



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**AIDAN SETLOCK,
Requester**

v.

**ALLEGHENY COUNTY,
Respondent**

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Docket No: AP 2024-2778

FACTUAL BACKGROUND

On October 8 and 22, 2024, Aidan Setlock (“Requester”) submitted two requests (“Requests”) to Allegheny County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

Request #1: National Commission on Correctional Health Care [(“NCCHC”)] Mortality Review report released on or about March 2nd 2023 previously located at the link: https://www.alleghenycounty.us/uploadedFiles/Allegheny_Home/DeptContent/Jail/Docs/Reports/NCCHC_Mortality%20Review-Technical%20Assistance%20Report.pdf.¹

Request #2: ...[A]ll records, reports, and documentation concerning individuals who became deceased while under the care or custody of the Allegheny County Jail [(“ACJ”)], or who were under the care or custody of the jail within one week prior to their death, between January 1, 2010, and October 22, 2024 (or the most recent available record). This request includes, but is not limited to:

¹ The County assigned the Request #1 tracking number W018792-100824.

Incident reports
Medical records
Mortality reviews
Internal communications or memorandums related to these cases[.]

The purpose of this request is for academic research with the goal of determining trends relating to the manner and/or timeline of death. If removal of the records is not possible, I respectfully request the opportunity to inspect them on-site....²

On October 29, 2024, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the County denied Request #1, arguing that although the requested mortality reviews are accessible on the ACJ website, at the time of the Request, the 2023 report was in draft form and, therefore, is exempt under Section 708(b)(9) of the RTKL. 65 P.S. § 67.708(b)(9).

Also, on October 29, 2024, the County partially denied Request #2, arguing that incident reports are exempt as they relate to noncriminal and criminal investigations, 65 P.S. §§ 67.708(b)(16) – (17), that medical records are exempt under Section 708(b)(5) of the RTKL and the Health Insurance Portability and Accountability Act (“HIPAA”), 65 P.S. § 67.708(b)(5); 45 C.F.R. §164.502(a), and that the portion of the Request seeking communications or memorandums is insufficiently specific, 65 P.S. § 67.703.

On October 31, 2024, the Requester appealed to the Office of Open Records (“OOR”), challenging the denials and stating grounds for disclosure.³ The Requester asserts that there is a substantial public interest in jail health and safety standards and to support academic research. For Request #1, the Requester argues that Section 708(b)(9) of the RTKL does not apply to the requested mortality review report. The Requester argues, regarding Request #2, that “non-identifiable, aggregate data or summaries of inmate fatalities, including any general insights on

² The County assigned the Request #2 tracking number W018849-102224.

³ The Requester granted the OOR additional time 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).”).

policy adjustments or procedural responses undertaken by the jail administration” should be released. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On November 14, 2024, the Requester submitted a supplemental statement in support of the appeal, asserting that the requested records can be provided with appropriate redactions. The Requester also specifically disputes each of the exemptions claimed by the County and provides caselaw support for the arguments.

On November 21, 2024, the County submitted a position statement, arguing that incident reports and internal memorandums sought are related to internal noncriminal investigations and, therefore, are exempt under Sections 708(b)(17)(ii) and (vi)(A) of the RTKL. 65 P.S. §§ 67.708(b)(17)(ii); (vi)(A). The County also argues that the medical records and mortality reviews are exempt from disclosure under Section 708(b)(5) of the RTKL, as well as HIPAA. 65 P.S. § 67.708(b)(5); 45 C.F.R. §164.502(a). Regarding the portion of the Request seeking internal communications, the County asserts that the language is insufficiently specific, 65 P.S. § 67.703. Finally, the County asserts that it has satisfied Request #1, by providing a redacted copy of the National Commission on Correctional Health Care Mortality Review (“NCCHCMR”). In support of its position, the County submitted the affidavit made under penalty of perjury pursuant to 18 Pa.C.S. § 4904 (relating to unsworn falsifications to authorities) from Jesse Geleynse (“Geleynse Affidavit”), the Public Information Officer for the ACJ.

On December 30, 2024, the OOR had sought clarification regarding the differences between the ACJ’s mortality reviews and the NCCHC Mortality Review Technical Assistance reports, found on the public website and referenced by the Requester in the appeal and in his argument. On January 7, 2025, in response to the OOR’s request for clarification, the County

submitted the affidavit of Warden Jason Beasom, which was made subject to the penalty of perjury pursuant to 18 Pa.C.S. §4904, that explained the differences between the two types of mortality review documents and reiterated the County’s position that the information contained in the records are exempt under Section 708(b)(5) and confidential under HIPAA.

LEGAL ANALYSIS

The County 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 County 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. The appeal as to Request #1 is moot

In the County’s final response, it provided an electronic link to the ACJ’s website in response to the Request for the “National Commission on Correctional Health Care Mortality Review report released on or about March 2nd[,] 2023” that had been previously accessible on the ACJ’s website, but the County also stated, “the 2023 report is currently in draft form, and is therefore exempt from disclosure under Section 708 (b) (9) of the RTKL, but it will be added to the website next month.” During the course of the appeal, a redacted copy of the report was provided to the Requester. Further, the Geleynse Affidavit states:

I provided a redacted copy of that report to the County’s Open Records Office, and my understanding is that they provided it to [the Requester] on November 18, 2024.

The redactions were necessary to remove protected health information about the deceased individuals and for the safety and security of the institution and the incarcerated population. It should be noted that this version contains a clerical error that was corrected in the updated report currently published to the Jail's website.⁴

Accordingly, the appeal is moot as to the unredacted information contained in the report. *See Kutztown Univ. of Pa. v. Bollinger*, 217 A.3d 931 (Pa. Commw. Ct. 2019) (holding that an appeal is properly dismissed as moot where no controversy remains). Further, to the extent that the Requester continues to challenge the redactions, the issue will be addressed below.

2. Request #2 may not be modified on appeal

In the Requester's position statement, he argues that "non-identifiable, aggregate data or summaries of inmate fatalities, including any general insights on policy adjustments or procedural responses undertaken by the jail administration" responsive to Request #2 should be released. However, Request #2 did not seek "non-identifiable, aggregate data or summaries"; rather, Request #2 sought "all records, reports, and documentation." Once a request is submitted, a requester is not permitted to expand or modify the request on appeal. *See McKelvey v. Off. of Att'y Gen.*, 172 A.3d 122 (Pa. Commw. Ct. 2017). Nevertheless, the Requester is not prohibited from submitting a new request seeking data or summaries.

3. The County proved that certain records relate to a noncriminal investigation, but the OOR does not have jurisdiction to entertain appeals related to criminal investigative records

The County argues that the requested incident reports and internal memoranda relate to noncriminal investigations conducted by the ACJ or the County Police Department and are exempt from disclosure pursuant to 65 P.S. § 67.708(b)(17). Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "[a] record of an agency relating to a noncriminal

⁴ See <https://www.alleghenycounty.us/Government/County-Jail/County-Jail-Reports> (last accessed on December 30, 2024). We note that Section 704(b)(1) of the RTKL states in pertinent part, "an agency may respond to a request by notifying the requester that the record is available through publicly accessible electronic means."

investigation, including ... [i]nvestigative materials, notes, correspondence and reports” or 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); 65 P.S. § 67.708(b)(17)(vi)(A). 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). Furthermore, the investigation must specifically involve an agency’s legislatively-granted fact-finding powers. *See Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

The County also argues that some of the responsive Incident Reports and Serious Incident Reports relate to criminal investigations and are exempt under Section 708(b)(16) of the RTKL. 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.* The RTKL creates a two-step analysis for determining when cases should be heard by the OOR and when they should be heard by the appeal officer appointed by a District Attorney. *See* 65 P.S. 67 § 503(d). 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 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 materials when determining whether an exemption applies).; *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 2010-1869, 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 County's arguments, it submits the Geleynse Affidavit, which explains that Mr. Geleynse's responsibilities include assisting the County's Open Records Officer with reviewing and responding to requests for ACJ records. The Geleynse Affidavit further states, the following:

4. When someone who is incarcerated at the ACJ dies while in our custody, the Jail investigates each death thoroughly to determine if any violations of ACJ policy were involved. In addition, the Allegheny County Police [(“ACP”)] investigate[s] each death to see if any criminal activity occurred. I searched our OnBase records management system and found incident reports about several deaths categorized as “major incident reports.” These incident reports are included in the investigations performed by both the jail and ACP....

9. Any internal memorandums about individuals who died at the ACJ would contain information related to the investigations that the Jail or the ACPD performed into the deaths and/or protected health information that cannot be disclosed under federal HIPAA law.

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).

Regarding the County's assertion that the incident reports and internal memoranda are exempt under Section 708(b)(17), the OOR has previously considered whether incident reports at county correctional facilities qualify for exemption under Section 708(b)(17) of the RTKL. In *Ciavaglia v. Bucks County*, the OOR reviewed a variety of prior appeals and determined that such reports could be exempt if the agency submits evidence sufficient to show that the reports are created pursuant to official policy. OOR Dkt. AP 2022-0541, 2022 PA O.O.R.D. LEXIS 966. Merely demonstrating that an investigation occurred may not be sufficient. *Pa. State Police v. Grove*, 119 A.3d 1102 (Pa. Commw. Ct. 2015), *aff'd*, 161 A.3d 877 (Pa. 2017).

The Commonwealth Court has held that, in the RTKL context, “[a]ffidavits are the means through which a governmental agency details the search it conducted for the documents requested and justifies nondisclosure of the requested documents under each exemption upon which it relied upon. The affidavits must be detailed, nonconclusory, and submitted in good faith. ... In other words, a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *See Moore v. Pa. Dep’t of Corr.*, 177 A.3d 1073 (Pa. Commw. Ct. 2017) (citing *Office of Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (citation omitted) (emphasis in original)); *see also Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d at 659 (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*); *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 129 (Pa. Commw. Ct. 2019), *appeal denied by* 223 A.3d 675 (Pa. 2020) (“A preponderance of the evidence may be the lowest burden of proof, but it still requires

evidence unless the facts are uncontested or clear from the face of the RTKL request or the exemption”).

In this matter, the County has not presented evidence to establish the legislatively-granted fact finding authority to conduct noncriminal investigations or that individual investigations occurred that resulted in the creation of the incident reports. *C.f. Shepherd and Broad + Liberty v. Delaware Cnty.*, OOR Dkt. AP 2024-0784, 2024 PA O.O.R.D. LEXIS 1274 (County demonstrated legislatively-granted fact finding authority to conduct a noncriminal investigation of an inmate death based in County prison policies and 37 Pa. Code § 95.246). Nevertheless, the Request expressly seeks, among other records, incident reports related to inmate deaths and 37 Pa. Code § 95.246 requires that local county correctional facilities promulgate written policies providing “for the procedure to be following in the event of a death of an inmate ...” that must include the “identification of the staff person responsible for coordinating investigative efforts with the coroner and the law enforcement agency and completing and submitting a report to the governing county prison authority.” 37 Pa. Code § 95.246(1)(iv). *See Shepherd and Broad + Liberty v. Delaware Cnty.*, OOR Dkt. AP 2023-1068, 2023 PA O.O.R.D. LEXIS 1720 (a county prison has the authority to conduct a noncriminal investigation into the circumstances regarding an inmate’s death); *Sopin v. Montgomery Cnty.*, OOR Dkt. AP 2019-0944, 2019 PA O.O.R.D. LEXIS 970 (same). Therefore, on the face of the record, sufficient facts have been presented to demonstrate that the ACJ conducts noncriminal investigations in the event that an inmate dies in its care or custody and that certain incident reports are exempt from disclosure under Section 708(b)(17) of the RTKL, 65 P.S. § 67.708(b)(17). *See* 65 P.S. § 708(a); *see Fennell, supra.*; *see also 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). Further, to the extent that any internal memorandums are included in the investigative file or attached to the incident reports, the records are also exempt under Section 708(b)(17).

In addition, while not expressly claimed by the County, the evidence submitted to provide clarification regarding mortality reviews presents a reasonable inference that the records are also related to a noncriminal investigation. The Beasom Affidavit states the following:

3. ... I do not believe that ACJ mortality reviews should be redacted and released to the public despite the fact that the County publishes redacted NCCHC Technical Assistance reports on the ACJ website....

5. The ACJ has been conducting our own mortality reviews since 2023. The ACJ personnel who participate in the mortality reviews are the assigned doctor, the Medical Director, members of the health care administration and operational administration. A clinical mortality review is conducted to determine the appropriateness of the clinical care provided and the effectiveness of the clinical policies and procedures relevant to the circumstances surrounding the death. Generally, a clinical mortality review asks at least three key questions: Could the medical response at the time of death be improved? Was an earlier intervention possible? Independent of the cause of death, is there any way to improve patient care?

6. The mortality reviews contain detailed information about the physical and mental health of the decedents. This information comes directly from the decedents' medical records and interviews with health care professionals who treat them.

7. The mortality reviews contain information that ACJ staff learned from investigating the deaths. Since we have a responsibility to the community to create as safe an environment as possible, each death at the Jail is thoroughly investigated to prevent a similar situation from occurring in the future. The mortality reviews are related to these investigations.

8. Mortality reviews are part of the Jail's Quality Improvement Process. The Jail uses its Quality Improvement Process to identify and improve in specific areas such as patient outcomes, morale, and efficiency. The Jail must have a Quality Improvement Process in place for compliance with national standards, including NCCHC standards. Mortality reviews are part of the Quality Improvement Process because they are used to examine the circumstances surrounding death to identify processes that may need to be changed to improve patient care.

9. ... I believe that, even with redactions, the ACJ mortality reviews would reveal details about our internal investigations and could possibly lead to the public learning protected medical information about deceased individuals.

The ACJ Policy #2101, “Responsible Health Authority,” sets forth the guidelines and procedures that the ACJ must follow in order to “arrange[] for all levels of health care and ensure[] the quality, accessibility, and timely health services for incarcerated individuals.” The procedural guidelines include those required by the NCCHC. The Deputy Warden for Health Services (“DWHS”) is the ACJ’s designated health authority for the ACJ Healthcare Services Department. In addition, the DWHS’ duties include, “developing operational policies and procedures for the department, and *monitoring the scope and quality of services delivered.*” (Emphasis added).⁵ Based on Warden Beasom’s attestations regarding the purpose for and steps taken to conduct a mortality review, the records facially are created as a result of a noncriminal investigation. More specifically, the purpose underlying the mortality review falls squarely within the procedural duties set forth in Policy #2101, such as: to determine the appropriateness of the clinical care provided and the effectiveness of the clinical policies and procedures relevant to the circumstances surrounding the death; [to carry out] a responsibility to the community to create as safe an environment as possible, each death at the Jail is thoroughly investigated to prevent a similar situation from occurring in the future; and, examine the circumstances surrounding death to identify processes that may need to be changed to improve patient care. *See*, Beasom Affidavit, ¶¶ 5, 7-8. Further, the Beasom Affidavit establishes that the mortality review records contain details of the ACJ’s internal investigation in the event of an inmate death. *Id.* at ¶ 9. Therefore, we conclude that the mortality review records are also exempt from disclosure under Section 708(b)(17). Regarding the Requester’s assertion that the mortality review records should be provided with redactions pursuant to Section 706 because the NCCHC Mortality Review

⁵ *See* <https://www.allegHENYcounty.us/files/assets/county/v/2/government/jail/healthcare-policies/2101-responsible-health-authority.pdf> (last accessed January 14, 2025).

Technical Assistance reports are published on the ACJ website, the County supplemented its argument with the Beasom Affidavit to explain the distinction between the records. Warden Beasom explains that the NCCHC Mortality Review Technical Assistance reports are created by a hired consultant, not a County entity, whose purpose is “to review clinical services provided to individuals who died while in custody and to make recommendations for improvement in processes and clinical services.” Beasom Affidavit, ¶ 4. Warden Beasom also affirms that the “number of [ACJ] mortality reviews is greater than the number of NCCHC Technical Assistance Reports” and “[a] former administration made the decision to redact the NCCHC reports.” Beasom Affidavit, ¶ 9. We note that, the discretionary release of information by an agency in prior instance is solely within the discretion of the agency and is not subject to the OOR’s legal review. *See* 65 P.S. § 67.506(c). Further, “the RTKL does not mandate that an agency’s exercise of this discretion requires it to continue to release the same or similar records in response to future requests.” *See Sherwood v. Pennsylvania State Police*, OOR Dkt. AP 2011-1718, 2012 PA O.O.R.D. LEXIS 373.

The County has also asserted that in some instances, the ACPD is notified and that the police conduct an investigation into an inmate’s death. The OOR has previously held that an agency cannot withhold records of another agency’s investigation. *See Shepherd v. Delaware Cnty. Jail*, OOR Dkt. AP 2023-0573, 2023 PA O.O.R.D. LEXIS 794 (noting that an agency may not withhold records of another agency’s investigation in its possession as noncriminal investigative records). Therefore, to the extent that the County has withheld records created by the ACPD pursuant to its investigation of an inmate death, such records are not exempt under Section 708(b)(17) of the RTKL.⁶

⁶ The County also argues that the requested incident reports, if released, would likely jeopardize the safety and security of the Jail and the individuals who work in and reside in the Jail and, therefore, the records are exempt under 65 P.S. §§ 67.708(b)(1)(ii) and (b)(2). However, because we have determined that the incident reports are exempt under

Additionally, as set forth above, 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). The County Prison is a criminal justice agency under the Criminal History Record Information Act (“CHRIA”). 18 Pa.C.S. § 9102. CHRIA provides for the sharing of investigative information between local law enforcement agencies and criminal justice agencies. *Id.* at § 9121. Therefore, to the extent that the responsive records may contain investigative information shared between the County Prison and a member of the ACPD or if the Jail is in possession of investigative records created by the ACPD, the appeal as to this record is transferred to the Appeals Officer for the Allegheny County District’s Attorney’s Office (“DA’s Office”). *See, e.g., Shepherd and Broad + Liberty v. Delaware Cnty.*, OOR Dkt. AP 2024-0784, 2024 PA O.O.R.D. LEXIS 1274, *13-14 (concluding that correspondence from a County District Attorney’s Office investigator to prison investigator regarding the intent to conduct a homicide investigation is confidential under CHRIA). A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the Allegheny County District Attorney’s Office.

4. The County proved that certain records contain information that is exempt under Section 708(b)(5) of the RTKL or is confidential under HIPAA

The County argues that medical records and mortality review records are exempt from disclosure under the RTKL pursuant to Sections 708(b)(5) and 305(a)(3), as the records contain individually identifiable medical information.

Section 708(b)(5) of the RTKL protects individually identifiable health information from disclosure. Section 708(b)(5) of the RTKL exempts from disclosure:

[a] record of an individual’s medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program

Section 708(b)(17) of the RTKL, we need not reach the County’s additional claims of exemption for the incident report records.

or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

65 P.S. § 67.708(b)(5).

In addition, under the RTKL, the presumption that records in the possession of a Commonwealth agency are public records does not apply if the records are “exempt from disclosure under any other Federal or State law or regulation ...” 65 P.S. § 67.305(a)(3). HIPAA states that “[a] covered entity may not use or disclose protected health information.” 45 C.F.R. § 164.502(a). HIPAA defines a “covered entity” as “(1) A health plan; (2) A health care clearinghouse; (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.” 45 C.F.R. § 160.103. Pursuant to HIPAA, “[a] covered entity may not use or disclose protected health information[,]” including “individually identifiable health information.” HIPAA defines “individually identifiable health information” as: information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 C.F.R. § 160.103; *see also Opis Mgmt. Res. LLC v. Sec’y Fla. Agency for Health Care Admin.*, 713 F.3d 1291, 1294-95 (11th Cir. 2013) (noting that the enactment of HIPAA was to address concerns about the confidentiality of patients’ individually identifiable health information); *S.C.*

Med. Ass'n v. Thompson, 327 F.3d 346, 348 (4th Cir. 2003); *Citizens for Health v. Leavitt*, 428 F.3d 167, 172-74 (3d Cir. 2005) (detailing the history of the Privacy Rule's promulgation and explaining its requirements).

In support of the County's position, the Geleynse Affidavit provides, the following:

6. The ACJ currently generates mortality reviews for each death of a person in custody. They are full of detailed information about the deceased individual's health and medical history. Since the ACJ announces some information about deaths to the public at the time of each death, the mortality reviews could be matched to specific individuals even if the names were removed. Incarcerated individual deaths have been widely publicized in local, state and national media outlets. As a result, providing medical records with the name removed would be tantamount to confirming the identity of the individuals described in the records.

7. The ACJ does retain medical records for individuals that we have treated since 2015, but these records contain protected health information and cannot be disclosed under the federal HIPAA law.

The Requester asserts that the records should be de-identified and released pursuant to Section 706 of the RTKL. The Requester also asserts that the County releases similar information, such as the Allegheny County Jail Technical Assistance Report, which is available on the County's public website.⁷ The County argues that the mortality review records cannot be effectively de-identified because "the County releases the names the names and some information about individuals who die at the Jail to the public, and therefore the medical records and mortality reviews could be matched to specific individuals even if the names were removed."

Regarding the portion of the Request seeking "medical records," the express language implies that the responsive records will contain the exact categories of information Section 708(b)(5) was intended to exempt from disclosure. *See Fennell*, 149 A.3d at 104; *Davis*, 122 A.3d at 1193-94. Additionally, the OOR has repeatedly held that an individual's medical records are

⁷ The Requester included an electronic link to the report with his submission: <https://www.alleghenycounty.us/Government/County-Jail/County-Jail-Reports> (last accessed December 30, 2024).

not subject to disclosure for any reason and cannot be provided even when de-identified. *See Monaghan v. Downingtown Area Sch. Dist.*, OOR Dkt. AP 2021-0369, 2021 PA O.O.R.D. LEXIS 1359; *Ortiz v. Pa. Dep't of Corr.*, OOR Dkt. AP 2017-2193, 2017 PA O.O.R.D. LEXIS 1819; *Wishnefsky v. Pa. Dep't of Corr.*, OOR Dkt. AP 2011-0171, 2011 PA O.O.R.D. LEXIS 172. Accordingly, while the Requester argues that the records should be provided with the exempt material redacted pursuant to Section 706 of the RTKL, because the records do not meet the definition of 'public records' under the RTKL, the County is not required to redact the responsive medical records and provide redacted materials. 65 P.S. § 67.706; *Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 815 (Pa. Commw. Ct. 2010).⁸ Therefore, the medical records sought in the Request are exempt from disclosure under Section 708(b)(5) of the RTKL, 65 P.S. § 67.708(b)(5).

5. The portion of the Request seeking internal communications is insufficiently specific

The County argues that the portion of the Request seeking "internal communications" related to the cases where an inmate died while in the custody of the Jail is not sufficiently specific. Section 703 of the RTKL states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested." 65 P.S. § 67.703. When determining whether a particular request is sufficiently specific, the OOR uses the multifactor test employed by the Commonwealth Court in *Pa. Dep't of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015).

First, "[t]he subject matter of the request must identify the 'transaction or activity' of the agency for which the record is sought." *Id.* at 1125 (quoting 65 P.S. § 67.102). Second, "[t]he

⁸ Because we have determined that the requested medical records are fully exempt pursuant to Section 708(b)(5) of the RTKL, we do not have to reach the County's claim that HIPAA prevents disclosure of the medical records.

scope of the request must identify ‘a discrete group of documents, either by type ... or by recipient.’” *Id.* (quoting *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013)). Finally, “[t]he timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126 (citing *Carey, supra*). “The timeframe prong is, however, the most fluid of the three prongs, and whether or not the request’s timeframe is narrow enough is generally dependent upon the specificity of the request’s subject matter and scope.” *Id.*

The above factors are intended “to facilitate an analysis in order to determine whether an agency can ascertain which records are being requested.... The subject matter, scope, and timeframe of a request are flexible, analytical elements, not evidentiary requirements.” *Pa. Dep’t of Health v. Shepherd*, No. 377 C.D. 2021, 2022 Pa. Commw. Unpub. LEXIS 207 *6-7 (Pa. Commw. Ct. 2022), appeal denied, No. 334 MAL 2022, 2022 Pa. LEXIS 1862 (Pa. 2022). Finally, we must analyze the entirety of a request, as it is possible that portions of a request are insufficiently specific, while other portions provide sufficient guidance. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 517 (Pa. Commw. Ct. 2010) (noting “the valid part of the request was included in a laundry list of requested materials”).

The County argues that this portion of the Request does not contain an identified scope because it does not provide names of “individuals or categories of individuals whose communications should be searched.” The County asserts that *Davidson v. Allegheny Cnty.*, OOR Dkt No. AP 2022-2720,⁹ is analogous to this matter and supports its position. In addition, the Mr. Geleynse affirms that “[he] was unable to determine how to search for ‘internal communications’ related to all deaths at the ACJ since 2010, since our I.T. Department requires names of employees

⁹ 2023 PA O.O.R.D. LEXIS 183.

before it can perform an email search. The ACJ has had hundreds of employees between 2010 and now.”

In *Davidson*, part of the request sought “all communications” of the County between January 1, 2022 and October 19, 2022 related to restrictions on inmate telephone calls at the County jail.” The OOR concluded that the scope of the request was overly broad, in that “all communications” was not limited in any fashion, such as only electronic communications, and required a search of any type of communication within the County for timeframe was over ten months. *Davidson*, 2023 PA O.O.R.D. LEXIS 183, *10-13. In this matter, the timeframe is over fourteen years. While the Request does identify a subject matter as records “concerning individuals who became deceased while under the care or custody of the jail within one week prior to their death,” it is still very broad, and it also seeks records that may contain information from after an inmate’s release from the Jail. Furthermore, similar to *Davidson*, “internal communications or memorandums” is not sufficiently narrow to allow the County to conduct a meaningful search. As stated in the Geleynse Affidavit, not a single Jail official, employee or department has been identified by name or email address and “communications” can consist of any type of communication record. *See Pa. Dep’t of Educ., supra.*; 65 P.S. § 67.703.

6. Except for records of inmates after release from the ACJ, the County did not prove that no additional responsive records exist

The County’s final response and appeal submission address the specifically identified records listed in Request #2, namely, “[i]ncident reports[,] [m]edical records[,] [m]ortality reviews[,] [and] [i]nternal communications or memorandums...”. However, Request #2 also sought, “all records, reports, and documentation concerning individuals who became deceased while under the care or custody of the Allegheny ACJ, or who were under the care or custody of

the jail within one week prior to their death ...” “including but not limited to” the categories of records listed above.

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 identified 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 all 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).

Regarding the records concerning an individual’s death after release from the ACJ, the Geleynse Affidavit states, “Once an individual is released from custody, the ACJ has no right or access to that person’s medical information or treatment. Therefore, it would not be possible for the Jail to know or have record of all individuals who die within a week of being released from custody.” Therefore, the County’s evidence establishes that such records would not exist within its possession, custody or control.

However, the County's evidence does not demonstrate that any records other than the specifically listed categories of records were searched for or reviewed. As set forth above, to demonstrate the non-existence of records, 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. Further, in *Pennsylvania Department of Health v. Mahon*, the Commonwealth Court discussed the evidence required to establish the absence of records, quoting its previous decision in *Hodges v. Pa. Dep't of Health*, which held that an agency "may satisfy its burden of proof...with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record." *Mahon*, 283 A.3d 929, 936 (Pa. Commw. Ct. 2022) quoting 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011); *see also 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 lowest evidentiary standard, and is tantamount to a "more likely than not" inquiry). In this matter, the Geleysne Affidavit does not address whether any other category of records was searched others than those specifically listed in the Request. The Request language expressly stated "including but not limited to" the listed categories and, the County's evidence does not demonstrate by a preponderance of the evidence that a good faith search was conducted by the AORO for all possible categories of records and that no additional responsive records exist. 65 P.S. § 67.708(a); *Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part, transferred in part and dismissed as moot in part**, and the County is directed to conduct a good faith search and provide the Requester with any additional responsive records within thirty days. In addition, the

County is directed to provide de-identified mortality review records, as set forth in this Final Determination. If no additional records are located as a result of its search, the County shall provide an attestation or sworn affidavit to the Requester confirming same. Regarding investigative records created by the Allegheny County Police Department, the County does not have to take any additional 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 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 according to court rules 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.¹⁰ 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: January 16, 2025

/s/ Kelly C. Isenberg

KELLY C. ISENBERG, ESQ.
DEPUTY CHIEF COUNSEL

Sent via E-File Portal to: Aidan Setlock; Maggie Shiels, Esq.; Jessica Garofolo, AORO
Sent via email to: Appeals Officer, Allegheny County District Attorney's Office

¹⁰ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).