



On October 7, 2022, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Office denied Items 2 and 3 of the Request, arguing that the records relate to a criminal investigation, 65 P.S. § 67.708(b)(16). The Office “redirected” Items 1 and 4 of the Request to the Philadelphia Police Department.

On October 28, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.<sup>2</sup> The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 7, 2022, the Requester submitted a position statement arguing that the Office “does not explain how the criminal investigations exemption applies to the responsive records.” On November 10, 2022, the Requester submitted an additional position statement reiterating his argument.

On November 16, 2022, the Office submitted a position statement reiterating its grounds for denial. The Office claims that “[t]his appeal should be dismissed because the appeal, as it pertains to requests related to ADA Foulkes is premature.” The Office further argues that “[t]he homicide files and records of police misconduct were properly redirected to the Philadelphia Police Department, and the requested witness interviews, notes on such interviews, and autopsy report, are exempt criminal investigative records.” In support of its position, the Office submitted the Attestation of Attorney Josh Niemtow, Assistant District Attorney, Civil Litigation Unit and Open Records Officer for the Office (“Niemtow Attestation”) and Attorney Michael Garmisa,

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<sup>2</sup> Although it was received by the OOR on October 31, 2022, the appeal is postmarked October 28, 2022; therefore, pursuant to the “prisoner mailbox rule,” the appeal is considered timely filed. *See Jones v. Pa. Dep’t of Corr.*, 1213 C.D. 2018, 2019 Commw. Unpub. LEXIS 472 (Pa. Commw. Ct. 2019); *Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

Assistant District Attorney and Supervisor of the Conviction Integrity Unit for the Office (“Garmisa Attestation”).

On November 22, 2022, the OOR asked the Office whether or not it was in possession of Items 1 and 4 and to provide additional evidence addressing whether it has those specific records. That same day, the Office submitted the supplemental attestation of Attorney Niemtzw (“Niemtzow Supplemental Attestation”). On November 27, 2022, the Requester submitted a response arguing that the Office should make “[a] good faith effort ... to thoroughly search through the twenty two boxes associated with [the Requester’s] case.”

### LEGAL ANALYSIS

The Office is a local agency subject to the RTKL. 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. As an agency subject to the RTKL, the Office is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). 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. Requester may not modify the Request on appeal**

On appeal, the Requester alleges that he requested the following:

1. A complete copy of the H-File gathered in the homicide investigation of Amos Norwood by Detectives Cimino, J. McNesby, and related personnel, from June 11, 1984 to February 21, 1986.
2. Complete copies of all interviews, witness statements, personal notes and communications conducted by Detectives Cimino, J. McNesby, ADA Andrea

Foulkes and related personnel in the homicide investigation of Amos Norwood from June 11, 1984 to February 21, 1986.

3. A complete copy of the autopsy report and related findings in the death of Amos Norwood, from June 11, 1984 to February 21, 1986.
4. Complete copies of any misconduct committed by or complaints on Detectives Cimino, J. McNesby, Sgt. Daniel Rosentstein [sic], and ADA Andrea Foulkes.

Here, the Requester attempts to add witness statements and information relating to ADA Andrea Foulkes (in Items 2 and 4). A requester may not modify, explain or expand upon a request on appeal. *See Michak v. Dep't of Pub. Welfare*, 56 A.3d 925 (Pa. Commw. Ct. 2012) (holding that “where a requestor requests a specific type of record ... the requestor may not, on appeal, argue that an agency must instead disclose a different record in response to the request”); *Staley v. Pittsburgh Water and Sewer Auth.*, OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256 (“A requestor may not modify the original request as the denial, if any, is premised upon the original request as written”).<sup>3</sup> Therefore, the OOR’s review on appeal is confined to the Request as written, and no modifications to the Request will be considered.

**2. The Office proved that Items 1 and 4 do not exist within the Office’s possession, custody or control**

The Office argues that it properly redirected Items 1 (H-file) and 4 (police misconduct information) to the Philadelphia Police Department (“Department”). In support, the Niemtzw Attestation states the following:

1. With respect to [the] [R]equest for the police H-file, the [Office] has determined that there are twenty-two boxes associated with this case in the [Office’s] possession. These boxes are currently in storage and are not readily accessible.
2. However, after speaking with senior prosecutor, ADA Jude Conroy, longtime member of the [Office’s] Homicide Unit, and the Assistant Supervisor of the [Office’s] Law Division, Paul George, who oversees post-conviction review, which frequently entails reviewing materials contained in the “H File,” both

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<sup>3</sup> The OOR notes that the Requester filed a separate RTK request with the Office seeking information relating to ADA Foulkes. The Office responded to that request on November 15, 2022.

colleagues confirmed that the DAO's standard practice is to return the [Office's] copy of the Police H File to the Philadelphia Police Department after the case is completed.

3. The prosecutions of the Amos Norwood murder are completed. Therefore, the [Office] would not be in possession of the "H File." Moreover, the [Office] reiterates, as explained in its appellate submission, that in any case, the H File is a record belonging to the Philadelphia Police Department.
4. With respect to police misconduct information, as the [Office] explained in its original attestations, recorded complaints against police officers are in the possession of the Philadelphia Police Department's Internal Affairs Bureau. The [Office] receives truncated summaries of such misconduct from Internal Affairs for use in the [Office's] criminal investigations.
5. As the [Office] explained in its affidavit from CIU Supervisor, Michael Garmisa, because this information is obtained for the Office's investigation into the background of witnesses, such information should not be disclosed outside of the criminal discovery context. It would be improper for the DAO to confirm or deny the existence of any entry related to particular law enforcement personnel in response to this request.

In further support of the Office's position, the Office argues that "[r]ecords of disciplinary violations/complaints would be contained in the detectives' personnel files" and that the Office "receives a limited subset of misconduct information from the Internal Affairs Bureau for the [Office's] use to assess police officer credibility and for disclosure through criminal discovery pursuant to its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963)."

In response to a request for records, "an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]" 65 P.S. § 67.901. While the RTKL does not define the term "good faith effort," in *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency's physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors ... After obtaining

potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020).

An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency's records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep't of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

Here, the Office submitted a Supplemental Attestation from Attorney Niemtzw, the Open Records Officer for the Office, who attests that he spoke with a senior prosecutor and member of the Office's Homicide Unit, as well as the Assistant Supervisor of the Office's Law Division, who both confirm that the Office's "standard practice is to return the [Office's] copy of the Police H File to the Philadelphia Police Department after the case is completed." Additionally, the Niemtzw Supplemental Attestation states that the Office "receives truncated summaries" of Police Misconduct. Attorney Niemtzw further attests that the H File and police misconduct information would be in the possession of the Philadelphia Police Department.<sup>4</sup> Therefore, the evidence presented is sufficient to prove that records responsive to Items 1 and 4 of the Request more likely than not, do not exist within the possession, custody or control of the Office. *See Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the

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<sup>4</sup> Under the RTKL, a sworn affidavit or statement made under the penalty of perjury 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 Office acted in bad faith or that additional responsive records exist, "the averments in the statement should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. 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)).

lowest evidentiary standard, and is tantamount to a “more likely than not” inquiry), *appeal granted on other grounds*, 280 A.3d 870 (Pa. 2022); *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

### **3. The OOR lacks jurisdiction over records that are related to a criminal investigation**

In this instance, the Office argues that the records responsive to Items 2 and 3 are exempt from disclosure under the RTKL’s criminal investigative records exemption, 65 P.S. § 67.708(b)(16), and, as such, the OOR does not have jurisdiction over the appeal.

While the OOR has no jurisdiction over records that are related to a criminal investigation, a local agency claiming that records are exempt under Section 708(b)(16) does not automatically divest the OOR of jurisdiction over an appeal. Section 503(d) creates a two-step analysis for determining when cases should be heard by the OOR and when they should be heard by the appeals officer appointed by a District Attorney. First, jurisdiction is properly transferred from the OOR to the District Attorney’s Office when an appeal, on its face, involves records that relate to a criminal investigation (e.g., search warrants, witness statements, etc.). *See, e.g., Porter v. Allegheny County Sheriff’s Office*, OOR Dkt. AP 2014-1910, 2014 PA O.O.R.D. LEXIS 1444 (transferring an appeal where the request sought a search warrant, which was facially related to a criminal investigation).

Second, when it is unclear whether the requested records relate to a criminal investigation, the local agency must provide some evidence showing how the records relate to a specific criminal investigation. While a low threshold for transferring a case is needed, an agency must provide more than a conclusory affidavit that merely repeats the language of Sections 503(d) and 708(b)(16). *See Bush v. Westtown-East Goshen Police Dep’t*, OOR Dkt. AP 2016-1869, 2016 PA O.O.R.D. LEXIS 1708 (finding that an affidavit demonstrated how the requested records related

to a specific criminal investigation); *Burgess v. Willistown Twp. Police Dep't*, OOR Dkt. AP 2013-1511, 2013 PA O.O.R.D. LEXIS 868 (holding that where a local agency made a preliminary showing that records relate to a criminal investigation, the OOR lacked jurisdiction to consider the merits of the appeal).

In this instance, the Requester expressly seeks criminal investigative records, such as “copies of interviews, personal notes and communications” along with “autopsy report and related findings in the death of Amos Norwood[,]” which appear to be related to a criminal case involving the homicide investigation of Amos Norwood. Additionally, in support of the Office’s position, the Niemtzow Attestation states that the Office’s “decision to deny [the R]equest for autopsy reports and witness interviews, notes on interviews, and correspondence was based on clear statutory language under 708(b)(16)(ii) and case law from the Commonwealth Court affirming this principle.” Niemtzow Attestation, ¶6. Finally, the Niemtzow Attestation explains that complaints against police officers are investigated through the Conviction Integrity Unit (“CIU”) and that the Office maintains a “Police Misconduct Database” (“PMD”) “in which instances of misconduct by members of the Philadelphia law enforcement agencies are entered into the [Office’s] database.” *Id.*, ¶9. Thus, Attorney Niemtzow found that “PMD records are properly exempt under the criminal investigative records exemption of the RTKL.”<sup>5</sup>

Because the requested records relate to specific criminal matters, the OOR does not have jurisdiction over the appeal. Rather, the matter is within the jurisdiction of the Appeals Officer for the County District Attorney’s Office to determine if the requested records relate to a criminal investigation. *See Bookman v. Phila. Dist. Attorney’s Off.*, OOR Dkt. AP 2020-0368, 2020 PA O.O.R.D. LEXIS 1855 (transferring an appeal where the request sought forensic evidence reports,

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<sup>5</sup> Additionally, the Garmisa Attestation further explains the CIU and the information contained in the PMD on how it relates to a criminal investigation. *See Garmisa Attestation.*



which were facially related to a criminal investigation); *Brown v. Monroe Cnty. Dist. Attorney's Off.*, OOR Dkt. AP 2020-0720, 2020 PA O.O.R.D. LEXIS 2223 (transferring an appeal where the request sought fingerprint and DNA reports, which were facially related to a criminal investigation).

The Commonwealth Court has noted that the OOR has the authority to transfer an appeal to “where [a requester] should have initially appealed.” *See Phila. Dist. Attorney's Office v. Williams*, 204 A.3d 1062, \*4 n.5 (Pa. Commw. Ct. 2019) (“...[A]lthough the onus for appealing from an RTKL denial to the proper appeals officer is on the requester, the OOR did not violate the law or any procedure in redirecting the appeal in this case”). However, in this instance, the matter was already appealed to and adjudicated by the County District Attorney's Office. *See* Niemtzow Attestation. Therefore, the OOR need not transfer the appeal, and the OOR defers to the determination made by the Open Records Appeals Officer for the District Attorney's Office, finding that the records are exempt from disclosure as records related to a criminal investigation, 65 P.S. § 67.708(b)(16). *See Saunders v. Lackawanna Cnty. Dist. Attorney's Office*, OOR Dkt. AP 2022-1551, 2022 PA O.O.R.D. LEXIS 1837.

## CONCLUSION

For the foregoing reasons, the appeal is **denied in part** and **dismissed in part** for lack of jurisdiction, and the Office 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 Philadelphia 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. 65 P.S. § 67.1303. 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>6</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: November 29, 2022**

*/s/ Lyle Hartranft*

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LYLE HARTRANFT, ESQ.  
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Sent via email to: Marc Draper (via US Mail); Josh Niemtzw, Esq.

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<sup>6</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).