



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**ANNE HUNTER AND MUNLEY LAW,
Requester**

v.

**HONESDALE BOROUGH,
Respondent**

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Docket No: AP 2020-2638

INTRODUCTION

Anne Hunter, on behalf of Munley Law, (collectively “Requester”) submitted a request (“Request”) to Honesdale Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various records related to a motor vehicle accident. The Borough did not respond, and the Request was deemed denied. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied in part and transferred in part**, and the Borough is not required to take any further action.

FACTUAL BACKGROUND

On November 12, 2020,¹ the Request was filed, seeking:

The complete HPD file regarding the investigation into the 9/21/2019 accident described in HPD Report No. W0756031, including the Pennsylvania State Police CRASH reconstruction, all witness statements, all officer reports, autopsy of Richard Fleszar, drug/alcohol report for Richard H. Dunn, photos of the scene, all measurements of the scene, any information regarding the locations and status of the street lights on Fair Avenue in Honesdale on 9/21/2019, and any other information/statement/report received by Officer Ray Gabikian, Sergeant Donald Thacher, or any other Police Department member in investigation Incident 842-19-3100. This [R]equest is seeking any and all information included in the HPD Investigation of the scene and accident regarding the death of Richard Fleszar and the operation of William Dunn's Chevrolet Trailblazer by Richard H. Dunn; it is not interpreted as request that HPD obtain any new or additional information.

The Borough did not timely respond to the Request, and the Request was deemed denied on November 19, 2020. *See* 65 P.S. § 67.901. On December 10, 2020, the Requester appealed to the OOR, stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On January 4, 2021,³ the Borough submitted a position statement arguing that certain records relate to criminal and noncriminal investigations, 65 P.S. §§ 67.708(b)(16)-(17), that certain records are exempt from disclosure under the Criminal History Record Information Act ("CHRIA"), 18 Pa.C.S. §§ 9101-9183, and that OOR lacks jurisdiction to entertain the appeal as

¹ The appeal includes a copy of an out-of-office email reply from the Borough's Open Records Officer, Judy Poltanis, indicating that she would not be available through November 11, 2020. In the appeal, the Requester also acknowledges receiving the out-of-office reply upon submitted the Request via email. Although the Requester states that her Request was filed on November 10, 2020, the Request is not filed until it is actually received by the agency open-records officer. *See* 65 P.S. § 67.901 (stating that "[t]he time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency"). Accordingly, the Request was received by the Borough on November 12, 2020.

² In the appeal, the Requester granted the OOR an additional thirty days to issue a Final Determination. In addition, the Requester granted the OOR an extension of time to issue the Final Determination until February 24, 2020. *See* 65 P.S. § 67.1101(b)(1).

³ On December 22, 2020, the OOR granted the Borough's request to keep the record open until January 4, 2021. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute").

to the criminal investigative records. The Borough also argues that the Request seeks an exempt autopsy report, 65 P.S. § 67.708(b)(20), that the requested drug and alcohol reports are exempt personal medical information, 65 P.S. § 67.708(b)(5), and that the portion of the Request seeking information regarding the status of the streetlights on Fair Avenue is insufficiently specific, 65 P.S. § 67.703. In support of its position, the Borough submitted the affidavit of Judith Poltanis, the Borough's Secretary and Right-to-Know Officer.

Also, on January 4, 2021, the Requester submitted a supplemental position statement in support of the appeal, along with a September 19, 2019, article from the Tri-County Independent news website⁴ and a copy of the Honesdale Borough Police Department "Police Crash Report" for Incident No. 842-19-3100, referenced in the Request. The Requester asserts that the records requested are not exempt under CHRIA or Sections 708(b)(16)-(17) of the RTKL because no criminal charges were filed and the investigation has been concluded. The Requester also asserts that the requested records would contain non-confidential information that would normally be included in the crash report already provided and to the extent that there may be exempt investigatory information, the records should be redacted and released. In addition, the Requester withdrew the appeal as to the autopsy report of Richard Fleszar.

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

⁴ www.tricountyindependent.com.

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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, the parties did not request a hearing.

The Borough 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)(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 Request is partially insufficiently specific

The Borough argues that the portion of the Request seeking “any information regarding the locations and status of the street[]lights on Fair Avenue in Honesdale on 9/21/19” is not sufficiently specific because the language is overly broad and the Borough cannot determine what records are being sought. The Borough argues that this portion does not identify a scope or discrete group of documents.

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 interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d 813). In determining whether a particular request is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep't of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). Specifically, the OOR examines to what extent the request sets forth (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. *Pa. Dep't of Educ.*, 119 A.3d at 1124-25. Finally, “[t]he fact that a request is burdensome does not deem it overbroad, although it may be considered as a factor in such a determination.” *Pa. Dep't of Env'tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012) (*en banc*).

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. In *Carey*, the Commonwealth Court found a request for unspecified records (“all documents/communications”) related to a specific agency project (“the transfer of Pennsylvania inmates to Michigan”) that included a limiting timeframe to be sufficiently specific “to apprise [the agency] of the records sought.” 61 A.3d 367. Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *See Pa. Dep’t of Educ.*, 119 A.3d at 1125. “The timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126. This factor is the most fluid and is dependent upon the request’s subject matter and scope. *Id.* Failure to identify a finite timeframe will not automatically render a sufficiently specific request overbroad; likewise, a short timeframe will not transform an overly broad request into a specific one. *Id.*

While a timeframe is stated (the date of the accident), based upon a review of the portion the Request seeking “any information regarding the location or status of the street[]lights on Fair Avenue” on the date of the accident, the Request is insufficiently specific in that it fails to seek a clearly defined universe of documents. *Legere*, 50 A.3d at 265. “A request for a broad category of documents, such as all records, may be sufficiently specific if confined to a particular recipient or recipients.” *Pa. Dep’t of Educ.* 119 A.3d at 1125; *see also Carey*, 61 A.3d at 372 (concluding request for “all records that were provided to the transferred inmates” was sufficiently specific because it sought “a discrete group of documents” limited by recipient); *but see Iverson v. Montgomery Cnty.*, 50 A.3d 281, 284 (concluding request which “does not identify specific individuals, email addresses, or even departments, but requests any applicable emails sent from the County’s domain to four other domains” was insufficiently specific). This portion of the Request fails to identify any type of discrete record. Further, the broad category of “any

information” is sought for the equally broad subject of “location” and “status” of the streetlights. Finally, this portion of the Request does not limit the scope of records sought by identifying potential custodians of such records. As stated by the Borough, this portion of the Request implicates a universe of records that includes “any potentially conceivable document that may be connected ‘in any way’ to the street[]lights on Fair Avenue from every single possible person ... connected in any way to the Borough.” Similar to *Iverson*, the portion of the Request seeking records related to streetlights on Fair Avenue is merely an open-ended request that gives an agency little guidance regarding what to look for and, therefore, is insufficiently specific. *See Iverson*, 50 A.3d at 284, n.4 (finding that a request was insufficiently specific because it did not “sufficiently inform[] an agency of the records requested); 65 P.S. § 67.703.⁵

2. The OOR lacks jurisdiction over criminal records

The Borough argues that the requested police reports and investigative materials are related to a criminal investigation of a traffic accident that resulted in a fatality and, therefore, the OOR lacks jurisdiction to entertain the appeal as to these records. The threshold question is whether the OOR has jurisdiction to hear this appeal as it pertains to these records. 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).

⁵ We note that Ms. Poltanis affirms that, “[d]espite the lack of specificity, [she] completed a good faith search of records within the possession, custody and control of the Borough by searching the files in Borough Hall[]” and “[she has] not found any [Borough] records addressing streetlights of Fair Avenue on September 21, 2019.” In addition, we also note that Ms. Poltanis affirms that, in response to a prior similar RTKL request, the Requester was informed such a request is misdirected “as the Borough streetlights are owned and operated by PPL Electric Utilities not the Borough....”

In support of the Borough's position, Ms. Poltanis attests, in pertinent part, the following:

10. ... I conducted an examination of the files in the possession, custody and control of the [Borough] for records responsive to the [R]equest and directed the Chief of Police of the Borough ... to identify all Police Department records associated with the [R]equest.

11. The ... Borough Police Department is authorized to investigate suspected and reported criminal activity as a criminal justice agency created by the Borough Council pursuant to Section 1121 of the Borough Code, which grants police officers the powers and duties as are granted to police officers under the laws of the Commonwealth. 8 Pa.C.S. § 1121(b).

12. Regarding the investigative file requested, the file was compiled by the ... Borough Police Department as a result of a fatal motor vehicle accident that, depending on the evidence collected during the course of the Department's criminal investigation, could result in criminal charges being filed.

13. The investigative file requested contains police reports reflecting physical evidence gathered during the investigation as well as conclusion, actions and observations of officers, the toxicology report following the motor vehicle crash (the drug/alcohol report), written statements of witnesses and the driver of the vehicle, crash photographs, an autopsy report, a death certificate and other information obtained during the course of the investigation into the fatal crash.

14. The information in the requested police reports and investigative files was assembled as a result of an investigation into potential criminal conduct. The police reports and investigative materials are reports of that criminal investigation and contain investigative information which, if disclosed would reveal the progress or result of the criminal investigation.

Under the RTKL, an attestation made under the 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).

Section 708(b)(16)(ii) of the RTKL exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation, including: ... [i]nvestigative materials, notes, correspondence, videos and reports.” 65 P.S. § 67.708(b)(16)(ii). While the OOR has no jurisdiction over records that are related to a criminal investigation, a local agency claiming that

records are exempt under Section 708(b)(16) does not automatically divest the OOR of jurisdiction over an appeal.

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 this matter, Ms. Poltanis attests that the requested investigative report was "compiled as a result of fatal motor vehicle accident" that potentially could result in criminal charges and that "[t]he information in the requested police reports and investigative files was assembled as a result of an investigation into potential criminal conduct." The Requester argues that Section 708(b)(16)

should not apply because the driver of the vehicle was neither cited nor charged with an offense and there is no indication of the existence of a presently ongoing criminal investigation or a prior criminal investigation. However, Ms. Poltanis' sworn affirmations demonstrate that a criminal investigation resulted from the accident, and the Requester's unsworn statements do not amount to sufficient competent evidence to dispute the Borough's evidence. See *Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209 (Pa. Commw. Ct. 2012) (holding that statements of counsel are not competent evidence). Furthermore, regarding whether criminal charges were filed or whether the investigation has concluded, "[t]he RTKL does not provide an expiration date for exemptions." *Cafoncelli v. Pa. State Police*, No. 1392 C.D. 2016, 2017 Pa. Commw. Unpub. LEXIS 405 (citing *Hunsicker v. Pa. State Police*, 93 A.3d 911 (Pa. Commw. Ct. 2014)); see also *Weiss v. Pa. State Police*, OOR Dkt. AP 2009-0465, 2009 PA O.O.R.D. LEXIS 713; *Duffner v. Pa. State Police*, OOR Dkt. AP 2009-0130, 2009 PA O.O.R.D. LEXIS 7.

The Requester also asserts that certain information being sought is information that should be included in the Crash Report, but, in this instance, such information was not included. The Requester states that the primary information sought includes photographs of the scene; measurements; whether witnesses reported that the decedent was breathing and/or conscious at any point; and the identification of witnesses not previously disclosed in the crash report. The Requester further asserts that the Borough Police Department "should not be permitted to prevent the family of the decedent from obtaining information that should have been contained in the final crash report." While the OOR acknowledges the sensitive nature of the decedent's family's concerns, a requester's identity or motivation for making a request is not considered in determining whether a record is accessible to the public under the RTKL. *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013). Under the RTKL, whether the document is accessible is based

only on “whether a document is a public record, and if so, whether it falls within an exemption that allows that it not be disclosed. The status of the individual requesting the record and the reason for the request, good or bad, are unrelated to whether a document must be made accessible under Section 301(b) [of the RTKL].” *Hunsicker*, 93 A.3d at 913; *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli*, 2017 Pa. Commw. Unpub. LEXIS 405 (citing *Hunsicker*).

Here, the Request seeks the “complete HPD file regarding the investigation into the 9/21/2019 accident described in HPD Report No. W0756031,” which, based on a review of the Police Crash Report submitted by the Requester, relates to the fatal motor vehicle accident investigation described by Ms. Poltanis. In addition, the Requester further explains what is being sought in the Request by stating, “[t]his [R]equest is seeking *any and all information included in the HPD Investigation of the scene and accident* regarding the death of Richard Fleszar and the operation of William Dunn’s Chevrolet Trailblazer by Richard H. Dunn; it is not interpreted as request that HPD obtain any new or additional information.” (Emphasis added). Here, the records sought are facially related to the Borough Police Department’s criminal investigation of the fatal motor vehicle accident that occurred on September 19, 2019. *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); *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). Accordingly, this appeal is hereby transferred to the Appeals Officer for the Wayne County District Attorney’s Office to determine if the responsive records relate to a criminal investigation. *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)).⁶

CONCLUSION

For the foregoing reasons, the appeal is **denied in part** and **transferred in part**, and the Borough 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 Wayne 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.⁷ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 22, 2021

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Anne Hunter, Esq. (via email only);
Susan Yocum, Esq. (via email only);
Judith Poltanis (via email only);
Appeals Officer, Wayne County District Attorney's Office (via email and US Mail)

⁶ The OOR acknowledges that it does have jurisdiction over records related to a noncriminal investigation in the hands of a local agency. *See* 65 P.S. § 67.708(b)(17). Here, the Borough indicates that a corresponding noncriminal investigation may have occurred in relation to the accident; however, because the Borough has presented evidence that the responsive Borough Police Department files relate to a criminal investigation and has met the threshold of showing that the records relate to a criminal investigation, the appeal must be transferred to the Wayne County District Attorney's Office for adjudication. Furthermore, any noncriminal investigation that commenced after the police responded to the scene does not confer jurisdiction on the OOR to determine whether the responsive police incident report is exempt under 65 P.S. § 67.708(b)(16). *See Napolillo v. So. Connellsville Borough*, OOR Dkt. AP 2017-0669, 2017 PA O.O.R.D. LEXIS 857, *10, n.3.

⁷ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).