



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:	
	:	
<b>BRITTNEY HAILER AND PITTSBURGH</b>	:	
<b>CURRENT,</b>	:	
<b>Requester</b>	:	
	:	<b>Docket No: AP 2021-0117</b>
<b>v.</b>	:	
	:	
<b>ALLEGHENY COUNTY MEDICAL</b>	:	
<b>EXAMINER,</b>	:	
<b>Respondent</b>	:	

### INTRODUCTION

Brittney Hailer and Pittsburgh Current (collectively “Requester”) submitted a request (“Request”) to the Allegheny County Medical Examiner (“Examiner”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking an autopsy report and a toxicology report for an identified individual. The Examiner denied the Request, arguing the records are exempt autopsy records. 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 Examiner is required to take additional action as directed.

### FACTUAL BACKGROUND

On December 23, 2020, the Request was filed, stating:

I am requesting the Autopsy/External Examination and Toxicology Report for Daniel A. Pastorek, 63, who died November 26 at the Allegheny County Jail.

Can I have the parts of the report as they become available, as well.

I request the results of the physical autopsy as soon as they become available and  
I request the results of the toxicology as soon as they become available.

On January 5, 2021, the Examiner denied the Request, arguing the records are exempt autopsy records but providing the decedents' name, and cause and manner of death. 65 P.S. § 67.708(b)(20).

On January 19, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.<sup>1</sup> The OOR invited both parties to supplement the record and directed the Examiner to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On February 2, 2021, the Requester provided additional argument in support of her appeal.

On February 10, 2021, the Examiner submitted a position statement reiterating its grounds for denial. The Examiner claims that because Allegheny County is a county of the second class, the Coroner's Act does not require that autopsy reports be deposited with the Prothonotary and therefore, the autopsy report is exempt under Section 708(b)(20). Furthermore, the Examiner argues that the toxicology report is an exempt noncriminal investigative record. 65 P.S. § 67.708(b)(17). In support of its position, the Examiner submitted the affidavit of Mandy Tinkey, the Laboratory Director of the Allegheny County Office of the Medical Examiner.

## 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

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<sup>1</sup> The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

“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 Examiner 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)).

The Examiner argues the autopsy report is exempt under Section 708(b)(20) of the RTKL. Meanwhile, the Requester argues that these records are public pursuant to the Pennsylvania Supreme Court ruling, while the Examiner argues that the Coroner’s Act, 16 P.S. §§ 1231 *et seq.*, does not apply to Allegheny County *See* 16 P.S. § 102(a) (“[T]his act does not apply to counties of the first, second A, or second classes.”).

Section 708(b)(20) of the RTKL exempts from disclosure:

An autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmortem examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner.

65 P.S. § 67.708(b)(20). Thus, Section 708(b)(20) explicitly exempts public access to an autopsy report under the RTKL. *Id.*

Under the Coroner’s Act, there are two ways to access records of a coroner. First, Section 1236-B of the Coroner’s Act requires coroners of the third, fourth, fifth, sixth, seventh and eighth classes to deposit their records with the Prothonotary, 16 P.S. § 1236-B, but Allegheny County is a county of the second class, 16 P.S. § 210(2). Therefore, the Examiner is not obligated to file their “official records and papers” for the preceding year in the County’s Office of the Prothonotary. *See* 16 P.S. § 1236-B.

However, there is a second means of accessing records under the Coroner’s Act directly from the coroner under Section 1252-B which states:

The coroner shall charge and collect a fee of \$ 500 for an autopsy report, \$ 100 for a toxicology report, \$ 100 for an inquisition or coroner's report, \$ 50 for a cremation or disposition authorization and other fees as may be established from time to time for other reports or documents requested by nongovernmental agencies in order to investigate a claim asserted under a policy of insurance or to determine liability for the death of the deceased.

16 P.S. § 1252-B. The Pennsylvania Supreme Court analyzed this section in *Hearst Television, Inc. v. Norris*, finding that “[t]he RTKL provides the procedure for accessing those records that are available for immediate release for a fee pursuant to Section [1252-B].” 54 A.3d 23, 33 (Pa. 2012). The Court further noted that there was no mention of discretion when charging or collecting these fees; as a result, Section 1252-B “allows the coroner to charge fees for records but does not afford the coroner any discretion with regard to releasing such records.” *Id.* at 32 (emphasis added).

The Examiner argues that when the General Assembly exempted second class counties from the requirement that coroners deposit records and papers with the Prothonotary, it eliminated the rationale that the Court used in *Hearst Television*, which held that the RTKL provides a procedure for a citizen to request and pay for reports that have not yet been filed with the Prothonotary.

The Examiner argues that the reports “*are not required to become public at any point.*” (emphasis in original). This is incorrect. Even though *Norris* was determined under the former version of the Coroner's Act<sup>2</sup>, the rationale regarding the interplay between the former Coroner's Act and the RTKL still applies to the interplay between the current Coroner's Act and the RTKL. Furthermore, Section 1201-B of the Act specifically applies the Act to counties of the second class, second class A and third through eighth class, unless otherwise expressly provided. 16 P.S. § 1201-B

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<sup>2</sup> The former Coroner's Act, 16 P.S. §§ 1201 *et seq.*, was repealed and replaced by 16 P.S. §§ 1201-B *et seq.*, which became effective on December 24, 2018.

Therefore, a requester is not limited to only accessing records that may have been filed with the Prothonotary. Rather, any Coroner's records responsive to the Request identified in Section 1252-B of the Coroner's Act are available through the RTKL for the fees set forth in the Coroner's Act. *See Ciavaglia v. Bucks County*, OOR Dkt. AP 2020-0761, 2020 PA O.O.R.D. LEXIS 1528; *Bowen v. Indiana County*, OOR Dkt. AP 2019-2064, 2019 PA O.O.R.D. LEXIS 2068.

Similarly, although the County argues the toxicology report is exempt under both Sections 708(b)(17) and 708(b)(20) of the RTKL, because the Act provides that toxicology reports are available for a fee, the toxicology report is a public record but subject to disclosure for the fee set forth in the Act.

### CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Examiner is required to provide the reports in accordance with the Act. 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 Allegheny 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 31, 2021**

*/s/ Erin Burlew*

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ERIN BURLEW, ESQ.  
APPEALS OFFICER

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

Sent to: Britney Hailer (via email only);  
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