



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JEFFREY KAY,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2023-1586
	:	(Consolidated Appeal of OOR Dkt.
BRISTOL TOWNSHIP,	:	Nos. AP 2023-1586 and 2023-1587)
Respondent	:	

FACTUAL BACKGROUND

On June 22, 2023, Jeffrey Kay (“Requester”) submitted two requests (collectively “Requests,” individually “Request 1” and “Request 2”) to Bristol Township (“Township”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

Request 1:

Keyword searches for any/all servers, computer electronic that access data[]bases of [the Township] P.D. Any/all communications, text, emails, reports, notes, files, records, tickets, warning, incident reports or other relating to key[]words search Jeffrey Kay, Jeffrey Todd Kay, Jeffrey T. Kay, Mr. Kay. 16 Fortune Lane, 6-25-1964 and any reasonable variant. To/From or about.

Request 2:

April 18th, 2023 Kathrine Okieff call 911 Fortune Lane Farmbrook

Any/all recordings or trascripts of 911 call and dispatch relay responding to complaint that Mark David Krieg and Shannon Rielly/Krieg were assaulting, screaming threats of violance,

damaging propert[y], telling profanities at senior citizens “shut the fuck up[.]” threatening to beat up neighbors, [harrassing] public. Any/all video dash, rear body cam from both responding units. Any/all notes, reports, files[,] communications, tickets issued, charges pending. any/all inside recordings [of] both units. Evidence collected, follow[-]up call made or received, notes and reports from those complete files both officers kept[.] Any/all comments or updates[,] addendums, statements[,] or correction to report they would like to make. Please remit[] with these materials.

On June 26, 2023, the Township denied the Requests, arguing that the Pennsylvania Criminal History Records Information Act (“CHRIA”) limits the release of information about incidents to CHRIA-approved law enforcement agencies. 18 Pa.C.S. §§ 9101, *et seq.* However, the Township did provide general descriptions of each matter investigated; the descriptions included: “neighbor dispute,” “noise complaint,” “disorderly conduct,” and “harassing conduct,” and “civil complaint.”

On July 11, 2023, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial of the Requests and stating grounds for disclosure.¹ The Requester asserted that the investigations related to the Requests were in the past.² The OOR invited both parties to supplement the record and directed the Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On July 31, 2023, the Township submitted a position statement reiterating its grounds for denial of Request 2. The Township further asserted that 911 calls and dispatch relays were exempt from public access under Section 708(b)(18) of the RTKL, that the OOR did not have jurisdiction

¹ The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”). Further, the Requester appealed the denial of the Requests individually which were docketed as OOR Dkt. AP 2023-1586 and OOR Dkt. AP 2023-1587. Because the appeals involve the same agency, requester, and similar requests, the appeals are now consolidated into OOR Dkt. AP 2023-1586. *See* 65 P.S. § 1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

² The Requester does not explain how this undisputed fact affects the OOR’s analysis regarding whether a records is public or accessible to the public.

over the denial of access to law enforcement recordings under Act 22 of 2017, and that the responsive records related to criminal and noncriminal investigations of the Township. 65 P.S. § 67.708(b)(16)-(18); *See* 18 Pa. C.S. § 67A06(a)(1); *see also Clerkin v. Warminster Township Police Department*, OOR Dkt. AP 2021-2170, 2021 PA O.O.R.D. 2604. In support of its position, the Township submitted the attestation of Randee J. Elton, Agency Open Records Officer for the Township (“AORO”).

On September 8, 2023, the OOR inquired about the lack of submissions regarding Request 1. On the same day, the Township submitted the attestation of the AORO, responding to the OOR’s inquiry and reiterating its grounds for denial.³ The Township further asserted that the responsive records related to criminal and noncriminal investigations of the Township. 65 P.S. § 67.708(b)(16), (17).

LEGAL ANALYSIS

The Township 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 Township is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). The preponderance of the evidence standard 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)).

³ Both Elton Attestations were made subject to criminal penalties under 18 Pa.C.S. § 4804, relating to unsworn falsifications to authorities.

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 Township has acted in bad faith, “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)).

1. The 911 recordings responsive to Request 2 are exempt from public access

The Township argues that the 911 recordings and dispatch relays are exempt from public access under Section 708(b)(18) of the RTKL.

Section 708(b)(18) exempts the following from public access: “[r]ecords or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings. 65 P.S. § 67.708(b)(18)(i). In addition, Section 708(b)(18)(ii) states that this exemption “shall not apply to a 911 recording ... if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure.” 65 P.S. § 67.708(b)(18)(ii).

Here, the Request, on its face, seeks “recordings or transcripts of 911 calls and dispatch relay responding to a complaint.” As a result, the RTKL’s exception permitting the withholding of 911 calls and transcripts from public access is applicable in this instance. *See Fennell*; *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).

While the Township has discretion to release the requested recordings, the Township has chosen not to here. As such, the requested records relating to 911 recordings and relays are exempt

from disclosure. *See Stewart v. Butler City Police Department*, OOR Dkt. AP 2015-0044, 2015 PA O.O.R.D. LEXIS 162.

2. The video dash, rear, and body cameras of the units responding to the incident described in Request 2 are subject to Act 22 of 2017

The Township argues that the video and audio recordings sought by Request 2 are subject to Act 22 of 2017 instead of the RTKL. Act 22 of 2017 removed audio and video recordings made by law enforcement agencies from access under the RTKL and created a separate, exclusive means of access. 42 Pa.C.S. § 67A03. 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,” which is defined in relevant part as “[a]n officer of... the Commonwealth... who is empowered by law to conduct investigations of or make arrests for offenses enumerated in this chapter...,” which encompasses all of 18 Pa.C.S. 42 Pa.C.S. § 67A01. Act 22 of 2017 provides that “[t]he provisions of this chapter, and not the [RTKL] shall apply to any audio recording or video recording made by a law enforcement agency” 42 Pa.C.S. § 67A02(a).

The OOR recognizes that the Township employs law enforcement officers in its Police Department, and the responsive recordings are possessed by the Township’s Police Department.⁴ 42 Pa.C.S. § 67A01 (a “[l]aw enforcement agency” includes “an agency that employs a law enforcement officer.”); *see also Fennell*; and *Bradley v. Lehigh Area School District*, OOR Dkt. AP 2018-1586, 2018 PA O.O.R.D. LEXIS 1418.

⁴ The Requester does not dispute that the responsive records are in the possession of the Township’s Police Department. In point of fact, the descriptions in Request 2 as well as the indication that “officers” and “units” responded to the described incident indicate that the recordings would be created and be in the possession of the Township’s Police Department.

Accordingly, because Request 2 seeks audio and video recordings of the Township's Police Department, the RTKL is without jurisdiction to grant access to the requested video dash, rear, and body camera recordings.⁵

3. The Township met the threshold to show that some of the records responsive to Request 1 and 2 may relate to criminal investigations and that any remaining records noncriminal in nature are exempt from public disclosure

The Township argues that the responsive records relate to criminal and noncriminal investigations and, therefore, are exempt from public access. 65 P.S. §§ 67.708(b)(16), (17).

Section 708(b)(16) of the RTKL exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation, including:...[c]omplaints of potential criminal conduct other than a private criminal complaint.... [i]nvestigative materials, notes correspondence, videos and reports...[v]ictim information...[a] record that, if disclosed, would do any of the following:...[r]eveal the institution, progress or result of a criminal investigation, except the filing of charges.” 65 P.S. §§ 67.708(b)(16)(i)-(ii), (v), and (vi)(A).

The OOR lacks jurisdiction to consider whether a record of a local law enforcement agency is subject to public access when the agency claims that it withheld the responsive records under Section 708(b)(16) and either submits evidence demonstrating that a criminal investigation occurred or, based on the appeal documents or the language of the request itself, there is no dispute between the parties regarding the existence of a criminal investigation. *See* 65 P.S. § 67.503(d)(2); *see also Steinheiser v. Falls Twp.*, OOR Dkt. AP 2015-0323, 2015 PA O.O.R.D. LEXIS 378 (holding that where the plain language of a RTKL request sought a police report and there was evidence of a criminal investigation, the criminal investigative exemption applied); *Burgess v. Willistown Twp. Police Dep't*, OOR Dkt. AP 2013-1511, 2013 PA O.O.R.D. LEXIS 868 (holding

⁵ Nothing in this Final Determination prevents the Requester from making a request for the recordings under Act 22 of 2017 as described above.

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). Accordingly, the threshold question is whether the OOR has jurisdiction to hear this appeal. To that end, the OOR must determine whether the record sufficiently indicates that the responsive records may relate to a criminal investigation.

Here, the AORO attests that the records responsive to Request 1 consist of documents compiled by the Township's Police Department regarding criminal and noncriminal investigations. *See* Elton Attestation for Request 1 ¶ 5a. Further, the AORO asserts that the responsive records include complaints. *Id.* at ¶ 5b. Although the AORO does not provide details of the search for the responsive records and their precise nature, the Requester does not dispute that the responsive records would relate to investigations of the Township's Police Department but instead argues that the investigations would have been in the past. The final response of the Township further describes the nature of the responsive records as relating to "neighbor dispute," "civil complaint," harassing conduct," "noise complaint," and "disorderly conduct."

In this instance, the Township's Police Department is an agency tasked with conducting criminal investigations. Although a conclusory affidavit or a statement is not sufficient to meet the admittedly low bar for transferring an appeal, the uncontradicted facts demonstrate that the Township's Police Department conducted investigations into issues relating to neighbor disputes, disorderly conduct, complaints, and harassing behavior, which could relate to criminal investigations. *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 Callahan and Bucks County Courier Times v. Buckingham Twp.*, OOR Dkt. AP 2019-1859, 2019 O.O.R.D. LEXIS 1525 (the OOR was divested of jurisdiction when the

township asserted that the responsive records were compiled by the Fire Marshall and Police Department's investigation and, on the face of the record, could relate to a criminal investigation). As such, the record sufficiently demonstrates that a transfer to the District Attorney's Office is necessary. *See Bush v. Westtown-East Goshen Police Dep't*, OOR Dkt. AP 2016-1869, 2016 PA O.O.R.D. LEXIS 1708; *see also Steinheiser v. Falls Twp.*, OOR Dkt. AP 2015-0323, 2015 PA O.O.R.D. LEXIS 378; *and Burgess v. Willistown Twp. Police Dep't*, OOR Dkt. AP 2013-1511, 2013 PA O.O.R.D. LEXIS 868.

Similarly, the Township argues that some of the records responsive to Request 2 relate to criminal investigations, such as, notes, reports, files, communications, tickets issued, charges pending, victim's statements, injuries reported, evidence collected, follow-up calls made, and the reports written, including any updates and corrections. Request 2 describes an incident that led to a 911 call and a response by the Township's police officers. As such, Request 2 on its face relates to a potential criminal investigation. On appeal, the Requester does not challenge that the responsive records would relate to a criminal investigation but merely states that any investigation would have been in the past. *See Fennell*, 149 A.3d 101.

Accordingly, the record sufficiently demonstrates that some of the records responsive to Request 2, may relate to criminal investigations. Accordingly, the appeal as it relates to the responsive records listed above is transferred to the Bucks County District Attorney's office for adjudication.

The Township also asserts that some of the above investigations responsive to the Requests could qualify as noncriminal, which is exempt from public access under the RTKL. 65 P.S. § 67.708(b)(17).

Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation,” including “[i]nvestigative materials, notes, correspondence and reports,” “record[s] that include[] information made confidential by law” and “[a] record that, if disclosed, would ... [r]eveal the institution, progress or result of an agency investigation.” 65 P.S. §§ 67.708(b)(17)(ii), (iv), and (vi)(A). 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 noncriminal matter. *See Pa. Dep’t 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. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

Municipal police departments, such as the Township’s Police Department, are empowered to enforce the laws of the Commonwealth or otherwise perform the functions as to “any ... event that occurs within his primary jurisdiction and which reasonably requires action on the part of the police in order to preserve, protect or defend persons or property or to otherwise maintain the peace and dignity of this Commonwealth.” 42 Pa.C.S. § 8952. The OOR has found that this statutory authority grants municipal police departments the ability to conduct noncriminal investigations. *See Subhash v. Horsham Twp. Police Dep’t*, OOR Dkt. AP 2019-2421, 2020 PA O.O.R.D. LEXIS 306 (finding that dispatch notes in an incident report related to a local police department’s noncriminal investigation); *see also Alasevich v. Horsham Twp. Police Dep’t*, 2019-2054, 2020 PA O.O.R.D. LEXIS 72. As such, the Township has demonstrated that its Police Department is statutorily vested with the power to investigate incidents that occur.

Taking into account the vast authority provided to the Police Departments to conduct investigations of both criminal and noncriminal in nature, the specific descriptions provided by the Township in its final response, and the Requester's recognition that there would be investigations, the Township proved that the responsive records would relate to noncriminal investigations unless related to criminal investigations.

Accordingly, the appeal, as far as it relates to the entirety of Request 1 and some records responsive to Request 2,⁶ is transferred in part to the Bucks County District Attorney's office for review. So far as the responsive records do not relate to criminal investigations, they are exempt from public disclosure as relating to noncriminal investigations.

CONCLUSION

For the foregoing reasons, the appeal is **transferred in part** and **denied in part**, and the Township 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 Bucks 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.⁷ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁶ Specifically, notes, reports, files, communications, tickets issued, charges pending, victim's statements, injuries reported, evidence collected, follow-up calls made, and the reports written, including any updates and corrections.

⁷ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: September 18, 2023

/s/ Berk V. Demiral

BERK V. DEMIRAL
APPEALS OFFICER

Sent via e-file portal to: Jeffrey Kay
 Lt. Charles Winik
 Rande J. Elton