



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**JASON HOPKINS,
Requester**

v.

**PHILADELPHIA DISTRICT
ATTORNEY’S OFFICE,
Respondent**

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: Docket No: AP 2020-2553

INTRODUCTION

Jason Hopkins (“Requester”), on behalf of the Federation for American Immigration Reform, submitted a request (“Request”) to the Philadelphia District Attorney’s Office (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records of the Office’s Immigration Counsel. The Office partially denied the Request, providing certain information but stating no additional records exist. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part, denied in part** and **dismissed as moot in part**, and the Office is required to take further action as directed.

FACTUAL BACKGROUND

On October 8, 2020, the Request was filed seeking:

1. The total number of cases Immigration Counsel Caleb Arnold, or any other city attorney working in the Immigration Counsel capacity, has consulted or overseen since the creation of the Immigration Counsel position in January 2018.

2. The total number of cases in which the Immigration Counsel recommended plea agreements in lieu of trial with all charges, and the total number of plea agreements accepted, since the creation of the Immigration Counsel position in January 2018.
3. The total number of all non-citizens the Immigration Counsel has shielded from deportation or transfer into Immigration and Customs Enforcement (ICE) custody since the creation of the Immigration Counsel position in January 2018.
4. The total list of charges and convictions against non-citizens who have received assistance from the Immigration Counsel since the creation of the position in January 2018.
5. The total number of any non-citizens who were shielded from deportation and then re-arrested in the City of Philadelphia after accepting a plea agreement offer from the Immigration Counsel office, and the list of the charges relating to their re-arrest, since the creation of the Immigration Counsel position in January 2018.
6. The total amount of City of Philadelphia taxpayer dollars allocated to the Immigration Counsel position since its creation in 2018.
7. The total amount of George Soros supported Political Action Committee (PAC) contributions to fund the Immigration Counsel position since its creation in January 2018.

On November 13, 2020, after extending the response period for thirty days pursuant to 65 P.S. § 67.902, the Office granted Item 6, providing the amount paid to the Office's Immigration Counsel but denied the remainder of the Request because records do not exist.

On December 1, 2020, the Requester appealed to the OOR, challenging the denial of Items 1, 2, 3, 4, 5 and 7¹ and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c).

On December 11, 2020, the Office submitted its position statement records do not exist for Items 2, 3, 4 in part, 5 and 7. The Office also explains that it conducted another search and has

¹ As the Requester does not challenge Item 6 of the Request, the Requester has waived any objections regarding the sufficiency of the responsive information provided by the Office. *See Dep't of Corrections v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

located a record that may be responsive to Item 1 and Item 4 in part. The Office also submitted an affidavit under the penalty of perjury from Zehava Robbins, Assistant District Attorney, in support.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing and the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Office 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). 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)). The 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).

1. There are no records responsive to Items 2, 3, 4 in part, 5 and 7 of the Request

The Office asserts that it does not possess records responsive to Items 2, 3, 4 in part, 5 and

7. Attorney Robbins attests as follows:

3. In response to this [R]equest, I interviewed Caleb Arnold, Immigration Counsel for [the Office]. I asked them about the existence of any documents responsive to ...[the R]equest.

4. As the [Office’s] Immigration Counsel, ADA Arnold has direct knowledge of the immigration-related case information.

5. ... ADA Arnold stated that they do not analyze or track cases in the manner requested by [the Requester]. I relied on that statement to conclude that the [Office] had no documents responsive to [the] Request.

6. Upon [Requester's] appeal, I interviewed ADA Arnold again, asking for further clarification. At that time, ADA Arnold stated that they have a spreadsheet that roughly tracks the cases they are consulted on. ADA Arnold maintains this spreadsheet in real-time as they work through their cases. It reflects their prosecutorial involvement and decision-making in individual cases.

...

8. In response to [Items] 2 and 5, ADA Arnold stated that they keep track of final offers in cases where they are consulted but that records do not indicate whether or how the offer was changed as a result of their involvement. ADA Arnold does not keep track of whether offers are accepted.

9. In response to [Item] 3, ADA Arnold stated that the [Office] often does not have all information needed to determine whether an offer will prevent removal and that the [Office] does not know how or why ICE responds to the [Office's] actions. ADA Arnold confirmed that the [Office] therefore does not have records responsive to [Item] 3...

10. In response to [Item] 4, ADA Arnold indicated that they do not track convictions or charges other than main charge.²

11. In response to [Item] 5, ADA Arnold stated that they do not track rearrests.

Attorney Robbins also states that she consulted with Jan Bass, the Budget Administrator, who would have direct knowledge of the Office's budget-related matters. Regarding Item 7, Attorney Robbins attests that, "Ms. Bass confirmed that she had no documents responsive to part 7 of [the R]equest."

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records. *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 Office has acted in bad faith or that the records do, in fact, exist, "the averments in [the affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl.*

² The spreadsheet identified as responsive to Item 1 is partially responsive to Item 4; however, the Office argues this spreadsheet is exempt as relating to its criminal investigations.

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)). Based on the evidence provided, the Office has met its burden of proof that it does not possess the records responsive to Items 2, 3, 4 in part, 5 and 7 of the Request.

2. The Office provided responsive information to Item 1, but the Office has not provided sufficient evidence to withhold the list of charges responsive to Item 4 of the Request

The Office indicates that Immigration Counsel, ADA Arnold, has a spreadsheet that is used to work through cases and may be responsive to Item 1 and part of Item 4. It reflects their prosecutorial involvement and decision-making in individual cases.

Attorney Robbins attests:

7. In response to [Item] 1 of [the R]equest, the spreadsheet indicates that ADA Arnold has been consulted on over 400 cases. However, an exact number is unavailable because they sometimes respond to emergency calls from an ADA in court and those cases may not be added to their records if they do not obtain a case number. As of December 2, 2020, ADA Arnold has consulted on at least 415 cases.

Under the RTKL, an affidavit may serve as sufficient evidentiary support. *See Sherry, supra*. Based on the evidence provided, the Office has provided the information from the spreadsheet responsive to Item 1 of the Request. Accordingly, Item 1 is dismissed as moot.

As for Item 4, Attorney Robbins confirms that the spreadsheet would not contain the list of charges and convictions, only the main charge, thereby only being partially responsive to this Item. The Office explains the spreadsheet tracks cases that are being worked on by the Immigration Counsel and that it tracks only the main charge, not the totality of the charges or any convictions. The Office asserts that to the extent the spreadsheet is being sought, it is exempt as relating to its criminal investigations and the OOR lacks jurisdiction.

The Office is local law enforcement agency, and the OOR has no jurisdiction over appeals related to criminal investigative records held by local law enforcement agencies. *See* 65 P.S. § 503(d). Instead, such appeals are to be heard by an appeals officer designated by the local district attorney. *See id.* However, a local agency claiming that records are exempt under Section 708(b)(16) does not automatically divest the OOR of jurisdiction. 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., 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 request sought a police report and there was evidence of a criminal investigation, the criminal investigative exemption applied).

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).

Here, Item 4, in part, seeks the “total list of charges”. Under the RTKL, Section 708(b)(16) of the RTKL specifically states, “a record that, if disclosed, would do any of the following... reveal the institution, progress or result of a criminal investigation, *except the filing of criminal charges.*” 65 P.S. § 67.708(b)(16)(vi)(A) (emphasis added). Here, the Office has not explained how the

portion of the spreadsheet listing the charges is investigative in nature other than Attorney Robbins attestation that the spreadsheet “constitutes a criminal investigative record under the RTKL and CHRIA.” Because Section 708(b)(16)(vi)(A) makes such information expressly public and would not reveal an investigation, the OOR retains jurisdiction over this appeal. Lastly, the Office provided only conclusory statements to withhold the list of charges sought in Item 4, as such the evidence is not sufficient to justify the exemption of information. *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*).

Additionally, the Office assert the Criminal History Records Information Act, 18 Pa.C.S. §§ 9101 *et seq.* (“CHRIA”), to withhold the responsive information. The Commonwealth Court has held that “[a]n agency may not restrict access to public records requested under the RTKL by asserting that the records are subject to disclosure only under CHRIA. The RTKL offers an alternative to CHRIA to obtain public records. It is the duty of the disclosing agency to produce the records in accordance with any limitations set by either statute.” *Pa. State Police v. Zloczower*, No. 2082 C.D. 2010, 2011 Pa. Commw. Unpub. LEXIS 822 at *13 (Pa. Commw. Ct. Oct. 4, 2011), *petition for allowance of appeal denied*, 47 A.3d 1179 (Pa. 2012); *see also Guagliardo v. Luzerne County*, OOR. Dkt. AP 2012-0003, 2012 PA O.O.R.D. LEXIS 387. Accordingly, the Office is required to provide a list of charges from the spreadsheet as sought in Item 4 of the Request. See 65 P.S. § 67.708(b)(16)(vi)(A); 18 Pa.C.S. § 9104(b) (“Court dockets, police blotters and press releases and information contained therein shall, for the purpose of this chapter, be considered public records”).

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part, denied in part** and **dismissed as moot in part**, and the Office is required to provide the list of charges responsive to

Item 4 to the Requester within thirty days. 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 Philadelphia 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. 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: December 18, 2020

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent via email to: Jason Hopkins;
Zehava Robbins, Esq.

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