



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**ANDRE YATES,
Requester**

v.

**PITTSBURGH CITY,
Respondent**

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Docket No: AP 2023-1957

FACTUAL BACKGROUND

On June 21, 2023, Andre Yates (“Requester”), an inmate at SCI-Greene, submitted a request (“Request”) to the City of Pittsburgh (“City”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

Any and all records of calls to police dispatch, 9-1-1 calls, reporting a shooting on November 14, 2002 at the intersection of East Liberty Boulevard and Larimer Avenue, including, but not limited to, (a) the number of calls received, (b) descriptions of vehicles involved, and (c) descriptions of individuals involved.

Please, redact any personal identifying information such as names, addresses, or phone numbers.

On July 26, 2023, following a thirty-day extension, 65 P.S. § 67.902(b), the City granted the Request in part, providing four responsive summary incident reports.¹ The City also denied the

¹ The City redacted a home address from the granted records pursuant to Section 708(b)(6) of the RTKL. Because the Requester specifically sought redaction of any names, addresses, or phone numbers in his Request, the OOR need not address the issue.

Request in part, arguing that all other responsive police records are investigative in nature and relate to a criminal investigation. 65 P.S. § 67.708(b)(16). The City also argues that responsive records are exempt from access pursuant to Pennsylvania’s Criminal History Record Information Act (“CHRIA”), 18 Pa. C.S. §§ 9101 *et seq.* Finally, the City asserts that to the extent any other records sought do not exist, the City is not required to create records which do not currently exist. 65 P.S. § 67.705.

On August 14, 2023,² the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On August 29, 2023, the City submitted a position statement reiterating its grounds for denial. Additionally, the City notes that the Requester also submitted an appeal to the Allegheny County District Attorney’s Office (“Office”), and the Office denied the appeal. The City attached the Office’s Opinion as Exhibit “3” of its submission. Further, the City argued that it does not have 911 call records in its possession, custody or control. In support of the City’s position, the City submitted the attestation of Julie Stoops (“Stoops Attestation”), Lieutenant with the City’s Police Bureau.³

LEGAL ANALYSIS

The City 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

² The appeal was received by the OOR on August 17, 2023; however, it was postmarked August 14, 2023. Therefore, pursuant to the “prisoner mailbox rule,” the appeal is considered filed as of August 14, 2023. *See Commonwealth v. Jones*, 700 A.2d 423, 426 (Pa. 1997).

³ The Stoops Attestation is made subject to penalties under 18 Pa. C.S. § 4904, relating to unsworn falsifications to authorities.

protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the City 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)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

The City asserts that all additional records responsive to the Request are exempt pursuant to Section 708(b)(16), because they relate to criminal investigations; therefore, the OOR must determine if it has jurisdiction over this appeal. 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...[and a] record that, if disclosed, would do any of the following: ...[r]eveale 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). 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)).

The OOR has no jurisdiction over criminal investigative records held by a local agency; however, a local agency claiming that records are exempt criminal investigative records does not

automatically divest the OOR of jurisdiction over an 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). 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 support of the argument that these records relate to a criminal investigation, the Stoops Attestation states the following, in part:

1. I am in my 23rd year of law enforcement with the Pittsburgh Bureau of Police (PBP or Bureau or Police Bureau).
2. I currently serve as Administration Lieutenant for the Police Bureau, and [RTKL] requests having to do with police and public safety matters are directed to my attention.
- ...
5. I am familiar with the records and methods of record storage of the PBP.
- ...
7. The request seeks identification of vehicles and people, which are very unique and specific aspects of the crime that was committed.
8. If we reveal specifics of a criminal investigation, it is quite likely that witnesses could become endangered, or evidence could disappear.
9. Each investigation that is undertaken by the Bureau starts as a criminal investigation whether charges are ultimately filed or not.
10. Calls to 911 are often the start of a criminal investigation.
11. The PBP does not maintain records from the 911 Call Center.
12. 911 records are maintained by Allegheny County Emergency Services.

Under the RTKL, an affidavit or statement made under 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. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the City has acted in bad faith, “the averments in the [attestation] 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 *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

The evidence provided by the City clearly demonstrates that some of the responsive records sought relate to a criminal investigation. Further, the Request facially seeks investigative records concerning a specific shooting. *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). Additionally, the Requester appealed the City's denial to the Office, which held that the responsive records were exempt pursuant to Section 708(b)(16).⁴

Moreover, the City affirms that it does not possess the responsive 911 recordings. Specifically, the City attests that those records would be in the possession of Allegheny County. Stoops Attestation ¶¶ 11-12. The City echoes the Office's opinion that even if it did maintain these records, they would likely be exempt under Section 708(b)(18).

Accordingly, the City's submissions are sufficient to prove that it does not have any responsive 911 call records in the City's possession, custody, or control. *See Pa. Dep't of Health v. Mahon*, 283 A.3d 929 (Pa. Commw. Ct. 2022); *Hodges*, 29 A.3d at 1192. Therefore, the appeal must be denied in part.

Finally, the matter has already been adjudicated by the Office in its entirety and denied pursuant to Section 708(b)(16); therefore, the OOR need not transfer the appeal. Accordingly, the OOR lacks jurisdiction and must therefore dismiss the appeal in part.

CONCLUSION

⁴ The Office's opinion also concluded that the 911 calls relate to a criminal investigation under Section 708(b)(16) but would otherwise also be exempt under Section 708(b)(18) of the RTKL, which protects from disclosure "[r]ecords or parts of records, except time response logs, pertaining to audio records, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings." 65 P.S. § 67.708(b)(18)(i). However, "[t]his paragraph shall not apply to a 911 recording, a transcript of 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).

For the foregoing reasons, the appeal is **denied in part**, and **dismissed in part**, and the City 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 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 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 18, 2023

/s/ Tope L. Quadri

TOPE L. QUADRI
APPEALS OFFICER

Sent to: Andre Yates, GA0749 (via first class mail)
Celia Liss, Esq., AORO (via portal)

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