pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JAYQUON MASSEY,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2016-1203**
	:	
COUNTY OF ALLEGHENY,	:	
Respondent	:	

INTRODUCTION

Jayquon Massey ("Requester") submitted a request ("Request") to the County of Allegheny ("County") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking forensic lab reports and related notes. The County denied the request as seeking exempt records of criminal investigations and DNA evidence. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **transferred**, and the County is not required to take any further action before the OOR.

FACTUAL BACKGROUND

On June 20, 2016, the Request was filed, seeking,

1) Forensic Lab Reports of Case No. 07-LAB-11669 of Jayquon Massey.
2) Any and all Forensic Lab Reports in the above titled Name of Jayquon Massey dated on or about October 21, 2008.
3) Any and all notes concerning how many times testing was provided and results as to its testing.

On June 29, 2016, the County denied the Request, stating that the requested materials are exempt under the Criminal History Record Information Act ("CHRIA"), 18 P.S. §§ 9101-9183; and under exemptions for records related to a criminal investigation, 65 P.S. § 67.708(b)(16); and DNA records, 65 P.S. § 67.708(b)(19).

On July 12, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the County to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c). On July 29, 2016, the County submitted a position statement and the affidavit of Deputy District Attorney Michael Streily. Deputy Streily attests that the reports sought by the Request were all created in furtherance of a criminal investigation. The County further asserted that such records remain exempt even after the end of an investigation. On appeal, the County did not argue that the records are exempt under 65 P.S. § 67.708(b)(19).

On August 1, 2016, the Requester submitted argument against the County's position, asserting that the records should be public because the investigation was concluded, the contents were incapable of harming any party and that the County was compelled to release them under the *Brady* rule. *See Brady v. Maryland*, 373 U.S. 83 (1963).

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" and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal; however, 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). Here, neither of the parties requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate this matter.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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)).

The Request seeks forensic lab reports and related notes as they concern cases involving Jayquon Massey. The County argues that such records are exempt under CHRIA and Section 708(b)(16), and, in support, offers the affidavit of Deputy Streily, who states that all of the responsive materials were created for the sole purpose of undertaking a criminal investigation. In response, the Requester argues that the investigation has long-since been completed, and, therefore, the records no longer relate to any pending investigation.

Section 708(b)(16) exempts from disclosure "[a] record of an agency relating to or resulting in a criminal investigation." 65 P.S. § 67.708(b)(16). CHRIA provides that records of criminal investigations shall be exempt from public disclosure. *See* 18 Pa.C.S. § 9106(c)(4). The Department is a local law enforcement agency under the RTKL. *See* OOR Advisory Opinion issued Jan. 15, 2010, *available at* http://www.openrecords.pa.gov/Using-the-RTKL/Documents/Separate_ORO_appointment_for _PD.pdf (stating that a municipal police department is not a separate agency from a municipality). 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*. Accordingly, the appeal is hereby transferred to the Appeals Officer for the Allegheny County District Attorney's Office. A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the Allegheny County District Attorney's Office.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **transferred** to the Appeals Officer for the Allegheny County District Attorney's Office, and the County is not required to take any further action at this time. 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 Allegheny 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.[1] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: August 8, 2016

/s/ Jordan C. Davis

Jordan C. Davis, Esq.
Appeals Officer

Sent to: Jayquon Massey (HW-6337);
Allegheny County District Attorney's Office;
Jerry Tyskiewicz (via e-mail only);
Rachel Cipolat, Esq. (via e-mail only)

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