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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
TANYA PANNELLA,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
PHOENIXVILLE	:	
POLICE DEPARTMENT,	:	DA-RTKL-A NO. 2018-002
Respondent	:	

INTRODUCTION

On December 16, 2017, Requester, Tanya Pannella, filed a right-to-know request with the Respondent, the Phoenixville Police Department, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, et. seq.. On December 21, 2017, the request was denied. On January 12, 2018, Requester appealed to the Office of Open Records. On January 17, 2018, the Office of Open Records transferred the

appeal to the Chester County District Attorney's Office [AP 2018-0068], which was received on January 24, 2018.

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

FACTUAL BACKGROUND

On December 16, 2017, Requester, Tanya Pannella, filed a right-to-know request with the Respondent, the Phoenixville Police Department, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, et. seq..

Requester sought the following records:

Accident report records [and] photos from [November] 3, 1973 for Arthur Frank March III. Accident occurred on 113 in Phoenixville PA. A.F. March was a fatality from this Accident. Person requesting records is the daughter of the deceased. Death [certificate] can be provided upon request.

On December 21, 2017, the request was denied. The Respondent gave the following reason for the denial:

The Phoenixville Borough Police Department report pertaining to the incident that you requested is either a record(s) relating to, or the results of a criminal investigation by the Phoenixville Borough Police Department, or is an on-going criminal investigation, or contain the identity of a confidential source, or victim information which might jeopardize the safety of the victim. As such they are exempt from otherwise "Public Records" per 65 P.S. * 67.708(b) of the Right to Know Law and your request for those record(s) is denied.

On January 12, 2018, Requester appealed to the Office of Open Records. On January 17, 2018, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office [AP 2018-0068], which was received on January 24, 2018. In the appeal to the Office of Open Records, the Requester requested the following records:

[A] car accident that occurred on November 3rd, 1973. The accident happened on route 113 in Phoenixville at [approximately] 1:00 AM by the General Pike Bar. There was a fatality from the accident Arthur Frank March III. This was my father and I was only 2½ years of age when this happened. I would like to obtain any information and photos from this accident. I think [I] have the right to know the details of my father's death. I do know the other person that was involved in this accident.

The Requester stated that the reason for the appeal:

I have no memory of my father I would like the to know the details of the accident. He was my father. I also was a victim from this tragic accident. Thank you.

On January 24, 2018, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

On December 16, 2017, 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 December 21, 2017, the request was denied. On January 12, 2018, Requester appealed to the Office of Open Records. On January 17, 2018, the Office of Open Records transferred the appeal to the Chester County District Attorney's Office [AP 2018-0068], which was received on January 24, 2018.

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 24, 2018, which is February 23, 2018.** 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 Supreme Court of Pennsylvania 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).

The Commonwealth Court of Pennsylvania 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).

If the Respondent wishes to submit a response, it should do so on or before **February 2, 2018.**

If the Requester wishes to submit a response, it should do so on or before **February 9, 2018.**

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 24, 2018 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

Neither party submitted an additional response. Consequently, this decision is based on the initial request, response, and appeal filings.

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 Phoenixville 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”).

On December 21, 2017, the request was denied. The Respondent gave the following reason for the denial:

The Phoenixville Borough Police Department report pertaining to the incident that you requested is either a record(s) relating to, or the results of a criminal investigation by the Phoenixville Borough Police Department, or is an on-going criminal investigation, or contain the identity of a confidential source, or victim information which might jeopardize the safety of the victim. As such they are exempt from otherwise “Public Records” per 65 P.S. * 67.708(b) of the Right to Know Law and your request for those record(s) is denied.

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).

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 filed an Affidavit in support of its reasons for the denial. Moreover, even if the reasons cited for the denial were in an Affidavit these reasons would be insufficient to justify the denial. The above cited reasons are not detailed and are purely conclusory; merely citing exceptions to the required disclosure of public records. “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).

Moreover, the reasons cited for the denial were not submitted in good faith.

[1] The Respondent states that the records are the result of a criminal investigation.

The requested information involves a 1973 motor vehicle accident. Information related to motor vehicle accidents does not always or necessarily “relate to” or “result in” a criminal investigation such that they would be *per se* exempt from disclosure under the Right to Know Law. See Pennsylvania State Police v. Grove, ___ Pa. ___, 161 A.3d 877, 893 (2017). Since the Respondent has declined to offer any verified facts in support of this reason for the denial it must be rejected.

[2] The Respondent states that the records are part of an on-going criminal

investigation. Again, the requested information involves a 1973 motor vehicle accident. An alleged forty-five (45) year on-going traffic accident criminal investigation is not a credible assertion. Moreover, the Respondent has declined to

offer any verified facts in support of this reason for the denial and it must be

rejected. [3] The Respondent states that the records contain the identity of a

confidential source. Again, the requested information involves a 1973 motor vehicle accident. This is not a credible assertion. Moreover, the Respondent has

declined to offer any verified facts in support of this reason for the denial and it must be rejected. [4] The Respondent states that the records contain victim

information which might jeopardize the safety of the victim. Again, the requested

information involves a 1973 motor vehicle accident. This is not a credible

assertion. Moreover, the Respondent has declined to offer any verified facts in support of this reason for the denial and it must be rejected.

I caution the Respondent that in the future they should not take such a cavalier attitude toward Right to Know Request appeals. Mere citation to specific exceptions in the statute is generally not sufficient without providing a necessary factual predicate. Any statements of fact must be supported by an Affidavit made under penalty of perjury by a person with actual knowledge.

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). The Respondent has not 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 **GRANTED**, and the Respondent is required to provide “**any information and photos**” involving the **1973 accident in its possession** within thirty (30) days. 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 22, 2018

APPEALS OFFICER:

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INDEX OF APPENDICES

APPENDIX “A” Appeal Documents

APPENDIX “B” Jan. 24, 2018 Letter of CDDA Nicholas J. Casenta, Jr., Esquire
Appeals Officer for DA’s Office of Chester County