

IN RE: : RIGHT-TO-KNOW REQUEST
: DAUPHIN COUNTY, PENNSYLVANIA
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APPEAL OF THE WASHINGTON POST : RTK-2021-DA-002 (HUMMELSTOWN)

FINAL DETERMINATION

After review of the decision of the Open Records Officer for the Borough of Hummelstown, the appeal is denied. The Requester, The Washington Post, filed a request with the Borough of Hummelstown seeking "... all records in your office's possession related to the police shooting of David Kassick on or about 2/2/15."¹ The request went on to state that it "may include, but is not limited to: complete incident reports, including witness statements; reports listing name(s) and badge number(s) of the officers involved and their statements related to the shooting; any non-exempt investigative files, including summaries and findings."² After those requests were denied, the Requester appealed to both this Office and the Office of Open Records (OOR). The District Attorney's Office received the appeal on February 16, 2021. The undersigned Appeals Officer communicated to both parties that I would be addressing only the question of whether any of the listed items qualified as "criminal investigative

¹ I will refer to this sentence as the "first part of the request."

² There was one additional item requested: "any internal affairs and/or departmental review board findings, including any disciplinary records that may exist related to the shooting (e.g. commission/review board proceedings, recommendations and final actions)." The appeal as it pertains to that item is being addressed by the OOR.

records,” and invited both parties to supplement the record. The Requester did not submit any additional items. The Borough of Hummelstown, through counsel, submitted a position statement, which included several affidavits. Copies of the initial request, the denial by the Borough, the Requester’s appeal, and the position statement of the Borough are incorporated herein by reference, as well as attached collectively as Appendix “A.”

A record in the possession of a local agency shall be presumed to be a public record. 65 P.S. §67.305(a). However, the presumption shall not apply if the record is exempt from disclosure under section 708 of the Right to Know Law. 65 P.S. §67.305(a)(1). The burden of proving that a record of a local agency is exempt from public access is on the local agency receiving the request by a preponderance of the evidence. 65 P.S. §67.708(a)(1). The duty of this Appeals Officer is solely to determine whether the receiver of the request was obligated by law to disclose the requested item(s). Whether to disclose one or more items outside the boundaries of the Right to Know Law is within the discretion of the agency possessing the requested item(s).

As a threshold matter, I agree with the Borough of Hummelstown (Borough) that the initial request properly sought disclosure only of the items that were specifically described.³ The first part of the request was insufficiently specific to require a response. “A written request should identify or describe the records sought with

³ In its Final Determination issued on March 15, 2021, at docket AP 2021-0312, the OOR reached the same conclusion.

sufficient specificity to enable the agency to ascertain which records are being requested.” 65 P.S. §67.703. To determine whether a request is sufficiently specific, we must examine “the extent to which the request sets forth (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought.” ***Pennsylvania Dept. of Educ. v. Pittsburgh Post-Gazette***, 119 A.3d 1121, 1124 (Pa. Commw. Ct. 2015). The scope of the request must identify a discrete group of documents, either by type or recipient. *Id.* at 1125. With regard to the third factor, the request should identify a finite period of time for which records are sought. *Id.* at 1126.

Here, the subject matter of the first part of the request is somewhat specific in that it refers to a particular police shooting on a particular date. However, the scope – “all records in your office’s possession” - is much too broad. There is no specification of a type of document or recipient of the document. Moreover, although the date of the incident is referenced, there is no limitation placed on the timeframe for the records that are sought. Similar to the situation in ***Pennsylvania State Police v. Office of Open Records***, 995 A.2d 515, 517 (Pa. Commw. Ct. 2010), it is only when the request here is narrowed to describe specific types of records that it becomes specific enough to reasonably allow the Borough to respond. Accordingly, as it pertains to the arena of potential criminal investigative records, the request here was for “complete incident reports, including witness statements; reports listing name(s) and

badge number(s) of the officers involved and their statements related to the shooting; (and) any non-exempt investigative files, including summaries and findings.”

In its Final Determination issued on March 15, 2021, the OOR determined that the Borough had satisfied its burden to demonstrate that it does not possess any records that would be responsive to the request for “reports listing name(s) and badge number(s) of the officers involved and their statements related to the shooting.” As that determination was within the purview of the OOR, there is no reason to re-examine it here.

Similarly, with regard to what the Borough has identified as the “noncriminal investigation file,” the OOR made a determination that this file is protected by privilege. There is no reason for this Appeals Officer to re-examine that issue.

As part of my examination, I conducted an *in camera* review of what the Borough identified as the “criminal investigation file.” The contents of that file are exempt from disclosure. The Borough’s denial was based in large part on Section 67.708(b)(16) of the Right-to-Know Law.

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

* * *

- (16) A record of an agency relating to or resulting in a criminal investigation, including:
 - (i) Complaints of potential criminal conduct other than a private criminal complaint.

- (ii) Investigative materials, notes, correspondence, videos and reports.
- (iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised.
- (iv) A record that includes information made confidential by law or court order.
- (v) Victim information, including any information that would jeopardize the safety of the victim.
- (vi) A record that, if disclosed would do any of the following:
 - (A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.
 - (B) Deprive a person of the right to a fair trial or an impartial adjudication.
 - (C) Impair the ability to locate a defendant or codefendant.
 - (D) Hinder an agency's ability to secure an arrest, prosecution or conviction.
 - (E) Endanger the life or physical safety of an individual.

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

65 P.S. §67.708(b)(16).

I will note as an initial matter that the contents of the criminal investigation file were somewhat limited, which is consistent with the Borough's explanation that the primary investigative agency on this case was the Pennsylvania State Police. With that

said, the entirety of the criminal investigation file I reviewed *in camera* consists of materials related to a criminal investigation that are excluded from the applicability of the Right-To-Know Law. 65 P.S. §67.780(b)(16). The file contains incident reports (C15-0000230 and C15-0000231) which outline investigation of potential criminal activity which is plainly within the exception. Investigative reports and witness statements taken by law enforcement personnel during a criminal investigation are not subject to disclosure under the Right-To-Know Law. ***Pennsylvania State Police v. Office of Open Records***, 5 A.3d 473 (Pa.Cmwlt. 2010). The contents of the police reports fall within the exception contained at 65 P.S. §67.780(b)(16) and fall outside the definition of police blotter information.

The only other contents of the file are one video⁴ and a few documents that plainly fall within the category of “investigative materials, ... videos and reports” under 65 P.S. §67.780(b)(16)(ii).

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 Criminal History Record Information Act (CHRIA). Coley v. Philadelphia District Attorney’s Office, 77 A.3d 694, 697 (Pa. Commw. Ct. 2013). Section 9106(c)(4) of CHRIA provides that “[i]nvestigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the

⁴ This is the video footage from the officer’s taser, which was placed in the public domain by the District Attorney’s Office immediately after the trial in this case.

information is a criminal justice agency.” 18 Pa.C.S. §9106(c)(4). CHRIA defines “investigative 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 above-referenced items are therefore also exempt under the RTKL because they are protected from release under CHRIA. Barros v. Martin, 92 A.3d 1243, 1250 (Pa. Cmwlth. 2010).

The Borough submitted three affidavits. Of particular interest to the instant analysis was the affidavit of Chief Justin Hess. His characterization of the context under which the items in the criminal investigation file were created and/or assembled clearly points in the direction of these items qualifying as criminal investigative records. Under the Right to Know Law, an affidavit may suffice as evidentiary support. ***Sherry v. Radnor Twp. Sch. Dist.***, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); ***Moore v. OOR***, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). The averments in the affidavit should be accepted as true absent some competent evidence that the Borough acted in bad faith. ***McGowan v. Pennsylvania DEP***, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014). In the instant matter, no evidence has been presented to contradict the averments in the affidavit.

For the above reasons, the Borough’s denial of the request for the contents of the criminal investigation file is affirmed. The parties are hereby notified of

their right to appeal this decision to the Dauphin County Court of Common Pleas within thirty days.


MICHAEL A. SPROW
APPEALS OFFICER

FINAL DETERMINATION ISSUED AND MAILED: 3/15/21
Date

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