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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
WILLY FIALLO, SR.,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
	:	
WESTTOWN-EAST GOSHEN	:	DA-RTKL-A NO. 2020-002
REGIONAL PD,	:	
Respondent	:	
	:	

INTRODUCTION

On November 25, 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 November 27, 2019, the request was denied. On December 17, 2019, Requester appealed to the Office of Open Records. On January 9, 2020, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office [AP 2019-2548], which was received on January 15, 2020.

For the reasons set forth in this Final Determination, the appeal is **GRANTED** and the Respondent is required to take further action.

FACTUAL BACKGROUND

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. Although this Appeals Officer has not been provided with a copy of the actual request, it appears from subsequent documents that Requester is requesting the police report concerning the death of his son, Willy Fiallo, Jr. On November 27, 2019, the request was denied. The Respondent stated in part:

On November 25, 2019, you requested a copy of a police report regarding your son, Willy Fiallo, Jr.

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

You have the right to appeal this denial of information in writing to Terry Mutchler, Executive Director, Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120.

If you choose to file an appeal you must do so within 15 business days of the mailing date of this agency’s response, as outlined in Section 1101. Please be advised that this correspondence will serve to close this record with this office as permitted by law.

November 27, 2019 Letter of Chief of Police Brenda M. Bernot.

On December 17, 2019, Requester appealed to the Office of Open Records. On December 18, 2018, the Office of Open Records sent the parties notice of the procedures that should be followed concerning the appeal.

On December 6, 2019, the Requester sent a submission to the Office of Open Records stating the following:

The motive for this letter is to ask for the report on Willy Andres Fiallo police report.

I have attached the response from the Westtown-East Goshen Regional Police about when I first inquire about such report.

As a father this have become very important to me to bring closure to my son's unfortunate event. I hope you will understand.

December 6, 2019 Letter of Chief of Police Brenda M. Bernot.

On December 18, 2019, the Respondent sent a submission to the Office of Open Records stating the following:

This letter is submitted in response to the above-referenced appeal on behalf of the Westtown-East Goshen Regional Police Department ("the police department").

The requisite background for our appeal submission is not extensive. Mr. Fiallo, Sr. contacted the police department on November 25, 2019, requesting a copy of the police report that was completed concerning the death of his son (Willy Fiallo, Jr.). The police department denied Mr. Fiallo's request indicating that the requested records relate to a criminal investigation and are therefore exempt from disclosure under 65 P.S. 67.708(b)(16).

On September 1, 2019, the Westtown-East Goshen Regional Police Department was dispatched to respond to the parking lot of a business located at 1373 Enterprise Drive, East Goshen Township, for a report of a deceased individual in a car parked at that location. The police department subsequently conducted an investigation to determine the cause and manner of that individual's death; the individual was subsequently identified as Willy Fiallo, Jr., Mr. Fiallo's son.

A death investigation, regardless of the cause and manner of death that is ultimately determined, is a criminal investigation and therefore, the requested records relate to a criminal investigation and are exempt from disclosure under 65 P.S. 67.708(b)(16).

In addition, the exclusive jurisdiction to determine whether a record is a criminal investigative record under 65 P.S. 67.708(b)(16) is vested in the appeals officer appointed by the District Attorney's Office pursuant to 65 P.S. 67.503(d)(2). *See In The Matter Of Erik Steinheiser*, 2015 PA O.O.R.D. LEXIS 733 (PA O.O.R.D. 2015).

Thank you in advance for your consideration in this matter.

December 18, 2019 Letter of Chief of Police Brenda M. Bernot.

On January 9, 2020, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office [AP 2019-2548], which was received on January 15, 2020. The Office of Open Records stated in part:

On November 25, 2019, Willy Fiallo, Sr. ("Requester") filed a request ("Request") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 et seq., with the Westtown-East Goshen Regional Police Department ("Department"), seeking a copy of the police report related to the death of his son, Willy Fiallo, Jr. On November 27, 2019, the Department denied the Request, arguing that the records are related to a criminal investigation. 65 P.S. § 67.708(b)(16). On December 17, 2019,

the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c). On December 18, 2019, the Department submitted a position statement, reiterating its grounds for denial.¹ The Department’s police chief explains that the Department conducted an investigation into the cause and manner of death of Willy Fiallo, Jr.

Section 708(b)(16) of the RTKL exempts from disclosure records “relating to or resulting in a criminal investigation.” 65 P.S. §§ 67.708(b)(16). The Department is a local law enforcement agency. 65 P.S. § 67.102. 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, where the agency either submits evidence demonstrating that a criminal investigation occurred or, based on the appeal documents or the language of the request itself, there is no dispute between the parties regarding the existence of a criminal investigation, such appeals are to be heard by an appeals officer designated by the local district attorney. *See id.*; Steinheiser v. Falls Twp., OOR Dkt. AP 2015-0323, 2015 PA O.O.R.D. LEXIS 378 (holding that where the plain language of a RTKL request sought a police report and there was evidence of a criminal investigation, the criminal investigative exemption applied).

Here, the Request facially seeks a record pertaining to the Department’s investigation into a death. Thus, the requested record and its contents could relate to a criminal investigation. *See, e.g.*, Green v. Philadelphia Dist. Attorney’s Office, OOR Dkt. AP 2019-1996, 2019 PA O.O.R.D. LEXIS 1709 (transferring an appeal involving a request for discovery materials to the appeals officer for the local district attorney’s office); Pugh v. Montgomery County Dist. Attorney’s Office, OOR Dkt. AP 2017-0323, 2017 PA O.O.R.D. LEXIS 1376 (transferring an appeal involving a request for published exhibits in a criminal trial). Accordingly, the appeal is hereby

transferred to the Appeals Officer for the Chester County District Attorney's Office to determine whether the record relates to a criminal investigation. *See* Pennsylvanians for Union Reform v. Centre County Dist. Attorney's Office, 139 A.3d 354 (Pa. Commw. Ct. 2016) (*citing* 42 Pa.C.S. §

5103(a) (relating to the process for handling improperly filed appeals)). A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the Chester County District Attorney's Office.

1. While the Department's original denial stated that the requested report was also related to a noncriminal investigation, 65 P.S. § 67.708(b)(17), the Department's appellate submission argues only that the report is related to a criminal investigation.

In the Matter of Willy Fiallo, Sr. v. Westtown-East Goshen Regional Police Department, Docket No. AP-2019-2548 (footnote in original), at 1-3.

On January 15, 2020, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

On November 25, 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 November 27, 2019, the request was denied. On December 17, 2019, Requester appealed to the Office of Open Records. On January 9, 2020, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office [AP 2019-2548], which was received on January 15, 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 January 15, 2020, which is February 14, 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 its response, if any, on or before January 27, 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 its response, if any, on or before February 3, 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.

January 15, 2020 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr., Appeals Officer.

Neither party submitted a response. Consequently, this decision is based on the initial request and response, and the appeal documents received from the Office of Open Records.

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 Westtown-East Goshen Regional 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).

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.

Respondent states that a death investigation, regardless of the cause and manner of death that is ultimately determined, is a criminal investigation and therefore, the requested records relate to a criminal investigation and are exempt from disclosure under 65 P.S. § 67.708(b)(16). 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).

Requester does not address the grounds asserted by Respondent. Requester merely states why he wants the document. 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. *See* DiMartino v. Pennsylvania State Police, 2011 WL 10841570, at *6 (Pa. Cmwlth. 2011); Mahoney v. Pennsylvania State Police, 339 C.D. 2011, 2011 WL 10841247 (Pa. Cmwlth. 2011); Hunsicker v. Pennsylvania State Police, 93 A.3d 911 (Pa. Cmwlth. 2014).

There is no factual support that the records in question are criminal investigative records. Under the RTKL, an affidavit may serve as sufficient evidence to support an appeals officer's decision. Office of Governor v. Davis, 122 A.3d 1185, 1194 (Pa.Cmwlth. 2015); Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515, 520-21 (Pa. Cmwlth. 2011); Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Cmwlth. 2010) (affidavit suffices to establish nonexistence of records); Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013) (in the absence of any evidence that a Respondent has acted in bad faith or that the records do, in fact, exist, the averments in an affidavit should be accepted as true). However, "[a] generic determination 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).

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

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

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

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

McGowan v. Pennsylvania Dep't of Env'tl. Prot., at 381.

Respondent has not provided either the Office of Open Records or this Appeals Officer with an affidavit, although both the Office of Open Records and this Appeals Officer put Respondent on notice that; **any statements of fact must be supported by an Affidavit made under penalty of perjury by a person with actual knowledge.** The December 18, 2019 Letter of Chief of Police Brenda M. Bernot is purely conclusory, and is not an affidavit. Requester does not address the grounds stated by the agency for denying the request, but merely explains why he wants the records. Consequently, neither the Respondent nor the Requester has provided this Appeals Officer with the type of information required by the Right to Know Law. However, the Respondent bears the burden of proving, by a preponderance of the evidence, that the document requested is exempt from public access. Consequently, the Respondent has not met its burden that the requested document is a criminal investigative record and exempt from disclosure.

CONCLUSION

For the foregoing reasons, the appeal is **GRANTED**, and the Respondent is required to take further action, and provide Requester with the police report

concerning the death of his son, Willy Fiallo, Jr. However, the Respondent can required the payment of any fees authorized by 65 P.S. § 67.1307 before the documents are provided to Requester.

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: February 7, 2020

APPEALS OFFICER:

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FINAL DETERMINATION MAILED TO:

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INDEX OF APPENDICES

APPENDIX “A” Appeal Documents

APPENDIX “B” Jan. 15, 2020 Letter of CDDA Nicholas J. Casenta, Jr., Esquire
Appeals Officer for DA’s Office of Chester County