



**DISTRICT ATTORNEY'S OFFICE OF CHESTER COUNTY
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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
JOHN DeMARCO,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
EAST WHITELAND TOWNSHIP	:	
POLICE DEPARTMENT,	:	DA-RTKL-A NO. 2020-005
Respondent	:	

INTRODUCTION

On March 16, 2020, 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 March 18, 2020, the request was granted in part and denied in part. On March 30, 2020, Requester appealed to the Chester County District Attorney's Office, which was received on April 7, 2020.

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 March 16, 2020, Requester submitted a right-to-know request pursuant to the Right to Know Law (“RTKL”), 65 P.S. § 67.101, *et. seq.*, with the Respondent, requesting: “All documents pertaining to the investigation of David Stiteler who was involved in a vehicle accident on January 11, 2020. All documents pertaining to this incident and the investigation to include reports of any radio dispatches, incident reports, interview statement(s), accident reports, lab reports, property/evidence receipts/reports and search warrant(s).”

On March 18, 2020, the request was denied. The Respondent stated in part: Thank you for writing to East Whiteland Township with your request for information pursuant to the Pennsylvania Right-To-Know Law.

On 16 March 2020 you requested information regarding a vehicle crash on 11 January 2020 being driven by David Stiteler in East Whiteland Township in Malvern, Pa. Your request is granted in part and denied in part as follows:

Your documents responsive to accident occurrence acknowledgement are enclosed.

However, East Whiteland Township has withheld information that is exempt from disclosure by law. We withheld results of a criminal investigation and non-criminal investigation as outlined in Section 708(b)(16)(i)(ii) and 17(i)(ii) of the Right-to-Know Law.

This information is exempt from disclosure under Section 708(b)(16)(i)(ii) and 17(i)(ii) of the Right-to-Know Law.

March 18, 2020 Letter of Chief of Police Chris Yeager.

On March 30, 2020, Requester appealed to the Chester County District Attorney's Office, which was received on April 7, 2020. The Requester stated:

Dear District Attorney Ryan:

I am forwarding this correspondence to your attention in accordance with Pennsylvania's Right to Know Act, appeals process. I seek the records of a criminal investigation that has been concluded by the East Whiteland Township Police Department. The incident is the investigation of a motor vehicle accident on January 11, 2020. The operator of the vehicle involved in the accident is identified as David Stiteler. David Stiteler is a sworn officer of the Upper Uwchlan Township Police Department and was off duty at the time. I have enclosed with this letter my March 16, 2020 filing for the request of records of this accident. I have also enclosed the response letter I received as well as the one document provided by the East Whiteland Police Department.

It is my position that the records of this accident should be released to me. This is an accident in which David Stiteler was suspected of being intoxicated and operating his personal vehicle in an erratic manner. In a recent discussion with Chief Chris Yeager, he has informed me that the investigation is closed, and no charges are being brought against David Stiteler. I was able to ascertain that there are no parties involved where anonymity is a necessity or that of any juvenile involvement. The East Whiteland Police Department has refrained from providing a copy of the Pennsylvania State Accident Report that they are compelled to file with the Pennsylvania Department of Transportation when there is an injury accident. These reports are released on a regular basis to insurance companies and motorists. Once an investigation has been

closed, the records of this investigation should be made available as a public document.

The conduct of a Police Officer comes under a high level of scrutiny. It is my responsibility to assure the integrity of the police department and those who serve within its ranks. This mandate comes from the community. Transparency must be in place to assure the community that any suspected inappropriate personal conduct is thoroughly investigated. Officers are accountable for their conduct on and off duty. A Police Officer is subject to administrative review when events such as these occur. A criminal charge holds a higher level of proof to show the commission of a violation of the law. An administrative review in the finding of misconduct does not require that same level. Additionally, these documents could also be used to validate that no misconduct has been committed by David Stiteler. I believe the items I have cited validates the reasons to have the records I seek released. If released to me, these records would remain as part of an administrative review file and not be available to anyone that the law does not permit to view in personnel related matters.

Thank you for your attention to this matter. Please feel free to contact me in the event you may have any questions. I am looking forward to your response.

Sincerely,

John D. DeMarco
Chief of Police

March 30, 2020 Letter of Requester, at 1-2.

On April 7, 2020, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

On March 16, 2020, 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 March 18, 2020,

the request was denied. On March 30, 2020, Requester appealed to the Chester County District Attorney's Office, which was received on April 7, 2020.

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 April 7, 2020, which is May 7, 2020.** 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 any response on or before April 17, 2020.

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 any response on or before April 24, 2020.

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.

April 7, 2020 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr., Appeals Officer.

On April 17, 2020, Respondent submitted a response. On April 22, 2020, Requester submitted a response. Consequently, this decision is based on the initial request, response, and the additional responses of the parties.

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 East Whiteland Township 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).

On April 17, 2020, the Respondent sent a response which stated:

RE: Appeal Caption: DA-RTKL-A No. Appeal Docket 2020-005

I, Chief G. Christian Yeager, have reviewed all responsive records and have made the determination they are criminal investigative records related to a potential criminal and non-criminal investigations related to (the accident/and potential criminal actions of the David Stiteler-operator of a motorcycle involved in a serious MV accident).

The East Whiteland Township Police Department is withholding CODY RMS Police Report, Pa. Reportable Accident Report, blood/lab report, search warrant and return, and lab test interpretation obtained for criminal investigations purpose from the Requestor because it constitutes records relating to a criminal investigation, pursuant to Section 708(b)(16) of the Right to Know Law.

The CODY RMS Police Report and Pa. Reportable accident report also contain non-criminal investigation information which is exempted under Section 708(b)(17)(i)(ii). The Police report constitutes both complaints of potential criminal conduct other than a private criminal complaint and investigative materials, notes, correspondence, videos, and reports.

The Pennsylvania Commonwealth Court has found that incident reports are considered investigative materials and that the entire report is exempt from disclosure. Hunsicker v. Pa. State Police, 93 A.3d 911 (Pa. Commw. Ct. 2014); see also Johnson v.

Pennsylvania State Police, AP 2015-0121. See also Burda v. Upper Merion Township, AP 2016-0869.

Regarding the request for response logs, recordings of the 9-1-1 call and/or any radio dispatches can be requested from the Chester County Department of Emergency Services. Per their website, (<https://chesco.org/4320/9-1-1-Call-Request>), to request a copy of a 9-1-1 call that someone else made, you must obtain a subpoena from the Prothonotary Officer where the case is pending.

April 17, 2020 Response of Respondent.

The Respondent's response included the affidavit of Chief G. Christian Yeager, of the East Whiteland Township Police Department. The affidavit stated:

ATTESTATION IN SUPPORT OF WITHOLDING OF RECORDS

Name of Requester: John DeMarco

Records Requested: Documents associated with a motor vehicle that Officer David Stiteler was involved in within our jurisdiction [East Whiteland Township]

Appeal Caption: DA-RTKL-A No. Appeal Docket 2020-005

I, Chief G. Christian Yeager, hereby declare, pursuant to 18 Pa.C.S. § 4904, that the following statements are true and correct based upon my personal knowledge, information, and belief:

1. I serve as the Open Records Officer for the East Whiteland Township Police Department (the "Police Department").
2. I am responsible for responding to Right to Know Law Request filed with the Police Department.

3. In my capacity as the Open Records Officer, I am familiar with the records of the Police Department.

4. Upon receipt of the request, I conducted a thorough examination of files in the possession, custody, and control of the Police Department for records responsive to that request.

5. Additionally, I have inquired with relevant Police Department personnel, and, if applicable, relevant third-party contractors as to whether the requested records exist in their possession.

6. After conducting a good faith search of the Police Department's files and inquiring with relevant Police Department personnel, I identified all records within the Police Department's possession, custody or control.

7. The responsive record identified consists of: CODY RMS Police Report, Pa. Reportable Accident Report and exchange sheet, search warrants and return, medical records, lab test results and description and interpretations of the results.

8. The Police Department generated the reports, tests and interpretations search warrant and return in furtherance of a criminal investigation the Police Department performed concerning a possible criminal cause of a serious traffic accident.

9. The Police Department withheld the CODY RMS Police Report, Pa. Reportable Accident report, medical records, search warrant and return, lab test results and description and interpretations of the results from the Requestor because (it constitutes records relating to a criminal investigation, pursuant to Section 708(b)(16) of the Right to Know Law).

10. The Police Department withheld the CODY RMS Police Report, Pa. Reportable Accident report, medical records, search warrant and return, lab test results and description and interpretations of the results from the Requestor because it

constitutes “Investigative information” under the Criminal History Records Information Act.

Chief G. Christian Yeager
Open Records Officer
East Whiteland Township Police Department

Date: 4-17-2020

April 17, 2020 Affidavit of Chief G. Christian Yeager.

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.Cmwlt. 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).

Based on the evidence provided, the Respondent has met its burden of proof as to what documents it possesses, and that they are criminal investigative records and exempt from disclosure.

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).

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”).

In Pennsylvania State Police v. Grove, 640 Pa. 1, 161 A.3d 877 (2017), the Supreme Court discussed the definition of “criminal investigative records”, in part:

The RTKL requires Commonwealth agencies to provide access to public records upon request. 65 P.S. § 67.301 (“A Commonwealth agency shall provide public records in accordance with this act.”). Section 102 of the RTKL defines a “public record” as: “A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.” 65 P.S. § 67.102. A “record” is further defined under the RTKL as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

Id. There is no dispute that MVRs are public records of an agency as defined in the RTKL and thus subject to public disclosure unless some exemption applies. We consider whether MVRs generally, and the video portions of Trooper Vanorden and Trooper Thomas’s MVRs in this matter specifically, qualify under an enumerated exemption to disclosure described in Section 708(b)(16) of the RTKL regarding “criminal investigative records.”

...

Under the Statutory Construction Act, where the words or phrases at issue are undefined by the statute itself, we must

construe the words and phrases according to their plain meaning and common usage. 1 Pa.C.S. § 1903(a). The RTKL does not define the central phrase “criminal investigation” as used in Section 708(16)(b)(ii). *The plain meaning of a “criminal investigation” clearly and obviously refers to an official inquiry into a possible crime. See, e.g.,* <https://www.merriamwebster.com/dictionary/criminal> (last visited Jan. 17, 2017) (“*relating to crime or to the prosecution of suspects in a crime*”); <https://www.merriamwebster.com/dictionary/investigation> (last visited Jan. 17, 2017) (“*to investigate*” is “*to observe or study by close examination and systematic inquiry,*” “*to make a systematic examination;*” or “*to conduct an official inquiry*”).

The Commonwealth Court has previously opined that material exempt from disclosure as “criminal investigative information” under the RTKL includes: statements compiled by district attorneys, forensic reports, and reports of police, including notes of interviews with victims, suspects and witnesses assembled for the specific purpose of investigation. *See, e.g., Barros v. Martin*, 92 A.3d 1243, 1250 (Pa. Cmwlth. 2014) (criminal complaint file, forensic lab reports, polygraph reports and witness statements rise to level of criminal investigative information exempt from disclosure); *Coley*, 77 A.3d at 697 (witness statements compiled by District Attorney’s office are criminal investigative records exempt from disclosure); *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473, 478–79 (Pa. Cmwlth. 2010) (incident report prepared by police with notes of interviews of alleged victims and perpetrators assembled during investigation exempt as criminal investigative information); *Mitchell v. Office of Open Records*, 997 A.2d 1262, 1265–66 (Pa. Cmwlth. 2010) (record pertaining to PSP’s execution of search warrant was criminal investigation exempt from disclosure under Section 708 of the RTKL). With regard to the MVRs requested by Grove in this case, we must determine whether the video aspects generally depict a systematic inquiry or examination into a potential crime.

Grove at 24-26, 161 A.3d at 891–893 (emphasis added).

In Grove, as the RTKL does not define “criminal investigation” as used in § 708(16)(b)(ii), the Supreme Court held that the term “criminal investigation” refers to an official inquiry into a possible crime. Grove at 24-26, 161 A.3d at 891–893. In Grove, the Supreme Court agreed with the Commonwealth Court and reaffirmed that witness interviews, interrogations, testing and other investigative work, are investigative information exempt from disclosure by § 708(b)(16) of the RTKL and CHRIA. The Supreme Court also cited Commonwealth Court cases as some examples of “criminal investigative information” under the RTKL, which included, but is not limited to: (1) statements compiled by district attorneys, (2) forensic reports, (3) police reports - including notes of interviews with victims, suspects, and witnesses assembled for the specific purpose of investigation, (4) criminal complaint file, (5) lab reports, (6) polygraph reports, (7) witness statements, and (8) records pertaining to execution of search warrant.¹

¹ See also 65 P.S. § 67.708(b) (i)-(vi) [A record of an agency relating to or resulting in a criminal investigation, includes: **(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.].

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.

As previously stated, Respondent, pursuant to 65 P.S. § 67.708(b)(16)(i)(ii), stated the requested records are exempt from access as 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. Ultimately the question is; are the requested documents criminal investigative records exempt from disclosure.

On April 23, 2020, the Requester sent a response which stated:

ATTESTATION IN SUPPORT OF RELEASE OF RECORDS

Name of Requester: Chief John D. DeMarco

Records Requested: Documents associated with the motor vehicle accident in which David Stiteler was involved in within the jurisdiction of East Whiteland Township, Chester County, Pennsylvania.

Appeal Caption: DA-RTKL-A No. Appeal Docket 2020-005

I, Chief John D. DeMarco hereby declare, pursuant to 18 Pa.C.S. § 4904, that this correspondence in support of the release of records is true and correct based upon my personal knowledge, information, and belief.

As the Chief of Police of the Upper Uwchlan Township Police Department, it my responsibility to investigate all matters regarding the conduct of the police officers who are employed by the Township of Upper Uwchlan, Chester County.

David Stiteler is employed as a sworn Police Officer by the Township of Upper Uwchlan, Chester County, Pennsylvania, and was employed at the time of occurrence of the accident.

On the evening of January 11, 2020, David Stiteler was involved in a personal motor vehicle accident within the bailiwick of the East Whiteland Township Police Department. The East Whiteland Township Police Department responded and investigated.

On the evening of January 11, 2020, I was contacted by Chief Chris Yeager of the East Whiteland Township Police Department. He advised me that David Stiteler had been involved in a motor vehicle accident within his jurisdiction. Chief Chris Yeager also informed me that his agency was

investigating the accident. Chief Chris Yeager additionally made me aware that his department suspected David Stiteler to be under the influence of alcohol. During the investigation I had discussions with Chief Chris Yeager of the East Whiteland Township Police Department to ascertain the status of the investigation.

During this time, I was informed that the East Whiteland Police Department was investigating to determine if criminal and traffic summary charges should be brought against David Stiteler for his vehicle accident. The nature of the East Whiteland Township Police Department's investigation was to determine if David Stiteler violated any statutes for operating a vehicle under the influence of an alcoholic beverage.

I was eventually contacted by Chief Chris Yeager of the East Whiteland Township Police Department and informed that they had concluded their investigation of the vehicle accident. Chief Chris Yeager informed me that upon final review of the Chester County District Attorney's Office, that there would be no charges forthcoming. The matter was closed.

Upon the conclusion of this investigation, I filed a written request to receive copies of the reports on March 16, 2020 with the East Whiteland Township Police Department. On March 18, 2020, I received a written response from Chief Chris Yeager of the East Whiteland Police Department denying me the request for the copies of these reports that I have identified in this letter. It is at that time I filed an appeal with the Chester County District Attorney's Office to seek these report copies. I was informed by Nicholas J. Casenta, Jr., Esquire, Chief Deputy District Attorney, Chester County District Attorney's Office, to prepare a formal response by April 24, 2020. This correspondence shall serve as notice and follows his request.

The East Whiteland Township Police Department Incident Report/RAC Report

There are "Exceptions" as identified in 65 P.S. § 67.708(b)(16) that would prohibit the release of these records. None of these

exceptions are applicable and would not prohibit the release of these reports. This would be applicable to all the reports. The information in these reports we seek are documentation of the incident and the outcome of the matter. The Upper Uwchlan Township Police Department can receive records as we are identified as a CHRIA agency. If David Stiteler did nothing wrong, there should be no problem in releasing the reports. The reports could also serve to vindicate David Stiteler of any suspicion of wrongdoing.

The Pennsylvania Motor Vehicle Accident Report

The release of the vehicle accident report is addressed in PA Title 75. 3751. Reports by police.

General rule. -- Every police department that investigates a vehicle accident for which a report must be made as required in this subchapter and prepares a written report as a result of an investigation either at the time and at the scene of the accident or thereafter by interviewing the participants or witnesses shall, within 15 days of the accident, forward an initial written report of the accident to the department. If the initial report is not complete, a supplemental report shall be submitted later.

(b) Furnishing copies of report.

(1) Police departments shall, upon request, furnish a certified copy of the full report of the police investigation of any vehicle accident to any person involved in the accident, his attorney or insurer, and to the Federal Government, branches of the military service, Commonwealth agencies, and to officials of political subdivisions and to agencies of other states and nations and their political subdivisions.

(2) Except as provided in paragraph (3), the cost of furnishing a copy of a report under this subsection shall not exceed \$15.

(3) In a city of the first class, the cost of furnishing a copy of a report under this subsection shall not exceed \$25.

(4) The copy of the report shall not be admissible as evidence in any action for damages or criminal proceedings arising out of a motor vehicle accident.

(5) Police departments may refuse to furnish the complete copy of an investigation of the vehicle accident whenever there are criminal charges pending against any persons involved in the vehicle accident unless the Pennsylvania Rules of Criminal Procedure require the production of the documents.

* Section b (1) is very clear on the release of the accident that is filed with the State of Pennsylvania.

* Section b (5) identifies that the report may not be released if there are criminal charges pending. The investigation is over and there are no charges.

Search Warrant

Upon making application for a search warrant, police must have probable cause to believe that a violation of Pennsylvania law has occurred. Accordingly, the written policy of the Chester County District Attorney's Office is "All search warrants require the prior approval of the Chester County District Attorney's Office."

"The prosecutor approving the search warrant must review both the cover sheet and the affidavit of probable cause. No search warrant may be submitted for judicial approval until the designated prosecutor has given final approval."

The East Whiteland Police apparently had enough probable cause in an affidavit that they suspected David Stiteler was under the influence of alcohol to a degree that he violated the Pennsylvania law. The search warrant was approved by the Chester County District Attorney's Office. If the police discovered this was not the case, then there should be no issue for releasing a copy of this warrant.

Police Chiefs are responsible to address the conduct of the member of their agency to assure the highest integrity. Members of police departments fall under the scrutiny of Pennsylvania Law regarding their tenure as Police Officers. The legislatures clearly identified the expectations of the conduct of police officers in this Commonwealth. This is identified in the Police Tenure Act, 53 Pa. Stat. § 812 (4) inefficiency, neglect, intemperance, disobedience of orders, or conduct unbecoming an officer.

Within Chester County, the Office of the District Attorney has issued Giglio Protocols that clearly define what dictates Giglio material. This is the current protocol that was issued in June of 2019. There have been no revisions since that time.

Chester County District Attorney Protocols and Policies for Law Enforcement

Giglio Protocols

I. Introduction

The following protocol addresses the handling of potential impeachment information for law enforcement officers in Chester County, which is called “Giglio material” or “Giglio issues.” **The criminal justice system relies upon the integrity of law enforcement officers.** Chester County law enforcement has a long and proud history of upholding the highest standards of integrity and intends to maintain those standards.

II. Protocols

B. Giglio Material

Giglio material shall be any impeachment material as defined by Giglio and related cases, including but not limited to:

2. Misconduct that is relevant to a prosecution or investigation and negatively affects the integrity of a prosecution or investigation.

The request to release these reports is unique and exigent. I do not believe that there has been a case like this one. It is rare, if non-existent for a police department to file an RTK on another police department. Because this is unique, it should receive closer scrutiny. This request should not be judged with the other non-law enforcement RTK requests.

In this case we have an off-duty police officer involved in a reportable motor vehicle accident. From the beginning the police investigated the case as they would any possible alcohol involved accident. There is a final decision not to prosecute. The conduct of the vehicle's operator may not have risen to the criminal standards, but it may violate the established the professional code of conduct. If released, these records would remain secured and not released. This is a personnel matter. There should be exceptions taken into consideration when applying this rule.

Police officer accountability and the ability to assure integrity is paramount. How do you expect police administrators to address the unprofessional conduct of their officers? The off-duty activity that officers engage in is just as important as their on-duty conduct.

Example:

Police respond to the private residence of an Assistant District Attorney (ADA) for multiple domestic disputes. There would be concerns for the wellbeing and the conduct of the ADA when they come to work. The ADA in question refuses to provide any information when their supervisor inquiries. The District Attorney's Office requests to get copies of the multiple domestic call reports to the residence. These reports should be released for the obvious reasons. There should not be a blanket rule. Each request needs to be reviewed into the unique of the need for release of reports.

In an April 16, 2020 e-mail you sent the following to me.

“This appeal is unique in that I have never had one police department file a Right to Know Request against another. I am not sure if either party has had me decide an appeal concerning their department. It is a formal procedure and I follow the rules precisely. Please find attached a prior decision I recently issued to show you how I approach these appeals. It is helpful if the parties file responses consistent with the Right to Know Law. Under the law I must decide the appeal within 30 days unless the Requester agrees to an additional 30 days. My decision only involves the rights and obligations under the Right to Know Law. I hope my prior decision is helpful.”

This appeal is unique. The appeal is not from a citizen, but from a police department. Your decision should be based upon the exigent circumstances that exist. Within the rules, you can release these records. Nowhere in the rules does it say that you “shall not”. The discretion is left up to the District Attorney’s Office. Hopefully, your prior decision does not cause you to have a predisposition of your decision making with this matter.

By turning down my request, you send a clear message to the police administrators who take efforts to assure the proper conduct and integrity of the members of their department. The Commonwealth of Pennsylvania, the written policy of the Chester County District Attorney’s Office, Police Policy Manuals and the citizens of the community compel officers to conduct themselves in an appropriate manner so as not to impeach their credibility when in the performance of their duties.

Sincerely

Chief John D. DeMarco
Chief of Police

April 23, 2020 Response of Requester (emphasis in original).

The RTKL provides that records of an agency (**relating to**) or (**resulting in**) a criminal investigation may be withheld as exempt by the agency. 65 P.S. § 67.708(b). The question is not whether the requester is a public official or private citizen. Under the RTKL, all requesters are to be treated equally. The question is not whether the requester has a personal or professional interest in the records requested or is just curious about what the records reveal. The question is not whether the requester has a good or bad reason for the request. The question is not whether the requester has a pure or evil motive for the request. The question is not how the records will or will not be used. The law has been consistent, and is clear and unequivocal. The only question is whether the respondent has correctly classified the records as (relating to) or (resulting in) a criminal investigation.

65 P.S. § 67.503, titled, “Appeals Officer”, states in part:

(d) Law enforcement records and Statewide officials. --

(1) The Attorney General, State Treasurer and Auditor General shall each designate an appeals officer to hear appeals under Chapter 11.

(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.**

65 P.S. § 67.503 (emphasis added).

The Commonwealth Court has clearly stated on numerous occasions that the role of an Appeals Officer under the RTKL is limited. The Commonwealth Court has stated:

“Although the RTKL grants appeals officers wide discretion with respect to [the] procedure [for deciding appeals], **there appears to be little ‘discretion’ concerning whether a document may or may not be released to a requester. Either the document falls under one of the specific exemptions, or it is a document that must be released.” Bowling v. Office of Open Records, 621 Pa. 133, 75 A.3d 453, 467 (2013). Nonetheless, “the RTKL contemplates that the foundational question of whether a record or document is exempt from disclosure is a factual one,” id. at 476, that should be made in the first instance by an appeals officer. ... Indeed, an appeals officer and the reviewing courts, regardless of where located on the hierarchical appeals scheme, are charged with performing the same task: **“the duty of an appeals officer or a [reviewing court] is simply to determine whether the underlying agency correctly denied a requester access to a document under one of the statutory exceptions.”** Id. at 467.**

Com., Office of Open Records v. Ctr. Twp., 95 A.3d 354, 369 (Pa. Cmwlth. 2014) (emphasis added).

The Commonwealth Court has also clearly stated on numerous occasions that the role of the District Attorney’s Appeals Officer under the RTKL is limited to a specific question. The Commonwealth Court has stated:

[T]he RTKL recognizes criminal investigative records present a special case necessitating review by an appeals officer designated by a district attorney to determine access disputes. Miller, 135 A.3d at 239 (*citing* Section 503(d)(2) of the RTKL, 65 P.S. § 67.503(d)(2)). The DA-designated appeals officer is only authorized to hear appeals “relating to access to criminal

investigative records....” *Id.* **Significantly, the DA-designated appeals officer “shall determine if the record requested is a criminal investigative record.”** *Id.*

Pennsylvanians for Union Reform v. Ctr. Cty. Dist. Attorney’s Office, 139 A.3d 354, 357 (Pa. Cmwlth. 2016) (emphasis added).²

In this appeal, the question of whether or not the requested records are criminal investigative records is not in dispute. Requester does not argue that the

² As the designated RTKL Appeal Officer for the Chester County District Attorney’s Office (“DAO”), I am walled off from all other members of the DAO, including the District Attorney, from anything involving any issue that could potential come before me for a decision. My role as the RTKL Appeal Officer is not to advance the policies of the DAO, but to apply the RTKL as a neutral arbiter. **As the Pennsylvania Supreme Court has stated:** “Commonwealth agencies which act in an adjudicatory capacity may also act as parties in appeals to the Commonwealth Court from the agency’s adjudication. *See, e.g., Dep’t of Labor & Ind., Bureau of Workers’ Comp. v. Workers’ Comp. Appeal Bd. (Crawford & Co.)*, 611 Pa.10, 23 A.3d 511 (2011) (appeal naming agency that rendered adjudication; agency did not file brief); Riverwalk Casino, L.P. v. Pa. Gaming Control Bd., 592 Pa. 505, 926 A.2d 926, 935 (2007) (appeal naming agency that “serves as a quasi-judicial body with fact-finding and deliberative responsibilities”; agency filed brief defending its decision); *see also Rendell v. Pa. State Ethics Comm’n*, 603 Pa. 292, 983 A.2d 708 (2009) (declaratory judgment action against agency concerning agency’s interpretation of governing statute in advisory opinion). **Administrative agencies commonly establish “walls of division” between their prosecutory staff and adjudicative functions “necessary to ensure that their administrative procedures comport with due process.”** Stone and Edwards Ins. Agency, Inc. v. Commonwealth, Dep’t of Ins., 538 Pa. 276, 648 A.2d 304, 308 (1994). **Absent “actual commingling” of these functions, the quasi-judicial character and impartiality of the administrative agency in its adjudicatory capacity is not compromised, and a party’s right to due process is not violated.** *Id.* Indeed, the Right-to-Know Law authorizes the OOR to appoint staff attorneys, other than appeals officers, to perform those functions of representing the OOR in the Commonwealth Court. 65 P.S. § 67.1310(d); *see, e.g., Lyness v. Commonwealth, State Bd. of Medicine*, 529 Pa. 535, 605 A.2d 1204, 1211 (1992) (“fatal defect here lies in the administrative regulations, and the loose interpretation afforded those regulations by the [State Board of Medicine,] which defect can be readily cured by placing the prosecutorial functions in a group of individuals, or entity, distinct from the Board which renders the ultimate adjudication”); George Clay Steam Fire Engine & Hose Co. v. Pa. Human Relations Comm’n, 162 Pa. Cmwlth. 468, 639 A.2d 893, 901 (1994) (“commission did not commingle its functions because the regulations require the commissioners to make final adjudications whereas the commission’s staff finds probable cause”).” **Pennsylvania State Educ. of Ass’n ex rel. Wilson v. Com., Dep’t of Cmty. & Econ. Dev., 616 Pa. 491, 517–518, 50 A.3d 1263, 1280–1281 (2012)** (emphasis added).

requested records are not relate to or resulted in a criminal investigation. The Requester in his response sets forth his reasons for wanting and needing the requested records. Under the RTKL these considerations are irrelevant. If the records are exempt from disclosure, then they cannot be obtained by anyone for any reason, pursuant to the RTKL. If the records are not exempt from disclosure, then they are available to everyone for any reason, pursuant to the RTKL.

One of the fundamental principles of the RTKL is 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. For example, although a criminal defendant may be entitled to receive certain criminal investigative records in discovery, he or she would not be entitled to receive the same criminal investigative record by a RTKL request. Moreover, civil and criminal discovery law is not relevant to RTKL requests. The rights afforded a requester under the RTKL are constrained by the presumption and exemptions contained in the law itself. *See* 65 P.S. § 67.305, 67.708. Discovery conducted in a civil or criminal case and a request made under the RTKL are wholly separate processes. Office of the Dist. Attorney of Philadelphia v. Bagwell, 155 A.3d 1119, 1139 (Pa. Cmwlth. 2017). Civil and criminal discovery law provides their own procedures and safeguards for the acquisition and use of potential evidence. However, once something is ruled

available pursuant to a RTKL request, it is available to everyone, not just the current requesting party. Under the RTKL, the question is whether or not the requested documents are criminal investigative records. The requester and purpose for the request are irrelevant under the RTKL.

In DiMartino v. Pennsylvania State Police, 2011 WL 10841570 (Pa. Cmwlth. 2011), the Commonwealth Court, in a memorandum opinion,³ 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 (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

³ 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.

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. 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).

The Requester makes an argument with respect to 75 Pa.C.S.A. § 3751. The Pennsylvania Office of Open Records has on numerous occasions addressed arguments concerning the effect of 75 Pa.C.S.A. § 3751 on RTKL determinations. The Pennsylvania Office of Open Records has consistently held that entitlement to receive records pursuant to § 3751 is irrelevant to RTKL determinations. If someone is entitled to receive records pursuant to § 3751, they should proceed under that statute and applicable procedures, and not seek these records pursuant to the RTKL.

In the case of In the Matter of Denise Durkee v. Cranberry Township, 2009 WL 6504555 (Pa.OOR), the Office of Open Records stated in part:

In part, the administrative adjudicatory process implemented under the RTKL through the OOR determines whether a record

requested qualifies as a “public record.” **Once a record is determined to be a “public record” under the RTKL, then that record is public regardless of the identity of the requester.** Here, the fact that the requester would have had a greater entitlement to information had she sought the Accident Report under the Vehicle Code as opposed to the RTKL does not entail that the information to which she is entitled is “public.” **The OOR has consistently held that the identity of the requester does not determine the public or non-public status of the information.** *See, e.g., Hocker v. East Stroudsburg Area Sch. Dist.*, OOR Dkt. AP 2009-0193.

The Citizen contends that regardless of the express enumeration of a drivers’ license number and a telephone number as “personal identification information” under Section 708(b)(6), that a driver involved in an accident does not have a reasonable expectation of privacy in her driver’s license number or telephone number. The “personal identification information” exception does not require any analysis of an individual’s privacy expectation as the Legislature determined the enumerated types of information to qualify for protection without further assessment or analysis. Section 708(b)(6) expressly protects the information the Township redacted from the Accident Report, and that ends the inquiry under the RTKL.

The Citizen’s argument that the RTKL and 75 Pa. C.S. § 3751 conflict, requiring the Vehicle Code provision to supercede the RTKL based on its more particular application, is inconsistent with statutory construction principles. **The Vehicle Code provision does not specify the public or nonpublic nature of an accident report, and thus does not constitute a law that conflicts with the general disclosure principles underlying the RTKL.** Therefore, Section 306 of the RTKL, which provides that nothing in the RTKL “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” is not implicated, and 1 Pa. C.S. § 1933 of the Statutory Construction Act does not apply. **The Vehicle Code provision cited by the Citizen only outlines the persons to whom such information under that provision must be**

furnished, it does not exempt accident reports from disclosure nor deem them public records in their entirety.

In the Matter of Denise Durkee v. Cranberry Township, 2009 WL 6504555 (Pa.OOR), 3 (emphasis added).

In the case of In the Matter of Jaycin Stillwagon v. City of Connellsville, 2020 WL 1321803 (Pa.OOR), the Office of Open Records stated in part:

The Requester argues that she is entitled to the report because she was involved in the vehicle incident at issue and the Officer she spoke with after the incident assured her she could have a copy of the accident report. However, the RTKL must be construed without regard to the Requester's identity. See Slaby v. Northumberland County, OOR Dkt. AP 2011-0331, 2011 PA O.O.R.D. LEXIS 257. The reason for requesting an agency's records is not relevant to determining a record's public status under the RTKL. Advancement Project v. Pa. Dep't of Transp., 60 A.3d 891 (Pa. Commw. Ct. 2013). While the Requester, given her identity and connection to the incident, may be entitled to the requested records through a different legal mechanism, that is not relevant to an analysis under the RTKL.⁵

⁵ For example, Section 3751 of the Motor Vehicle Code, 75 Pa.C.S. § 3751, requires police departments which investigate a motor vehicle accident to prepare a written report. 75 Pa.C.S. § 3751(a). Copies of such written reports are available, with exception, only to certain individuals, including any person involved in the accident, his attorney or insurer for a fee not to exceed \$15.00. 75 Pa.C.S. §§ 3751(b)(1)-(2). Furthermore, accident reports prepared under Section 3751 are available to authorized individuals in accordance with procedures established by the Department of Transportation. 67 Pa. Code § 95.5. **However, the OOR has held that accident reports accessible under Motor Vehicle Code are**

not accessible under the RTKL. Smith v. Pa. State Police, AP 2012-0274, 2012 PA O.O.R.D. LEXIS 660 *citing* Jamison v. Upper Dublin Twp. Police Dep't., OOR Dkt. AP 2011-1300, 2011 PA O.O.R.D. LEXIS 1015; *see also* 65 P.S. § 67.3101.1 (the RTKL does not apply to records accessible under other Federal or state law or regulation).

In the Matter of Jaycin Stillwagon v. City of Connellsville, 2020 WL 1321803 (Pa.OOR), 4 (footnote in original) (emphasis added).

“Section 3751 of the Motor Vehicle Code, 75 Pa.C.S. § 3751, requires police departments which investigate a motor vehicle accident to prepare a written report. 75 Pa.C.S. § 3751(a). Copies of such written reports are available only to certain individuals, including the insurer of a person involved in the accident for a fee not to exceed \$15.00. 75 Pa.C.S. §§ 3751(b)(1)-(2). Furthermore, accident reports prepared under Section 3751 are available to authorized individuals in accordance with procedures established by the Department of Transportation. 67 Pa. Code § 95.5. **The OOR has previously held that accident reports accessible under Motor Vehicle Code are not accessible under the RTKL.** Jamison v. Upper Dublin Twp. Police Dep't., OOR Dkt. AP 2011-1300, 2011 PA O.O.R.D. LEXIS 1015; *see also* 65 P.S. § 67.3101.1 (the RTKL does not apply to records accessible under other Federal or state law or regulation).” In the Matter of Thomas Smith v. Pennsylvania State Police, 2012 WL 1826344 (**Pa.OOR**), 2 (emphasis added).

“While the Requester argues that 67 Pa. Code § 95.2(e)(3) does not apply to police accident reports held by a local agency like the City, such an interpretation

would lead to an absurd result. Under 75 Pa. C.S. § 3751(a), police departments are required to prepare a written report of an accident investigation and forward the accident report to PennDOT. **It would make little sense for an accident report in the hands of PennDOT to be exempt from disclosure, but be subject to public access in the hands of the local agency responsible for the preparation of the same accident report.** See 1 Pa.C.S. § 1922(1) (stating the General Assembly does not intend an absurd result in interpreting a statute); 65 P.S. § 67.3101.1 (mandating the RTKL does not apply in the event of a conflict with state or federal law or regulation regarding access to records).” In the Matter of Robert Cavoto v. City of Philadelphia, 2012 WL 1826000 (Pa.OOR), 1 (emphasis added).

“[75 Pa.C.S.A. § 3751] expressly limits the persons to whom agencies are authorized to release the records and serving as a “regulatory exemption protecting” accident reports held by PennDOT and local agencies. See, e.g., Tennis Towing v. State College Police Dep’t, OOR Dkt. AP 2016-0835, 2016 PA O.O.R.D. LEXIS 849; Jamison v. Norristown Borough Police Dep’t, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927; Pohlman v. Pa. Dep’t of Trans., OOR Dkt. AP 2010-0500, 2010 PA O.O.R.D. LEXIS 453; Bieber v. Pa. Dep’t of Trans., OOR Dkt. AP 2009-0825, 2009 PA O.O.R.D. LEXIS 391. **Therefore, the requested crash reports are not publically available through a RTKL**

request.” In the Matter of Amanda St. Hilaire and ABC 27 News v. West Shore Regional Police Department, 2016 WL 7240889 (Pa.OOR), 3 (emphasis added).

“The OOR interprets [75 Pa.C.S.A. § 3751] as expressly limiting the persons to whom agencies are authorized to release the records and serving as a ‘regulatory exemption protecting’ accident reports held by PennDOT and local agencies. See, e.g., Towing v. State College Police Dep’t, OOR Dkt. AP 2016-0835, 2016 PA O.O.R.D. LEXIS 849; Jamison v. Norristown Borough Police Dep’t, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927; Pohlman v. Pa. Dep’t of Trans., OOR Dkt. AP 2010-0500, 2010 PA O.O.R.D. LEXIS 453; Bieber v. Pa. Dep’t of Trans., OOR Dkt. AP 2009-0825, 2009 PA O.O.R.D. LEXIS 391. Therefore, the requested accident report is not publically available through a RTKL request.” In the Matter of Alan Rich v. Township of Lower Makefield, 2016 WL 4975488 (Pa.OOR), 3 (emphasis added).

The Respondent argues that the District Attorney’s Appeals Officer has the discretion to order the release of a record, the release of which was denied by the responding agency, even if the record has been determined to be a criminal investigative record. Respondent is incorrect as a matter of law. The Commonwealth Court has stated:

Although Section 506(c) grants an agency the discretion to release an otherwise exempt record under certain circumstances, it does not require an agency to do so. See Department of Conservation and Natural Resources v. Office of

Open Records, 1 A.3d 929, 939 n. 16 (Pa. Cmwlt. 2010) (explaining that **agencies have the discretion**, pursuant to Section 506(c), to release otherwise exempt records through the process of redaction when certain conditions are satisfied). Thus, ... , the Department was not required to redact nonpublic information from what are nonpublic records in order to make such records public and subject to disclosure.

Dep't of Health v. Office of Open Records, 4 A.3d 803, 815 (Pa. Cmwlt. 2010)

(emphasis added).

Any discretion to release record found to be exempt is with the responding agency, and not with the appeals officer deciding the appeal. The appeals officer has no discretion in this respect. The role of the District Attorney's Appeals Officer under the RTKL is limited to a specific question. "The appeals officer designated by the district attorney **shall determine** if the record requested is a criminal investigative record. 65 P.S. § 67.503(b)(2) (emphasis added).

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).

In Heavens v. Pennsylvania Department of Environmental Protection, 65 A.3d 1069 (Pa. Cmwlth. 2013), the Commonwealth Court stated in part:

Furthermore, under the RTKL, records that are exempt under Section 708 or privileged are not considered public records and are therefore not subject to the redaction requirement contained in Section 706, which applies only to records that are public and contain information that is not subject to access. 65 P.S. § 67.706; Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540, 543 (Pa. Cmwlth. 2012).

Heavens at 1077.

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. 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. 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: May 3, 2020

Nicholas J. Casenta, Jr.

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INDEX OF APPENDICES

APPENDIX “A” Appeal Documents.

APPENDIX “B” April 7, 2020 Letter - CDDA Nicholas J. Casenta, Jr., Esquire
Appeals Officer for DA’s Office of Chester County

APPENDIX “C” April 17, 2020 Response of Respondent.

APPENDIX “D” April 23, 2020 Response of Requester.