



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>ANDREW GLENN ROTHEY,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2015-1925</b>
	:	
<b>CALIFORNIA BOROUGH,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Andrew Glenn Rothey, Esq. (“Requester”) submitted a request (“Request”) to California Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking certain video of the Borough police department’s holding cell. The Borough denied the Request, arguing, among other reasons, that the video relates to both criminal and noncriminal investigations. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Borough is required to take further action as directed.

**FACTUAL BACKGROUND**

On August 7, 2015, the Request was filed, seeking the “[v]ideo recording of all interaction between Adam Logan and California Borough Police Officer Justin Todd Shultz in a holding cell in the California Borough Police Department on November 9, 2013, particularly the physical altercation between Mr. Logan and Officer Shultz.” On August 14, 2015, the Borough

invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902(b). On September 14, 2015, the Borough denied the Request, arguing that release of the requested video poses a threat to personal security and is reasonably likely to jeopardize public safety or the physical security of a building. *See* 65 P.S. §§ 67.708(b)(1)-(3). The Borough further asserted that the requested video is exempt from disclosure because it relates to both criminal and noncriminal investigations. *See* 65 P.S. §§ 67.708(b)(16)-(17). In addition, the Borough asserted that the requested video was confidential under the Criminal History Record Information Act (“CHRIA”), 18 P.S. §§ 9101-9183.

On September 17, 2015, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On September 25, 2015, the Requester submitted a position statement, arguing that the requested video does not relate to an investigation because the Borough “is not a proper entity to assert the investigative exemptions.” The Requester further claims that any exemptions asserted by the Borough are “no longer applicable due to prior disclosure” of the requested video. On September 29, 2015, the Borough submitted a position statement, reiterating its grounds for denial. The Borough also submitted the sworn affidavit of P. Richard Encapera, the Borough’s Chief of Police, in support of its position.

In response to a request for clarification from the OOR, the Borough provided a supplemental position statement on October 9, 2015. The Requester provided an additional

position statement on October 9, 2015, and the Borough issued a subsequent response on October 16, 2015.<sup>1</sup>

On October 28, 2015, the OOR confirmed the Requester's agreement to an extension of time for the issuance of this Final Determination<sup>2</sup> in order to hold an evidentiary hearing. The OOR appointed a hearing officer, *see* 1 Pa.Code § 35.185, and on February 8, 2016, the OOR held an evidentiary hearing; Chief Encapera was the sole witness at the hearing.

On April 4, 2016, the Borough submitted its Brief in Support of Denial of Open Records Request. On May 4, 2016, the Requester submitted his Brief in Support of Open Records Request. On May 12, 2016, the Borough submitted its Reply Brief to Requester's Brief in Support of Open Records Request. On May 18, 2016, the hearing officer certified the record of proceedings in this matter. *See* 1 Pa.Code § 35.201

### LEGAL ANALYSIS

“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).

---

<sup>1</sup> The Requester's October 9, 2015 submission and the Borough's October 16, 2015 submission were received after the record closed; however to develop the record, the submissions were considered. *See* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

<sup>2</sup> *See* 65 P.S. § 67.1101(b)(1) (permitting extensions of time for the issuance of final determinations with a requester's consent).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). 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 Borough is a local agency subject to the RTKL that 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. *See* 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 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly 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). 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. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

## 1. The OOR retains jurisdiction over this appeal

The Borough argues that the requested video is exempt from disclosure because it relates to a criminal investigation. *See* 65 P.S. § 67.708(b)(16). Section 503(d)(2) of the RTKL states that the appeals officer designated by the district attorney of a county shall hear appeals “relating to access to criminal investigative records” in the possession of a local law enforcement agency in that county. 65 P.S. § 67.503(d)(2). Section 503(d)(2) adds that “[t]he appeals officer ... shall determine if the record requested is a criminal investigative record.” *Id.* As a result, the OOR ordinarily lacks jurisdiction over appeals involving criminal investigative records in the possession of a local law enforcement agency.

In *Silver v. City of Pittsburgh*, however, the OOR found that it had jurisdiction over records alleged to be exempt under Section 708(b)(16) that were held by the City of Pittsburgh:

Because the City alleges that the records are criminal investigative records, and the Appeals Officer for the Allegheny County District Attorney’s Office has held that the records are criminal investigative records, it appears that the OOR lacks jurisdiction over the present appeal. However, it strains credulity to imagine that the requested records — overtime report forms and correspondence regarding how said forms should be completed — are criminal investigative records and thus exempt under Section 708(b)(16) of the RTKL. The withheld records are related to a criminal investigation only in the sense that they have been obtained by the FBI as evidence during their investigation. The fact that a record becomes evidence in a criminal investigation — especially a nominally public record dealing with the expenditure of public funds — does not transform that record into one exempt from disclosure pursuant to Section 708(b)(16). The investigation at issue is not being conducted by the City, and as such, the records at issue were not created or compiled by the City in relation to a criminal investigation. *See Hayes v. Pennsylvania Department of Public Welfare*, OOR Dkt. AP 2012-0415, 2012 PA O.O.R.D. LEXIS 530 (“[A] review of case law interpreting the RTKL and its predecessor statute indicates that the investigative exemption has only been extended to protect the records of the agency carrying out an investigation”). Further, it cannot be said that these records resulted in a criminal investigation. Chief McDonald’s affidavits explain that the records were obtained by the grand jury only after the federal investigation had already begun.

Section 708(b)(16) of the RTKL protects from disclosure various records that, if disclosed, would jeopardize a criminal investigation or reveal the institution,

progress, or result of a criminal investigation. *See generally* 65 P.S. § 67.708(b)(16); *see, e.g., Danysh v. Pennsylvania State Police*, OOR Dkt. AP 2013-1338, 2013 PA O.O.R.D. LEXIS 767 (“[T]he PSP provides sufficient evidence that the PSP undertook a criminal investigation, the PSP gathered information as part of its investigative activities related to the homicide, and that the requested photographs are a component of the Homicide Investigation Report”); *Donahue v. City of Hazleton*, OOR Dkt. AP 2013-1284, 2013 PA O.O.R.D. LEXIS (involving incident reports and “intelligence analysis” regarding the requester); *American Civil Liberties Union of Pennsylvania v. Allegheny County*, OOR Dkt. AP 2013-0807, 2013 PA O.O.R.D. LEXIS 499 (involving records regarding the County’s SWAT teams). While the withheld records may be critical evidence in the FBI’s investigation of the Bureau of Police, there is no evidence that release of these records would jeopardize the ongoing criminal investigation or reveal the progress or result of the investigation. The purpose of the RTKL is to enable citizens to scrutinize their government and make government officials accountable for their actions. *See Bowling, supra*. As such, the OOR “must ... interpret the RTKL liberally to effect its purpose.” *Allegheny County Department of Administrative Services v. A Second Chance, Inc.*, 13 A.3d 1025, 1034 (Pa. Commw. Ct. 2011). The City’s broad interpretation of the criminal investigative exemption threatens to frustrate the very purpose of the RTKL by shielding records from disclosure when an agency is accused of wrongdoing.

The requested records are incapable of being exempt under Section 708(b)(16), even if they are potentially evidence in a criminal investigation. As such, the OOR has jurisdiction over this matter.

OOR Dkt. AP 2013-1395, 2013 PA O.O.R.D. LEXIS 886.

In the present case, the Borough asserts that the requested video relates to a criminal investigation. Specifically, Chief Encapera testified that the video prompted a criminal investigation of former Police Officer Justin Shultz by the Borough’s Police Department. (N.T. 36). Chief Encapera further testified, however, that the subject video was not being recorded for the purpose of furthering the criminal investigation. (N.T. 37). Rather, the surveillance video is “for the safety of the prisoner.” (N.T. 39). Although a later criminal investigation occurred *after* Chief Encapera viewed the contents of the video, the decision to conduct an investigation does not change the nature or content of the record itself. Accordingly, following *Silver*, the OOR retains jurisdiction over this matter.

## **2. The Borough did not waive its right to assert that the requested record is exempt from disclosure**

As a preliminary matter, the Requester argues that, because the Borough previously disclosed the requested video to a television news reporter, the Borough “cannot now claim that the records are not ‘public’ and exempted from RTKL disclosure.” The Borough, in turn, claims that it did not waive its right to assert that the requested record is exempt from disclosure simply by permitting a reporter to view portions of the video. In support of its argument, the Borough cites to *Lancaster Newspapers, Inc. v. Lancaster County*, OOR Dkt. AP 2011-0407, 2011 PA O.O.R.D. LEXIS 652, wherein a requester sought access to video and audio of a prison cell. The requester argued, in part, that the requested video was subject to disclosure because the mother of the prisoner had viewed the tape. *Id.* The OOR disagreed, noting that “[t]he fact that the video footage was shared with the subject’s mother does not belie the real security concerns the County has in releasing the record as a public record under the RTKL, particularly as there is no evidence of record that a request to view the video was made pursuant to a RTKL request.” *Id.*

Similar to *Lancaster Newspapers, Inc.*, there is no evidence in the instant matter that the reporter submitted a RTKL request in order to view the responsive record. To the contrary, the Borough submitted the affidavit of Chief Encapera, who attests, in part, that his “interview with Cara Sapida, of WPXI was not the result of a Right to Know Request, and, Ms. Sapida was never provided with a copy of the requested holding cell surveillance video, nor was she shown the entirety of the holding cell videotape.” As in *Lancaster Newspapers, Inc.*, the fact that a reporter was shown portions of the requested record outside the parameters of a RTKL request does not “belie the real security concerns” the Borough has in releasing the video as a public record. Consequently, the Borough has not waived its right to assert that the requested record is exempt from disclosure.

**3. The Borough has not demonstrated that the requested record is exempt from disclosure under Section 708(b)(1)(ii) of the RTKL**

The Borough argues that the requested video is exempt from public access under Section 708(b)(1)(ii) of the RTKL, which exempts from disclosure a record that “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). To establish that this exemption applies, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Delaware County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012). The OOR has held that “[b]elief alone without more, even if reasonable, does not meet this heightened standard.” *Zachariah v. Pa. Dep’t of Corr.*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that “[m]ore than mere conjecture is needed” to establish that this exemption applies).

In support of its assertions, the Borough relies on *Maley v. Greene County*, OOR Dkt. AP 2009-0864, 2009 PA O.O.R.D. LEXIS 718. *Maley*, however, is readily distinguishable from the instant matter, as it involves video surveillance of a prison’s visitation room and not a holding cell. The Borough also submits the sworn affidavit of Chief Encapera, who states that:

10. The holding cell surveillance is utilized for reasons including the safety and security of individuals being detained and for the safety and security of California Borough Police Officers....;

...

15. There are blind spots in the holding cell because the camera does not record these areas, making the knowledge of the location of the camera highly sensitive;

16. This information could potentially enable a detained individual to use the video footage to find blind spots or weaknesses with the video surveillance, to enable a detained individual to dangerously surprise (assault) an officer’s entry into the holding cell, cause disturbances, or otherwise enable him or her

to block the camera, thus, allowing them to smuggle contraband and/or weapons into the holding cell;

17. Obviously, this could create a substantial risk of physical harm to the personal security/safety of law enforcement officers/officials, and, potentially to the public....

Under the RTKL, a statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof. *See 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). However, conclusory affidavits or statements made under penalty of perjury are insufficient to meet an agency's burden of proof. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency's conclusory affidavit was insufficient).

In the instant matter, sufficient evidence has not been presented by the Borough to establish that disclosure of the requested video would be reasonably likely to result in a substantial or demonstrable risk of physical harm or personal security of an individual under Section 708(b)(1)(ii) of the RTKL. Instead, Chief Encapera simply concludes that “knowledge of the location of the camera [is] highly sensitive” and disclosure of the requested information “could create” a substantial and demonstrable risk of physical harm to law enforcement officers. Additionally, during the hearing, the Borough did not provide any testimony elaborating as to how this exemption applies. As previously noted, mere speculation is insufficient to establish that the requested record is exempt from disclosure. *Lutz*, 6 A.3d at 676. Consequently, the Borough has not met its burden of proving that the video is exempt under Section 708(b)(1)(ii) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

**4. The Borough has not demonstrated that the requested record is exempt from disclosure under Section 708(b)(2) of the RTKL**

The Borough next argues that the requested video is exempt from public access under Section 708(b)(2) of the RTKL, which exempts from disclosure records “maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity[.]” 65 P.S. § 67.708(b)(2). In order to establish this exemption, an agency must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013); *Adams v. Pa. State Police*, 51 A.3d 322 (Pa. Commw. Ct. 2012). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Carey*, 61 A.3d at 375; *Governor’s Office of Admin. v. Purcell*, 35 A.3d 811 (Pa. Commw. Ct. 2011); *Lutz*, 6 A.3d at 676.

Here, the requested video is a recording of the inside of a police department holding cell. As the requested video relates to the Borough’s performance of law enforcement activities, the first element is met. The Borough must also prove, however, that disclosure of the video would be “reasonably likely” to jeopardize public safety and/or preparedness. The Borough cites to *Lancaster Newspapers, Inc.* in support of its position. The records sought in *Lancaster Newspapers, Inc.* involved the video surveillance of an inmate under suicide watch in a prison’s mental health unit. The Borough also relies on the affidavit of Chief Encapera, who attests that:

13. The release of the video of the holding cell ... would reveal the layout of the holding cell, and, also, the capabilities, range and scope of the camera to the general public;

14. This would threaten public safety and the Police Department's ability to maintain a secure holding cell area because it could allow detained individuals to share information that could be used to breach security procedures.

The affidavit submitted by the Borough does not support a finding that disclosure of the video would be "reasonably likely" to jeopardize public safety. In fact, the Borough itself provided unfettered access of the holding cell to a television news reporter. As shown on a video newsclip entered into evidence at the hearing, WTAE reporter Bob Hazen is seen inside the holding cell.<sup>3</sup> Notably, the video newsclip also clearly shows the surveillance camera, as well as precisely what the surveillance camera is able to capture in the holding cell. The Borough's decision to permit access of the holding cell to a news reporter, who then aired the newsclip to the public at large, contradicts the Borough's argument that release of the requested video would jeopardize public safety.

Moreover, Chief Encapera's testimony fails to demonstrate how disclosure of the video would be "reasonably likely" to jeopardize public safety and/or preparedness. Specifically, during the hearing, Chief Encapera provided the following testimony:

The prisoner comes in. We identify them and search them outside of the holding cell. When they're put in the holding cell for whatever reason, I require them to be handcuffed and have a leg shackle on them so they can't roam around....

There's a bench there for them to sit on.... Our holding cell isn't [used for] a very long period of time. It's just to await arraignment or until someone comes and picks up that particular person.

(N.T. 28-29). Chief Encapera further testifies that it is the Police Department's policy that the police officers view the video surveillance before entering the holding cell to ensure the prisoner is still properly handcuffed and shackled. (N.T. 44). Based on the evidence presented, the

---

<sup>3</sup> Although the Borough objected to the admission of the video newsclip into evidence, the hearing officer overruled the objection and entered the video newsclip into the record. The video newsclip is available at <http://www.wtae.com/news/local/washington/california-borough-police-officer-charged-with-assaulting-handcuffed-suspect/23305494>.

Borough has failed to demonstrate that disclosure of the requested video would jeopardize public safety.

**5. The Borough has not demonstrated that the requested record is exempt from disclosure under Section 708(b)(3) of the RTKL**

The Borough also argues that the requested video is exempt from disclosure under Section 708(b)(3) of the RTKL, which provides that the following category of records may be withheld from public access: “A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system....” 65 P.S. § 67.708(b)(3); *see Crockett v. SEPTA*, OOR Dkt. AP 2011-0543, 2011 PA O.O.R.D. LEXIS 268 (holding that rail car inspection and repair records were not exempt under this exemption); *Portnoy v. Bucks County*, OOR Dkt. AP 2009-1007, 2009 PA O.O.R.D. LEXIS 728 (finding that an agency did not establish that a log of card swipes was protected under this exemption); *but see Moss v. Londonderry Twp.*, OOR Dkt. AP 2009-0995, 2009 PA O.O.R.D. LEXIS 724 (holding that records related to the Three Mile Island nuclear power plant were not subject to public access).

In order for this exemption to apply, “the disclosure of” the records — rather than the records themselves — must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructure records. *See* 65 P.S. § 67.708(b)(3). In support of this exemption, the Borough submits the supplemental affidavit of Borough Police Officer Timothy Sheehan, who states that:

6. The Borough’s holding cell is a private area that only authorized law enforcement officials are able to access;
7. The surveillance camera and the layout of the holding cell are not visible from outside of the cell or from any of the areas that are open to the public in the police station;

...

9. The only individuals who would ever be in the holding cell are either authorized law enforcement officials or detainees.

Additionally, Chief Encapera provided the following testimony regarding blind spots in the holding cell:

As you're looking in on the right of the bench, if it were --- if they were shackled there, they could maneuver their way over to the blind spot that I was saying on the far right corner.

...

If they were carrying drugs, they could probably take the drugs. If they were secreting a weapon, they could possible maneuver the weapon to a place where they could use it whenever my officers come back to check on them or to release them.

(N.T. 33-34).

In *Harasti v. Pa. Dep't of General Services*, an agency demonstrated that the release of a floor plan for the Workers' Compensation Office of Adjudication would be "reasonably likely to endanger the physical security of [its] employees" based on the affirmative evidence provided by the agency, which consisted of a verification from the Superintendent of the Pennsylvania Capitol Police discussing how the records reveal vulnerabilities to infrastructure and possible consequences, a United States Secret Service study concerning targeted violence against judicial officials, and an affidavit from a Deputy Secretary, who attested that employees at that location have been "confronted with threats to their safety and security." OOR Dkt. AP 2009-0226, 2009 PA O.O.R.D. LEXIS 43.

Here, unlike *Harasti*, the Borough has offered only conclusory statements concerning how the release of the record would be reasonably likely to endanger "the safety or the physical security" of the holding cell. An agency cannot rely on conclusory statements to sustain its burden of proof. See *Office of the Governor*, 65 A.3d at 1103. Moreover, Chief Encapera

acknowledged that he was not aware of any situation where a prisoner used information about a surveillance camera's blind spots to commit a security or safety issue. (N.T. 46).

Based on the evidence provided, the Borough has not established that release of the requested video would result in a reasonable likelihood of endangering the "safety or the physical security" of a building or infrastructure. The examples highlighted under the subsections in Section 708(b)(3) contemplate withholding records that may prevent terrorism or expose vulnerabilities in critical systems. *See* 65 P.S. §§ 67.708(b)(3)(i)-(iii). While the Borough has presented evidence that the record may reveal blind spots, there is no evidence that disclosure of the video would be reasonably likely to jeopardize the "safety or ... physical security" of the holding cell. This is especially true given that the Borough permitted a television news reporter from WPXI to view portions of the requested video<sup>4</sup> and allowed a television reporter from WTAE full access to the holding cell. As such, the Borough has not met its burden of proof that disclosure of the video would jeopardize the safety or security of the holding cell. *See* 65 P.S. § 67.708(a)(1).

**6. The Borough has not demonstrated that the requested video relates to a criminal investigation**

The Borough claims that the requested video is exempt from public access under Section 708(b)(16) of the RTKL and CHRIA. Section 708(b)(16) of the RTKL exempts from disclosure a "record of an agency relating to or resulting in a criminal investigation, including ... (ii) [i]nvestigative materials, notes, correspondence, videos and reports." 65 P.S. § 67.708(b)(16)(ii). In order for this exemption to apply, an agency must demonstrate that "a

---

<sup>4</sup> Although the Borough objected to the admission of the video newsclip into evidence, the hearing officer overruled the objection and entered the newsclip into the record. Additionally, while the Borough permitted WPXI reporter Cara Sapida to view the requested video, the Borough states it did not provide the reporter with a copy of the video and did not permit the reporter to show any footage from the video. Ms. Sapida's report is available at <http://www.wpxi.com/news/news/local/officer-suspended-after-video-surfaces-alleged-abu/ncBn7/>.

systematic or searching inquiry, a detailed examination, or official probe” was conducted regarding a criminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Similarly, Section 9106(c)(4) of CHRIA provides:

Investigative and treatment information shall not be disseminated to any department, agency, or individual unless the department, agency or individual requesting the information is a criminal justice agency which requests the information in connection with its duties, and the request is based upon a name, fingerprints, modus operandi, genetic typing, voice print or other identifying characteristic.

18 Pa.C.S. § 9106(c)(4). 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.” 18 Pa.C.S. § 9102.

In *Pa. State Police v. Grove* (“*Grove I*”), the Commonwealth Court addressed the issue of “whether video recordings of interactions between law enforcement officers and members of the public in a public place are exempt from disclosure as criminal investigative records under the [RTKL and CHRIA.]” 119 A.3d 1102 (Pa. Commw. Ct. 2015), *appeal granted*, 133 A.3d 292 (Pa. 2016). In that case, the requester sought a mobile video recording (“MVR”) of an accident scene, which the Pennsylvania State Police (“PSP”) claimed was exempt under the RTKL and confidential under CHRIA. *Id.* at 1104. The requester appealed to the OOR, which held that the PSP failed to meet its burden to prove that the MVRs were related to a criminal investigation. *Id.*

The Commonwealth Court upheld the OOR’s final determination, reasoning that:

PSP argues that both MVRs are criminal investigative records because the motor vehicle accident to which they relate resulted in traffic citations, which are summary criminal offenses, and because one of the troopers investigated the accident before issuing the citations. We do not agree that these facts make the recordings investigative or exempt them as records “relating to or resulting in a criminal investigation.” The mere fact that a record has some connection to a

criminal proceeding does not automatically exempt it under Section 708(b)(16) of the RTKL or CHRIA.

*Id.* at 1108. The court concluded that the “PSP’s evidence demonstrates that the MVRs are created to document troopers’ performance of their duties in responding to emergencies and in their interactions with members of the public, not merely or primarily to document, assemble or report on evidence of a crime or possible crime.” *Id.* The court noted that records protected under Section 708(b)(16) of the RTKL and CHRIA “as investigative are records created to report on a criminal investigation or set forth or document evidence in a criminal investigation or steps carried out in a criminal investigation.” *Id.* (citations omitted). However, the court also recognized that, in certain situations, an MVR could contain investigative material such as “witness interviews, interrogations, intoxication testing and other investigative work.” *Id.* As a result, the PSP was permitted to redact the audio of the MVRs that recorded witness interviews, but was not permitted to redact the video recordings. *Id.* at 1110. The Commonwealth Court reached a similar conclusion in *Pa. State Police v. Grove* (“*Grove II*”), holding that an MVR’s connection to a criminal investigation was nonexistent where the recording depicted an in-progress vehicle code violation that resulted in the trooper issuing a warning. No. 1646 C.D. 2014, 2015 Pa. Commw. Unpub. LEXIS 714, \*16 (Pa. Commw. Ct. Sept. 28, 2015) (“Here, ‘the connection to a criminal proceeding’ is non-existent.”).

In the instant matter, the Borough argues that because the video “was used as part of the criminal investigation,” the video is considered investigatory under Section 708(b)(16)(ii) of the RTKL. In support of its position, Chief Encapera attests as follows:

6. I personally conducted the criminal investigation of former officer, Justin T. Shultz stemming from the images captured on the holding cell video of November 9, 2013, which ultimately lead to him pleading guilty to the crime of simple assault;

7. The criminal charges issued against Mr. Shultz were issued by the California Borough Police Department, the Arresting Agency....

Notably, the Borough did not submit evidence describing the content of the video or the actions of the individuals shown on the video. Instead, the Borough simply argues that the requested video is not subject to public access because the actions of Mr. Shultz captured on the video later became the subject of an investigation by the Borough's Police Department to determine whether Mr. Shultz committed a crime. Based on the evidence submitted, the requested video chronicles factual events. These events do not include investigative material such as collecting evidence, interviewing witnesses or physically inspecting or analyzing a crime scene. As such, the events on the video do not constitute investigative content. Further, a subsequent investigation into whether Mr. Shultz committed a crime when interacting with a member of the public does not convert a video into a record of a criminal investigation. *See Levy v. Senate of Pa.*, 94 A.3d 436, 448 (Pa. Commw. Ct. 2014) ("To the extent the documents reference and arguably 'relate to' a criminal investigation conducted by another agency, the records themselves do not contain any investigatory material"); *see also Owens v. Pa. State Police*, OOR Dkt. AP 2015-1849, 2015 PA O.O.R.D. LEXIS 1597 (an MVR which "documents evidence of a possible crime" of two Troopers is not exempt under Section 708(b)(16) of the RTKL).

**7. The Borough has not demonstrated that the requested record is exempt from disclosure under Section 708(b)(17) of the RTKL**

Lastly, the Borough argues that the requested record relates to the Borough's noncriminal investigation of Mr. Shultz. *See* 67 P.S. § 67.708(b)(17). Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to noncriminal investigations[.]" *Id.* In order for this exemption to apply, an agency must demonstrate that "a systematic or searching

inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). Moreover, the investigation must specifically involve an agency’s legislatively-granted fact-finding powers. *See Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure. *Id.* at 259.

In his affidavit, Chief Encapera attests as follows:

9. As a result of my review of images captured on California Borough Police Department’s holding cell surveillance video on November 9, 2013, Mr. Shultz was immediately notified by way of a personal disciplinary writing, that he was not to report to work and the matter was being referred to [Borough] Council ....

The evidence presented, including Chief Encapera’s affidavit, does not demonstrate that the requested video is exempt from disclosure under Section 708(b)(17) of the RTKL. An agency cannot rely upon conclusory affidavits to meet its burden of proof. *Office of the Governor*, 65 A.3d at 1103. The fact that the requested video may have been used in disciplinary action taken against Mr. Shultz does not mean that the video is automatically related to a noncriminal investigation and exempt from disclosure under Section 708(b)(17). *See Hobbes v. Pa. Human Relations Comm’n*, OOR Dkt. AP 2014-2009, 2015 PA O.O.R.D. LEXIS 83. Based on the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *See Bowling*, 990 A.2d at 824; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 (Pa. Commw. Ct. 2012) (“The RTKL must be construed to maximize access to government records”). Therefore, without evidence demonstrating that the

withheld video exists “merely or primarily” for investigative purposes, the Borough has not demonstrated that the responsive record is exempt. *See* 65 P.S. § 67.708(a)(1); *Hawkins v. Cent. Dauphin Sch. Dist.*, OOR Dkt. AP 2016-0583, 2016 PA O.O.R.D. LEXIS 760.

### CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted**, and the Borough is required to provide the requested video to the Requester within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Washington 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 according to court rules 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.<sup>5</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: June 15, 2016**

/s/ Magdalene C. Zeppos

---

APPEALS OFFICER  
MAGDALENE C. ZEPPOS, ESQ.

Sent to: Andrew Glenn Rothey, Esq. (via e-mail only);  
Thomas Agrafiotis, Esq. (via e-mail only)

---

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