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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
CHARLESTAE TAGGART,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
	:	
COATESVILLE	:	DA-RTKL-A NO. 2018-006
POLICE DEPARTMENT,	:	
Respondent	:	
	:	

**INTRODUCTION**

On April 9, 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 12, 2018, the request was denied. On May 9, 2018, Requester appealed to the Office of Open Records. On June 8, 2018, the Office of Open

Records granted the appeal in part, denied the appeal in part, and transferred the appeal in part to the Chester County District Attorney's Office [AP 2018-0834], which was received on June 13, 2018.

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 April 9, 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.*. Requester sought the following records: "All documents, notes, incident reports, pictures, police blotters, supplemental narratives pertaining [to] case # 1408113, and evidence # 1095." On April 12, 2018, the request was denied. On May 9, 2018, Requester appealed to the Office of Open Records ("OOR"). On June 8, 2018, the OOR granted the appeal in part, denied the appeal in part, and transferred the appeal in part to the Chester County District Attorney's Office [AP 2018-0834], which was received on June 13, 2018.

In In the Matter of Charlestae Taggart v. City of Coatesville Police Department, Docket No: AP 2018-0834, the OOR stated in part:

### **INTRODUCTION**

Charlestae Taggart ("Requester"), an inmate at SCI-

Smithfield, submitted a request (“Request”) to the City of Coatesville Police Department (“Department”) pursuant to the Right- to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to an identified case and evidence number. The Department denied the Request, arguing that the records are related to a criminal investigation and release of them would be reasonably likely to result in a substantial risk of physical harm. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part, denied in part and transferred in part**, and the Department is required to take further action as directed.

### FACTUAL BACKGROUND

On April 9, 2018, the Request was filed, seeking:

All documents, notes, incident reports, pictures, police blotters, supplemental narratives pertaining [to] case # 1408113, and evidence # 1095. Com. v. Mines, 680 A.2d (Pa. Com. 1996) Incident reports are equivalent to police blotters.

On April 12, 2018 the Department denied the Request, arguing that the Request was insufficiently specific, 65 P.S. § 67.703, that release of the records sought would cause harm to individuals, 65 P.S. § 67.708(b)(1)(ii), and that the records contain personal identification information, 65 P.S. § 67.708(b)(6), and were related to a criminal investigation, 65 P.S. § 67.708(b)(16).

On May 9, 2018, the Requester appealed to the 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 May 21, 2018, the Department submitted a position statement, arguing that the appeal was defective, reiterating its earlier reasons for denial, and arguing that the Department’s

incident reports are sufficiently detailed and narrative that they do not constitute police blotters under the RTKL. In support of this position, the Department submitted the sworn affidavit of Kelly Ohar, the Department's Agency Open Records Officer, who attested that the incident reports sought contain detailed narrative information related to a criminal investigation.

## LEGAL ANALYSIS

...

### **3. The Department has demonstrated that release of certain records would create a demonstrable risk of physical harm**

The Department contends that the requested records are exempt from disclosure because disclosure would be reasonably likely to create a substantial risk of physical harm. Section 708(b)(1)(ii) exempts from disclosure a record that "would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." 65 P.S. § 67.708(b)(1)(ii). To establish that this exemption applies, an agency must show: (1) a "reasonable likelihood" of (2) "substantial and demonstrable risk" to a person's security. Delaware County v. Schaefer, 45 A.3d 1149 (Pa. Commw. Ct. 2012). The OOR has held that "[b]elief alone without more, even if reasonable, does not meet this heightened standard." Zachariah v. Pa. Dep't of Corr., OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also* Lutz v. City of Phila., 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that "[m]ore than mere conjecture is needed" to establish that this exemption applies).

In the present case, the Department explains that the requested incident report identifies and chronicles the use of a confidential informant during an undercover narcotics investigation. In support of this argument, Kelly Ohar, the Department's Agency Open Records Officer attests that the records contain information regarding activities, times and locations in a criminal investigation, and are likely to disclose

the identity of a confidential informant and place his or her safety in jeopardy.

The OOR has previously found that release of records touching upon the use of confidential informants for police agencies creates a risk to public safety. *See Adams v. Pa. State Police*, OOR Dkt. AP 2011-1476, 2011 PA O.O.R.D. LEXIS 1216. Therefore, the portions of the incident report chronicling the use of a confidential informant are exempt under Section 708(b)(1) of the RTKL.<sup>2</sup>

<sup>2.</sup> Because it is not apparent from the record that all responsive records catalogue the use of a confidential informant, the OOR cannot conclude that all responsive records are subject to the exemption.

#### **4. The appeal is transferred to the extent the Request seeks records related to a criminal investigation**

The Department also argues that the records relate to a criminal investigation, and are exempt from access under Section 708(b)(16) of the RTKL. Section 708(b)(16) of the RTKL exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation.” 65 P.S. § 67.708(b)(16). The OOR lacks jurisdiction to consider whether a record of a local law enforcement agency is subject to public access where the agency claims that the records are withheld as criminal investigative records and 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. *See, e.g., 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 Request sought a police report and there was evidence of a criminal investigation, Section 708(b)(16) of the RTKL

applied); Burgess v. Willistown Twp. Police Dep't, OOR Dkt. AP 2013-1511, 2013 PA O.O.R.D. LEXIS 868 (holding that where a local agency made a preliminary showing that records relate to a criminal investigation, the OOR lacked jurisdiction to consider the merits of the appeal).

The records sought are “all documents ... pertaining to” an identified case and evidence number. The Department argues that this case number was related to a narcotics investigation, and Ms. Ohar attests that the records of the case and incident report relate to a criminal investigation and that the incident report sought contains narrative details that describe the investigation in depth. This description and affidavit are sufficient to demonstrate the possibility that the records relate to a criminal investigation under Section 708(b)(16).

The Department is a local law enforcement agency. Pursuant to 65 P.S. § 67.503(d)(2), only the Appeals Officer for the Chester County District Attorney’s Office (“DA’s Office”) is authorized to “determine if the record[s] requested [are] criminal investigative record[s]” of a local law enforcement agency within Chester County. Consequently, the appeal is hereby transferred to the Appeals Officer for the DA’s Office to determine which, if any, items of the Request are criminal investigative records. A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the DA’s Office.

**5. The Department has not demonstrated that it does not possess responsive police blotter information**

On appeal, the Department has demonstrated that the Department’s incident reports are not police blotters but has not demonstrated that it does not possess a responsive police blotter. Section 708(b)(16) of the RTKL does not apply to information that would be contained within a police blotter. The RTKL defines a “police blotter” as “[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.” 65 P.S. § 67.708(b)(16); *see also* 18 Pa.C.S. § 9102. Therefore, to the extent that the Department possesses police blotter information related to this incident, that information must be released. *See Stewart v. Butler City Police Dep’t*, OOR Dkt. AP 2015-0044, 2015 PA O.O.R.D. LEXIS 162 (when an agency proves the elements of the exemption but does not address police blotter information, such information must be provided if it exists).

## CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part, denied in part and transferred in part** to the Appeals Officer for the DA’s Office, and the Department is required to provide any police blotter information, as well as any responsive records that do not chronicle the use of a confidential informant to the Requester upon a finding by the Appeals Officer for the DA’s Office that those records are not related to a criminal investigation. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Chester County Court of Common Pleas. 65 P.S. § 67.1302(a). ...

In the Matter of Charlestae Taggart v. City of Coatesville Police Department,

Docket No: AP 2018-0834, at 1-9 (footnote omitted) (footnote in original).

On June 13, 2018, this Appeals Officer for the Chester County District Attorney’s Office gave Notice to the parties of the following:

On April 9, 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 12, 2018, the request was denied. On May 9, 2018, Requester appealed to the Office of Open Records. On June 8, 2018, the Office of Open Records transferred the appeal to the Chester County District Attorney’s Office [AP 2018-0834], which was received on June 13, 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 June 13, 2018, which is July 13, 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 Respondent should submit its response, if any, on or before June 25, 2018.**

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). 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 July 2, 2018.**

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).

**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.

June 13, 2018 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

On June 25, 2018, this Appeals Officer received a response from the Respondent, which included a letter an Affidavit from Kelly J. Ohar, along with the previous submissions to the OOR.

The letter of Kelly J, Ohar, dated June 23, 2018, stated the following:

Dear Appeals Officer Casenta:

I am in receipt of a Final Determination in this matter issued by Appeals Officer Jordan C. Davis. I supply a copy of that Final Determination with this correspondence. The Final Determination asserts that the Police Department had demonstrated that the release of certain records would create a demonstrable risk of physical harm. The Final Determination transfers the appeal to your office to the extent that the Request seeks records related to a criminal investigation.

In the Final Determination the Appeals Officer asserted that the “Department has demonstrated that the Department’s incident reports are not police blotters **but has not demonstrated that it does not possess a responsive police blotter.**” (emphasis supplied).

I supply the affidavit I had previously provided which I believed had clearly addressed this issue. To the extent that this was not clear, I supply for your consideration a further affidavit establishing that the only documentation the Coatesville Police Department possesses which is responsive to the Request, is in the nature of an incident report. It is this document that the Police Department asserts, would, if released, create a

demonstrable risk of personal harm. This is the same incident report that is at issue for your office to make a determination as to whether the Request seeks records related to a criminal investigation. This document is not a “Police Blotter”.

I also supply for your consideration the letter brief submitted to the Office of Open Records which clearly stated: “**The report** sought herein is a true “investigative report”. See, Mitchell and other authorities cited, supra. Further, the report sought contains information relative to actions of a confidential informant which, if revealed, could “jeopardize the safety of the victim.” 65 P.S. § 67.708(b)(16)(v). (emphasis supplied).

The Police Department reasserts the argument that the single report in its possession is an investigative report and jeopardizes the safety of the victim. The Police Department incorporates herein by reference the earlier arguments as set forth in the letter brief to the Office of Open Records supporting its contention that this report is an investigative report.

To the extent that the Coatesville Police Department raised arguments previously in generic terms - suggesting the existence of other reports by the generic language - this supplemental affidavit should correct that impression.

June 23, 2018 Letter of Kelly J. Ohar.

The Affidavit of Kelly J. Ohar stated the following:

I, Kelly J. Ohar, Agency Open Records Officer of the City of Coatesville Police Department, being duly deposed according to law state as follows:

1. I am the Agency Open Record Officer of the City of Coatesville Police Department Chester County, Pennsylvania 19320.
2. I have received a request for “All documents, notes, incident reports, pictures, police blotters, supplemental

narratives (sic) pertaining to (sic) case # 1408113 and evidence # 1095....”

3. The City Police Department records as referenced above include information regarding, activities, times, locations, etc. in a criminal investigation as well as information regarding the identity of the police officer involved in the investigation and personal information regarding the “offender”.

4. The activities chronicled in these City Police Department records are likely to disclose the identity of a confidential informant and place his or her safety in jeopardy.

5. The report at issue involves “investigative matters” - which take the records clearly out of the limited type of information presented in a “police blotter”.

6. The City Police Department records responsive to the request consist of a single report containing information as identified in paragraph 4 above. This single report is six pages long and supplies information as identified in paragraph 3 above. It also specifies the times and dates of actions by a Confidential Informant as part of an investigation into illegal activities.

7. This report is not a police blotter.

8. I depose and state that the facts set forth in the foregoing Affidavit are true and correct.

Affidavit of Kelly J. Ohar.

The Requester did not file a response.

Consequently, this decision is based on the initial request, response, appeal filings with the OOR, and the new submission of Respondent. Moreover, those claims decided by the OOR cannot and will not be revisited in this opinion.

## **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 Coatesville 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).

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 filed an Affidavit, set forth above, in support of its reasons for the denial. The reasons cited for the denial and the Affidavit are sufficient to justify the denial. Consequently, there is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure.

The RTKL provides that records of an agency relating to or resulting in a criminal investigation, such as investigative materials, notes, correspondence,

videos, reports, and records, may be withheld as exempt. 65 P.S. § 67.708(b), titled, “Exceptions for public records”, provides in part as follows:

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

65 P.S. § 67.708(b).

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.

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. The Requester sought: “All documents, notes, incident reports, pictures, police blotters, supplemental narratives pertaining [to] case # 1408113, and evidence # 1095.” Respondent has filed an Affidavit, set forth above, in support of its reasons for the denial. The reasons cited for the denial and the Affidavit are sufficient to justify the denial.

The Requester stated in his appeal to the OOR that incident reports are the equivalent to police blotters, the criminal investigation is no longer on going, thereby conceding the investigative nature of the documents sought. The Requester also stated in his appeal to the OOR the general purposes of the Right to Know Law, and that the documents can be redacted.

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”).

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. In DiMartino v. Pennsylvania State Police, 2011 WL 10841570 (Pa. Cmwlth. 2011), the Commonwealth Court, in a memorandum opinion,<sup>1</sup> stated in pertinent part:

As a final point, we note that, the requester’s status as representative of Decedent’s family has no bearing on whether the requested records are accessible through a RTKL request.

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<sup>1</sup> DiMartino v. Pennsylvania State Police, 340 C.D. 2011, 2011 WL 10841570 (Pa. Cmwlth. 2011) is an unreported panel decision of the Commonwealth Court. As such, it may be cited for its persuasive value, but not as binding precedent. *See* Section 414 of the Commonwealth Court’s Internal Operating Procedures.

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 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. Based on the information provided by the parties it is clear that the record requested is a criminal investigative record. 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 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).

The RTKL provides that records of an agency relating to or resulting in a criminal investigation may be withheld as exempt. 65 P.S. § 67.708(b). The Respondent bears the burden of proving, by a preponderance of the evidence, that the documents requested are exempt from public access. 65 P.S. § 67.708(a)(1). A criminal investigative record is anything that contains information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing. 18 Pa.C.S.A. § 9102. There is sufficient evidence to support the determination that the documents requested 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. The Chester County District Attorney's Office shall also be served with a copy of the petition, pursuant to 65 P.S. § 67.1303(a), for the purpose of transmitting the record to the reviewing court. *See East Stroudsburg University Foundation v. Office of Open Records, 995 A.2d 496, 507 (Pa. Cmwlth. 2010).*

**FINAL DETERMINATION ISSUED AND MAILED ON: July 11, 2018**

*Nicholas J. Casenta, Jr.*

APPEALS OFFICER:

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## **INDEX OF APPENDICES**

**APPENDIX “A”** Appeal Documents

**APPENDIX “B”** 06/13/2018 Letter of CDDA Nicholas J. Casenta, Jr., Esquire  
Appeals Officer for DA’s Office of Chester County

**APPENDIX “C”** June 2018 Response of Respondent  
(Original appeal documents excluded)