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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
JEFFREY THOMPSON,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
CHESTER COUNTY DETECTIVES	:	
Respondent	:	DA-RTKL-A NO. 2016-005

INTRODUCTION

On February 12, 2016, Requester, Jeffrey Thompson, filed a right-to-know request with the Respondent, Chester County Detectives,¹ pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*. On February 18, 2016, the request was denied. On March 10, 2016, Requester appealed to the Office of Open Records. On March 10, 2016,

¹ This case was originally captioned with the Chester County District Attorney's Office listed as the Respondent. Although the Chester County Detectives are part of the District Attorney's Office, it is the Detectives documents that have been requested. Consequently, it is more accurate to have the Chester County Detectives listed as the Respondent.

the Office of Open Records transferred the appeal to the Chester County District Attorney's Office, which was received on March 14, 2016.

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

FACTUAL BACKGROUND

On February 8, 2016, Requester submitted a right-to-know request with the Respondent, seeking "information related to an investigation in which the Requester was the victim", pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*:

I am trying to obtain information about an investigation your office was conducting. While I was incarcerated at Chester County Prison from 2005 to 2006 I received threatening letters. Detective Beam and Detective Dykes from the Chester County Detectives office investigated.

I am trying to obtain information about an investigation your office was conducting. While I was incarcerated at Chester County Prison from 2005 to 2006 I received threatening letters. Detective Beam and Detective Dykes from the Chester County Detectives office investigated.

I would like copies of the original incident report and any subsequent reports, the investigative reports, the threatening letters and any other information about the incidents. How does your office wish me to proceed with this request? Is there a specific form that your agency needs me to fill out to receive this information or is my letter sufficient?

In advance I would like to thank you for your time and assistance. If you need any further information, please let me know. I look forward to hearing from you.

February 8, 2016 Right to Know Request.

On February 18, 2016, Respondent denied the request stating that the records requested related to a criminal investigation:

This letter is in response to your recent Right-to-Know request for records related to an investigation by the Chester County Detectives. The records that you requested are exempt from disclosure under the criminal investigation exemption of the Right-to-Know Law (65 P.S. § 61.708(b)(16)). Therefore, your request is hereby denied. You have a right to appeal this denial of information in writing to Erik Arneson, Executive Director, Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120. For criminal records of a local agency, you may appeal to Chief Deputy District Attorney Nicholas Casenta, Chester County District Attorney's Office, 201 W. Market St., PO Box 2746, West Chester, PA 19380.

If you choose to file an appeal you must do so within 15 business days of the mailing date of the agency's response. See 65 P.S. § 67.1101. Please note that a copy of your original Right-to-Know request and this denial letter must be included when filing an appeal. The law also requires that you state the reasons why the record is a public record and address each of the reasons the Agency denies your request. Visit the Office of Open Records website at <http://www.openrecords.pa.gov> for further information on filing an appeal. If you have further questions, please let me know. Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Should have any further questions, please don't hesitate to let me know.

February 18, 2016 Letter of William R. Christman, III, Assistant Solicitor.

On March 10, 2016, Requester appealed to the Office of Open Records. Requester included the following memo:

CONCISE STATEMENT OF FACTS:

On February 8, 2016, Jeffrey Peter Thompson requested copies of documents related to incidents that occurred from March 2005 until October 2006. The Chester County employees from Chester County Detectives and or Chester County Prison, intercepted several pieces of United States Postal mail addressed to Mr. Thompson at Chester County Prison. The mail was confiscated. Mr. Thompson was never notified, nor did he ever receive notice

that his United States Postal mail was being held. Mr. Thompson received a letter in the United States Postal mail that was threatening to him and his family. The letter was taken to his lawyer who in turn notified the Chester County Detectives who said, "oh yea, we already know about it, we have several of those that we already intercepted." Mr. Thompson is the victim and his United States Postal mail was confiscated without any due process related to notification. Mr. William Christman III, Assistant Solicitor, Chester County Solicitor's Office, denied Mr. Thompson's request on February 18, 2016.

LIST ALL GROUNDS UPON WHICH THE REQUESTER ASSERTS:

The County Solicitor's Office denied Mr. Thompson's request because, "The records that you requested are exempt from disclosure under the criminal investigation exemption of the Right-to-Know Law (65 P.S. § 61.708(b)(16)). Therefore, your request is hereby denied." The Statute in which the Solicitor's Office is relying on (65 P.S. § 61.708(b)(16)), does not exist, nor has it ever existed in the Commonwealth of Pennsylvania. If the Solicitor's Office is relying on (65 P.S. § 67.708(b)(16)) for the criminal investigation exemption of the Right-to-Know Law, they fail to meet their burden of proving by a preponderance of evidence that the exemption asserted applies. The RTKL is designed to promote access to government information in order to prohibit secrets, permit scrutiny of the actions of public officials, and make public officials accountable for their actions. Exemptions from disclosure must therefore be narrowly construed. (65 P.S. § 67.708(a)(1)). Pennsylvania State Police v. Michelle Grove, 119 A.3d 1102 (Pa. Commw. 2015). The mere fact that a record has some connection to a criminal investigation does not automatically exempt it under (65 P.S. § 67.708(b)(16)) of the RTKL. Coley v. Philadelphia District Attorney's Office, 77 A.3d 694, 697-698 (Pa. Commw. 2013). At the very least, copies of the letters delivered by the United States Post Office to the Chester County Prison addressed to Mr. Thompson and intercepted should be granted. Also, under what authority was Chester County Employee's granted Constitutional legal permission to intercept United States Post Office Mail without notification. If some records are truly exempt, Mr. Thompson still requests copies of the remaining records even if some of the portions of information with those documents are exempt. In such circumstances the agency must produce the record with the

exempt information redacted, (65 P.S. § 67.706). Advancement Project v. Pennsylvania Department of Transportation, 60 A.3d 891, 894 (Pa. Commw. 2013). The Solicitor's Office did not meet their burden, cite the correct Law, explain which documents were being denied for which reasons and they failed to accommodate Mr. Thompson's request at a *de minimis* by refusing to even provide a redacted record.

ADDRESS ALL GROUNDS RELIED ON BY THE AGENCY FOR DENIAL:

The Solicitor's Office relies on an invalid Statute, (65 P.S. § 61.708(b)(16)). Even if the Solicitor was relying on the proper criminal investigations exemption, (65 P.S. § 67.708(b)(16)), they failed to meet their burden. They failed to explain what documents truly meet the criteria for exemption, that all of the documents that were public contained non-disclosable information and those documents could not be redacted. The Solicitor fails to consider that Mr. Thompson is the victim and would like to know any and all information available to him, i.e.: Is the investigation still open? Have they caught the suspect? Is Mr. Thompson or his family still in danger? Did the agency conduct a full investigation? or Did the agency take advantage of these incidents in order to solicit a guilty plea from Mr. Thompson? Since a general statement that it is exempt from disclosure under the Right-to-Know Law is insufficient, the Solicitor's Office of Chester County has not meet their burden, therefore the request for information should be granted.

March 6, 2016 Memo of Jeffrey Thompson (Requester).

On March 10, 2016, J. Chadwick Schnee, Esquire, Appeals Officer for the Office of Open Records transferred the appeal to the Chester County District Attorney's Office, which was received on March 14, 2016. Jeffrey Thompson v. Chester County District Attorney's Office, Docket No. AP 2016-0507.

On March 10, 2016, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office, stating:

On February 8, 2016, Jeffrey Thompson (“Requester”) submitted a request (“Request”) to Chester County District Attorney’s Office (“DA”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “information related to an investigation in which the Requester was the victim”. The County responded on February 18, 2016 denying the request under an exemption for records related to a criminal investigation (65 P.S. § 67.708(b)(16)). On March 10, 2016, Requester appealed to the Office of Open Records.

The DA is a local law enforcement agency. The OOR does not have jurisdiction to hear appeals related to criminal investigative records held by local law enforcement agencies. *See* 65 P.S. § 67.503(d)(2). Instead, 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 id.*

For the foregoing reasons, Requester’s appeal is **transferred** to Appeals Officer for the Chester County District Attorney’s Office. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, either party may appeal to the Chester County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: March 10, 2016

/s/ J. Chadwick Schnee

APPEALS OFFICER / ASSISTANT CHIEF COUNSEL
J. CHADWICK SCHNEE, ESQ.

Sent to: Requester, Chester County District Attorney’s Office

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

(footnote omitted).

On March 15, 2016, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

On February 12, 2016, 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 February 18, 2016, the request was denied. On March 10, 2016, Requester appealed to the Office of Open Records. On March 10, 2016, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office, which was received on March 14, 2016.

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 March 14, 2016, which is April 13, 2016**. 65 P.S. § 67.1101(b)(1). If a final determination is not made within 30 days, the appeal is deemed denied by operation of law. 65 P.S. § 67.1101(b)(2). Prior to issuing a final determination, a hearing may be conducted. However, a hearing is generally not needed to make a final determination. The final determination shall be a final appealable order, and shall include a written explanation of the reason for the decision. 65 P.S. § 67.1101(b)(3).

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

The Commonwealth Court of Pennsylvania has held that, pursuant to 65 P.S. § 67.1101(a), the appeal shall state the grounds upon which the Requester asserts that the record is a public record and shall address any grounds stated by the agency for denying the request. When a Requester fails to state the records sought are public, or fails to address an agency's grounds for denial, the appeal may be dismissed. Padgett v. Pennsylvania State Police, 73 A.3d 644 (Pa. Cmwlth. 2013); Saunders v. Department of Correction, 48 A. 3d 540 (Pa. Cmwlth. 2012); Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011).

If the Respondent wishes to submit a response, it must do so on or before **March 25, 2016**.

If the Requester wishes to submit a response, it must do so on or before **April 1, 2016**.

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.

March 15, 2016 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

On March 20, 2016, Requester sent the following response to the March 15, 2016

Notice of this Appeals Officer for the Chester County District Attorney's Office:

I received your letter dated March 15, 2016, stating that the Appeal was transferred to your office and you would be making a final determination either in writing or by operation of law, within 30 days of March 14, 2016, which is April 13, 2016.

I, Jeffrey Thompson, the Requester would like to place on the record that he feels that it would be a conflict of interest for the Chester County District Attorney's Office to be the appeals officer for a right-to-know request that was denied by the same office, the Chester County District Attorney's Office. How can an agency defend their position of denial at the same time as being impartial to review both parties' facts to make a fair unbiased determination based on the law and the facts presented by both parties? With no disrespect intended, and lack of a better analogy, it is like, "*A Fox Watching the Hen House.*" As the Appeals Officer has not made a determination, I will await their determination before taking any further action.

I, Jeffrey Thompson, above named, hereby certifies this day, that the following information is true and correct to the best of my knowledge and belief. I understand that any false statements made herein are subject to the penalties of perjury, 18 Pa.C.S.A. § 4904, relating to unsworn falsification to authorities.

March 20, 2016 Letter of Jeffrey Thompson (Requester).

On March 22, 2016, Respondent sent the following response to the March 15, 2016 Notice of this Appeals Officer for the Chester County District Attorney's Office:

This letter is in response to an appeal filed by Jeffrey Thompson based on our denial of his Right to Know request for records related to an investigation in which the Requester was the victim. This request was denied on February 18, 2016, based on the criminal investigation exemption to Pennsylvania's Right to Know Law. Because the records are exempt from disclosure, Mr. Thompson's appeal should be denied.

As the agency that denied the Right to Know request, we bear the burden of proving that the records requested are exempt from public access by a preponderance of the evidence. 65 P.S. § 67.708(a)(1). Records of an agency are presumed to be public unless they are privileged, exempted under the Right to Know Law (RTKL), or exempted under any other State or Federal law. 65 P.S. § 67.102.

The RTKL clearly details an exemption for criminal investigative materials. 65 P.S. § 67.708(b)(16). Specifically, "a record of an agency relating to or resulting in a criminal investigation" includes "complaints of potential criminal conduct other than a private criminal complaint," "investigative materials, notes, correspondence, videos and reports," and "a record that, if disclosed, would ... reveal the institution, progress or result of a criminal investigation, except for the filing of criminal charges." 65 P.S. § 67.708(b)(16)(i), (ii), and (vi)(A). If a record, on its face, relates to a criminal investigation, it is exempt under this provision. Coley v. Phila. District Attorney's Office, 77 A.3d 694, 697 (Pa. Cmwlth. 2013) (citing Mitchell v. Office of Open Records, 997 A.2d 1262 (Pa. Cmwlth. 2010)). The RTKL lists only two types of records that do not fall within the purview of the criminal investigation: private criminal complaints and police blotters. 65 P.S. § 67.708.

The records requested by Mr. Thompson are facially related to a criminal investigation. Specifically, Mr. Thompson requests "copies of the original incident report and any subsequent reports, the investigative reports, the threatening letters and any other information about the incidents."

Primarily, the incident report, subsequent reports, and investigative reports all fall squarely within the exemptions for investigation materials,

notes, and reports, based on the plain meaning of the words. Furthermore, any evidence that the Chester County Detectives may have in their possession as a result of this investigation would clearly be “investigative materials” as well. Finally, the request for “any other information about the incidents” is not specific enough to require a formal response because it does not indicate any actual, physical records being requested.

Therefore, because Mr. Thompson requested records that are materially related to a criminal investigation, and are therefore exempt from the Right to Know law, his appeal should be denied. If you need any additional information, please do not hesitate to let me know.

March 22, 2016 Letter William R. Christman, III, Assistant Solicitor.

LEGAL ANALYSIS

In his March 20, 2016 Letter, Requester did not believe it appropriate that the Chester County District Attorney’s Office hear this appeal. However, the Chester County District Attorney’s Office is authorized and required 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 Chester County Detectives (“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). There is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure.

The Respondent is relying upon 65 P.S. § 67.708(b)(16). Although Respondent's Letter of February 18, 2016 cites 65 P.S. § 61.708(b)(16), it is clear from the context and the subsequent Letter of March 22, 2016 that Respondent is relying upon § 67.708(b)(16) and that the citation to § 61.708(b)(16) is a typographical error.

Requester seeks the following: "I am trying to obtain information about an investigation your office was conducting. While I was incarcerated at Chester County Prison from 2005 to 2006 I received threatening letters.... I would like copies of the original incident report and any subsequent reports, the investigative reports, the threatening letters and any other information about the incidents." February 8, 2016 Right to Know Request.

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

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

...

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

- (i) Complaints of potential criminal conduct other than a private criminal complaint.
- (ii) Investigative materials, notes, correspondence, videos and reports.

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

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

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

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

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

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

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

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

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

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

65 P.S. § 67.708(b).

18 Pa.C.S.A. § 9102 (relating to definitions) states in part: **“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”).

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.

Although Requester alleges that the requested documents are not investigative information, it is clear that he knows that the requested documents are investigative information based on his own statements. 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. The Requester states: "The Solicitor fails to consider that Mr. Thompson is the victim and would like to know any and all information available to him, i.e.: Is the investigation still open? Have they caught the suspect? Is Mr. Thompson or his family still in danger? Did the agency conduct a full investigation? or Did the agency take advantage of these incidents in order to solicit a guilty plea from Mr. Thompson?" March 6, 2016 Memo of Jeffrey Thompson (Requester).

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,² stated in part:

As a final point, we note that, the requester's status as representative of Decedent's family has no bearing on whether the requested records are accessible through a RTKL request. We agree with the OOR that the RTKL must be construed without regard to the requester's identity. *See, e.g.,* Section 301(b) of the RTKL, 65

² DiMartino v. Pennsylvania State Police, 340 C.D. 2011, 2011 WL 10841570 (Pa. Cmwlth. 2011) is an unreported panel decision of the Commonwealth Court. As such, it may be cited for its persuasive value, but not as binding precedent. *See* Section 414 of the Commonwealth Court's Internal Operating Procedures.

P.S. § 67.301(b) (stating that an agency “may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law”); Weaver v. Dep’t of Corr., 702 A.2d 370 (Pa. Cmwlth. 1997) (under the former Right-to-Know Act, the right to examine a public record is not based on whether the person requesting the disclosure is affected by the records or if her motives are pure in seeking them, but whether any person’s rights are fixed); Furin v. Pittsburgh Sch. Dist., OOR Dkt. No. AP 2010-0181, 2010 PA OORD LEXIS 212 (Pa. OOR 2010) (finding records exempt under Section 708(b) regardless of status of person requesting them); Wheelock v. Dep’t of Corr., OOR Dkt. No. AP 2009-0997, 2009 PA OORD LEXIS 725 (Pa. OOR 2009) (stating the only information available under the RTKL is a “public record” available to all citizens regardless of personal status or stake in requested information).

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).

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). As in Padgett, this decision only involves the application of the RTKL. *See* Coley v. Philadelphia District Attorney’s Office, 77 A.3d

694, 696 n.5 (Pa. Cmwlth. 2013) (principles and rights relevant in criminal proceedings have no bearing or relevance as to whether requested records are public records under the Right-to-Know Law).

Requester states: “If some records are truly exempt, Mr. Thompson still requests copies of the remaining records even if some of the portions of information with those documents are exempt. In such circumstances the agency must produce the record with the exempt information redacted, (65 P.S. § 67.706).” March 6, 2016 Memo of Jeffrey Thompson (Requester).

Where a record falls within an exemption under 67.708(b), it is not a public record as defined by the RTKL, and an agency is not required to redact the record and provide the remainder. 65 P.S. § 67.706, titled, “Redaction”, provides as follows:

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. § 67.901 *et seq.*]

65 P.S. § 67.706.

In Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540 (Pa. Cmwlth. 2012), the Commonwealth Court stated in part:

Petitioner's first argument addresses the sufficiency of the Department's denial of his request. Petitioner contends that because the Department's denial merely parroted the statutory language he was unable to properly respond to the Department's assertion of exemption from disclosure. Section 903 of the RTKL, 65 P.S. § 67.903, states that a denial of access shall include, inter alia, a description of the record requested and the specific reasons for the denial, including a citation of the supporting legal authority. Correspondingly, Section 1101 of the RTKL, 65 P.S. § 67.1101, requires that a party appealing a denial 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." See Dep't of Corr. v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011).

The Department asserted that the requested records were exempt from disclosure under five different subsections of Section 708. Petitioner is correct in noting that the Department merely parroted the statutory language. However, the Department's citations to the various subsections of Section 708 were sufficient to give him notice of the grounds for denial. Once the Department asserted that the requested records were exempt from disclosure under Section 708, Petitioner was required by Section 1101 to state why the records did not fall under the asserted exemptions and, thus, were public records subject to access. Petitioner failed to do so.

Petitioner's argument that the Department was required to produce the requested records subject to redaction of the exempt information is without merit. Section 706 provides that if an agency determines that a public record contains information that is both subject to disclosure and exempt from the disclosure, the agency shall grant access and redact from the record the information which is subject to disclosure. Pursuant to Section 706, the redaction requirement only applies to records that are determined to be "public records." A "public record" is defined in part as "a record, including a financial record, of a Commonwealth ... agency that: (1) is not exempt under section 708." Section 102, 65 P.S. § 67.102 (emphasis added). Thus, a record that falls within one of the exemptions set forth in Section 708 does not constitute a "public record." Dept. of Health v. Office of Open Records, 4 A.3d 803 (Pa. Cmwlth. 2010).

Saunders at 542-543 (footnote omitted).

In Heavens v. Pennsylvania Department of Environmental Protection, 65 A.3d

1069 (Pa. Cmwlth. 2013), the Commonwealth Court stated in part:

Furthermore, under the RTKL, records that are exempt under Section 708 or privileged are not considered public records and are therefore not subject to the redaction requirement contained in Section 706, which applies only to records that are public and contain information that is not subject to access. 65 P.S. § 67.706; Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540, 543 (Pa. Cmwlth. 2012).

Heavens at 1077.

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

CONCLUSION

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

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

FINAL DETERMINATION ISSUED AND MAILED ON: April 11, 2016

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- APPENDIX "B"** March 15, 2016 Letter of CDDA Nicholas J. Casenta, Jr., Esquire
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- APPENDIX "D"** March 22, Letter of William R. Christman, III