



FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ANDREW SWAIN,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2020-2642
	:	
BENSALEM TOWNSHIP POLICE	:	
DEPARTMENT,	:	
Respondent	:	

On December 9, 2020, Andrew Swain (“Requester”) submitted a request (“Request”) to Bensalem Township Police Department (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various records including arrest records, dispatch records, incident reports, internal affairs reports, excessive use of force reports, body cam audio and video, 911 call audio and other police or medical records related to the arrest of a named individual on February 23, 2020 and February 24, 2020. On December 11, 2020, the Department denied the Request, arguing that responsive records are related to a criminal investigation and that a portion of the Request seeks body cam footage, which is not subject to disclosure under the RTKL, as it is governed by Act 22. 65 P.S. 67.708(b)(16); 42 Pa.C.S. § 67A02(a).

On December 11, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed

the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On January 5, 2021, the Department submitted a position statement reiterating its grounds for denial. In support of its position, the Department submitted the affidavit of Lieutenant Keith Christie, the Department's Open Records Officer, who attests as follows:

Upon receipt of the [R]equest, the Department conducted a records search and located responsive records.

The responsive records included an incident form, police criminal complaint, affidavit of probable cause, victim witness statements and related photos, refusal of medical treatment form, and police body camera recordings.

The Department did not locate any other records in the course of the search.

Each of the responsive records are related to an incident for which the police were called to respond to a report of criminal activity. All of the responsive records were generated as a result of the police investigation into the alleged criminal conduct.

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. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Department acted in bad faith, "the averments in [the affidavit] 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)).

The threshold question is whether the OOR has jurisdiction to hear this 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).

Act 22 removed audio and video recordings made by law enforcement agencies from access under the RTKL and created a separate, exclusive means of access. *See* 42 Pa.C.S. § 67A03. In order 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.” 42 Pa.C.S. § 67A01. Here, the Request was made pursuant to the RTKL; however, it seeks, in part, an audio and video recording made by the Township’s Police Department, a law enforcement agency. Accordingly, the portion of the Request which seeks audio and video recordings should have been filed pursuant to Act 22, and the OOR lacks jurisdiction to consider this portion of the appeal. Therefore, the portion of the Request seeking audio and video recordings under Act 22 is dismissed for lack of jurisdiction.

Additionally, 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, because the Department has provided evidence that the record responsive to the Request relates to a pending criminal matter, this appeal is hereby transferred to the Appeals Officer for the Bucks County District Attorney’s Office to determine whether the requested record is a criminal investigative record. *See Pennsylvanians for Union Reform v. Centre Cnty. Dist. Attorney’s Office*, 139 A.3d 354 (Pa. Commw. Ct. 2016) (citing 42 Pa.C.S. § 5103(a) (relating to the process for handling improperly filed appeals)). A copy of this final order and the appeal filed

by the Requester will be sent to the Appeals Officer for the Bucks County District Attorney's Office.

For the foregoing reasons, the appeal is **dismissed for lack of jurisdiction in part** and **transferred in part** to the Appeals Officer for the Bucks County District Attorney's Office, and the Department is not required to take further 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 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 according to Section 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.¹ This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: January 22, 2021

/s/ Ryan W. Liggitt

RYAN W. LIGGITT, ESQ.
APPEALS OFFICER

Sent to: Andrew Swain (via email only);
 Nicole Freight, Esq. (via email only)
 Lt. Keith Christie, AORO (via email only);
 Appeals Officer, Bucks County District Attorney's Office (via U.S. Mail)

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).