



FINAL DETERMINATION

IN THE MATTER OF

**DAVID KNELLER,
Requester**

v.

**POCONO MOUNTAIN REGIONAL
POLICE DEPARTMENT,
Respondent**

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Docket No: AP 2021-0268

INTRODUCTION

David Kneller (“Requester”) submitted a request (“Request”) to the Barrett Township Police pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking a booking photo. The Pocono Mount Regional Police Department (“Department”) denied the Request claiming the photo is a criminal investigative record exempt under the RTKL, 65 P.S. §. 67.708(b)(16).¹ The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Department is required to take additional action as directed.

FACTUAL BACKGROUND

On February 2, 2021, the Request was filed, seeking the “[b]ooking photo of Joshua Mulligan Complaint #20130420M0001.” On February 4, 2021, 65 P.S. § 67.902(b), the

¹ The Department explained that the Barrett Township Police regionalized with the Pocono Mountain Regional Police Department sometime after the booking photo was taken.

Department denied the Request claiming the photo is a criminal investigative record exempt under the RTKL, 65 P.S. § 67.708(b)(16).

On February 8, 2021, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c). In his appeal, the Requester argued that booking photographs are routinely published and therefore public record. He provided two examples from local online news sites.

On February 17, 2021, the Department submitted a position statement² reiterating its grounds for denial.³ The Department also asserts that arrestees have a privacy interest in their booking photographs. In support of its position, the Department submitted the affidavit of Susan Kopp, the Department’s Right to Know Officer, who attested, in relevant part, that a search was conducted and that no responsive record exists in the Department’s possession.

On February 22, 2021, the Requester submitted supplemental argument in support of his appeal.

On March 2, 2021, in response to the OOR’s request for additional information, the Department submitted the supplemental affidavit of Ms. Kopp addressing Barrett Township Police’s records merge with the Department.

² The Department’s submissions routinely refer to the booking photographs referenced by the Requester in his appeal; however, those photos are not at issue here. The Request was solely for Joshua Mulligan’s booking photograph.

³ The Department’s submission contains an overview of the RTKL which references 65 P.S. § §67.708(b)(17)-(18) and Act 22 of 2017; however, nowhere in any of its submissions does the Department provide any evidence that the record may be exempt under these statutes. Therefore, the OOR will not address them here.

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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The Department 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)). Likewise, “[t]he 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. The Department failed to prove that the record is not in its possession, custody or control

The Department argues that the photograph does not exist in its possession, custody or control because the Barrett Police and Department RMS systems were not integrated. Ms. Kopp affirms that the requested photos were not taken at the Department’s headquarters and booking photos are conducted at the Monroe County Booking facility. She also explains that the relevant arrest leading to the booking photo was made by the Barrett Township Police prior to regionalizing with the Department. She explains that the systems were not integrated and therefore, the booking photo is not in the Department’s system. In her supplemental affidavit, she explains that the Barrett system was brought over as a stand-alone electronic file that can be accessed but is not integrated. She also affirmed that the Barrett system did not store or maintain booking photos. However, Ms. Kopp also affirms that the Department has a hard copy of the photo in the paper file of the Barrett Police Department, which is in the storage area of the Department.

Under the RTKL, a sworn affidavit or statement 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). In the absence of any evidence that the Department has acted in bad faith or that the records exist, “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)). Here, the Department admits it has the photograph in its possession, custody or control, as a result of its possession of a hard copy of the record. Based on the evidence provided, the Department has not met its burden of proof that it does not possess the record. *See Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). The OOR declines to make a finding of bad faith as the Department adequately addressed the OOR’s questions regarding system mergers.

2. The OOR retains jurisdiction over the appeal and booking photographs are not exempt under the criminal investigation exemption of the RTKL

The Request seeks Joshua Mulligan’s booking photograph. On appeal, the Department argues that the booking photograph is exempt under the criminal investigation exemption of the RTKL and appears to argue that the OOR is not the proper venue for appeal.

Ms. Kopp affirms “the booking photograph is not disclosable by the Agency as it fits into the exemption as noted in our brief with a criminal investigation in the proper venue of the Monroe County District Attorney’s Office.” The OOR interprets this as challenge to the OOR’s jurisdiction to hear this appeal. The OOR lacks jurisdiction to consider whether a record of a local law enforcement agency is subject to public access where the agency claims that the records are withheld under Section 708(b)(16) and either submits evidence demonstrating that a criminal investigation occurred or, based on the appeal documents or the language of the request itself, there is no dispute between the parties regarding the existence of a criminal investigation. *See* 65 P.S. § 67.503(d)(2). However, “the OOR will not deprive itself of jurisdiction over appeals ...

where an entity other than the agency from which records are requested has conducted the investigation.” *Wise v. Borough of Steelton*, OOR Dkt. AP 2015-0063, 2015 PA O.O.R.D. LEXIS 204. The criminal investigative exemption has “only been extended to protect the record of an agency carrying out an investigation.” *Hayes v. Pa. Dep’t of Pub. Welf.*, OOR Dkt. AP 2012-0415, 2012 PA O.O.R.D. LEXIS 530; *see also Univ. of Pittsburgh Medical Center v. City of Pittsburgh*, OOR Dkt. AP 2014-0089, 2014 PA O.O.R.D. LEXIS 186 (holding that records relating to a criminal investigation conducted by the Federal Bureau of Investigation were not exempt from public access under Section 708(b)(16)).

Similar to the cases cited above, the criminal investigation in the instant matter was conducted by an entity other than the Department, and the photograph is in the possession of the Department. Accordingly, the OOR retains jurisdiction over this appeal and Section 708(b)(16) is not applicable in this case. *See Mezzacappa v. West Easton Borough*, OOR Dkt. AP 2020-0981, 2020 PA O.O.R.D. LEXIS 2793; *Konias v. Allegheny County*, OOR Dkt. AP 2018-0783, 2018 PA O.O.R.D. LEXIS 840.

3. The public interest outweighs any privacy interest in this booking photograph

The Department asserts that arrestees have a significant privacy interest in their booking photographs. The Pennsylvania Supreme Court has held that an individual possesses a constitutional right to privacy in certain types of personal information. *Pa. State Educ. Ass’n v. Commonwealth*, 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual’s interest in informational privacy with the public’s interest in disclosure and may release the personal information only when the public benefit outweighs the privacy interest. *Id.*; *see also Pennsylvania State Univ. v. State Employees’ Retirement Bd.*, 935 A.2d 530 (Pa. 2007)

(employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

Although the Pennsylvania Supreme Court did not expressly define the types of “personal information” subject to the balancing test, the Court recognized that certain types of information, including home addresses, by their very nature, implicate privacy concerns and require balancing. *Pa. State Educ. Ass’n*, 148 A.3d at 156-57; *see also Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110, 117 (Pa. 2008) (finding telephone numbers to constitute personal information subject to the balancing test); *Pa. State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers’ International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, home addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test) .

To determine whether the constitutional right to privacy precludes disclosure of an individual’s personal information, the OOR must apply the balancing test enunciated in *Denoncourt v. Pa. State Ethics Comm’n*, 470 A.2d 945 (Pa. 1983), and applied in the public records context in *Times Publ. Co., Inc. v. Michel*, 633 A.2d 1233, 1237 (Pa. Commw. Ct. 1993), “weighing privacy interests and the extent to which they may be invaded, against the public benefit which would result from disclosure.”

Here, the Requester has noted that booking photographs are routinely published in the press, while the Department argues that “[t]hree factors contribute to this privacy interest: the fact that the photographs convey a unique, humiliating image; PA RTK ACT and United States FOIA’s legislative history and Supreme Court precedents; and technology that gives disclosed mug shots staying power well beyond the initial news of the subject’s arrest.”

In *Detroit Free Press, Inc. v. United States DOJ*, in analyzing Exemption 7(c) of the Freedom of Information Act, the Sixth Circuit explicitly held that individuals do have a privacy interest in booking photographs *and* that in certain instances, some public interests can outweigh that privacy interest. 829 F.3d 478 (6th Cir. 2016). In *Commonwealth v. Duncan*, the Pennsylvania Supreme Court recognized the distinctly different privacy interests of an individual under criminal investigation, and a lowered expectation of privacy in their name and address under Article 1, Section 8 of the Pennsylvania Constitution, as opposed to the right to informational privacy found in Article 1, Section 1. The Court stated:

In determining the scope of protection afforded under Article I, Section 8, this Court employs the same two-part test employed by the United States Supreme Court to determine the sweep of the Fourth Amendment of the U.S. Constitution -- a test first articulated by Justice Harlan in his concurring opinion in *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). *See, e.g., Commonwealth v. Rekasie*, 566 Pa. 85, 778 A.2d 624, 629 (Pa. 2001). “That test requires a person to (1) have established a subjective expectation of privacy and (2) have demonstrated that the expectation is one that society is prepared to recognize as reasonable and legitimate.” *Commonwealth v. Gordon*, 546 Pa. 65, 683 A.2d 253, 256 (Pa. 1996).

Duncan, 572 Pa. at 452. In Pennsylvania, mug shots are routinely disseminated to the press, sometimes as part of a press release, *see* 18 Pa.C.S. § 9104(a).

Here, the record sought is a booking photograph related to a closed criminal case. The individual it depicts has a lowered subjective expectation of privacy in such a photograph and society has come to expect dissemination of these photographs. Therefore, upon balance, the photograph must be disclosed.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted**, and the Department is required to provide Joshua Mulligan’s booking photograph 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 or petition for review to the Monroe County Court of Common Pleas. *See* 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 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.⁴ This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: March 17, 2021

/s/ Erin Burlew

ERIN BURLEW, ESQ.
APPEALS OFFICER

Sent to: David Kneller (via email only);
Harry Coleman, Esq. (via email only);
Susan Kopp (via email only)

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).