



**DISTRICT ATTORNEY'S OFFICE OF CHESTER COUNTY**  
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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
RONALD ECKERT,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
EASTTOWN TOWNSHIP	:	
POLICE DEPARTMENT,	:	DA-RTKL-A NO. 2020-006
Respondent	:	

**INTRODUCTION**

On March 18, 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 23, 2020, the request was denied. On April 5, 2020, Requester appealed to the Chester County District Attorney's Office, which was received on April 13, 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 18, 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: “Any and all police records submitted by JoAnne ... in reference to communication to/from Ronald Eckert or Allison Payne.”

On March 23, 2020, the request was denied. The Respondent stated in part: “Thank you for writing to us with your request for information pursuant to the Pennsylvania Right-To-Know Law. On March 18, 2020, this office received your information request seeking ‘any and all police records submitted by JoAnne Pepitone ... in reference to communication to/from Ronald Eckert or Allison Payne.’ Your request is denied. The Department is not in possession of any records submitted by JoAnne Pepitone. 65 P.S. 67.705.”

On April 5, 2020, Requester appealed to the Chester County District Attorney’s Office, which was received on April 13, 2020, and stated the following:

This letter serves as a formal appeal to a Right-To-Know request submitted by me, Ronald Eckert, to Easttown Township on 3/18/2020.

In the aforementioned Right-To-Know request, I applied for any and all police records initiated by Jo Anne Pepitone in reference to communication to/from Ronald Eckert or Allison Payne on or about 3/14/2020 (request is attached). On 3/23/2020, I received a reply from David Obzud, Chief of Police for Easttown Township. My request was denied on the

basis of the department not being “in possession of any records submitted by JoAnne Pepitone.” (response is also attached).

It should be noted that on 3/17/2020, I was informed by my employer (Lower Merion Township) that a police report was filed by Jo Anne Pepitone on 3/14/2020 in reference to communication between the aforementioned parties. This information was personally transmitted from Ms. Pepitone to members of Lower Merion Township. Additionally, on 3/18/2020, I spoke with Officer Derek Klinger of Easttown Township Police and was informed that a police report was initiated by Ms. Pepitone on 3/14/2020 and assigned the UCR Code “Matter of Record” in their ALERT reporting system. This incident was reportedly in reference to communication between Jo Anne Pepitone and myself.

Due to the above information, I am respectfully requesting that this Right-To-Know request be re-examined through this process.

April 5, 2020 Appeal Letter of Requester.

On April 13, 2020, this Appeals Officer for the Chester County District Attorney’s Office gave Notice to the parties of the following:

On March 18, 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 23, 2020, the request was denied. On April 5, 2020, Requester appealed to the Chester County District Attorney’s Office, which was received on April 13, 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 13, 2020, which is May 13, 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 24, 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 May 1, 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 13, 2020 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr., Appeals Officer.

On April 24 2020, Respondent submitted a response. On May 1, 2020, Requester submitted a response.

### **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 April 24, 2020, the Respondent sent a response which stated in part:

I am an attorney with Unruh, Turner, Burke & Frees, P.C., which is the duly appointed solicitor for the Township of Easttown (“Township”) Police Department (“Department”). I am responding to the request for information set forth in your letter of April 13, 2020.

## **A. BACKGROUND**

On March 18, 2020, the Department received a records request pursuant to the Right-to-Know Law (“RTKL”) from Ronald Eckert (“Requester”). The request (“Request”) was for “Any and all police records submitted by JoAnne Pepitone (46 Eastwood Rd, Berwyn PA) in reference to communication to/from Ronald Eckert or Allison Payne.” *See* Exhibit “A”. The Request was denied on March 23, 2020 (“Response”). *See* Exhibit “B”.

The Requester appealed the Response to the Chester County District Attorney’s Office (“CCDAO”) on April 13, 2020. *See* Exhibit “C”. On April 13, 2020, CCDAO directed that the Department should submit its response to Requester’s appeal, if any, on or before April 24, 2020. *See* Exhibit “D”. This letter shall serve as the Department’s response to Requester’s appeal. The Department reserves the right to respond to any new reasons for appeal raised in the Requester’s response to the CCDAO.

The Affidavit of Chief David Obzud is attached hereto as Exhibit “E” in support of the averments in the Department’s response herein.

## **B. RESPONSE TO REQUESTER’S ARGUMENTS**

1. The Department does not possess records responsive to the Request.

The Request sought: “Any and all police records submitted by JoAnne Pepitone (46 Eastwood Rd, Berwyn PA) in reference to communication to/from Ronald Eckert or Allison Payne.” (emphasis added). The Department does not possess any

records submitted by Ms. Pepitone, and therefore has nothing to produce in response to the Request.

On or about March 13, 2020, the Department had communications with Ms. Pepitone. No records were submitted by Ms. Pepitone regarding the Requester or Ms. Payne to the Department. The Department cannot produce records that do not exist nor is it required to create a record that does not exist. 65 P.S. § 67.705. As a result, this appeal must be denied.<sup>1</sup> [<sup>1</sup> **There was also a March 18, 2020 incident involving the Requester, Ms. Pepitone and Ms. Payne. No records were submitted by Ms. Pepitone to the Department as part of that matter.**]

2. The Requester is not permitted to modify his Request on appeal.

On appeal, the Requester has modified his Request. Rather than seeking records submitted by Ms. Pepitone to the Department, he now seeks a March 13, 2020<sup>2</sup> [<sup>2</sup> **The Requester references a March 14, 2020 report. No such report exists, but there is a March 13, 2020 incident report.**] Incident Report, an entirely different record. The RTKL does not permit a requester to revise his request upon appeal.

In Pennsylvania State Police v. Office of Open Records, 995 A.3d 515 (Pa. Commw. 2010), the Commonwealth Court addressed a case where a requester made an insufficiently specific request which was denied, and on appeal then revised his request to seek a very specific item. The Court stated:

Section 901 deals with the process the agency must go through to determine how to respond to a request for a record. It provides that an agency must make a good faith effort to determine the type of record requested and then to respond as promptly as possible to the request. Section 903 provides that if an agency denies access to a record, it must give “[t]he specific reasons for the denial.” Section 1101 provides, “The appeal [to the OOR] shall state the grounds upon which the requester asserts that the record is

a public record, legislative record or financial record and shall address any grounds stated by the agency for delaying or denying the request.”

Under these provisions, the requestor tells the agency what records he wants, and the agency responds by either giving the records or denying the request by providing specific reasons why the request has been denied. The requestor can then take an appeal to the OOR where it is given to a hearing officer for a determination. Nowhere in this process has the General Assembly provided that the OOR can refashion the request.

Id. at 516 (emphasis added).

Here the Requester attempts to do the same thing. In the Request he sought “records submitted ... by JoAnne Pepitone...”. The Department in good faith searched for records submitted by Ms. Pepitone and finding none, issued a denial. Allowing the Requester to now refashion his request to seek a different item, an incident report, on appeal, is inconsistent with the RTKL and must not be permitted. He is seeking an entirely new document on Appeal than he sought in his original Request. As the CCDAO’s review of the Appeal is limited to the Request as written, the modification of the Request on appeal should not be considered as part of its determination. *See In re James Schneller*, 2016 WL 1407898 (Pa. Off. Open. Rec. 2016). As a result, the Appeal must be denied.

3. Even if the Requester is permitted to refashion his Request on appeal, the Request, as modified, must still be denied.

Assuming *arguendo* the Requester is permitted to modify his Request on appeal, it appears he is seeking a March 13, 2020 incident report (“Incident Report”).

a. Incident reports are exempt from release.

Assuming arguendo the Requester is permitted to modify his Request on appeal, he appears to be seeking the Incident Report. Section 708(b)(16)(ii) states that investigative reports are exempt from access. *See* 65 P.S. § 67.708(b)(16)(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, and therefore, the Request, as modified, must be denied.

Even though the Requester is not permitted to modify his Request on appeal, as a courtesy, the Department has included a copy of the police blotter information for the Incident Report as part of this response. *See* Exhibit "F".

b. Complaints of potential criminal conduct.

Section 708(b)(16)(i) states that complaints of potential criminal conduct are exempt from release. 65 P.S. § 67.708(b)(16)(vi)(A). The Incident Report contained a complaint of potential criminal conduct, and therefore, the Request, as modified, must be denied.

c. Victim information, including any information that would jeopardize the safety of the victim.

Section 708(b)(16)(v) states that victim information, including any information that would jeopardize the safety of the victim, is exempt from release. 65 P.S. § 67.708(b)(16)(v). The Incident Report contains victim information, and therefore, the Request, as modified must be denied.

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 Incident Report would reveal the progress or result of this investigation and, therefore, the Request, as modified, must be denied.

4. The Incident Report cannot be released in accordance with the 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, investigative 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. Investigative 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.A. § 9106(c)(4) (emphasis added). While the Requester references his employer, Lower Merion Township, in his appeal, there is no indication he is making the Request, as modified, in conjunction with his job duties. The Township has not received an official request from Lower Merion Township for the Incident Report as of the date of this response.

The information sought by the Requester in his modified Request is investigative information under CHRIA and is therefore not a public record under the RTKL and not subject to access.

5. Even if this appeal is not dismissed, 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, home addresses, home addresses of law enforcement officials, driver's license numbers, marital status, email addresses and telephone numbers. 65 P.S. § 67.708(b)(6). The requested investigation material contains this information, and therefore, assuming arguendo, the Appeal is granted, 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.

Very truly yours,  
Amanda J. Sundquist

April 24, 2020 Response of Respondent, at 1-7.

The Respondent's response included an affidavit from Chief David Obzud, of the Easttown Township Police Department. The affidavit stated:

I, David Obzud, being duly sworn according to law depose and state as follows:

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 March 18, 2020, I received a Right-to-Know Law request from Ronald Eckert ("Requester") seeking "Any and all police records submitted by JoAnne Pepitone (46 Eastwood Rd, Berwyn PA) in reference to communication to/from Ronald Eckert or Allison Payne." (the "Request").
4. The Department's files were searched for any records submitted by Ms. Pepitone regarding communications to or from the Requester or Ms. Payne.
5. On or about March 13, 2020, the Department was dispatched regarding an incident involving the Requester.
6. JoAnne Pepitone did not submit records to the Department as part of the Department's investigation of the incident referenced in Para. 5.
7. On or about March 18, 2020, the Department was dispatched regarding an incident involving the Requester.
8. Ms. Pepitone did not submit records to the Department as part of the Department's investigation of the incident reference in Para. 7.
9. To the best of my information and belief the Department does not possess records submitted by Ms. Pepitone in reference to communications to or from the Requestor or Ms. Payne.
10. On March 23, 2020, I issued a denial to the Request ("Response").
11. The reasons for denial in the Response was responsive records did not exist.
12. When processing the Request I did not believe the Requester was seeking an incident report.
13. There is no March 14, 2020 incident report as referenced in the Requester's appeal.

14. There is a March 13, 2020 incident report ("Incident Report").
15. The Incident Report is an investigative report of the Department's dispatch in response to an alleged criminal incident
16. The Department's incident reports are investigative reports.
17. The Incident Report was assembled as a result of the performance of an inquiry into an allegation of criminal wrongdoing.
18. The Incident Report contains witness and alleged victim information, notes by the responding officer, summaries of statements from the witness/alleged victim information, observations and impressions related to the investigation, and directives and next steps for the witness/alleged victim.
19. The release of the Incident Report would obviously reveal the institution, progress or result of such an investigation.
20. The Incident Report contains information related to an alleged victim, including her personal information.
21. The Incident Report contains a complaint of alleged criminal conduct.
22. While the Requester references his employment with Lower Merion Township in his Appeal, there is no indication in either the Request or the Appeal that he is requesting the Incident Report on behalf of Lower Merion Township in connection with his job duties.
23. To date I have not received an official request from Lower Merion Township seeking the Incident Report in connection with its duties, based upon a name, fingerprints,

modus operandi, genetic typing, voice print or other identifying characteristics.

24. Social security numbers, home addresses, home addresses of law enforcement officials, driver's license numbers, marital status, email addresses, and telephone numbers are contained in the Incident Report.

I verify that the facts set forth in this affidavit are true and correct to the best of my information, knowledge and belief. aaI understand that the facts verified are subject to the penalties in Unsworn Falsification to Authorities (18 Pa.C.S.A. § 4904).

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). 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.<sup>1</sup>

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<sup>1</sup> 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

- Footnote continued -

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

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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.].

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.

On May 1, 2020, the Requester sent a response which stated:

In accordance with your instructions dated April 13, 2020, I have included the following information addressing the public nature of the record sought and grounds stated by the agency for denying my request.

#### Right-To-Know Request

On 3/18/2020, a Right-To-Know Request was filed for "any and all police records submitted by Jo Anne Pepitone (46 Eastwood Road, Berwyn PA) in reference to communication to/from Ronald Eckert or Allison Payne." In both Chief Obzud's denial for the request and the subsequent response from Ms. Sundquist (the Respondent), it is referenced that the Easttown Township Police Department is not in possession of any records submitted by Ms. Pepitone. The underlining of the words "submitted by" indicates that the denial was due to the use of this phrase in my original request.

However, said denial is relying on a narrow definition of "submit," one that appears to refer to an official document physically given to Easttown Township Police by Ms. Pepitone. By contrast, my request is using the broader meaning, in which the word "submit" describes the action of presenting information to another body. Any and all communication presented to a police officer would, therefore, be a "submission." Thus, the denial of my request on the grounds of not possessing any records "submitted by" Ms. Pepitone would be in error, as it relies on a very specific and narrow definition of the word "submit."

#### Issue of Public Record

As defined by the Right-To-Know Law, a public record is “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.”

As listed in Section 708(a)(1), the burden of proof that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request. In Chief Obzud’s denial of my original Right-To-Know request, this burden was not met. At no point did Chief Obzud specify that the request in question was exempt from public record, but merely stated that “the Department [was] not in possession of any records submitted by JoAnne [sic] Pepitone.”

That withstanding, numerous arguments were subsequently made by the Respondent on appeal and are in reference to the request falling under one of the public records exemptions under Section 708. As I describe below, the Respondent’s arguments are not valid.

As noted in my letter of appeal dated April 5, 2020, I was originally informed of the police report submitted by Ms. Pepitone by my employer, the Lower Merion Township Police Department (specifically, Lieutenant Peter Sharpe). During that discussion, I was informed that the police report was in reference to the dissolution of my relationship with Ms. Pepitone and communication that occurred between myself, my wife (Allison Payne), and Ms. Pepitone. This was reportedly an “information only” report that was initiated by Ms. Pepitone, with no conduct being deemed criminal (neither actual nor potential).

On March 18, 2020, I contacted the Easttown Township Police Department in reference to harassment committed by Ms. Pepitone. During my discussion with Officer Derek Klinger, he informed me that a police report was filed by Ms. Pepitone and assigned the UCR Code “Matter of Record” in their ALERT

reporting system. Officer Klinger further informed me that this report discussed the dissolution of my relationship with Ms. Pepitone and communication between parties (Eckert, Payne, Pepitone). He noted that the report was civil in nature and that he would advise me of the same remedy that was offered Ms. Pepitone - to pursue to matter civilly and seek a Protection From Abuse (PFA) order.

In her writings, the Respondent alleges “potential criminal conduct” and references a “criminal investigation.” This is in stark contrast to my two previous discussions surrounding the report submitted by Ms. Pepitone: I was never informed that this situation involved conduct that was criminal. Indeed, I was specifically told it was civil in nature. Additionally, if there had been a criminal incident (either actual or potential) with an identifiable victim (i.e., Ms. Pepitone), the investigating officer would have taken records submitted by Ms. Pepitone (in the form of communication) for investigative purposes. However, Chief Obzud has already stated that he was not in possession of any such materials submitted by Ms. Pepitone. It should also be noted that the ALERT reporting system used by the Easttown Township Police Department differentiates reports by their designated Uniform Crime Report (UCR) Codes, with separate codes for incidents that are criminal (i.e. harassment) versus civil (i.e. matter of record). It appears as though this particular incident was coded accordingly as civil.

Finally, to date, it does not appear that any investigation was conducted by the Easttown Township Police Department in reference to actual or potential criminal conduct stemming from the March 13th, 2020 report submitted by Ms. Pepitone. In my only contact with a representative of the Easttown Township Police Department (Officer Derek Klinger), the aforementioned report submitted by Ms. Pepitone was only a “matter of record” and civil in nature. As such, it does not appear that the Respondent’s arguments fulfill the exemptions listed under Section 708 of the Right-To-Know law.

Respectfully, I request a copy of the report submitted (meaning filed, completed, or provided in this request) by Ms. Pepitone from March 13, 2020.

I verify that the facts set forth in this affidavit are true and correct to the best of my information, knowledge and belief. I understand that the facts verified are subject to the penalties in Unsworn Falsification to Authorities (18 PA C.S.A. § 4904).

Thank you for your consideration in this matter.

Sincerely,  
Ronald Eckert

May 1, 2020 Response of Requester.

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. 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,<sup>2</sup> 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.

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<sup>2</sup> 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.

Dep't of Corr., OOR Dkt. No. AP 2009–0997, 2009 PA OORD LEXIS 725 (Pa. OOR 2009) (stating the only information available under the RTKL is a “public record” available to all citizens regardless of personal status or stake in requested information).

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

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

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

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

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

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

Finally Requestor contends that the PSP Trooper who investigated the incident assured her that she would receive that information. Even assuming that the assertion is true, an

individual State Trooper does not have the authority to authorize the release of documents or make PSP RTKL determinations pursuant to Section 1102, 65 P.S. § 67.1102.

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

A criminal investigative record is anything that contains information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing. 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).

Both parties have advanced arguments concerning the wording of the Requester's initial request for, "[a]ny and all police records submitted by JoAnne ... in reference to communication to/from Ronald Eckert or Allison Payne", and the Respondent's response to this request. The Respondent argues in part that the Requester is now changing what he initially requested and should not be able to do so on appeal. The Requester argues in part that this request was clear and that the Respondent should be limited to their initial response.

Under the RTKL, a requester submits a request that "tells the agency what records he wants, and the agency responds by either giving the records or denying the request by providing specific reasons why the request has been denied." Pa.

State Police v. Office of Open Records, 995 A.2d 515, 516 (Pa. Cmwlth. 2010).

The request must “identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” 65 P.S. § 67.703. “An open-ended request that gives an agency little guidance regarding what to look for may be so burdensome that it will be considered overly broad.”

Montgomery Cnty. v. Iverson, 50 A.3d 281, 283 (Pa. Cmwlth. 2012) (en banc).

While the Office of Open Records cannot refashion a request, if from the context of the request the agency can reasonably discern that a request is specific, the Office of Open Records can find the request sufficiently specific. Pa. State Police v. Office of Open Records, 995 A.2d 515, 516 (Pa. Cmwlth. 2010).

The Supreme Court has also 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). As the Requester has now been more specific as to the nature of his request, and has argued his position, and the Respondent can and has asserted their position and argument with respect to this more specific request, I shall decide this appeal based on the submissions to this Appeal’s Officer.

COURTNEY

**The Respondent’s position is summarized as follows from the Respondent’s response:** On March 13, 2020, the Easttown Police Department

was dispatched regarding an incident involving the Requester. There is a March 13, 2020 Incident Report. The Incident Report is an investigative report in response to an alleged criminal incident. The Incident Report was assembled as a result of the performance of an inquiry into an allegation of criminal wrong doing. The Incident Report contains witness and alleged victim information, notes by the responding officer, summaries of statements from the witness/alleged victim information, observations and impressions related to the investigation, and directives and next steps for the witness/alleged victim. The Incident Report contains information related to an alleged victim, including her personal information. The Incident Report contains a complaint of alleged criminal conduct. Social security numbers, home addresses, home addresses of law enforcement officials, driver's license numbers, marital status, email addresses, and telephone numbers are contained in the Incident Report.

**Requester's position is summarized as follows from the Requester's response:** Requester was informed of the police report by his employer. Requester was informed that the police report was in reference to the dissolution of his relationship with Ms. Pepitone and communication that occurred between Requester, his wife, and Ms. Pepitone. The report that was initiated by Ms. Pepitone, with no conduct being deemed criminal (neither actual nor potential). Requester contacted the Easttown Township Police Department in reference to

alleged harassment committed by Ms. Pepitone, and was informed that a police report was filed by Ms. Pepitone and assigned the UCR Code “Matter of Record” in their ALERT reporting system, and that the report was civil in nature, and that Requester was advised of the same remedy that was offered Ms. Pepitone; to pursue to matter civilly and seek a Protection From Abuse (PFA) order. Requester was never informed that this situation involved conduct that was criminal, and was told it was civil in nature.

It appears that there was an incident involving the Requester and a Ms. Pepitone. There was police involvement with the incident resulting in an Incident Report detailing the police response and involvement. The Requester argues that the incident was civil in nature pursuant to the Protection From Abuse (PFA) Act. However, the ultimate result of an investigation does not determine whether or not the reports of the investigation are criminal investigative records. It is the nature of the investigation that is determinative.

There is a considerable overlap between the PFA Act and criminal statutes and proceedings. The definition of “abuse” under the PFA Act clearly implicates multiple potential crimes. 23 Pa.C.S.A. § 6102, titled, “Definitions”, of the Protection from Abuse Act, states the following:

**“Abuse.”** The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:

(1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon.

(2) Placing another in reasonable fear of imminent serious bodily injury.

(3) The infliction of false imprisonment pursuant to 18 Pa.C.S. § 2903 (relating to false imprisonment).

(4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).

(5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

23 Pa.C.S.A. § 6102.

As the above definition of “abuse” demonstrates conduct that implicates the PFA Act also implicates the Crimes Code. Consequently, an investigation that implicates the PFA Act also implicates the Crimes Code.<sup>3</sup> Depending on the facts

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<sup>3</sup> To further demonstrate that there is a considerable overlap between the PFA Act and criminal statutes and proceedings, Protection from Abuse proceedings can give rise to double jeopardy issues. *See Commonwealth v. Yerby*, 544 Pa. 578, 679 A.2d 217, 218 (1996) (no double jeopardy bar to prosecution for making terroristic threats because neither the Protection from Abuse contempt order nor the transcript of the proceeding revealed precise basis for court's contempt finding); *Commonwealth v. Jackson*, 10 A.3d 341 (Pa. Super. 2010) (double jeopardy

- Footnote continued -

and circumstances of an investigation, there are (4) potential police responses: (1) take no action; (2) take action pursuant to the PFA Act; (3) take action pursuant to the Crimes Code; (4) take action pursuant to both the PFA Act and Crimes Code.

None of these (4) outcomes would change the character of the investigation or records. It is the records themselves that determine their character. 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.

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barred prosecution for criminal trespass but not for burglary or simple assault after a finding of indirect criminal contempt); Leonard v. Smith, 454 Pa. Super. 51, 684 A.2d 622 (1996) (Protection from Abuse order did not include the elements of the offenses for which the defendant was convicted in the criminal proceeding); Commonwealth v. Decker, 445 Pa. Super. 101, 664 A.2d 1028 (1995) (under facts of the case simple assault is a lesser-included offense of indirect criminal contempt); Commonwealth v. Majeed, 548 Pa. 48, 55, 694 A.2d 336, 339 (1997) (purpose of the Protection from Abuse is to prevent domestic violence and, concomitantly, to promote the security of the home).

The affidavit of the Respondent has set forth sufficient facts to establish that the requests records are criminal investigative record. Under the RTKL, an affidavit may serve as sufficient evidence to support an appeals officer's decision. Office of Governor v. Davis, 122 A.3d 1185, 1194 (Pa.Cmwlth. 2015); Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). 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).

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.

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 release of the requested documents also violates CHRIA. CHRIA prohibits “investigative information” “assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident” from disclosure. 18 Pa.C.S.A. § 9102. Pennsylvania State Police v. Kim, 150 A.3d 155, 160 (Pa.Cmwlth. 2016).

There is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure. The Respondent has met its burden of proving, by a preponderance of the evidence, that the documents requested are exempt from public access.

## 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 10, 2020**

APPEALS OFFICER:

*Nicholas J. Casenta, Jr.*

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## **INDEX OF APPENDICES**

**APPENDIX “A”** Appeal Documents.

**APPENDIX “B”** April 13, 2020 Letter - CDDA Nicholas J. Casenta, Jr., Esquire  
Appeals Officer for DA’s Office of Chester County

**APPENDIX “C”** April 24, 2020 Response of Respondent.

**APPENDIX “D”** May 1, 2020 Response of Respondent.