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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
DESIREE PURVENAS-HAYES,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
	:	
EASTTOWN	:	DA-RTKL-A NO. 2019-001
POLICE DEPARTMENT,	:	
Respondent	:	
	:	

INTRODUCTION

On March 14, 2018, Requester, Desiree Purvenas-Hayes, filed a right-to-know request with the Respondent, Easttown Township Police Department, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, et. seq.. On April 4, 2018, the request was granted in part and was denied in part. On February 25, 2019, Requester faxed an appeal to the Chester County District Attorney's Office.

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 14, 2018, the Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law, seeking: “12/01/17 Police Report for dog bite incident involving Mandy Tshibangu. ...”. On April 4, 2018, the request was granted in part and was denied in part. The Respondent stated in part as follows:

Your request is granted in part, and denied in part.

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

However, incident reports are protected from release as a record relating to or resulting in a criminal investigation. *See* 65 P.S. §67.708(b)(16). *See also* Pennsylvania State Police v. Office of Open Records, 5 A.3d 473 (Pa. Cmwlth. 2010); Hunsicker v. Pennsylvania State Police, 93 A.3d 911, 913 (Pa. Cmwlth. 2014). As to, any actual incident reports requested, the request is therefore denied.

April 4, 2018 Letter of David Obzud, Easttown PD Open Records Officer.

On February 25, 2019, Requester faxed an appeal to the Chester County District Attorney’s Office. On February 27, 2019, this Appeals Officer for the

Chester County District Attorney's Office gave Notice to the parties of the following:

On March 14, 2018, Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*. On April 4, 2018, the request was denied. On February 25, 2019, Requester faxed an appeal to the Chester County District Attorney's Office.

Unless the Requester agrees otherwise, as the appeals officer, I shall make a final determination, which shall be mailed to the Requester and the Respondent, **within 30 days of February 25, 2019, which is March 27, 2019.** 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 March 8, 2019.

The Respondent should note: The Supreme Court has held that a Respondent is permitted to assert exemptions on appeal, even if the agency did not assert them when the request was originally denied. Levy v. Senate of Pennsylvania, 619 Pa. 586, 65 A.3d 361 (2013). **Merely citing exceptions to the required disclosure of public records or conclusory statements are not sufficient to justify the exemption of public records.** Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013).

The Requester should submit its response, if any, on or before March 15, 2019.

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

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

The parties should also address whether this appeal is timely. *See* 65 P.S. § 67.1101(a)(1) (appeal must be filed within 15 business days of denial).

February 27, 2019 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

On March 8, 2019, the Respondent filed a Response in Opposition to the Right to Know Law Appeal, which stated in part:

The Requester appealed the Response to the Chester County District Attorney’s Office (“CCDAO”) on February 25, 2019, more than 10 months after the Department issued its Response. *See* Exhibit “C”. On February 27, 2019, CCDAO directed that the Department should submit its response to Requester’s appeal, if any, on or before March 8, 2019. *See* Exhibit “D”. This letter shall serve as the Department’s formal response to Requester’s appeal.

RESPONSE TO REQUESTER’S ARGUMENTS

1. The Requester’s appeal is untimely.

The RTKL provides a requester with 15 business days to appeal from an agency determination. 65 P.S. §67.11011(a)(1). Here, the Requester's time period to appeal the Department's Response expired on April 19, 2018. The Requester's appeal was received on February 25, 2019 over **ten (10) months** after the time period to appeal expired. *See* Exhibits "B" and "C".

The timeliness of an appeal impacts the subject matter jurisdiction of the CCDAO. The CCDAO is without jurisdiction to excuse a failure to file a timely appeal, as the appeal period must be strictly construed. *See In the Matter of Julianne Mattera and the Patriot-News v. Susquehanna Township School District*, 2014 WL 28543513 (Pa. Off. Open Rec. June 18, 2014). Therefore, her appeal must be dismissed as untimely.

2. The Requester's appeal fails to comply with the RTKL.

In addition to being untimely, the Requester's appeal does not include a concise statement of the grounds the Requester asserts that the record is a public record or a concise statement addressing the grounds stated by the Department for 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." *Padgett v. Pennsylvania State Police*, 73 A.3d 644, 647 (Pa. Cmwlth. 2013). The Requester's February 25, 2019 appeal does not contain any statement or information that could be construed as fulfilling that requirement. *See* Exhibit "C". The Requester simply states that she is appealing, and therefore, the appeal cannot be construed as even minimally sufficient. The Requester's appeal is deficient and must be dismissed.

3. To the extent the appeal has not been dismissed, the criminal investigation exemption precludes release of the requested materials.

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

a. Incident reports are exempt from release.

The Requester specifically seeks an 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 must be denied.

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

b. 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 must be denied.

4. Even if this appeal is not dismissed, the incident report cannot be released in accordance with Criminal History Record Information Act.

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

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

Under CHRIA, 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. §9106(c)(4) (emphasis added).

The information sought by the Requester is investigative information under CHRJA and is therefore not a public record under the RTKL and not subject to access. For additional information, please see the affidavit of Chief David Obzud, attached hereto as Exhibit “E”.

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, driver’s license numbers and telephone numbers. 65 P.S. §67.708(b)(6)(i). The requested investigation material contains this information, and therefore the Requester should be denied access to this information. For additional information, please see the affidavit of Chief David Obzud, attached hereto as Exhibit “E”.

6. Even if the appeal is not dismissed, the requested information contains information relating to a minor which is exempt from release.

Section 708(b)(30) exempts from access a record identifying the name, home address or date of birth of a child 17 years of age or younger. 65 P.S. §67.708(b)(3). The requested investigation material contains all of this information, and therefore, the Requester should be denied access to this information. For additional information, please see the affidavit of Chief David Obzud, attached hereto as Exhibit “E”.

March 8, 2019 Response of the Respondent, 2-5.

The Requester did not file a Response in Support of the Right to Know Law Appeal.

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.

On March 14, 2018, Requester filed a right-to-know request with the Respondent. On April 4, 2018, the request was granted in part and was denied in part. On February 25, 2019, Requester faxed an appeal to the Chester County District Attorney's Office.

Under the RTKL, an appeal must be filed within 15 days of a denied request. 65 P.S. § 67.1101(a)(1) (“If a written request for access to a record is denied or deemed denied, the requester may file an appeal with the Office of Open Records or judicial, legislative or other appeals officer designated under section [65 P.S. § 67.503] within 15 business days of the mailing date of the agency’s response or within 15 business days of a deemed denial. The appeal 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.”).

Requester filed this Right to Know Law Appeal 10 months and 21 days after the partial denial. Because this appeal was not filed within 15 days that the request was partially denied it is clearly untimely. Requester has not provided any legal justification as to why this clearly untimely appeal can be considered.

As Requester’s appeal is clearly untimely, and must be **DENIED**. The Respondent is not required to take any further action. However, this Appeals Officer will address the merits of this appeal in an abundance of caution.

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 December 4, 2018, the Respondent submitted a response to the Office of Open Records, which included an affidavit from David Obzud, Chief of Police of Easttown Township Police Department. The Affidavit stated the following:

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 April 3, 2018, I received a Right-to-Know Law request from Desiree Purvenas-Hayes ("Requester") seeking a "12/01/17 Police Report for dog bite incident involving Mandy Tshibangu."
4. The Request was made by Requester, but on behalf of a client, Emily Burgess, who is a minor, located at 415 Sylvan Lane, Devon PA 19333.
5. On April 4, 2018, I issued a partial denial to the Request ("Response").
6. As part of the Response, the Requester was provided with police blotter information pertinent to the Request.
7. The reason for the partial denial was that the requested records were protected from release as a record relating to or resulting in a criminal investigation ("Investigation").
8. The Requester sought an incident report.

9. The Department's incident reports are investigative reports.

10. The incident report at issue was assembled as a result of the performance of the Investigation.

11. The incident report at issue contains witness information, notes by the responding officer, information regarding investigative tasks that have been carried out, observations and impressions related to the Investigation, references to evidence obtained, and directives and next steps for the Investigation.

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

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

14. The investigative report also identifies the name, home address and date of birth of a child 17 years of age or younger,

16. The Department was not notified of or otherwise aware of any appeal of Response to the Chester County District Attorney's Office or the Office of Open Records by the Requester within 15 business days of April 4, 2018.

BY:

David Obzud

Chief of Police & Open Records Officer

Under the RTKL, an affidavit may serve as sufficient evidence to support an appeals officer's decision. Office of Governor v. Davis, 122 A.3d 1185, 1194 (Pa.Cmwlt. 2015); Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010) (affidavit suffices to establish nonexistence of records). In the

absence of any evidence that a Respondent has acted in bad faith the averments in an affidavit should be accepted as true. McGowan v. Pa. Dep't of Env'tl. Prot., 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014); Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013).

The RTKL provides that records of an agency relating to or resulting in a criminal investigation, such as investigative materials, notes, correspondence, videos, reports, and records, may be withheld as exempt. 65 P.S. § 67.708(b), titled, "Exceptions for public records", provides in part as follows:

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Complaints submitted to an agency.

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

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

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

(v) Work papers underlying an audit.

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

(A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

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

(C) Constitute an unwarranted invasion of privacy.

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

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

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

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

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”).

Pursuant to 65 P.S. § 67.708(b)(16), records of an agency are exempt from access by a requester if the records relate to or result in a criminal investigation. When a party seeks to challenge an agency’s refusal to release information by appealing that party must address any grounds stated by the agency for denying the request. Department of Corrections v. Office of Open Records, 18 A.3d 429, 434

(Pa. Cmwlth. 2011); Padgett v. Pennsylvania State Police, 73 A.3d 644, 647-648 (Pa. Cmwlth. 2013).

In Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011), the Commonwealth Court stated in part:

Consequently, we agree with DOC that when a party seeks to challenge an agency's refusal to release information by appealing to Open Records, that party must "address any grounds stated by the agency for ... denying the request." This is a typical requirement in any process that aims to provide a forum for error correction. We do not see it as a particularly onerous requirement, whether the requester has the benefit of legal counsel or is *pro se*.

DOC v. OOR at 434.

The Requester does not present any reason to dispute that the documents requested are investigative records and exempt from disclosure. 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.

It is also important to note that a requester's identity and motivation for making a request is not relevant, and his or her intended use for the information may not be grounds for granting or denying a request. *See* 65 P.S. § 67.301(b), 65 P.S. § 67.703. In DiMartino v. Pennsylvania State Police, 2011 WL 10841570 (Pa.

Cmwlth. 2011), the Commonwealth Court, in a memorandum opinion,¹ stated in pertinent part:

As a final point, we note that, the requester’s status as representative of Decedent’s family has no bearing on whether the requested records are accessible through a RTKL request. We agree with the OOR that the RTKL must be construed without regard to the requester’s identity. *See, e.g.*, Section 301(b) of the RTKL, 65 P.S. § 67.301(b) (stating that an agency “may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law”); Weaver v. Dep’t of Corr., 702 A.2d 370 (Pa. Cmwlth. 1997) (under the former Right-to-Know Act, the right to examine a public record is not based on whether the person requesting the disclosure is affected by the records or if her motives are pure in seeking them, but whether any person’s rights are fixed); Furin v. Pittsburgh Sch. Dist., OOR Dkt. No. AP 2010–0181, 2010 PA OORD LEXIS 212 (Pa. OOR 2010) (finding records exempt under Section 708(b) regardless of status of person requesting them); Wheelock v. Dep’t of Corr., OOR Dkt. No. AP 2009–0997, 2009 PA OORD LEXIS 725 (Pa. OOR 2009) (stating the only information available under the RTKL is a “public record” available to all citizens regardless of personal status or stake in requested information).

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

In Hunsicker v. Pennsylvania State Police, 93 A.3d 911 (Pa. Cmwlth. 2014), Requester (Hunsicker) appealed a Determination of the Office of Open Records

¹ 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.

denying her request under the RTKL for access to Pennsylvania State Police records regarding an investigation surrounding her brother's death, which involved a State Trooper. In affirming the denial, the Commonwealth Court stated in part:

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

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

Even if the requested records fall within the investigative exception, Requestor contends that she is entitled to those records because she has a special need for them because, as Mr. Rotkewicz's sister, she needs to know what her brother did to cause a PSP Trooper to shoot him and to investigate a possible PSP "cover up." While we are sympathetic to Requestor's desire to understand her brother's death, her status as his sister and her reasons for requesting the records do not render records that fall within the investigative exemption accessible. Under the RTKL, whether the document is accessible is based only on whether a document is a public record, and, if so, whether it falls within an exemption that allows that it not be disclosed. The status of the individual requesting the record and the reason

for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b). *See* 65 P.S. § 67.301(b) (stating that an agency “may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law.”).

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

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

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

A criminal investigative record is anything that contains information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing. 18 Pa.C.S.A. § 9102. The size, scope, or formality, of police inquiries are not relevant in determining if

something is a criminal investigative record. Whether an arrest has occurred or whether a criminal investigation is ongoing or closed, are not relevant factors in determining if something is a criminal investigative record. Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed. Also, a record is not considered a public record if it is exempt under any other State or Federal Law, including the Criminal History Records Information Act.

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

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

Also, a record is not considered a public record under Section 102 of the RTKL if it is "exempt under any other State or Federal Law," including the CHRIA. See Coley, 77 A.3d at 697. Section 9106(c)(4) of the CHRIA, 18 Pa.C.S. § 9106(c)(4), provides that "investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency." The CHRIA defines "investigative information" as "information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus

operandi information.” Section 9102 of the CHRIA, 18 Pa.C.S. § 9102.

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

Barros v. Martin at 1250 (emphasis added).

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

the Commonwealth Court stated in part:

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

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

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

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

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

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

We make no decision regarding Requester’s alleged entitlement to the records under an alternate legal mechanism. Entitlement does not arise under the RTKL through which citizens have a right to access public records “open to the entire public at large.” *See, e.g., Coulter v. Pa. Bd. of Prob. & Parole*, 48 A.3d

516, 519 (Pa. Cmwlth. 2012) (“home plans” of parolee requester are not accessible to her under RTKL though she is subject of records; to be accessible under the RTKL, identity of the requester is irrelevant).

Padgett at 647-648 (footnote omitted).

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

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

65 P.S. § 67.706.

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

Petitioner’s first argument addresses the sufficiency of the Department’s denial of his request. Petitioner contends that because the Department’s denial merely parroted the statutory language he was unable to properly respond to the Department’s assertion of exemption from disclosure. Section

903 of the RTKL, 65 P.S. § 67.903, states that a denial of access shall include, inter alia, a description of the record requested and the specific reasons for the denial, including a citation of the supporting legal authority. Correspondingly, Section 1101 of the RTKL, 65 P.S. § 67.1101, requires that a party appealing a denial shall “state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for ... denying the request.” See Dep’t of Corr. v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011).

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

Petitioner’s argument that the Department was required to produce the requested records subject to redaction of the exempt information is without merit. Section 706 provides that if an agency determines that a public record contains information that is both subject to disclosure and exempt from the disclosure, the agency shall grant access and redact from the record the information which is subject to disclosure. Pursuant to Section 706, the redaction requirement only applies to records that are determined to be “public records.” A “public record” is defined in part as “a record, including a financial record, of a Commonwealth ... agency that: (1) is not exempt under section 708.” Section 102, 65 P.S. § 67.102 (emphasis added). Thus, a record that falls within one of the exemptions set forth in Section 708 does not constitute a “public record.” Dept. of Health v. Office of Open Records, 4 A.3d 803 (Pa. Cmwlth. 2010).

Saunders at 542-543 (footnote omitted).

In Grove, both the Supreme and Commonwealth Courts discussed the purpose of MVRs. These Courts found that MVRs are created to document a trooper's performance of their duties in responding to emergencies and in their interactions with members of the public, not merely or primarily to document, assemble or report on evidence of a crime or possible crime. Consequently, MVRs are not *per se* criminal investigation information. However, when an MVR captures criminal investigative information that can part can be redacted. However, it is important to note that redaction is only appropriate where a public record subject to disclosure is involved. Nothing in the Grove decisions changes the discussion above that where a record falls within an exemption under 67.708(b), it is not a public record as defined by the RTKL, and an agency is not required to redact the record and provide the remainder. *See* 65 P.S. § 67.706; Heavens v. Pennsylvania Department of Environmental Protection, 65 A.3d 1069, 1077 (Pa. Cmwlth. 2013); Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540, 543 (Pa. Cmwlth. 2012).

Under the RTKL, an affidavit may serve as sufficient evidence to support an appeals officer's decision. Based on the evidence provided, the Respondent has met its burden of proof that the documents are criminal investigative records and exempt from disclosure.

CONCLUSION

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

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

FINAL DETERMINATION ISSUED AND MAILED ON: March 21, 2019

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APPENDIX “A” Appeal Documents

APPENDIX “B” 02/27/2019 Letter of CDDA Nicholas J. Casenta, Jr., Esquire
Appeals Officer for DA’s Office of Chester County

APPENDIX “C” Response of Respondent