



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF :
 :
JOHNATHON MAURY, :
Requester :
 :
 v. : **Docket No: AP 2023-1979**
 :
MAHANAY CITY BOROUGH, :
Respondent :

FACTUAL BACKGROUND

On August 14, 2023, Johnathon Maury (“Requester”) submitted a request (“Request”) to Mahanoy City Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

Any and All evidence including but not limited to: person statements, badge camera footage, police cruiser footage, bus camera footage, witness testimony, and any other evidence from an incident that occurred on 5/30/23 at 2:35 pm incident number 2023M0166. The docket numbers are MJ-21305-TR-0001498-2023, MJ-21305-TR-0001497-2023, and MJ-21305-TR-0001496-2023 for this incident.

The Borough did not respond to the Request within five business days, and on August 21, 2023, the Request was deemed denied. 65 P.S. § 67.901.

On August 22, 2023, the Requester appealed to the OOR, noting that he had not received any response to his Request. The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

LEGAL ANALYSIS

The Borough 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 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 Borough 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 factfinder ... 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 Borough did not respond to the Request or on appeal; however, as a preliminary matter, the OOR must determine if it 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 *sua sponte* in an administrative proceeding under the Public School Code).

1. Certain records are related to Act 22

Act 22 removed audio and video recordings made by law enforcement agencies from access under the RTKL and created a separate, exclusive means of access. *See* 42 Pa.C.S. § 67A03. In order to obtain such recordings, a requester must submit a written request to the open records officer for the law enforcement agency that possesses the record. A “[l]aw enforcement agency” includes “an agency that employs a law enforcement officer.” 42 Pa.C.S. § 67A01. Here, certain portions of the Request seeking audio and video recordings made by law enforcement agencies

were made pursuant to the RTKL. Accordingly, the portions of the Request, which seek audio and video recordings of law enforcement agencies, should have been filed pursuant to Act 22, and the OOR lacks jurisdiction to consider the appeal as to these portions of the Request.¹

2. Certain records relate to a criminal investigation

Additionally, the OOR has no jurisdiction over local agency records that are related to a criminal investigation; instead, such appeals must be heard by the local District Attorney's office. 65 P.S. § 67.503(d). 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

¹ Notably, Act 22 of 2017 has very different appeal procedures from the RTKL, with strict time constraints. The OOR has created a summary of the requirements and procedures to appeal under Act 22, which can be found at <https://www.openrecords.pa.gov/RTKL/PoliceRecordings.cfm>. The Borough, for example, has thirty days from the date its Agency Open Records Officer receives an Act 22 request to respond.

showing that records relate to a criminal investigation, the OOR lacked jurisdiction to consider the merits of the appeal).

Here, the Borough has not responded to the Request or raised any arguments on appeal, but the records sought are facially records of a criminal investigation. While the RTKL does not define the phrase “criminal investigation,” our courts have observed that the term “clearly and obviously refers to an official inquiry into a possible crime.” *Cal. Borough v. Rothey*, 185 A.3d 456 (Pa. Commw. Ct. 2018) (citing *Pa. State Police v. Grove*, 161 A.3d 877 (Pa. 2017)).

Additionally, Section 9106(c)(4) of the Criminal History Record Information Act (“CHRIA”) provides:

(c) Dissemination of protected information.

...

(4) 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.

Here, the Request seeks evidence, including witness testimony and video footage of law enforcement related to a specified police incident that resulted in the filing of charges in three MDJ dockets. *See Pa. Game Comm’n v. Fennell*; 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal filing when construing exemptions); *see also Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2015) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record). Therefore, because the Request explicitly seeks records of an “inquiry ...

into a criminal incident or an allegation of criminal wrongdoing[.]” the Request is facially seeking records which may be related to a criminal investigation.

Accordingly, because the Request seeks records related to a criminal investigation and which may be covered by CHRIA, the appeal is hereby transferred to the Appeals Officer for the Schuylkill County District Attorney’s Office to determine whether the responsive records are exempt under CHRIA or the RTKL.² A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the Office.

CONCLUSION

For the foregoing reasons, the appeal is **transferred in part** and **dismissed for lack of jurisdiction in part**, and the Borough 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 Schuylkill 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 18, 2023

/s/ Catherine R. Hecker

APPEALS OFFICER
CATHERINE R. HECKER, ESQ.

² 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”).

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

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