



DISTRICT ATTORNEY'S OFFICE OF CHESTER COUNTY
201 WEST MARKET STREET, SUITE 4450
POST OFFICE BOX 2746
WEST CHESTER, PENNSYLVANIA 19380-0989

TELEPHONE: 610-344-6801
FAX: 610-344-5905

IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
A. ROY DECARO,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
	:	
EASTTOWN	:	DA-RTKL-A NO. 2019-003
POLICE DEPARTMENT,	:	
Respondent	:	
	:	

INTRODUCTION

On April 16, 2019, Requester, A. Roy DeCaro, Esquire, filed a right-to-know request with the Respondent, Easttown Township Police Department, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*. On April 18, 2019, the request was granted in part and denied in part. On April 26, 2019, Requester appealed to the Chester County District Attorney's Office, and to the

Office of Open Records. On May 1, 2019, the Office of Open Records [AP 2019-0660] transferred the appeal before it to the Chester County District Attorney's Office. As these two appeals concern the same issue they shall be now considered as one consolidated appeal.

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 On April 16, 2019, the Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law, seeking: "in connection with the January 2, 2019 automobile accident involving Vasilios Papatolis (driver) and Aidan Heron (pedestrian) on Darby Paoli Road in Easttown Township. In addition to a copy the complete investigation report of the Easttown Township Police Department, we ask that you provide a copy of the accident reconstruction report made in relation to the investigation." On April 4, 2018, the request was granted in part and was denied in part. The Respondent stated in part as follows:

Dear Mr. DeCaro:

Thank you for writing to us with your request for information pursuant to the Pennsylvania Right-To-Know Law. On April 16, 2019, this office received your request for the (1) investigation report and (2) accident reconstruction report in relation to a January 2, 2019 automobile accident. Your request is granted in part, and denied in part.

A copy of the pertinent police blotter information as to the requested record(s) is enclosed in response to your request. Pursuant to the Right to Know Law at 65 P.S. § 67.708, release of incident or investigative reports is limited to information contained in a police blotter as defined in 18 Pa.C.S. § 9102. Your request is granted as to the blotter information which is provided and enclosed.

However, incident investigation and accident construction reports themselves are protected from release as a record relating to or resulting in a criminal investigation. *See* 65 P.S. §67.708(b) (16). As to any reports requested, the request is therefore denied.

The investigation report and accident construction report are also exempt from release as they do not constitute public records under the Right-To-Know Law, as they are exempt from access under other law. *See* 65 P.S. §§ 67.102, 305; 18 Pa. C.S. §§ 9101 *et. seq.*

You have a right to appeal this partial denial in writing to Office of Open Records, 333 Market Street, 16th Floor, Harrisburg, PA 17101 and / or the County District Attorney, 201 West Market Street, Suite 4450, P.O. Box 2746, West Chester, PA 19380. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response. For more information, please see the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*

This letter only addresses your request in the context of the Pennsylvania Right-to-Know Law. The Easttown Police Department separately addresses information requests received in the context of active legal proceedings, such as issued subpoenas or court orders.

Please be advised that this correspondence will serve to close this record request with our office as permitted by law.

April 18, 2019 Letter of David Obzud, Easttown PD Open Records Officer.

On April 26, 2019, Requester appealed to the Chester County District Attorney's Office, and to the Office of Open Records. On April 26, 2019, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

On April 16, 2019, Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*. On April 18, 2019, the request was denied in part. On April 26, 2019, Requester appealed to the Chester County District Attorney's Office.

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 26, 2019, which is May 26, 2019.** 65 P.S. § 67.1101(b)(1). However, Requester has agreed to an additional 30 days, if needed, to issue a final determination until **June 25, 2019.** If a final determination is not made on or before **June 25, 2019,** the appeal is deemed denied by operation of law. 65 P.S. § 67.1101(b)(2). Prior to issuing a final determination, a hearing may be conducted. However, a hearing is generally not needed to make a final determination. The final determination shall be a final appealable order, and shall include a written explanation of the reason for the decision. 65 P.S. § 67.1101(b)(3).

The Respondent should submit its response, if any, on or before May 14, 2019.

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

public records. Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013).

The Requester should submit its response, if any, on or before May 29, 2019.

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

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

April 26, 2019 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

On May 1, 2019, the Office of Open Records, issued a Final Determination and transferred the appeal before it to the Chester County District Attorney’s Office, stating the following:

On April 16, 2019, A. Roy DeCaro, Esq. (“Requester”) filed a request (“Request”) with the Easttown Township Police Department (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking two reports regarding an automobile accident. The Department denied the Request on April 18, 2019, stating that the records relate to a criminal investigation. *See* 65 P.S. §§ 67.708(b)(16). On April

26, 2019, the Requester appealed to the Office of Open Records (“OOR”).

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.* Accordingly, the appeal is hereby transferred to the Appeals Officer for the Chester District Attorney’s Office (“District Attorney’s Office”) to determine whether the records relate to a criminal investigation. A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the District Attorney’s Office.

For the foregoing reasons, Requester’s appeal is transferred to the Appeals Officer for the District Attorney’s Office. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, either 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 a party.^{FN#1} This Final Determination shall be placed on the OOR website ...

/s/ Kyle Applegate

Appeals Officer
Kyle Applegate

^{FN#1.} Padgett v. Pa. State Police, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

May 1, 2019 Final Determination Office of Open Records, Docket No. AP 2-19-0660, at 1-2 (footnote in original).

As these two appeals concern the same issue they shall be now considered as one consolidated appeal.

On May 13, 2019, the Respondent filed a Response in Opposition to the Right to Know Law Appeal, which stated in part:

...

The Requester appealed the Response to the Chester County District Attorney's Office ("CCDAO"). *See* Exhibit "C". On April 26, 2019, CCDAO directed that the Requester to provide required information for an appeal. *See* Exhibit "D".

By way of additional background information, on January 23, 2019, the Department uploaded the traffic crash report as required by law. The Requester would have access to the traffic crash report electronically. *See* Exhibits "E" and "F".

RESPONSE TO REQUESTER'S ARGUMENTS

1. The criminal investigation exemption precludes release of the requested materials.

Please see the affidavit of Chief David Obzud attached hereto as Exhibit "F" for additional information for this section.

a. Incident reports are exempt from release.

The Requester specifically seeks an incident report. Section 708(b)(1)(6)(ii) states that investigative reports are exempt from access. *See* 65 P.S. §67.708(b)(1)(6)(ii). In Hunsicker v. Pennsylvania State Police, 93 A.3d 911 (Pa. Cmwlth 2014), the Pennsylvania Commonwealth Court addressed the release of incident reports under the RTKL. The

Commonwealth Court states “In any event, no matter what is contained in an incident report, incident reports are considered investigative materials and are covered by that exemption [65 P.S. §67.708(b)(16)]”. *Id.* at 913. *See also Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Cmwlth. 2010) (“[T]he Incident Report is a report of a criminal investigation and contains investigative information.”) This information is exempt from release under the RTKL.

The police blotter information related to the incident report was supplied to the Requester as part of the Department’s Response. *See* Exhibit “B”.

b. Other investigative materials are exempt from release.

Section 708(b)(16)(ii) states that investigative materials and notes are exempt from access. 65 P.S. § 67.708(b)(16). An accident reconstruction report constitutes investigative materials, which were created in the course of the Department’s criminal investigation. Witness statements taken as part of the investigation also constitute investigative materials and are exempt from release. *See* Exhibit “F”.

c. “Victim” information is exempt from release.

Section 708(b)(16)(v) states that “victim” information is exempt from release. 65 P.S. § 67.708(b)(16)(v). The investigation report and accident reconstruction report contain information relating to the deceased in this case, and are therefore exempt from release.

d. Records that, if disclosed, would reveal the institution, progress or result of a criminal investigation are exempt from release.

Section 708(b)(16)(vi)(A) states that a record that would reveal the institution, progress or result of a criminal investigation is exempt from release. 65 P.S. §

67.708(b)(16)(vi)(A). The release of the requested records would reveal the result of this investigation.

e. Records that, if disclosed would hinder an agency's ability to secure an arrest, prosecution or conviction, are exempt from release.

Section 708(b)(16)(vi)(D) states that a record that would hinder an agency's ability to secure an arrest, prosecution or conviction is exempt from release. 65 P.S. §67.708(b)(16)(vi)(A). The release of the requested records would hinder the ability to prosecute or convict the alleged perpetrator in this case. As of the date of this letter, the alleged perpetrator has been charged with careless driving - unintentional death under 75 P.S. § 3714.B. No plea has been entered. A summary trial is scheduled for May 30, 2019. See Exhibits "F" and "G".

f. The status of the investigation / charges against Mr. Papatolis are irrelevant to the application of the exception.

The Requester argues that since the CCDAO has charged the alleged perpetrator with a summary traffic offense as opposed to a more severe offense, the requested records are no longer protected by this exception. He provides no case law applicable to or in support of this contention.

The plain language of the statute of this exception states it applies to "A record of an agency relating to . . . a criminal investigation". There can be no question here that a criminal investigation occurred. The statute does not distinguish the application of this exception based on the type or severity of charges ultimately determined by an outside local agency in their prosecutorial discretion (here the CCDAO) that may result from a criminal investigation conducted by the Department.^{FN#1} As such the requested documents retain their protection under this exception.

^{FN#1.} This charging argument has parallels to the Commonwealth Court’s decision in Coley v. Philadelphia Dist. Attorney’s Office, 77 A.3d 694 (Pa. Cmwlth. 2013), where it noted that there was no legal authority for the argument that investigative records become public records after they are used at trial.

The Requester cites only to In re Subpoenas in the Case of Mielcarz v. Pietzsch, 2018 WL 3113916 (Pa. Super. Ct. 2018)^{FN#2} in support of his contention that the criminal investigation exception no longer applies because the CCDAO, in its prosecutorial discretion, determined that a summary offense was appropriate as opposed to a more severe charge as a result of the criminal investigation. This case stands for no such proposition.

^{FN#2.} This case should not be relied upon by the CCDAO. *See* Pa. Super. Ct. I.O.P. 65-37, as modified by 2019 Pa. C.O. 0026 (“An unpublished memorandum decision filed prior to May 2, 2019, shall not be relied upon or cited by a Court or a party in any other action or proceeding, except that such a memorandum decision may be relied upon or cited (1) when it is relevant under the doctrine of law of the case, *res judicata*, or collateral estoppel, and (2) when the memorandum is relevant to a criminal action or proceeding because it recites issues raised and reasons for a decision affecting the same defendant in a prior action or proceeding.”) (emphasis added). None of the exceptions included in 2019 Pa. C.O. 0026 apply to this appeal.

In Mielcarz v. Pietzsch, Pietzsch rear-ended a vehicle driven by Mielcarz. Pietzsch ultimately pled guilty to a number of criminal offenses. Mielcarz subsequently instituted a civil action related to injuries sustained in the traffic accident. As part of the civil action, the DA’s office was served with subpoenas seeking its investigative file related to the accident. The DA’s office filed motions to quash, which were denied by the trial court.

The Superior Court focused primarily on the application of CHRIA in regard to the subpoenas (discussed herein). The

only discussion of the RTKL's criminal investigation exception is as follows:

RTKL does not grant public access to “record[s] of an agency relating to a noncriminal investigation[.]” It similarly does not grant public access to “record[s] of an agency relating to or resulting in a criminal investigation[.]” Hence, in RTKL, our General Assembly explicitly addressed both criminal investigative information and noncriminal investigative information. In CHRIA, however, our General Assembly precluded dissemination only of information pertaining to criminal investigations. By comparing these related statutes, we can infer by this omission that our General Assembly meant only to protect criminal investigative information under CHRIA. With CHRIA, our General Assembly made a policy choice to permit disclosure of noncriminal investigative information by criminal justice agencies when served with a lawful subpoena under the Federal Rules of Civil Procedure or Pennsylvania Rules of Civil Procedure. Accordingly, a comparison of CHRIA to RTKL supports the conclusion that noncriminal investigative information is not protected by CHRIA.

Id. at *5 (internal citations omitted). The case is silent in regard to any impact of the ultimate charging decision on the status of a preexisting record under the criminal investigation exception of the RTKL.

It should be noted that the requested reports were created to document, assemble and report on the evidence of a possible crime. *See Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173 (Pa. Cmwlth. 2019). In fact, the investigative activities far exceed the scope of routine traffic accident investigation activities and reports, and would not have been created or conducted, but for the Department, when upon arriving at the scene of the accident, believed a possible crime may have occurred. The sole purpose of these records is as part of a systematic inquiry or examination into a potential crime. *See Port Auth. of Allegheny Cty. v. Towne*, 174 A.3d 1167 (Pa.

Cmwlth. 2017); Barros v. Martin, 92 A.3d 1243 (Pa. Cmwlth. 2014); Pennsylvania State Police v. Grove, 161 A.3d 877 (Pa. 2017) (videos depicting what any bystander could see are not investigative materials as compared to records created primarily to document, assemble or report on evidence of a crime or possible crime). *See also* Exh. “F”.

g. The Requester’s client’s relationship with the deceased does not merit release.

To the extent the Requester asserts that he is entitled to this information because his client is the family of the decedent, his relationship / his client’s relationship to the deceased is irrelevant. In Hunsicker v. Pennsylvania State Police, 93 A.3d 911 (Pa. Cmwlth. 2014), the Commonwealth Court found that the requester’s status as a sibling did not make the records 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).” *Id.* at 913; *See also*, 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.”).

Similarly to the extent the Requester asserts that he is entitled to this information because he / his client is aware of the content of some of the information contained therein, that is not a reason for release. “... [J]ust because she purportedly knows some of the information contained in the documents is irrelevant as to whether a document must be made accessible.” *Id.* at 913.

2. The information cannot be release in accordance with Criminal History Record Information Act.

A record only constitutes a public record under the RTKL if it is “not exempt for being disclosed under any other

... State law ...”. 65 P.S. §§ 67.102, 67.305. *See also* 65 P.S. § 67.708. The information sought by the Requester is also exempt under the Commonwealth’s Criminal History Record Information Act (“CHRIA”). *See* 18 Pa. C.S. §§ 9101 *et seq.*

Under CHRIA, investigation information is “information assembled as the result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing . . .” 18 Pa.C.S. § 9102 (emphasis added). Investigation 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 which requests the information in connection with its duties, and the request is based upon a name, fingerprints, modus operandi, genetic typing, voice print or other identifying characteristic.” 18 Pa.C.S. § 9106(c)(4) (emphasis added).

There have been a series of cases regarding how CHRIA operates in concert with the RTKL. Most significant is the Pennsylvania State Police v. Grove, 161 A.3d 877 (Pa. 2017). In Grove, an individual requested dashcam videos from the Pennsylvania State Police. The Pennsylvania State Police denied the request and argued that disclosing dashcam video recordings violated CHRIA. Our Supreme Court disagreed in part. It noted that dashcam videos are created when a light or siren is activated, and capture many events. Dashcam videos “are created in many instances that plainly do not involve criminal activity, and may ultimately be used in civil proceedings, administrative enforcement and disciplinary actions.” Id. at 895. (citation omitted). The Supreme Court therefore held that “the question of whether information captured on a particular MVR [dashcam video] is to be excluded from public access under CHRIA must be determined on a case-by-case basis.” Id. at 895. (footnote omitted). Ultimately, the Supreme Court determined that the video portions of the dashcam videos were not investigative information protected by CHRIA; however, the audio portions of the dashcam videos were investigative information protected by CHRIA because they contained recordings of witness interviews.

The records sought by the Requester are investigative information under CHRIA. Both documents were assembled as part of a formal inquiry into an allegation of criminal wrongdoing. Therefore, they are not a public record under the RTKL and not subject to access. The Requester is not a criminal justice agency.

Further, as referenced above the case cited by the Requester in his appeal, In re Subpoena in the case of Mielcarz v. Pietzsch, 2018 WL 3113916 (Pa. Super. Ct. June 22, 2018), does not stand for the proposition advanced by the Requester. When the Superior Court reviewed the CHRIA protection, it referenced Grove stating that investigation information that is created for the purpose of investigating suspected criminal activity is protected by CHRIA. The Court found: “CHRIA protects information based on the circumstances under which it was gathered. Information obtained as a result of an investigation into criminal activity is protected. Information gathered as a result of a different inquiry or for a different reason is not protected.” Id. at *6. The Court noted the investigative file contained measurements and photographs of the accident scene, blood alcohol test results, and other information. The Court found that “...blood alcohol tests are not conducted during routine police action. Instead, they are only performed if there is reason to believe that a driver was operating a motor vehicle under the influence of alcohol and / or drugs. In other words, blood test results are the consequence of investigation into criminal activity. Hence, we conclude that the trial court erred in denying DA’s Office’s motions to quash with respect to the portions of the subpoenas seeking blood test results.” Id. at *6. The Court noted there was insufficient information to determine whether the balance of the information in the file was collected as part of a typical accident investigation, or as part of an investigation into possible criminal activity. The extensive investigation in this case resulting in the requested reports far exceeds that of a routine accident investigation and would not have been created but for the possibility of criminal wrongdoing. For additional

information, please see the affidavit of Chief David Obzud, attached hereto as Exhibit "F".

3. The requested information contains personal identification information which is exempt from release.

Section 708(b)(6) exempts from access certain personal identification information, including Social Security numbers, driver's license numbers, home, cellular and personal telephone numbers and marital status. 65 P.S. § 67.708(b)(6)(i). The requested investigation materials all contain this information. For additional information, please see the affidavit of Chief David Obzud, attached hereto as Exhibit "F". The Requester should be denied access to this information.

Please let me know if you require any additional information in this appeal. Thank you for your consideration of this matter.

March 8, 2019 Response of the Respondent, 2-9 (footnotes in original).

On May 10, 2019, the Requester filed a Response in Support of the Right to Know Law Appeal, which stated:

Following up on your correspondence of April 26, 2019 - and in further support of my request for the investigative materials relating to the January 2, 2019 automobile accident involving Vasilios Papatolis and Aidan Heron - I wish to advise you that the insurance carrier for Mr. Papatolis, the driver in this auto/pedestrian collision, now has also requested the accident investigation report and associated reconstruction report of the Easttown Township Police Department (see attached). Given that the family of Mr. Heron, who was killed in this tragic accident, and the insurance carrier for the potentially negligent driver in the accident have now both requested the police department's investigative materials, we believe it is incumbent on the department to release those materials to both parties.

Please feel free to call me if you have any questions.

May 10, 2019 Response of Requester. On April 26, 2019, the Requester in Support of the Right to Know Law Appeal, stated:

I represent the family of Aidan Heron in connection with a January 2, 2019 automobile accident in which Mr. Heron was killed when he was struck by an automobile driven by Vasilios Papatolis. The accident occurred on Darby Paoli Road in Easttown Township and was investigated by the Easttown Township Police Department (the responding Agency).

By Right-to-Know request dated April 16, 2019, I requested that the Police Department provide me with its accident investigation report, including the results of an accident reconstruction that was completed as part of the investigation. It is believed that the accident reconstruction report was created by Officer Ted Cam of the Westtown-East Goshen Regional Police Department. By correspondence dated April 18, 2019, the Police Department denied my request, indicating that these materials were generated as part of a criminal investigation and were therefore exempt from production under 65 P.S. 67.708(b)(16).

It is my understanding that the Police Department has now completed its investigation of the accident and that criminal charges are not contemplated against Mr. Papatolis. To the extent that the materials I requested are not related to an active criminal investigation - and are rather part of the Department's routine investigation of a traffic accident -- the materials are not subject to protection under 65 P.S. 67.708(b)(16). See In re Subpoenas in Case of Mielcarz v. Pietzsch, 2018 WL 3113916 (Pa. Super. Ct. June 22, 2018).

As such, I ask that I be provided with any and all portions of the investigation report (including the accident reconstruction results) that do not relate to - the Department's criminal investigation of Mr. Papatolis' role in the accident.

April 26, 2019 Response of the Requester.

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 Easttown 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 May 13, 2019, the Respondent submitted a response, which included an affidavit from David Obzud, Chief of Police of Easttown Township Police Department. The Affidavit stated the following:

1. I am the Chief of Police for Easttown Township (the “Township”).
2. I am the Open Records Officer for the Township’s Police Department (“Department”).

3. On April 16, 2019, I received a Right-to-Know Law request from A. Roy DeCaro (“Requester”) seeking a “[a] complete copy of the investigation report of the Easttown Township Police Department in connection with the January 2, 2019 automobile accident involving Vasilios Papatolis (driver) and Aidan Heron (pedestrian) on Darby Paoli Road in Easttown Township. Such report shall include the accident reconstruction report made in relation to the accident.” (the “Request”).
4. The Request was made by Requester, but on behalf of a client.
5. On April 18, 2018, I issued a partial denial to the Request (“Response”).
6. As part of the Response, the Requester was provided with police blotter information pertinent to the Request.
7. On January 23, 2019 the Police Crash Report was uploaded on the electronic system, which is accessible to the Requester (“Crash Report”).
8. A criminal investigation of the January 2, 2019 incident was conducted by the Department (“Investigation”).
9. The reason for the partial denial was, that the requested records were protected from release as a record relating to or resulting in a criminal investigation and also under the Commonwealth’s Criminal History Record Information Act.
10. The Requester sought an investigation report, including the accident reconstruction report.
11. The Department’s incident reports are investigative reports.
12. The incident report at issue was assembled as a result of the performance of the Investigation.

13. As of the date of the Request the status of the report was “Further Investigation.”

14. The investigation report contains witness information, notes by the responding officer, summaries of statements from witnesses, information regarding investigative tasks that have been carried out, observations and impressions related to the Investigation, references to and list of evidence obtained, investigation actions taken and the results thereof, research by the officers, directives and next steps for the Investigation, and the accident reconstruction report.

15. The release of the report would obviously reveal the institution, progress or result of such an Investigation.

16. The report contains information related to the victim, including his personal information and medical status.

17. Social security numbers, home addresses, driver’s license numbers, and personal telephone numbers are contained in the investigative report.

18. The scope of the investigation report exceeds that of a routine traffic investigation and related report.

19. A routine traffic investigation and related report would be limited to the information required by law to be included in the Crash Report.

20. Typically, an accident reconstruction would not occur as of a routine traffic investigation and Crash Report.

21. The reason the requested records exceed that of a routine traffic investigation and related report is because it was believed upon arrival at the scene, given severity of the incident and the status of the victim, that a possible crime may have occurred.

22. As such, the investigation was treated as the investigation of possible criminal activity from the outset of the investigation.

23. In particular, as part of the investigation activities including but not limited to: blood, accelerometer, acceleration and deceleration, mannequin, vehicle, conspicuity and evidence testing, field sketching, scene mapping and measurements, skid mark measurements, photography and videography, traffic counts and studies, pedestrian throw calculations, vehicle mechanism inspections, inspection and testing of evidence obtained via search warrant, review of crash data recorder information, research regarding PennDot data, vehicle information, recalls, and night-time crashes, crash data recorder review, consultation with appropriate third parties, and SCAT team work, all occurred.

24. The investigation activities described herein would not have occurred as part of a routine traffic accident investigation.

25. The investigation activities described herein far exceed those that occur as a part of a routine traffic accident investigation.

26. The investigation activities described herein would only occur as part of an investigation into possible criminal activity.

27. The investigation activities and their results as described herein are detailed in the investigation and related accident reconstruction report.

28. The investigation activities and their results as described herein were used to create the investigation and related accident reconstruction report.

29. Both reports were created to document, assemble and report on the evidence of a possible crime.

30. As of the date of this affidavit the alleged perpetrator has been charged with careless driving-unintentional death under 75 P.S. 3714.

31. No plea has been entered by the alleged perpetrator.

32. A summary trial is scheduled for May 30, 2019.

33. Release of the requested record would hinder the ability to prosecute or convict the alleged perpetrator in this case.

34. The Department does not determine which charges the Chester County District Attorney's Office elects to file against an alleged perpetrator.

BY:
David Obzud
Chief of Police & Open Records Officer

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).

The RTKL provides that records of an agency relating to or resulting in a criminal investigation, such as investigative materials, notes, correspondence,

videos, reports, and records, may be withheld as exempt. 65 P.S. § 67.708(b), titled, “Exceptions for public records”, provides in part as follows:

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

...

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

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

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

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

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

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

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

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

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

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

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

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

This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b) (relating to accident prevention investigations).

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

(i) Complaints submitted to an agency.

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

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

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

(v) Work papers underlying an audit.

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

(A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine

or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

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

(C) Constitute an unwarranted invasion of privacy.

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

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

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

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

65 P.S. § 67.708(b).

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

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

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

In Pennsylvania State Police v. Office of Open Records, 5 A.3d 473 (Pa. Cmwlth. 2010), the *en banc* Commonwealth Court found an incident report exempt from disclosure pursuant to 65 P.S. § 67.708(b)(16). The Court held that the incident report was not a public record because the incident report was not the equivalent of a police blotter under the RTKL and the Criminal History Records Information Act (“CHRIA”).

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, as follows:

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.”

The RTKL provides, “the burden of proving that a record of a Commonwealth agency ... is exempt from public access shall be on the Commonwealth Agency ... receiving a request by the preponderance of the evidence.” 65 P.S. § 67.708(a)(1). The RTKL specifically exempts from disclosure to a requester such as Grove any agency record “relating to or resulting in a criminal investigation,” including “investigative materials, notes, correspondence, videos and reports.” 65 P.S. § 67.708(b)(16)(ii). We interpret these exemptions in a manner that comports with the statute’s objective, “which is to empower citizens by affording them access to information concerning the activities of their government.” SWB Yankees LLC v. Wintermantel, 615 Pa. 640, 45 A.3d 1029, 1042 (2012).

Moreover, when the General Assembly replaced the Right to Know Act in 2009 with the current RTKL, it “significantly expanded public access to governmental records ... with the goal of promoting government transparency.” Levy, 65 A.3d at 368 “Consistent with the RTKL’s goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed.” Office of Governor v. Davis, 122 A.3d 1185, 1191 (Pa. Cmwlth. 2015), *citing* McGill, 83 A.3d at 479.

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 specifically 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. 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 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.

The Requester focuses primarily on the need for the requested documents and the reason for requesting the documents. An individual's need or reason for requesting documents, no matter how important or noble, are not relevant considerations in determining whether or not a document is a criminal investigative record. 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 (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).

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.

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

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

On appeal, Requestor first contends that the materials she is requesting are referred to as an "incident" report, not an "investigative" report, implying that those records fall outside of the investigative exemption. An incident report normally refers to a report filed by the responding officers, not the entire investigative file, although, here, it appears that the investigative report was filed at the incident report number. In any event, no matter what is contained in an incident report, incident reports are considered investigative materials and are covered by that exemption. Pennsylvania State Police v. Office of Open Records, 5 A.3d 473, 479 (Pa. Cmwlth. 2010), *appeal denied*, [621] Pa. [685], 76 A.3d 540 (2013).

Even if the requested records fall within the investigative exception, Requestor contends that she is entitled to those records because she has a special need for them because, as Mr. Rotkewicz's sister, she needs to know what her brother did to cause a PSP Trooper to shoot him and to investigate a possible PSP "cover up." While we are sympathetic to Requestor's desire to understand her brother's death, her status as his sister and her reasons for requesting the records do not render records that fall within the investigative exemption accessible. Under

the RTKL, whether the document is accessible is based only on whether a document is a public record, and, if so, whether it falls within an exemption that allows that it not be disclosed. The status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b). *See* 65 P.S. § 67.301(b) (stating that an agency “may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law.”).

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

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

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

A criminal investigative record is anything that contains information assembled as a result of the performance of any inquiry, formal or informal, into a

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

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

Thus, if a record, on its face, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(ii). *See* Coley v. Philadelphia Dist. Attorney's Office, 77 A.3d 694, 697 (Pa. Cmwlth. 2013); Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 (Pa. Cmwlth. 2010). ***Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed.*** Sullivan v. City of Pittsburgh, Dep't of Pub. Safety, 127 Pa. Cmwlth. 339, 561 A.2d 863, 865 (1989).

Also, a record is not considered a public record under Section 102 of the RTKL if it is "exempt under any other State or Federal Law," including the CHRIA. *See* Coley, 77 A.3d at 697. Section 9106(c)(4) of the CHRIA, 18 Pa.C.S. § 9106(c)(4), provides that "investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice

agency.” *The CHRIA defines “investigative information” as “information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.”* Section 9102 of the CHRIA, 18 Pa.C.S. § 9102.

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

Barros v. Martin at 1250 (emphasis added).

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

the Commonwealth Court stated in part:

Pursuant to Section 1101(a) of the RTKL, “[t]he appeal shall state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a). When a requester fails to state the records sought are public, or fails to address an agency’s grounds for denial, the OOR properly dismisses the appeal. *See Saunders v. Dep’t of Corr.*, 48 A. 3d 540 (Pa. Cmwlth. 2012) (affirming OOR dismissal); Dep’t of Corr. v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011) (holding an appeal that fails to sufficiently specify the reasons for appeal should be dismissed rather than addressed by OOR).

In Department of Corrections, we outlined the sufficiency requirements for an appeal under Section 1101(a) of the RTKL. At a minimum, a requester’s appeal “must address any grounds stated by the agency ... for denying the request.” Dep’t of Corr., 18 A.3d at 434. We reasoned a minimally sufficient

appeal is a condition precedent for OOR to consider a requester's challenge to an agency denial.

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

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

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

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

We make no decision regarding Requester's alleged entitlement to the records under an alternate legal mechanism. Entitlement

does not arise under the RTKL through which citizens have a right to access public records “open to the entire public at large.” *See, e.g., Coulter v. Pa. Bd. of Prob. & Parole*, 48 A.3d 516, 519 (Pa. Cmwlth. 2012) (“home plans” of parolee requester are not accessible to her under RTKL though she is subject of records; to be accessible under the RTKL, identity of the requester is irrelevant).

Padgett at 647-648 (footnote omitted).

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

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency’s response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9. [65 P.S. § 67.901 *et seq.*]

65 P.S. § 67.706.

In Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540 (Pa. Cmwlth. 2012), the Commonwealth Court stated in part:

Petitioner’s first argument addresses the sufficiency of the Department’s denial of his request. Petitioner contends that

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

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

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

Dept. of Health v. Office of Open Records, 4 A.3d 803 (Pa. Cmwlt. 2010).

Saunders at 542-543 (footnote omitted).

In Grove, both the Supreme and Commonwealth Courts discussed the purpose of MVRs. These Courts found that MVRs are created to document a trooper's performance of their duties in responding to emergencies and in their interactions with members of the public, not merely or primarily to document, assemble or report on evidence of a crime or possible crime. Consequently, MVRs are not *per se* criminal investigation information. However, when an MVR captures criminal investigative information that can part can be redacted. However, it is important to note that redaction is only appropriate where a public record subject to disclosure is involved. Nothing in the Grove decisions changes the discussion above that 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. *See* 65 P.S. § 67.706; Heavens v. Pennsylvania Department of Environmental Protection, 65 A.3d 1069, 1077 (Pa. Cmwlt. 2013); Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540, 543 (Pa. Cmwlt. 2012).

Under the RTKL, an affidavit may serve as sufficient evidence to support an appeals officer's decision. Based on the evidence provided, the Respondent has

met its burden of proof that the documents are criminal investigative records and exempt from disclosure.

The Right to Know Law is not a substitute for criminal or civil discovery. An individual's right to obtain documents in criminal or civil proceedings is not relevant under the Right to Know Law. Under the Right to Know Law it is only the classification of the document itself that is relevant. The requester's identity and motivation for making a request is not relevant, and the intended use for the information may not be grounds for granting or denying a request.

As stated by the Commonwealth Court: "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 v. Pennsylvania State Police*, 73 A.3d 644, 647–648 (Pa. Cmwlth. 2013).

CONCLUSION

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

This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may petition for review, to the Chester County Court of Common Pleas, pursuant to 65 P.S. § 67.1302(a). All parties must be served with a copy of the petition for review. The Chester County District Attorney's Office shall also be served with a copy of the petition for review, pursuant to 65 P.S. § 67.1303(a), for the purpose of transmitting the record to the reviewing court. *See East Stroudsburg University Foundation v. Office of Open Records*, 995 A.2d 496, 507 (Pa. Cmwlth. 2010).

FINAL DETERMINATION ISSUED AND MAILED ON: June 20, 2019

APPEALS OFFICER:

Nicholas J. Casenta, Jr.

Nicholas J. Casenta, Jr., Esquire
Attorney I.D. No. 43844
Chief Deputy District Attorney
District Attorney's Office
Chester County Justice Center
201 West Market Street, P.O. Box 2746
West Chester, PA 19380-0989
(610) 344-6801

FINAL DETERMINATION EMAILED AND MAILED TO:

A. Roy DeCaro, Esquire
Raynes Lawn Hehmeyer
1845 Walnut Street, 20th Floor
Philadelphia, PA 19103
(215) 988-0618
ardecaro@rayneslaw.com

David Obzud, Open Records Officer
Easttown Township Police Department
566 Beaumont Road
Devon, PA 19333
(610) 341-9780
dobzud@easttown.org

Amanda J. Sundquist, Esquire
Unruh Turner Burke & Frees
P.O. Box 515
West Chester, PA 19381-0515
(610) 692-1371
asundquist@utbf.com

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Appeals Officer for DA’s Office of Chester County

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