



FINAL DETERMINATION

IN THE MATTER OF

**MARCUS HAND,
Requester**

v.

**PHILADELPHIA DISTRICT
ATTORNEY'S OFFICE,
Respondent**

:
:
:
:
:
:
:
:
:
:
:
:

Docket No: AP 2022-1050

INTRODUCTION

Marcus Hand ("Requester"), an inmate at SCI Mahanoy, submitted a request ("Request") to the Philadelphia District Attorney's Office ("Office") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking documents used at trial. The Office denied the Request, arguing the records are related 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 **transferred**, and the Office is not required to take any further action at this time.

FACTUAL BACKGROUND

On March 10, 2022, the Request was filed, seeking "documents from the trial of Commonwealth v. Marcus Hand, CP-51-CR-0114933, October 29, 1976 – November 2, 1976:

1. Commonwealth Exhibit (63), statement of Mr. Gene Bryant to FBI.
2. Commonwealth Exhibit (64), statements of Mr. James Porter to FBI
3. Commonwealth Exhibit (68), two enlarged photos of fingerprints."

On March 17, 2022, the Office invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On April 18, 2022, the Office denied the Request, arguing that the responsive records are exempt as they relate to a criminal investigation. *See* 65 P.S. § 67.708(b)(16).

On May 3, 2022, 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 Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On May 12, 2022, the Office submitted a position statement reiterating its grounds for denial. The Office claims that the records relate to a criminal investigation and the appeal should be transferred. 65 P.S. § 67.708(b)(16). In support of its position, the Office submitted the sworn attestation of Joshua Niemtzow, the Office's Open Records Officer, reiterating its grounds for denial.

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). 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 Office is a local agency, and the Request seeks Commonwealth trial exhibits. The Office argues that the responsive records relate to a criminal investigation and are exempt from access under Section 708(b)(16) of the RTKL. Section 708(b)(16) of the RTKL exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation.” 65 P.S. §

67.708(b)(16). However, the OOR lacks jurisdiction to consider whether records of a local law enforcement agency are subject to public access where the agency claims that the records are withheld as criminal investigative records 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, e.g., Steinheiser v. Falls Twp.*, OOR Dkt. AP 2015-0323, 2015 PA O.O.R.D. LEXIS 378 (holding that where the plain language of a request sought a police report and there was evidence of a criminal investigation, Section 708(b)(16) of the RTKL applied); *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).

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.* The exemption remains during and after any investigation is completed. *See Coley v. Philadelphia Dist. Attorney's Office*, 77 A.3d 694, 697 (Pa. Commw. 2013) (“[C]riminal investigative records are still exempt from disclosure under the Right-to-Know Law after the investigation is completed[.]”); *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473, 479 (Pa. Commw. 2010) (*en banc*) (holding that criminal investigative-record exemption of RTKL exempts records of “whether certain investigative tasks have been carried out or whether certain information was discovered”).

In his sworn attestation, Mr. Niemtzw contends that the records responsive to the Requests were used in a criminal prosecution case as well as further Post Conviction Relief Act petitions and Federal Habeas petitions. Attestation ¶4, ¶6. Mr. Niemtzw further argues that as the documents were used in criminal proceedings, the records remain part of a criminal investigation. Attestation ¶6. In the unsworn position statement also submitted, Mr. Niemtzw argues that records do not lose investigative character simply because they were used in trial. Statement ¶5. Further, Mr. Niemtzw cites to *Adkins*, and correctly states that upon meeting the evidentiary threshold that the records may relate to a criminal investigation held by local law enforcement, the OOR is divested of jurisdiction. *Adkins v. Philadelphia District Attorney's Office*, OOR Dkt. AP 2021-2957.¹

Under the RTKL, a sworn 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 Township acted in bad faith, “the averments in [the statement] 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)). Accordingly, because the exhibits could relate to criminal investigations conducted by the Office, the appeal is hereby transferred to the Appeals Officer for the Office to

¹ Should the records instead be judicial and not criminal records, there exists a common law right of access to judicial records. *Commonwealth v. Upshur*, 924 A.2d 642 (Pa. 2007). The common law right of access to public judicial records and documents arose from the presumption that judicial proceedings will be open to the public. As the Supreme Court has stated, “[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 591 (1978) (footnotes omitted). The Pennsylvania Supreme Court has viewed the common law right of access as compelled by many of the considerations that underlie the presumption of public trials. See *Commonwealth v. Fenstermaker*, 530 A.2d 414, 417-18 (Pa. 1987). The record sought, if it exists, may be obtained from the issuing court.

determine whether the records relate to a criminal investigation.² A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the Office.

CONCLUSION

For the foregoing reasons, the appeal is **transferred**, and the Office is not required to take any 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 Philadelphia 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: MAY 16, 2022

/s/ Matthew Eisenberg

APPEALS OFFICER
MATTHEW EISENBERG, ESQ.

Sent to: Marcus Hand, AF-8748 (via US Mail only);
Joshua Niemtzow (via email only)

² 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”).

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