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R. SETH WILLIAMS
District Attorney

December 30, 2016

By post (Mr. Fennell) & electronic mail (Mr. Cohen)

Mr. Robert Fennell
Inmate No. GWO-392
SCI-Smithfield
P.O. Box 999
1120 Pike Street
Huntingdon, PA 16652

Jeffrey Cohen, Esq.
Assistant City Solicitor
Law Department
One Parkway Building
1515 Arch Street
Philadelphia, PA 19102

Re: OOR Forward of Fennell Appeal from the Philadelphia Police Department's Denial of RTKL Request

Dear Mr. Fennell and Mr. Cohen:

This letter constitutes the final determination of the Appeals Officer for the Philadelphia District Attorney's Office concerning Mr. Fennell's appeal from the denial by the Philadelphia Police Department of his request for public records under Pennsylvania's Right-to-Know Law, which was forwarded from the Office of Open Records following its dismissal for lack of jurisdiction. For the reasons set forth below, the appeal is dismissed.

BACKGROUND

On November 14, 2016, the Philadelphia Police Department (PPD) received a request under the Right-to-Know Law (the RTKL), 65 P.S. §§ 67.101-67.3104, dated November 14, 2016, from Mr. Robert Fennell (the Requestor). The Requestor sought a "copy of the search warrant and affidavit for such warrant with the number 152647 and if it does not exist please send me an affidavit stating that it does not exist so I do not have to file an appeal."

On November 21, 2016, the PPD sent its response, denying the request. As the basis for its denial, the PPD asserted the criminal investigative records exemption found in Section 708(b)(16) of the RTKL. The PPD explicitly informed the Requester that any appeal from its decision based on the criminal investigative records exemption should be filed with the Appeals Officer for the Philadelphia District Attorney's Office no later than fifteen business days from the mailing date of its response.

Notwithstanding those instructions, on or about December 20, 2016, the Requester filed an appeal with the Pennsylvania Office of Open Records (OOR). On December 21, 2016, the OOR

issued a final determination, concluding that the Requester's appeal related to criminal investigative records and that the OOR therefore did not have jurisdiction to hear the appeal. *Fennell v. Philadelphia Police Dept.*, OOR Docket No. AP 2016-2053. The OOR also forwarded the appeal to the Appeals Officer for the Philadelphia District Attorney's Office. The undersigned Appeals Officer for the Philadelphia District Attorney's Office received the forwarded materials on December 21, 2016.¹

LEGAL ANALYSIS

The RTKL grants the Appeals Officer for the Philadelphia District Attorney's Office (DAO Appeals Officer) exclusive jurisdiction to hear and decide appeals from denials based on the criminal investigative record exemption to the RTKL. 65 P.S. §§ 503(d)(2), 1101(a)(1); *see Barros v. Martin*, 92 A.3d 1243, 1246 (Pa. Commw. 2014) (explaining that where "the appeal . . . relates to access to criminal investigative records, the appeal is heard by an appeals officer designated by the District Attorney and not OOR"). Such appeals must be filed "within 15 business days of the mailing date of the agency's response." 65 P.S. § 67.1101(a)(1).

The Requester's forwarded appeal is unquestionably untimely. The Requester was required to file his appeal with the DAO Appeals Officer within fifteen business days of the mailing date of the PPD's response, i.e. by December 13, 2016.² Instead, he filed his appeal with the OOR on December 20, 2016. By the time the OOR forwarded the Requester's incorrectly filed appeal on December 21, 2016, the time for his appeal to the DAO Appeals Officer had already expired.³

There is no provision in the RTKL that permits transfers of appeals from the OOR.⁴ Although the OOR attempted to do the Requester a courtesy by forwarding his appeal to the DAO

¹ On December 23, 2016, the Appeals Officer received copies of the City's denial letter and the original request that the Requestor had mailed in an envelope postmarked December 16, 2016.

² This calculation excludes the Thanksgiving holiday on November 24, 2016.

³ Even if the Requestor had submitted the December 20, 2016 appeal to the DAO Appeals Officer instead of the OOR, the appeal still would have been filed past the December 13, 2016 deadline. Likewise, the copies of the City's denial letter and the original request that the Requestor mailed to the DAO Appeals Office on December 16, 2016, were submitted too late (even presuming that the submission constituted a proper appellate submission).

⁴ Moreover, the Judicial Code's provision concerning transfer of appeals does not apply here. Section 5103(a) of the Judicial Code governs transfers of appeals improperly filed in jurisdiction-lacking "court[s] or magisterial district[s] of this Commonwealth" or "tribunals." 42 Pa.C.S. § 5103. Under Section 5103(a), such appeals must be transferred to the proper tribunal and treated "as if originally filed in the transferee tribunal." Neither the OOR nor the DAO Appeals Officer is a "court," "magisterial district," or "tribunal," as those terms are defined in Section 5103(d). That is because RTKL matters are not traditionally identified with the judiciary or within the original jurisdiction of Pennsylvania courts. *See, e.g., Penn. State Police, Bureau of*

Appeals Officer, it was the Requester’s responsibility to direct his appeal correctly. *See Faulk v. Philadelphia Clerk of Courts*, 116 A.3d 1183, 1186 (Pa. Commw. 2015) (rejecting claim that OOR was required to transfer improperly filed appeal to correct appeals officer because RTKL “plac[es] the initial onus for compliance on a requester . . . includ[ing] properly directing the appeal to the designated appeals officer”).⁵

For the foregoing reasons, this appeal is dismissed. This final determination is binding on all parties. Within thirty days of the date of this letter, either party may appeal to the Philadelphia County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served notice of the appeal. The DAO Appeals Officer also shall be served notice and have an opportunity to respond in accordance with applicable court rules. *Id.* § 67.1303.

Sincerely,

/s/ Priya Travassos

Priya Travassos
Appeals Officer
Office of the District Attorney of Philadelphia

Liquor Control Enforcement v. Harry’s Holiday Park Lounge, Inc., 799 A.2d 878, 880-81 (Pa. Commw. 2002) (“To determine whether a ‘similar agency’ is a ‘tribunal’ as that term is used in Section 5103, the agency must be a commonwealth agency with statewide jurisdiction, and its jurisdiction must involve subjects traditionally identified with the judiciary.”). The DAO Appeals Officer additionally could not be a transferee “tribunal” because it lacks statewide jurisdiction. *E.g., Harry’s Holiday Park Lounge*, 799 A.2d at 880.

⁵ In any event, the records the Requestor sought plainly are records “relating to or resulting in a criminal investigation,” and are explicitly exempt from disclosure under the RTKL. 65 P.S. § 67.708(b)(16); *see, e.g., Commonwealth v. Mines*, 680 A.2d 1227, 1229 (Pa. Commw. 1996) (“[I]nformation relating to police investigations . . . , i.e., statements, affidavits, warrants, various reports, composite-sketches and photographs, is excluded from the definition of public records . . .”).