

counts of 1st degree murder after a bench trial in January of 1967. I have Information that Guthier died in one of the state correctional institutions in July of 2002. I am planning a book on the subject and would request any information police reports, photographs, interviews or any other information that the State Police might have regarding this incident.

On April 19, 2016, the PSP denied the Request, citing exemptions for records related to a criminal investigation (65 P.S. § 67.708(b)(16)) and CHRIA. The PSP also cited exemptions for personal identification information (65 P.S. § 67.708(b)(6)(i)(A)) and for records that would identify a minor (65 P.S. § 67.708(b)(30))

On May 26, 2016, 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 PSP to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c). On June 8, 2016, the PSP submitted a position statement, along with a notarized affidavit from its Open Records Officer, who affirms that that it identified PSP Initial Crime Report No. L1-2179 (“Report”), a 99-page document, as the sole responsive record. The PSP’s Open Records Officer affirms that the Report was “compiled on or after April 3, 1966 by Tpr. Elwood Krause describing and documenting his investigation into a complaint of criminal activity.” The PSP’s Open Records Office also affirms that the Report is exempt under 65 P.S. § 67.708(b)(16) and CHRIA.

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).

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.* 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.* Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The PSP is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The PSP alleges that the Report is exempt as a record related to a criminal investigation. Section 708(b)(16) of the RTKL exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation,” including “[i]nvestigative ... reports.” 65 P.S. § 67.708(b)(16)(ii). 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 criminal matter. *See Department 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. Pennsylvania Convention Center Authority*, 49 A.3d 920 (Pa. Commw. Ct. 2012).

Here, the PSP has provided evidence establishing that it conducted an investigation and that Trooper Krause created the Report as a result. The Commonwealth Court has previously held that an incident report regarding a criminal matter “is wholly exempt from disclosure because it is a criminal investigative record, which contains investigative materials and victim information.” *Pa. State Police v. Office of Open Records*, 5 A.3d 473, 477 (Pa. Commw. Ct. 2010); *see also Schofield v. Pennsylvania State Police*, OOR Dkt. AP 2011-0738, 2011 PA O.O.R.D. LEXIS 473 (holding that an incident report is exempt under Section 708(b)(16)). Based on a review of the evidence presented, the PSP has established that the requested Report is exempt as a record related to a criminal investigation. *See Grocki v. Pennsylvania State Police*, OOR Dkt. AP 2009-0661, 2009 PA O.O.R.D. LEXIS 75 (holding that records related to a murder investigation occurring 40 years earlier were exempt under 65 P.S. § 67.708(b)(16)).

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, and the PSP is not required to take any further action. 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 Commonwealth Court. 65 P.S. § 67.1301(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: July 19, 2016

/s/ J. Chadwick Schnee, Esq.

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