



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**TERRY SIFORD, JR.,  
Requester**

**v.**

**FRANKLIN COUNTY DISTRICT  
ATTORNEY'S OFFICE,  
Respondent**

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**Docket No: AP 2021-0365**

### **INTRODUCTION**

Terry Siford, Jr. ("Requester") submitted a request ("Request") to the Franklin County District Attorney's Office ("Office") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking various records relating to the Requester. The Office partially denied the Request, arguing certain records do not exist and relate to a criminal investigation. 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 Office is not required to take any further action at this time.

### **FACTUAL BACKGROUND**

On December 28, 2020, the Request was filed, seeking, in pertinent part:

...

6. Emails, memos, and or official communications between Franklin County District Attorney's Office (ie DA Matthew Fogal, ADA Sulcove, ADA Kerstetter,

ADA Drumheller, ADA Lewis, and Det. Rush) and any of these Law Enforcement Personnel: Aaron Martin, Gregory Alton, Michael St. Clair, Alex Grate, James Shearer, Tom Shelton, Paul Taylor, Alan Procter, Amanda Wisely, Kristen Zalenski, Brian Hupe between November 01, 2013 thru December 28, 2020, and within the case files relative to Terry Wayne Siford, and, or

7. Any, and, all e-mails, memos, and, or official communications produced, preserved, received, obtained, and, or within the case files, database, and, or in official stored repository of the Franklin County District Attorney's Office that mention, pertains to, and, or relates to the investigation, surveillance, GPS Tracking, and, or identification of an actor within the burglar[ies], robber[ies], and, or home invasions occurring between November 01, 2013 thru February 09, 2014, which shall also include any mentioning, referencing, and, or of these subject matters" Terry Wayne Siford, 2003 Ford Explorer, Joshua Gingell, Joshua Trite, and, or Tiffany Robinson, which the Franklin County District Attorney's office produced, received, obtained, shared, preserved, and, or possess[ed] within their care, custody and, or control with the possession occurring between November 01, 2013 thru December 28, 2020, and...

On February 5, 2021, after invoking a thirty-day extension during which to respond, the Office partially denied certain records responsive to Item 6 as related to criminal investigations, 65 P.S. § 67.708(b)(16). The Office also denied one record responsive to Item 7 as attorney-work product doctrine. Lastly, the Office granted access to certain records responsive to Items 6 and 7.

On February 23, 2021, the Requester appealed to the OOR, challenging the denial of Items 6 and 7 of the Request and stating grounds for disclosure.<sup>1</sup> The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

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<sup>1</sup> The Requester challenges only the denial of Items 6 and 7, stating that he "appeals the denial of records, exemptions utilized, and, or vague responses, and or vague descriptions to exactly what is being denied, and, or exempt in paragraphs no. 6 , and, or 7." As the Requester does not challenge the remaining items of the Request, the Requester has waived any objections regarding the sufficiency of the responsive information provided by the District. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

On March 9, 2021, the Office submitted a position statement reiterating its grounds for denial. In support of its position, the County submitted sworn affidavit from Laura Kerstetter, First Assistant District Attorney.

### **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 Office is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011). 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 of Item 6 is transferred to the District Attorney**

Item 6 of the Request seeks records in his case file for a certain timeframe. The Office asserts that these records relate to criminal investigations. 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).

Here, Attorney Kerstetter attests that the Office “began an investigation of [the Requester] as it pertains to reports of home invasion burglaries/robberies, in or about November 8, 2013. Integral to any investigation by our office is communication with the law enforcement personnel involved, including but not limited to police officers/troopers.” She further attests:

4. There were numerous communications between the [Office] and police officer/troopers, primarily during the time period of November 8, 2013 and May 31, 2016, pertaining to the investigation of the [Office]. Said communications occurred between the time the investigation started, criminal charges were pursued and continuing through the trial and conviction of [Requester], for the crimes of robbery, burglary, theft by unlawful taking and criminal mischief.

5. The communications between the [Office] cover matters such as determining the witness list and making arrangements for subpoenas, determining what physical evidence, requesting supplement reports, updates to out of state attorney regarding the status of the Franklin County, PA case and correspondence with a potential expert.

6. In this matter specifically, as it pertains to the [Requester] the [Office] did have communications with Aaron Martin, Gregory Alton, and Kristen Zalenski, all regarding this criminal matter.

7. [The Requester] has been incarcerated for the crimes initially investigated in or about November 8, 2013, since June 24, 2014.

Under the RTKL, a sworn affidavit is generally competent evidence to sustain an agency's burden of proof. *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). Because the responsive records in the Requester's case file could relate to a criminal investigation, the OOR has no jurisdiction over the appeal of Item 6 and is hereby transferred to the Appeals Officer for the Office to determine whether the records relate to a criminal investigation.<sup>2</sup> A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the Office.

## **2. The records responsive to Item 7 are attorney-work product**

The Office asserts that there are three records responsive to Item 7 that have been withheld as attorney-work product doctrine. The Office identifies this record as a draft record being prepared for Court. The RTKL defines "privilege" as "[t]he attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." 65 P.S. § 67.102.

The attorney work-product doctrine, on the other hand, prohibits disclosure "of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pa.R.C.P. 4003.3. "The purpose of the work product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a

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<sup>2</sup> The Commonwealth Court has noted that the OOR has the authority to transfer an appeal to "where [a requester] should have initially appealed." *See Phila. Dist. Attorney's Office v. Williams*, 204 A.3d 1062, \*4 n.5 (Pa. Commw. Ct. 2019) "... [A]lthough the onus for appealing from an RTKL denial to the proper appeals officer is on the requester, the OOR did not violate the law or any procedure in redirecting the appeal in this case").

client, regardless of whether the work product was prepared in anticipation of litigation.” *Bousamra v. Excelsa Health*, 210 A.3d 967, 976 (Pa. 2019) (internal citations omitted); *see also Heavens v. Pa. Dep’t of Env’t Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) (“[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked”). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978 (internal citation omitted), the work-product doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id.* at 979 (internal citations and quotation omitted).

Here, Attorney Kerstetter attests:

On May 24, 2017, I sent an email to Eric Augustine, an Assistant District Attorney in our office, regarding a witness list, a legal document I was preparing for Court. This was in draft form, and I was seeking his review and response.

On April 7, 2017, I sent an email to Eric Augustine, an Assistant District Attorney in our office, regarding a sentencing memo, a legal document I was preparing for Court. This was in draft form, and I was seeking his review and response.

On July 21, 2016, I sent an email to Ricky Lewis, an Assistant District Attorney in our office, regarding a sentencing memo, a legal document I was preparing for Court. This was in draft form, and I was seeking his review and response.

Draft documents created by an agency attorney are generally protected under both the attorney-client privilege and the attorney-work product doctrine, unless those drafts consist of purely factual information or where the privilege has been waived. *See Andritz Sprout-Bauer v. Beazer East*, 174 F.R.D. 609, 634 (M.D. Pa. 1997) (“Drafts of documents prepared by counsel or circulated to counsel for comments on legal issues are considered privileged if they were prepared or circulated for the purpose of giving or obtaining legal advice and contain information or comments not included in the final version”). Thus, the Office may withhold the draft documents

to the extent they contain information or comments not included in the final, public drafts of those documents. *See id.*

## CONCLUSION

For the foregoing reasons, the appeal is **denied in part** and **transferred in part** to the Appeals Officer for the Office. 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 Franklin 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.<sup>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: March 24, 2021**

*/s/ Jill S. Wolfe*

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APPEALS OFFICER  
JILL S. WOLFE, ESQ.

Sent to: Terry Siford, Jr., MQ-4204;  
Hannah Herman-Snyder, Esq. (via email only);  
Jean Byers (via email only)

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