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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
SHERRY COCKERHAM,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
PHOENIXVILLE	:	
POLICE DEPARTMENT,	:	DA-RTKL-A NO. 2018-007
Respondent	:	

INTRODUCTION

On May 2, 2018, Requester, Sherry Cockerham, filed a right-to-know request with the Respondent, the Phoenixville Police Department, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, et. seq.. On May 9, 2018, the request was denied. On May 14, 2018, Requester appealed to the Office of Open Records. On June 11, 2018, the Office of Open Records transferred the appeal to

the Chester County District Attorney's Office [AP 2018-0865], which was received on June 18, 2018.

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 2, 2018, 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.*. Requester sought the following records: Every record associated with the following individuals: From January 2016 to present - Sherry Cockerham, Ralph Cockerham, ... Street, Phoenixville, PA; From years January 2003 to present - Kristin Davis, ... Street, Phoenixville, PA; From January 2016 to present - [minor child] , [minor child]. On May 9, 2018, the request was denied. On May 9, 2018, Requester appealed to the Office of Open Records ("OOR"). On May 14, 2018, the OOR transferred the appeal to the Chester County District Attorney's Office [AP 2018-0865], which was received on June 18, 2018.

In In the Matter of Sherry Cockerham v. Phoenixville Police Department, Docket No: AP 2018-0865, the OOR stated in part:

FACTUAL BACKGROUND

On May 2, 2018,¹ the Request was filed, seeking:

^{1.} On June 1, 2018 and June 4, 2018, respectively, the parties responded to the

OOR's request for clarification regarding the date the Department received the Request. Based on the parties' responses, the OOR determined that the Request was submitted to the Department on May 2, 2018.

Every record associated with the following individuals:

From January 2016 to present[:] Sherry Cockerham[,]
Ralph Cockerham ... Street, Phoenixville, PA....

From years January 2003 - present[:] Kristin Davis, ...
Street, Phoenixville, PA

From January 2016 - present[:] [minor child] [,] [minor
child].

On May 9, 2018, the Department denied the Request, identifying three responsive incident reports and arguing that the reports are part of an "on-going investigation" by the Department; therefore, they are exempt under Section 708 of the RTKL. On May 14, 2018, 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 Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On May 24, 2018, the Requester submitted a position statement attaching several documents relating to a custody dispute with her sons' father, communications to and from her ex-husband, as well as communications from school officials and medical providers concerning issues with her two sons. The submission also included emails between the Requester and Department Officers. The Requester's submission also describes her concerns surrounding the open police incidents involving the home where her son's father resides.

In response to the OOR's request for clarification, on June 1, 2018, the Requester provided an email statement containing a general description of the events surrounding the police

contacts that resulted in incident reports, including one during which she was allegedly threatened with violence. Although the Department did not initially make a submission on appeal, in response to the OOR's request for clarification, the Department submitted a position statement asserting that the three reports identified in its response "were denied as a result of criminal investigations."²

2. The Department's June 4, 2018 submission was received after the record closed in this matter; however, to further develop the record, the submission was considered. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute").

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 law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be

reasonably probative and relevant to an issue in dispute. Id. The decision to hold a hearing is discretionary and non-appealable. Id.; Giurintano v. Pa. Dep't of Gen. Servs., 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Department 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 factfinder ... 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)).

In its final response, the Department cited Section 708(b) of the RTKL as its basis for denying access to the identified incident reports by stating that they relate to an “ongoing investigation.” While the Department did not specify what subsection of Section 708(b) it relied upon to deny access to the requested records, in its position statement, the Department stated that the incident reports relate to criminal matters. The issue of subject

matter jurisdiction may be raised by the parties or the OOR, *sua sponte*. See Weber v. Wyoming Valley Sch. Dist., 668 A.2d 1218 (Pa. Commw. Ct. 1995) (Secretary of Education permitted to raise issues of subject matter jurisdiction in an administrative proceeding under the Public School Code *sua sponte*). The OOR is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. § 67.503(a).

The Department 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 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.*

Here, the Department asserts that the identified reports relate to criminal investigations and, as a result, they are exempt from disclosure pursuant to Section 708(b)(16) of the RTKL, 65 P.S. § 67.708(b)(16). On its face, the Request seeks records related to Department interactions with named individuals at a specific address. In addition, the Requester does not dispute that the incident reports identified by the Department relate to investigations made in connection with police contact at the address identified in the Request or involving the individuals named in the Request. Based upon a review of the evidence presented, the Department has demonstrated that the requested records could relate to a criminal investigation. See Pa. Game Comm'n v. Fennell, 149 A.3d 101 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal materials when determining whether an exemption applies); see also Office of the Governor v. Davis, 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2015) (en banc) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record). Therefore, the OOR is without jurisdiction to consider this appeal. See 65 P.S. § 67.503(d)(2); Pennsylvanians for Union Reform v. Centre Cnty. Dist. Attorney's Office, 139 A.3d 354 (Pa. Commw. Ct. 2016) (citing 42 Pa.C.S. § 5103(a) (relating to the process for handling improperly filed appeals)). Accordingly, the appeal is

hereby transferred to the Appeals Officer for the Chester County District Attorney's Office to determine whether the requested records have a sufficient connection to a criminal investigation to constitute investigative content and are, therefore, exempt from disclosure, in whole or in part, as criminal investigative records under Section 708(b)(16) of the RTKL. A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the Chester County District Attorney's Office.

CONCLUSION

For the foregoing reasons, Requester's appeal is transferred, and the Department 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 Chester 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. 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 party.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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

In the Matter of Sherry Cockerham v. Phoenixville Police Department, Docket No: AP 2018-0865, at 1-6.

On June 18, 2018, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

On May 2, 2018, 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 May 9, 2018, the

request was denied. On May 14, 2018, Requester appealed to the Office of Open Records. On June 11, 2018, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office [AP 2018-0865], which was received on June 18, 2018.

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 June 18, 2018, which is July 18, 2018.** 65 P.S. § 67.1101(b)(1). If a final determination is not made within 30 days, 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 on or before June 29, 2018.

The Supreme Court of Pennsylvania 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 on or before July 6, 2018.

The Commonwealth Court of Pennsylvania 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.

June 18, 2018 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

Neither party submitted an additional response. Consequently, this decision is based on the initial request, response, and appeal filings.

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.”).

The Phoenixville Police Department (“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).

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. Cmwlth. 2011); Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Cmwlth. 2010) (affidavit suffices to establish nonexistence of records); Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013) (in the absence of any evidence that a Respondent has acted in bad faith or that the records do, in fact, exist, the averments in an affidavit should be accepted as true).

In McGowan v. Pennsylvania Dep't of Env'tl. Prot., 103 A.3d 374, 381 (Pa. Cmwlth. 2014), the Commonwealth Court stated in part:

“Testimonial affidavits found to be relevant and credible may provide sufficient evidence in support of a claimed exemption.” Heavens v. Department of Environmental Protection, 65 A.3d 1069, 1073 (Pa. Cmwlth. 2013).

Affidavits are the means through which a governmental agency ... justifies nondisclosure of the requested documents under each exemption upon which it relied upon. The affidavits must be detailed, nonconclusory, and submitted in good faith.... Absent evidence of bad faith, the veracity of an agency's submissions explaining reasons for nondisclosure should not be questioned.

Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013) (en banc) (citation omitted).

McGowan v. Pennsylvania Dep't of Env'tl. Prot., at 381.¹

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.

¹ Respondent has not filed an Affidavit in support of its reasons for the denial. However, there is sufficient evidence, in this appeal, to support the determination that the documents requested are criminal investigative records and exempt from disclosure based upon all of the information before this Appeals Officer. I have cautioned the Respondent in the past, and do so again, that they should not take such a cavalier attitude toward Right to Know requests and appeals. Mere citation to specific exceptions in the statute is generally not sufficient without providing a necessary factual predicate. Any statements of fact must be supported by an Affidavit made under penalty of perjury by a person with actual knowledge. *See* 65 P.S. § 67.1305, titled, "Civil penalty", provides in part as follows: "**(a) Denial of access.** -- A court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith." I suggest that Respondent consult their Solicitor to develop an appropriate procedure for addressing Right to Know requests.

(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).

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.

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 does not appear to dispute that the records requested are investigative records. In fact, it appears that the Requester seeks the records because they are investigative records. Requester appealed to the Office of Open Records ("OOR"). The OOR summarized the Requester's position as follows:

On May 24, 2018, the Requester submitted a position statement attaching several documents relating to a custody dispute with her sons' father, communications to and from her ex-husband, as well as communications from school officials and medical providers concerning issues with her two sons. The submission also included emails between the Requester and Department Officers. The Requester's submission also describes her concerns surrounding the open police incidents involving the home where her son's father resides.

In response to the OOR's request for clarification, on June 1, 2018, the Requester provided an email statement containing a general description of the events surrounding the police contacts that resulted in incident reports, including one during which she was allegedly threatened with violence. Although the Department did not initially make a submission on appeal, in response to the OOR's request for clarification, the

Department submitted a position statement asserting that the three reports identified in its response “were denied as a result of criminal investigations.”

In the Matter of Sherry Cockerham v. Phoenixville Police Department, Docket No: AP 2018-0865, at 2-3 (footnote omitted).

It is 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,² 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 any person’s rights are fixed); Furin v. Pittsburgh Sch. Dist., OOR Dkt. No. AP 2010–0181, 2010 PA OORD LEXIS 212

² 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.

(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. Based on the information provided by the parties it is clear that the record requested is a criminal investigative record. 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 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).

The RTKL provides that records of an agency relating to or resulting in a criminal investigation may be withheld as exempt. 65 P.S. § 67.708(b). The Respondent bears the burden of proving, by a preponderance of the evidence, that the documents requested are exempt from public access. 65 P.S. § 67.708(a)(1). 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. There is

sufficient evidence to support the determination that the documents requested 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. The Chester County District Attorney's Office shall also be served with a copy of the petition, 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: July 12, 2018

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INDEX OF APPENDICES

APPENDIX “A” Appeal Documents (excluding submitted responses)

APPENDIX “B” June 18, 2018 Letter of CDDA Nicholas J. Casenta, Jr., Esquire
Appeals Officer for DA’s Office of Chester County