

Middlesex Township Police Department. Mr. Sherman states that the body cam footage being requested is related to a criminal investigation for which criminal charges are currently pending. Mr. Sherman also affirms that the body cam footage requested is evidence in a pending criminal proceeding initiated by the Commonwealth, which is awaiting disposition before the Court of Common Pleas of Cumberland County.² Under the RTKL, an affidavit may serve as sufficient evidentiary support. *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). In the absence of any evidence that the Township has acted in bad faith, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

The threshold question is whether the OOR has jurisdiction to hear this appeal. The issue of subject matter jurisdiction may be raised by the parties or the OOR, *sua sponte*. *See Weber v. Wyoming Valley Sch. Dist.*, 668 A.2d. 1218 (Pa. Commw. Ct. 1995) (Secretary of Education permitted to raise issues of subject matter jurisdiction in an administrative proceeding under the Public School Code *sua sponte*). The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a).

The Township is a local law enforcement agency.³ 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

² Docket No. MJ-09201-CR-0000063-2016.

³ *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 township police department is not necessarily a separate agency from a township).

officer designated by the local district attorney. *See id.* During the course of this appeal, the Township submitted evidence demonstrating that the requested records could potentially relate to a criminal investigation. *See Pennsylvanians for Union Reform v. Centre Cnty. Dist. Attorney's Office*, 139 A.3d 354 (Pa. Commw. Ct. 2016) (citing 42 Pa.C.S. § 5103(a) (relating to the process for handling improperly filed appeals)). Accordingly, the appeal is hereby transferred to the Appeals Officer for the Cumberland County District Attorney's Office to determine, consistent with the *Grove*⁴ decisions, whether the requested records have a sufficient connection to a criminal investigation to constitute investigative content and are, therefore, exempt from disclosure, in whole or in part, as criminal investigative records under Section 708(b)(16) of the RTKL.⁵ A copy of this final order and the appeal filed by the Requester will be sent to Appeals Officer for the Cumberland County District Attorney's Office.

For the foregoing reasons, Requester's appeal is **transferred** to the Appeals Officer for the Cumberland County District Attorney's Office, and the Township 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, either party may appeal to the Cumberland 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

⁴ *Pa. State Police v. Michelle Grove*, 119 A.3d 1102 (Pa. Commw. Ct. 2015), *appeal granted*, 133 A.3d 282 (Pa. 2016) ("Grove I"); *Pa. State Police v. Casey Grove*, No. 1646 C.D. 2014, 2015 Pa. Commw. Unpub. LEXIS 714 (Pa. Commw. Ct. Sept. 28, 2015), *appeal pending* 801 MAL 2015 ("Grove II").

⁵ In the *Grove* cases, the Commonwealth Court held that recordings of interactions between law enforcement officers and members of the public in a public place are not automatically exempt under Section 708(b)(16) of the RTKL. The mere fact that a record has some connection to a criminal proceeding does not automatically exempt it under Section 708(b)(16). *See Coley v. Phila. District Attorney's Office*, 77 A.3d 694 (Pa. Commw. Ct. 2013). The Commonwealth Court found that activities constituting "investigative content" include taking measurements, collecting evidence, or physically inspecting or analyzing a crime/accident scene. Additionally, records that are created to report on a criminal investigation, set forth or document evidence in a criminal investigation, or show steps carried out in a criminal investigation have been found to be investigative. *See Grove*, 119 A.3d at 1108.

Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at:
<http://www.openrecords.pa.gov/>.

FINAL DETERMINATION ISSUED AND MAILED: November 10, 2016

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Connee Hempt (via e-mail only);
Keith Brenneman, Esq. (via e-mail only);
Eileen Gault, AORO (via e-mail only)