

3. Incident reports, statements, and CAD documents in connection with the shooting at the rally in Butler involving former president Donald Trump
4. All written communications, including but not limited to, complete emails chains, text messages, memos, online chat messages, Zoom chat messages, and voicemails, sent or received by Scott Frederick on July 12, July 13, and July 14, 2024 in connection with the Trump rally and/or the associated shooting
5. All written communications between Butler Township and any of the following entities in July 2024 involving the Trump rally at the Butler Farm Show grounds and/or the associated shooting, including but not limited to, complete email chains, text messages, memos, online chat messages, Zoom chat messages, and voicemails
 - U.S. Secret Service
 - Federal Bureau of Investigation
 - Allegheny County Police Department
 - Pennsylvania State Police
 - Bethel Park School District
 - The White House
 - Allegheny County District Attorney's Office
 - Butler County District Attorney's Office
 - City of Butler
 - Butler County Sheriff's Office
 - Pennsylvania Governor's Office

On July 16, 2024, the Township denied the Request, directing the Requester to Butler County for responsive 911 call recordings and arguing that the remaining records relate to a criminal investigation, 65 P.S. § 67.708(b)(16).

On July 29, 2024, 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 Township to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c). Neither party submitted legal argument or evidence during the appeal.¹

¹ After the submission deadline in this matter expired, the OOR contacted the Township to determine whether the Township intended to submit argument or evidence to support its grounds for denial; however, the Township did not respond to the OOR's inquiry.

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). 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)).

As a threshold matter, local agencies have the burden of proving that records are exempt from access. 65 P.S. § 67.708(a)(1). Here, the Township did not participate on appeal by submitting legal argument or evidence in support of withholding records or to establish that records do not exist within the Township’s possession, custody or control. *See* 65 P.S. § 67.305; *see also Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2022). However, the OOR must consider uncontradicted statements in the appeal materials when determining whether an exemption applies. *See Pa. Game Comm’n v. Fennell*, 149 A.3d 101 (Pa. Commw. Ct. 2016); *Office of the Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2015) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record).

Item 1 of the Request seeks all audio and video footage recorded or possessed by the Township, including audio and video recordings from the Township Police Department. However, the RTKL does not apply to audio or video recordings made by a law enforcement agency; instead, these recordings must be sought through Act 22 of 2017 of the Judicial Code (“Act 22”), 42 Pa.C.S.

§§ 67A02-67A03, which removed audio and video recordings made by law enforcement agencies from access under the RTKL and created a separate, exclusive means of access to the records. To obtain such recordings, a requester must follow the procedures set forth in Act 22 and submit a written request to the open records officer for the law enforcement agency that possesses the record. 42 Pa.C.S. § 67A03. Therefore, the OOR lacks jurisdiction over the portion of the Request seeking body/dash cam audio and video, as well as other surveillance footage generated by local law enforcement. *See, e.g., Devine v. Butler County*, OOR Dkt. AP 2024-1893, 2024 PA O.O.R.D. LEXIS 1863.

Similarly, Item 1 seeks “dispatch audio” and “any recordings of 911 calls[.]” While the Township’s final response suggests that these records do not exist within the Township’s possession, custody or control, the Township failed to submit evidence to support its position. However, these records are expressly exempt under Section 708(b)(18) of the RTKL, which exempts from disclosure “[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). Accordingly, because there has been no evidence presented to suggest that the Township or a court determined the public interest in disclosure outweighed the interest in nondisclosure, *see* 65 P.S. § 67.708(b)(18)(ii), the recordings are not subject to disclosure. *See, e.g., Lacy v. Butler County*, OOR Dkt. AP 2024-1969, 2024 PA O.O.R.D. LEXIS 1875.

Item 3 of the Request seeks incident reports and statements taken in connection with the Trump rally shooting. As noted above, the Township denied the Request, in part, because certain records relate to a criminal investigation. Although the Township has not established that this exemption could reasonably apply to all of the remaining responsive records, on its face, Item 3

seeks records which could relate to a criminal investigation conducted by the Township's police department, a local law enforcement agency, regarding the shooting. 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 officer designated by the local district attorney. *See id.* Accordingly, the appeal of Item 3 of the Request is hereby transferred to the Appeals Officer for the Butler County District Attorney's Office ("DA's Office").² A copy of this final order and the appeal filed by the Requester will be sent to Appeals Officer for the DA's Office.

Finally, with respect to the remainder of the Request, the Township has failed to submit evidence sufficient to meet its burden of proving that the records are exempt from disclosure under the RTKL. *See* 65 P.S. § 67.708(a); 65 P.S. § 67.305.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part, dismissed in part for lack of jurisdiction, and transferred in part**, and, within thirty days, the Township is required to provide the Requester with all responsive records, other than those found to be exempt from disclosure above or over which the OOR lacks jurisdiction. In the alternative, the Township may provide the Requester with a sworn affidavit or a statement made under the penalty of perjury demonstrating that the records do not exist. 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 Butler County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with

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").

notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per 65 P.S. § 67.1303, but 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 All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 29 August 2024

/s/ Joshua T. Young

JOSHUA T. YOUNG
SENIOR DEPUTY CHIEF COUNSEL

Sent via e-file portal to: Jared Kofsky; Tom Knights, AORO

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