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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
MARY BUSH,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
	:	
CHESTER COUNTY,	:	DA-RTKL-A NO. 2019-004
Respondent	:	
	:	

INTRODUCTION

On January 2, 2019, Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, et. seq.. On February 6, 2019, the request was denied in part. On February 21, 2019, Requester appealed to the the Office of Open Records. On May 3, 2019, the Office of Open Records denied the appeal in part, and transferred the appeal in part

to the Chester County District Attorney's Office [AP 2019-0242], which was received on May 13, 2019.

For the reasons set forth in this Final Determination, the appeal is **DENIED** and the Respondent is not required to take any further action.

FACTUAL BACKGROUND

On May 3, 2019, Ryan W. Liggitt, Esquire, of the Office of Open Records, issued his Final Determination stating in part:

INTRODUCTION

Mary Bush ("Requester") submitted a request ("Request") to Chester County ("County") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 et seq., seeking, among other records, guardianship reports. The County denied the Request in part, arguing, among other things, that the County does not possess certain records. 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 County is not required to take any further action.

FACTUAL BACKGROUND

On January 2, 2019, the Request was filed, stating:

1. I am requesting all guardian reports by Carol J Hershey filed with the Chester County Orphans Court in the matter of Genevieve Bush Case # 1509-1720. I am a party to the case.
2. I am requesting a copy of Judge Katherine B L Platt's oath of office.

3. I am requesting any and all documents on the investigation of the Chester County use of my identity and email address (flyfreeandstrong@gmail.com)

4. I am requesting any and all documents in connection with The Chester County Department of Aging investigations surrounding the matter of Genevieve Bush.

On January 9, 2019, the County invoked a thirty-day extension to respond. 65 P.S. § 67.902(b). On February 6, 2019, the County partially denied the Request, arguing that the County does not create or possess guardian reports referenced in Item 1 of the Request; that no responsive records for Item 3 exist; and that the records responsive to Item 4 are related to a noncriminal investigation and confidential under Pennsylvania's Older Adult Protective Services Act ("OAPSA"). See 65 P.S. 67 §§ 67.708(b)(17)(i)-(ii),(vi)(A); 35 P.S. § 10225.101.

On February 21, 2019, the Requester appealed to the OOR, challenging the denial of Items 1, 3, and 4 and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On March 14, 2019, the County submitted a position statement reiterating its grounds for denial. In addition, the County claims that the records are judicial records. In support of its position, the County submitted the affidavits of Heidi Carlson, Deputy Director for the County Department of Aging Services, addressing Items 1 and 4, and Alfred A. Sciotti, Jr., Deputy Director of the County Department of Information Services, addressing Item 3.

On March 22, 2019, the Requester submitted a written response to the County's submission. The Requester argues various reasons for disclosure of Items 1 and 4, including that as the legal guardian of her mother and that as a party, Items 1 and 4 should be disclosed under the RTKL. The Requester also

argues that Item 3 is in the possession of the County, based on prior communication the Requester has had with employees within Chester County District Attorney's Office.

On May 1, 2019, after the OOR sought clarification as to whether the County is in possession of responsive records related to Item 3 of the Request, the County submitted the affidavit of Charles A. Gaza, Esq., Chief of Staff of Chester County District Attorney's Office. Mr. Gaza indicates that the County Department of Information Services can conduct a search of all County records, except for the County's Detectives' database / Record Management System. Mr. Gaza further states that responsive records were found in a search of that database, but argues that those records are exempt from public disclosure pursuant to the Criminal History Records Information Act ("CHRIA"), 18 Pa.C.S. §§ 9101 et seq., and the criminal investigative exemption under Section 708(b)(16) of the RTKL. 65 P.S. § 67.708(b)(16).

On the same day, the Requester submitted argument opposing the County's submission to the OOR. The Requester argues that because the District Attorney did not elect to prosecute the County, the records should not be protected by CHRIA or criminal investigative exemptions to the RTKL.

LEGAL ANALYSIS

...

1. The County demonstrated that records responsive to Item 1 are not in its possession, custody or control

...

2. The County has demonstrated that some responsive records could relate to a criminal investigation

Item 3 of the Request sought "any and all documents on the investigation of the Chester County use of my identity and email address flyfreeandstrong@gmail.com)." On appeal, the

County has provided the affidavit of Alfred A. Sciotti, Jr., who attests, in pertinent part, as follows:

In my capacity as Deputy Director of Chester County's Department of Information Services, I directed appropriate staff to conduct a thorough and expansive search for any information pertaining to the email address flyfreeandstrong@gmail.com. After that search was completed, I consulted with staff and it was determined that no records currently exist pertaining to this email address. There are no records in the possession, custody or control of the Department of Information Services regarding the email address "flyfreeandstrong@gmail.com."

The County also provided the affidavit of Charles A. Gaza, Esq., who attests, in pertinent part, as follows:

3. In addition to the affidavit of [Mr. Sciotti] submitted as part of [the County's] response to the Appeal filed by [the Requester], I hereby attest that while the Department of Computer Information Services (DCIS) can conduct a wide search of county records, DCIS does not have access to the Chester County Detectives' database / Record Management System (RMS).

4. Today, I conducted an additional search within the Detectives' RMS in which I found an incident report pertaining to citizen complaints made by [the Requester] to [County] Detectives regarding the use of her email address, flyfreeandstrong@gmail.com.

5. The incident report details [Requester's] allegations and the investigative steps taken by County Detectives to assess whether any crime was committed. It was determined by County Detectives that the complained of activity did not rise to the level of criminal conduct and that no further action would be taken.

6. [Requester] is not entitled to the incident report contained within the RMS database pursuant to [CHRIA], ... which protects criminal investigative records from production.

7. Further, Detectives' incident reports constitute investigative reports which are exempt from disclosure under Section 708(b)(16) of the RTKL as relating to or resulting in a criminal investigation.

The County's District Attorney's Office is a local law enforcement agency. 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 that are deemed 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.*

Here, the Request seeks a copy of the "documents on the investigation of the ... use of my identity and email address." Accordingly, the appeal is hereby transferred, in part, to the Appeals Officer for the County's District Attorney's Office to determine whether the withheld incident report is a criminal investigative record. A copy of this final order and the appeal filed by the Requester will be sent to Appeals Officer for the County's District Attorney's Office.

3. The records responsive to Item 4 are protected from disclosure pursuant to OAPSA

...

CONCLUSION

For the foregoing reasons, the appeal is **denied in part and transferred in part**, and the County is not required to take any further action. ...

On May 3, 2019, the Office of Open Records denied the appeal in part, and transferred the appeal in part to the Chester County District Attorney's Office [AP 2019-0242], which was received on May 13, 2019. (Attached as Appendix "A").

The only issue remaining is the Request for "any and all documents on the investigation of the Chester County use of my identity and email address flyfreeandstrong@gmail.com)." On May 13, 2019, this Appeals Officer gave the following Notice (Attached as Appendix "B"):

On January 2, 2019, Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*. On February 6, 2019, the request was denied in part. On February 21, 2019, Requester appealed to the the Office of Open Records. On May 3, 2019, the Office of Open Records denied the appeal in part, and transferred the appeal in part to the Chester County District Attorney's Office [AP 2019-0242], which was received on May 13, 2019.

Unless the Requester agrees otherwise, as the appeals officer, I shall make a final determination, which shall be mailed to the Requester and the Respondent, **within 30 days of May 13, 2019, which is June 12, 2019.** 65 P.S. § 67.1101(b)(1). If a final determination is not made on or before **June 12, 2019**, the appeal is deemed denied by operation of law. 65 P.S. § 67.1101(b)(2). Prior to issuing a final determination, a hearing may be conducted. However, a hearing is generally not needed to make a final determination. The final determination shall be a final appealable order, and shall include a written explanation of the reason for the decision. 65 P.S. § 67.1101(b)(3).

The Respondent should submit its response, if any, on or before May 22, 2019.

The Respondent should note: The Supreme Court has held that a Respondent is permitted to assert exemptions on appeal, even if the agency did not assert them when the request was originally denied. Levy v. Senate of Pennsylvania, 619 Pa. 586, 65 A.3d 361 (2013). **Merely citing exceptions to the required disclosure of public records or conclusory statements are not sufficient to justify the exemption of public records.** Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013).

The Requester should submit its response, if any, on or before May 31, 2019.

The Requester should note: The Commonwealth Court has held that, pursuant to 65 P.S. § 67.1101(a), the appeal shall state the grounds upon which the Requester asserts that the record is a public record and shall address any grounds stated by the agency for denying the request. **When a Requester fails to state the records sought are public, or fails to address an agency's grounds for denial, the appeal may be dismissed.** Padgett v. Pennsylvania State Police, 73 A.3d 644 (Pa. Cmwlth. 2013); Saunders v. Department of Correction, 48 A. 3d 540 (Pa. Cmwlth. 2012); Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011).

Any statements of fact must be supported by an Affidavit made under penalty of perjury by a person with actual knowledge. However, legal arguments and citation to authority do not require Affidavits. All parties must be served with a copy of any responses submitted to this appeal officer.

May 13, 2019 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

On May 21, 2019, the Respondent sent a Response in Opposition to the Right to Know Law Appeal by email.

On May 31, 2019, the Requester sent a Response in Support of the Right to Know Law Appeal by email.

LEGAL ANALYSIS

The Chester County District Attorney's Office is authorized to hear appeals relating to access to criminal investigative records in the possession of a local agency located within Chester County. 65 P.S. § 67.503(d)(2) ("The district attorney of a county shall designate one or more appeals officers to hear appeals under Chapter 11 relating to access to criminal investigative records in possession of a local agency of that county. The appeals officer designated by the district attorney shall determine if the record requested is a criminal investigative record."). Chester County, Respondent, is a local agency subject to the RTKL that is required to disclose public documents. 65 P.S. § 67.302.

Records of a local agency are presumed "public" unless the record: (1) is exempt under 65 P.S. § 67.708(b); (2) is protected by privilege; or (3) is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. § 67.305. "Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree." 65 P.S. § 67.306.

The Respondent bears the burden of proving, by a preponderance of the evidence, that the document requested is exempt from public access. 65 P.S. § 67.708(a)(1). A preponderance of the evidence standard is the lowest evidentiary

standard. The preponderance of evidence standard is defined as the greater weight of the evidence, *i.e.*, to tip a scale slightly is the criteria or requirement for preponderance of the evidence. Commonwealth v. Brown, 567 Pa. 272, 284, 786 A.2d 961, 968 (2001), *cert. denied*, 537 U.S. 1187, 123 S.Ct. 1351, 154 L.Ed.2d 1018 (2003). “A ‘preponderance of the evidence’ is defined as ‘the greater weight of the evidence ... evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other....’ Black’s Law Dictionary 1301 (9th ed. 2009).” Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 n.3 (Pa. Cmwlth. 2010); *See also* Commonwealth v. Williams, 532 Pa. 265, 284-286, 615 A.2d 716, 726 (1992) (preponderance of the evidence in essence is proof that something is more likely than not).

The Respondent has submitted a response which included an affidavit from Charles A. Gaza, Esquire, Chief of Staff of the Chester County District Attorney’s Office. (Attached as Appendix “C”). The Affidavit states the following:

AFFIDAVIT OF CHARLES A. GAZA, ESQUIRE, CHIEF OF STAFF
OF CHESTER COUNTY DISTRICT ATTORNEY’S OFFICE

I, Charles A. Gaza, Esquire, Chief of Staff of Chester County District Attorney’s Office of Chester County, Pennsylvania, am authorized to make this Affidavit and declare under oath the following:

1. On or about January 2, 2019, a Right To Know request was received in the Chester County Solicitor's office.

2. This request, submitted by a Mary Bush, sought numerous things, however pertinent to this Appeal, Ms. Bush sought:

“3. I am requesting any and all documents on the investigation of the Chester County use of my identity and email address (flyfreeandstrong@gmail.com).”

3. In addition to the affidavit of Alfred A Sciotti, Jr. submitted as part of Chester County's response to the Appeal filed by Ms. Bush, I hereby attest that while the Department of Computer information Services (DCIS) can conduct a wide search of county records, DCIS does not have access to the Chester County Detectives' database / Record Management System (RMS).

4. Today, I conducted an additional search within the Detectives' RMS in which I found an Incident report pertaining to citizen complaints made by Mary Bush to Chester County Detectives regarding the use of her email address, “flyfreeandstrong@gmail.com.”

5. The incident report details Ms. Bush's allegations and the investigative steps taken by County Detectives to assess whether any crime was committed. It was determined by County Detectives that the complained of activity did not rise to the level of criminal conduct and that no further action would be taken.

6. Ms. Bush is not entitled to the incident report contained within the RMS database pursuant to the Criminal History Records Information Act (CHRIA), 18. Pa.C.S. §9101, *et seq.*, which protects criminal investigation records from production.

7. Further, Detectives' incident reports constitute investigative reports which are exempt from disclosure under'

Section 708(b)(16) of the RTKL as relating to or resulting in a criminal investigation.

May 1, 2019 Affidavit of Charles A. Gaza, Esquire.

Under the RTKL, an affidavit may serve as sufficient evidence to support an appeals officer's decision. Office of Governor v. Davis, 122 A.3d 1185, 1194 (Pa.Cmwlth. 2015); 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) (affidavit suffices to establish nonexistence of records). In the absence of any evidence that a Respondent has acted in bad faith the averments in an 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); Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013).

The RTKL provides that records of an agency relating to or resulting in a criminal investigation, such as investigative materials, notes, correspondence, videos, reports, and records, may be withheld as exempt. 65 P.S. § 67.708(b), titled, "Exceptions for public records", provides in part as follows:

(b) Exceptions. -- Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

...

(16) A record of an agency relating to or resulting in a criminal investigation, including:

(i) Complaints of potential criminal conduct other than a private criminal complaint.

(ii) Investigative materials, notes, correspondence, videos and reports.

(iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised.

(iv) A record that includes information made confidential by law or court order.

(v) Victim information, including any information that would jeopardize the safety of the victim.

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.

(B) Deprive a person of the right to a fair trial or an impartial adjudication.

(C) Impair the ability to locate a defendant or codefendant.

(D) Hinder an agency's ability to secure an arrest, prosecution or conviction.

(E) Endanger the life or physical safety of an individual.

This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police

department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b) (relating to accident prevention investigations).

(17) A record of an agency relating to a noncriminal investigation, including:

(i) Complaints submitted to an agency.

(ii) Investigative materials, notes, correspondence and reports.

(iii) A record that includes the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L. 1559, No. 169), [43 P.S. § 1421 et seq.] known as the Whistleblower Law.

(iv) A record that includes information made confidential by law.

(v) Work papers underlying an audit.

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

(B) Deprive a person of the right to an impartial adjudication.

(C) Constitute an unwarranted invasion of privacy.

(D) Hinder an agency's ability to secure an administrative or civil sanction.

(E) Endanger the life or physical safety of an individual.

(18) (i) Records or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.

(ii) This paragraph shall not apply to a 911 recording, or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure.

65 P.S. § 67.708(b).

18 Pa.C.S.A. § 9102 (relating to definitions) states in part: “**Police blotter.**’

A chronological listing of arrests, usually documented contemporaneous with the incident, which may include, but is not limited to, the name and address of the individual charged and the alleged offenses.”

18 Pa.C.S.A. § 9102 (relating to definitions) states in part: “**Investigative information.**’ Information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.”

In Pennsylvania State Police v. Office of Open Records, 5 A.3d 473 (Pa. Cmwlth. 2010), the *en banc* Commonwealth Court found an incident report exempt from disclosure pursuant to 65 P.S. § 67.708(b)(16). The Court held that the

incident report was not a public record because the incident report was not the equivalent of a police blotter under the RTKL and the Criminal History Records Information Act (“CHRIA”).

Pursuant to 65 P.S. § 67.708(b)(16), records of an agency are exempt from access by a requester if the records relate to or result in a criminal investigation. When a party seeks to challenge an agency’s refusal to release information by appealing that party must address any grounds stated by the agency for denying the request. Department of Corrections v. Office of Open Records, 18 A.3d 429, 434 (Pa. Cmwlth. 2011); Padgett v. Pennsylvania State Police, 73 A.3d 644, 647-648 (Pa. Cmwlth. 2013).

In Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011), the Commonwealth Court stated in part:

Consequently, we agree with DOC that when a party seeks to challenge an agency’s refusal to release information by appealing to Open Records, that party must “address any grounds stated by the agency for ... denying the request.” This is a typical requirement in any process that aims to provide a forum for error correction. We do not see it as a particularly onerous requirement, whether the requester has the benefit of legal counsel or is *pro se*.

DOC v. OOR at 434.

The Requester does not present any reason to dispute that the documents requested are investigative records and exempt from disclosure, as set forth by the May 1, 2019 Affidavit of Charles A. Gaza, Esquire. It appears that Requester

seeks the documents because they are investigative records. When a party seeks to challenge an agency's refusal to release information by appealing that party must address any grounds stated by the agency for denying the request. The Requester appears to argue that her connection to the documents requested and her reasons for wanting the documents require disclosure of the requested documents.

It is also important to note that a requester's identity and motivation for making a request is not relevant, and his or her intended use for the information may not be grounds for granting or denying a request. *See* 65 P.S. § 67.301(b), 65 P.S. § 67.703. In DiMartino v. Pennsylvania State Police, 2011 WL 10841570 (Pa. Cmwlth. 2011), the Commonwealth Court, in a memorandum opinion,¹ stated in pertinent part:

As a final point, we note that, the requester's status as representative of Decedent's family has no bearing on whether the requested records are accessible through a RTKL request. We agree with the OOR that the RTKL must be construed without regard to the requester's identity. *See, e.g.*, Section 301(b) of the RTKL, 65 P.S. § 67.301(b) (stating that an agency "may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law"); Weaver v. Dep't of Corr., 702 A.2d 370 (Pa. Cmwlth. 1997) (under the former Right-to-Know Act, the right to examine a public record is not based on whether the person requesting the disclosure is affected by the records or if her motives are pure in seeking them, but whether

¹ DiMartino v. Pennsylvania State Police, 340 C.D. 2011, 2011 WL 10841570 (Pa. Cmwlth. 2011) is an unreported panel decision of the Commonwealth Court. As such, it may be cited for its persuasive value, but not as binding precedent. *See* Section 414 of the Commonwealth Court's Internal Operating Procedures.

any person's rights are fixed); Furin v. Pittsburgh Sch. Dist., OOR Dkt. No. AP 2010-0181, 2010 PA OORD LEXIS 212 (Pa. OOR 2010) (finding records exempt under Section 708(b) regardless of status of person requesting them); Wheelock v. Dep't of Corr., OOR Dkt. No. AP 2009-0997, 2009 PA OORD LEXIS 725 (Pa. OOR 2009) (stating the only information available under the RTKL is a "public record" available to all citizens regardless of personal status or stake in requested information).

DiMartino at *6 (footnote omitted). *See also* Mahoney v. Pennsylvania State Police, 339 C.D. 2011, 2011 WL 10841247 (Pa. Cmwlth. 2011).

In Hunsicker v. Pennsylvania State Police, 93 A.3d 911 (Pa. Cmwlth. 2014), Requester (Hunsicker) appealed a Determination of the Office of Open Records denying her request under the RTKL for access to Pennsylvania State Police records regarding an investigation surrounding her brother's death, which involved a State Trooper. In affirming the denial, the Commonwealth Court stated in part:

Requestor appealed the PSP's denial to the OOR contending that she lived with her brother for 35 years, that she was not a member of the general public but his sister, and that she should have special access to the information. The OOR denied her appeal because it failed to address agency grounds for denial of access and the appeal did not challenge the confidentiality of the records under CHRIA. This appeal followed.

On appeal, Requestor first contends that the materials she is requesting are referred to as an "incident" report, not an "investigative" report, implying that those records fall outside of the investigative exemption. An incident report normally refers to a report filed by the responding officers, not the entire investigative file, although, here, it appears that the investigative report was filed at the incident report number. In any event, no matter what is contained in an incident report,

incident reports are considered investigative materials and are covered by that exemption. Pennsylvania State Police v. Office of Open Records, 5 A.3d 473, 479 (Pa. Cmwlth. 2010), *appeal denied*, [621] Pa. [685], 76 A.3d 540 (2013).

Even if the requested records fall within the investigative exception, Requestor contends that she is entitled to those records because she has a special need for them because, as Mr. Rotkewicz's sister, she needs to know what her brother did to cause a PSP Trooper to shoot him and to investigate a possible PSP "cover up." While we are sympathetic to Requestor's desire to understand her brother's death, her status as his sister and her reasons for requesting the records do not render records that fall within the investigative exemption accessible. 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 irrelevant as to whether a document must be made accessible under Section 301(b). *See* 65 P.S. § 67.301(b) (stating that an agency "may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law.").

As a corollary to this argument, Requestor contends that the investigative file should be made accessible because portions of the withheld documents are already known to her, and that if any of the record contains information that falls within an exemption to disclosure, that information should be redacted and the records then be given to her. Again, for the reasons stated above, just because she purportedly knows some of the information contained in the documents is irrelevant as to whether a document must be made accessible. Moreover, her request that the documents be redacted to the extent the records contain exempt information is based on a premise that only certain information is exempt from disclosure when, under the investigative exemption, the entire investigative report falls within the investigative exemption. 65 P.S. § 67.706(b)(16); *see also* Pennsylvania State Police.

Finally Requestor contends that the PSP Trooper who investigated the incident assured her that she would receive that information. Even assuming that the assertion is true, an individual State Trooper does not have the authority to authorize the release of documents or make PSP RTKL determinations pursuant to Section 1102, 65 P.S. § 67.1102.

Hunsicker v. Pennsylvania State Police at 913-914 (footnote omitted).

A criminal investigative record is anything that contains information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing. 18 Pa.C.S.A. § 9102. The size, scope, or formality, of police inquiries are not relevant in determining if something is a criminal investigative record. Whether an arrest has occurred or whether a criminal investigation is ongoing or closed, are not relevant factors in determining if something is a criminal investigative record. Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed. Also, a record is not considered a public record if it is exempt under any other State or Federal Law, including the Criminal History Records Information Act.

In Barros v. Martin, 92 A.3d 1243 (Pa. Cmwlth. 2014), *appeal denied*, 626 Pa. 701, 97 A.3d 745 (2014), the Commonwealth Court stated in part:

Thus, if a record, on its face, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(ii). *See Coley v. Philadelphia Dist. Attorney's Office*, 77 A.3d 694, 697 (Pa. Cmwlth. 2013); Mitchell v. Office of Open Records,

997 A.2d 1262, 1264 (Pa. Cmwlth. 2010). ***Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed.*** Sullivan v. City of Pittsburgh, Dep't of Pub. Safety, 127 Pa. Cmwlth. 339, 561 A.2d 863, 865 (1989).

Also, a record is not considered a public record under Section 102 of the RTKL if it is “exempt under any other State or Federal Law,” including the CHRIA. See Coley, 77 A.3d at 697. Section 9106(c)(4) of the CHRIA, 18 Pa.C.S. § 9106(c)(4), provides that “investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency.” ***The CHRIA defines “investigative information” as “information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.”*** Section 9102 of the CHRIA, 18 Pa.C.S. § 9102.

Thus, the records requested by Barros - *i.e.*, the criminal complaint file, forensic lab reports, any confession and record of polygraph of Quinones, the “Communication Center Incident Review,” the “Internal Police Wanted Notice,” “Reports on individual mistakenly apprehended,” and three signed witness statements - are protected from disclosure under both the RTKL and the CHRIA as records “relating to ... a criminal investigation” and “investigative information,” respectively.

Barros v. Martin at 1250 (emphasis added).

In Padgett v. Pennsylvania State Police, 73 A.3d 644 (Pa. Cmwlth. 2013),

the Commonwealth Court stated in part:

Pursuant to Section 1101(a) of the RTKL, “[t]he appeal shall state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for delaying or denying the request.” 65 P.S. §

67.1101(a). When a requester fails to state the records sought are public, or fails to address an agency's grounds for denial, the OOR properly dismisses the appeal. *See Saunders v. Dep't of Corr.*, 48 A. 3d 540 (Pa. Cmwlth. 2012) (affirming OOR dismissal); *Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Cmwlth. 2011) (holding an appeal that fails to sufficiently specify the reasons for appeal should be dismissed rather than addressed by OOR).

In *Department of Corrections*, we outlined the sufficiency requirements for an appeal under Section 1101(a) of the RTKL. At a minimum, a requester's appeal "must address any grounds stated by the agency ... for denying the request." *Dep't of Corr.*, 18 A.3d at 434. We reasoned a minimally sufficient appeal is a condition precedent for OOR to consider a requester's challenge to an agency denial.

More recently, in *Saunders*, we explained Section 1101(a) of the RTKL requires a requester "to state why the records did not fall under the asserted exemptions and, thus, were public records subject to access." *Id.* at 543 (agency's citation to various subsections of the RTKL, without explanation or application of exceptions, triggers requester's burden to address exemption). Because *Saunders* failed to address the exemptions, we affirmed OOR's dismissal of the appeal.

In this case, Requester did not state the records are public, or address the exemptions PSP cited in its response and verification. Requester stated merely that the RTKL exceptions do not apply without further explication. That does not satisfy the requirements of Section 1101(a) as we interpret that provision. *Id.*

Requester also did not address the agency's cited exemptions pertaining to the police report. Most notably, Requester did not discuss CHRIA, which pertains to criminal records. In fact, when he explained the reason he sought the records, Requester described them as criminal investigation records.

Requester emphasized he is entitled to the records as a party involved in the criminal investigation to which his Request relates. However, a requester's motivation for making a request is not relevant, and his intended use for the information may not be grounds for denial. *See* Section 301(b) of the RTKL, 65 P.S. § 67.301(b); Section 703 of the RTKL, 65 P.S. § 67.703. An explanation of why a requester believes an agency should disclose records to him does not satisfy the requirement in Section 1101(a) to explain why the requested records are public and available to everyone. To the contrary, Requester's explanation underscores PSP's criminal investigative defenses here.

We make no decision regarding Requester's alleged entitlement to the records under an alternate legal mechanism. Entitlement does not arise under the RTKL through which citizens have a right to access public records "open to the entire public at large." *See, e.g., Coulter v. Pa. Bd. of Prob. & Parole*, 48 A.3d 516, 519 (Pa. Cmwlth. 2012) ("home plans" of parolee requester are not accessible to her under RTKL though she is subject of records; to be accessible under the RTKL, identity of the requester is irrelevant).

Padgett at 647-648 (footnote omitted).

Where a record falls within an exemption under 67.708(b), it is not a public record as defined by the RTKL, and an agency is not required to redact the record and provide the remainder. 65 P.S. § 67.706, titled, "Redaction", provides:

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to

access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9. [65 P.S. § 67.901 *et seq.*]

65 P.S. § 67.706.

In Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540 (Pa.

Cmwlth. 2012), the Commonwealth Court stated in part:

Petitioner's first argument addresses the sufficiency of the Department's denial of his request. Petitioner contends that because the Department's denial merely parroted the statutory language he was unable to properly respond to the Department's assertion of exemption from disclosure. Section 903 of the RTKL, 65 P.S. § 67.903, states that a denial of access shall include, *inter alia*, a description of the record requested and the specific reasons for the denial, including a citation of the supporting legal authority. Correspondingly, Section 1101 of the RTKL, 65 P.S. § 67.1101, requires that a party appealing a denial shall "state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for ... denying the request." See Dep't of Corr. v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011).

The Department asserted that the requested records were exempt from disclosure under five different subsections of Section 708. Petitioner is correct in noting that the Department merely parroted the statutory language. However, the Department's citations to the various subsections of Section 708 were sufficient to give him notice of the grounds for denial. Once the Department asserted that the requested records were exempt from disclosure under Section 708, Petitioner was required by Section 1101 to state why the records did not fall under the asserted exemptions and, thus, were public records subject to access. Petitioner failed to do so.

Petitioner's argument that the Department was required to produce the requested records subject to redaction of the exempt information is without merit. Section 706 provides that if an agency determines that a public record contains information that is both subject to disclosure and exempt from the disclosure, the agency shall grant access and redact from the record the information which is subject to disclosure. Pursuant to Section 706, the redaction requirement only applies to records that are determined to be "public records." A "public record" is defined in part as "a record, including a financial record, of a Commonwealth ... agency that: (1) is not exempt under section 708." Section 102, 65 P.S. § 67.102 (emphasis added). Thus, a record that falls within one of the exemptions set forth in Section 708 does not constitute a "public record." Dept. of Health v. Office of Open Records, 4 A.3d 803 (Pa. Cmwlth. 2010).

Saunders at 542-543 (footnote omitted).

Under the RTKL, an affidavit may serve as sufficient evidence to support an appeals officer's decision. Based on the evidence provided, the Respondent has met its burden of proof that the documents are criminal investigative records and exempt from disclosure.

CONCLUSION

For the foregoing reasons, the appeal is **DENIED**, and the Respondent is not required to take any further action.

This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may petition for review, to

the Chester County Court of Common Pleas, pursuant to 65 P.S. § 67.1302(a). All parties must be served with a copy of the petition for review. The Chester County District Attorney's Office shall also be served with a copy of the petition for review, pursuant to 65 P.S. § 67.1303(a), for the purpose of transmitting the record to the reviewing court. *See* East Stroudsburg University Foundation v. Office of Open Records, 995 A.2d 496, 507 (Pa. Cmwlth. 2010).

FINAL DETERMINATION ISSUED AND MAILED ON: June 7, 2019

Nicholas J. Casenta, Jr.

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INDEX OF APPENDICES

APPENDIX “A” May 3, 2019 Final Determination of Office of Open Records

APPENDIX “B” 02/27/2019 Letter of CDDA Nicholas J. Casenta, Jr., Esquire
Appeals Officer for DA’s Office of Chester County

APPENDIX “C” Affidavit from Charles A. Gaza, Esquire