respondent is not required to take any further action. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may petition for review, to the Delaware County Court of Common Pleas, pursuant to 65 P.S. § 67.1302(a). All parties must be served with a copy of the petition. The Appeals Officer shall also be served with a copy of the petition, pursuant to 65 P.S. § 67.1303(a), for the purpose of transmitting the record to the reviewing court. *See East Stroudsburg University Foundation v. Office of Open Records*, 995 A.2d 496, 507 (Pa. Cmwlth. 2010).

FINAL DETERMINATION ISSUED AND MAILED ON: August 24, 2018

APPEALS OFFICER:

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