



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
PENNSYLVANIANS FOR UNION REFORM,	:	
Requester	:	
	:	Docket No: AP 2015-2557
v.	:	
	:	
CENTRE COUNTY DISTRICT ATTORNEY'S OFFICE,	:	
Respondent	:	

INTRODUCTION

Pennsylvanians for Union Reform, (“Requester”) submitted a request (“Request”) to the Centre County District Attorney's Office (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking Office banking records. The Office partially denied the Request, arguing, among other reasons, that certain information was confidential under various statutes. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted** and the Office is required to take further action as directed.

FACTUAL BACKGROUND

On September 28, 2015, the Request was filed, seeking:

For all bank accounts under the ownership or control of the ... Office: please query, extract, and send to PFUR the following financial information from online banking records between the dates of 1-1-13 and 9-25-15:

- Request Item 1. The names of all banks and associated names of all persons with signatory financial control over those bank accounts; in electronic database format or printed hard copy form.
- Request Item 2. An itemized list of all deposit transactions including but not limited to incoming bank-to-bank (wire) transfers; in electronic database format or printed hard copy form.
- Request Item 3. An itemized list of all Debit Card/ATM card withdrawal transactions; in electronic database format or printed hard copy form.
- Request Item 4. An itemized list of all check withdrawal transactions; in electronic database format or printed hard copy form.
- Request Item 5. Copies of the front side of all Item 4 check withdrawals; in electronic database format or printed hard copy form.
- Request Item 6. An itemized list of all outgoing bank-to-bank (wire) transfers; in electronic database format or printed hard copy form.
- Request Item 7. Copies of all monthly bank statements; in electronic database format or printed hard copy form....
- Request Item 8. Copies of all expense reports filed by Stacy Parks Miller, District Attorney, for anticipated government reimbursement between the dates of 1-1-13 and 9-25-15.
- Request Item 9. Records evidencing all line item expense reimbursements paid from governmental funds to Stacy Parks Miller, District Attorney, between the dates of 1-1-13 and 9-25-15.

On October 2, 2015, the Office invoked a thirty day extension to respond to the Request. *See* 65 P.S. § 67.902. On October 28, 2015, the Office partially denied the Request. The Office denied access to information requested in Item 1 of the Request, claiming that it asked a question that does not require a response under the RTKL. The Department denied access to the information sought in Items 2-7 of the Request, claiming that the information contained public safety information, 65 P.S. § 67.708(b)(2), records of a criminal investigation, 65 P.S. § 67.708(b)(16), and records of a noncriminal investigation, 65 P.S. § 67.708(b)(17). The Office

also claims that Items 2-7 of the Request seek information related to the Office's Drug Forfeiture Account and Non-Drug Forfeiture Accounts made confidential by statute, specifically provisions of the Controlled Substances Forfeitures Act, 42 Pa. C.S. § 6801, the Terrorism Forfeiture Act, 42 Pa. C.S. § 6801.1, and the Chop Shop Forfeiture Act, 18 Pa. C.S. § 7707. The Office also cites *McDevitt v. Allegheny County District Attorney*, OOR Dkt. AP 2010-0123, 2010 PA O.O.R.D. LEXIS 165, in support of its denial. *See* 2010 PA O.O.R.D. LEXIS 165 (holding that forfeiture account information provided to a county controller were records of a noncriminal investigation because the records were used to create an audit report made confidential by statute). Finally, the Office granted access to information claimed to be responsive to Items 8 and 9 of the Request.

On November 9, 2015, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On November 10, 2015 and November 12, 2015, the Requester submitted supplemental position statements reiterating arguments raised in the initial appeal. On November 23, 2015, the Requester argued that, because the Office did not make a submission in this appeal, the Office waived its grounds for denial.

On November 30, 2015, in response to an OOR request for clarification, the Office reiterated its grounds for denial. The Office also argues that the OOR lacks jurisdiction to

¹ The Requester indicates that he filed a concurrent appeal with the appeals officer for the Office. During the course of the appeal, the Requester copied the OOR on filings submitted to the Office's appeals officer. For purposes of this final determination, the OOR considered only those submissions and portions of submissions directed to the OOR's appeals officer. *See* 65 P.S. § 1102(a)(2) (stating that "[t]he appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute").

consider this appeal as the Office is a judicial agency under the RTKL. In support of its position, the Office cites to *Johnson v. Bedford County*, No. 60071-2015 (Nov. 5, 2015), which held that the Bedford County District Attorney is a judicial agency under the RTKL, not subject to the jurisdiction of the OOR. The Office also submits a court transcript that resulted in the imposition of a preliminary injunction against Centre County prohibiting it from release judicial records of the Office in response to a RTKL request. N.T. 90-92 (imposing a preliminary injunction on the Centre County's release of the Office's judicial records). The transcript includes the following from Judge Kurtz: "no administrative agency may exercise control over the records generated by personnel of a judicial agency. [The Office] ... is a judicial agent. Here records, therefore, are out of bounds when it comes to anybody other than the judiciary." N.T. 51-52.

On November 30, 2015, the Requester reiterated his claim that the requested information should be subject to public access.

LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the

request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

As explained below, the Office is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct.

2011) (quoting *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The OOR has jurisdiction to consider this appeal

The Office argues that the OOR does not have jurisdiction over this appeal because the Office is a “judicial agency” under the RTKL. *See* 65 P.S. § 67.102 (defining judicial agency as “[a] court of the Commonwealth or any other entity or office of the unified judicial system”). The OOR does not have jurisdiction to hear appeals related to requests for records of judicial agencies. *See Court of Common Pleas of Lackawanna County v. Office of Open Records*, 2 A.3d 810, 813 (Pa. Commw. Ct. 2010); *Antidormi v. Lackawanna County Clerk of Courts*, No. 274 C.D. 2011, 2011 Pa. Commw. Unpub. LEXIS 779, *5-6 (Pa. Commw. Ct. 2011). Instead, appeals involving judicial agencies are to be heard by an appeals officer designated by the judicial agency. *See* 65 P.S. § 67.503(b).

The Requester essentially argues that the Office is collaterally estopped from relitigating the issue of whether the Office is a local agency under the RTKL. Collateral estoppel prevents a party from relitigating an issue if: 1) the issue decided in the earlier case is identical to the issue presented in the latter case; 2) there was a final judgment on the merits; 3) the party against whom estoppel is asserted was a party to the prior case; and 4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior case. *City of Pittsburgh v. Zoning Bd. of Adjustment*, 599 A.2d 896 (Pa. 1989). Collateral estoppel does not require mutuality of parties in both cases. *In re: Stevenson*, 40 A.3d 1212 (Pa. 2012). Thus, only the party against whom collateral estoppel is asserted need be a party in the prior case.

In *Sawicki v. Centre County District Attorney's Office*, OOR Dkt. AP 2015-0757, 2015 PA O.O.R.D. LEXIS 885, the OOR held that the Office is a local agency as defined in the

RTKL. Thus, the issue here is identical to the issue in *Sawicki*, there was a final judgment on the merits, and the Office, against which collateral estoppel is asserted, was a party in *Sawicki*, and had a full and fair opportunity to litigate the issue. Accordingly, the Office is collaterally estopped from claiming that it is a judicial agency.² *See also Pa. Dep't of Corr. v. Maulsby*, 121 A.3d 535 (Pa. Commw. Ct. 2015) (applying collateral estoppel in the context of RTKL appeals).

2. Item 1 of the Request seeks records

The Office asserts that Item 1 of the Request is a question and does not request records. Section 703 of the RTKL states that “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” *See* 65 P.S. § 67.703. A request must seek records, rather than answers to questions, in order to comply with the requirements of 65 P.S. § 67.703. *See Moll v. Wormleysburg Borough*, OOR Dkt. AP 2012-0308, 2012 PA O.O.R.D. LEXIS 197; *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at * 14 (Pa. Commw. Ct., 2012) (noting that the portion of a request “set forth as a question” did not “trigger a response”). Item 1 of the Request is not phrased as a question; instead, it seeks specific information regarding the bank accounts used by the Office and persons with control over those accounts. In addition, while not determinative, Item 1 of the Request is also not punctuated by a question mark, indicating that the Requester did not intend to ask a question. *See Varick v. Paupack Twp.*, OOR Dkt. AP 2013-1348, 2013 PA O.O.R.D. LEXIS 766. As Item 1 of the Request seeks specific information about bank accounts under ownership or control of the Office, the Item seeks records and not the answer to a question. As the Office has not cited any exemptions to withhold the records responsive to Item 1 of the Request, these records are subject to release.

² In support of its position, the Office cites a recent Bedford County Court of Common Pleas opinion. However, the decision in *Johnson* is not binding precedent as the Office is an agency located in Centre County. *See Boyd v. Langhorne Borough*, OOR Dkt. AP 2010-1040, 2010 PA O.O.R.D. LEXIS 997.

3. The Office has failed to meet its burden to prove that the withheld records are made confidential by statute

The Office claims that the account information sought by the Requester is made confidential by statute. Under the RTKL, “[a] record in the possession, custody or control of a local agency is presumed to be public unless ... (3) the record is exempt from disclosure under any other federal or State law or regulation or judicial order or decree.” *See* 65 P.S. § 67.305.

The Office distinguishes between Drug Forfeiture and Non-Drug Forfeiture accounts. With respect to Drug Forfeiture accounts, the Office cites to 42 Pa.C.S. § 6801(i)-(j), which states:

(i) Annual audit of forfeited property. -- It shall be the responsibility of every county in this Commonwealth to provide, through the controller, board of auditors or other appropriate auditor and the district attorney, an annual audit of all forfeited property and proceeds obtained under this section. The audit shall not be made public but shall be submitted to the Office of Attorney General. The county shall report all forfeited property and proceeds obtained under this section and the disposition thereof to the Attorney General by September 30 of each year.

(j) Annual report; confidential information regarding property. -- The Attorney General shall annually submit a report, to the Appropriations and Judiciary Committees of the Senate and to the Appropriations and Judiciary Committees of the House of Representatives, specifying the forfeited property or proceeds thereof obtained under this section. The report shall give an accounting of all proceeds derived from the sale of forfeited property and the use made of unsold forfeited property. The Attorney General shall adopt procedures and guidelines governing the release of information by the district attorney to protect the confidentiality of forfeited property or proceeds used in ongoing drug enforcement activities.

42 Pa.C.S. §§ 6801(i)-(j).

For the accounts described as “Non-Drug Forfeiture Accounts,” the Office withholds the information explaining as follows:

With regard to forfeiture proceeds from forfeiture activities other than from drug forfeitures, the ... Office maintains a separate account for those proceeds. The source of those proceeds are forfeitures undertaken pursuant to other Pennsylvania forfeiture statutes, such as the Chop Shop Act[,], 18 Pa. C.S.A. 7701-7708; the Gambling Forfeiture Statute at 18 Pa. C.S.A. 5513; the Human Trafficking Forfeiture Statute at 18 Pa. C.S.A. 3021; and the Sexual Offense

Forfeiture Statute at 18 Pa. C.S.A. 3141 as well as the Liquor Code[,] 47 P.S. 6-601 et[] seq.; Terrorism Forfeitures 42 Pa. C.S.A. 66801.1; and forfeitures under the Common Law. The ... Office does not keep separate accounts for each class of non-drug forfeiture proceeds.

... The Terrorism Forfeiture Act 42 Pa C.S.A. 6801.1 (i) (j) provides that counties shall provide through the controller, board of auditors or other appropriate auditor and the district attorney an annual audit of all forfeited property and proceeds obtained under The 42 Pa C. S. S. A. 6801.1. This audit, like the drug forfeiture audit, is not to be made public, but is to be submitted to the Office of Attorney General. The Attorney General then annually submits reports to the Appropriations and Judiciary Committees of the Pennsylvania House of Representatives. The Office of Attorney General is required under the statute to adopt procedures and guidelines governing the release of information by the several district attorneys' offices in Pennsylvania to "protect the confidentiality of forfeited property or proceeds used in ongoing enforcement activities." ...

The same exact statutory language applies to [the] Chop Shop Forfeiture proceeds 18 Pa. C. S. A. 7707 (i) (j).

Of the forfeiture statutes cited by the Office, three statutes—the Controlled Substances Forfeiture Act, the Chop Shop Act, and the Terrorism Forfeiture Act—contain similar provisions providing for submission of audits to the Attorney General to account for the use of forfeiture funds. The OOR has previously held that the Controlled Substances Act does not serve as a basis to withhold forfeiture account revenue and expense information. *See Karson v. County of Lycoming*, OOR Dkt. AP 2014-1926, 2015 PA O.O.R.D. LEXIS 55.

In *Karson*, a requester sought "revenue and expenses of the [District Attorney's] Office Drug and Liquor Forfeiture Funds." To support its denial of access, the agency cited the Controlled Substances Act, 42 Pa. C.S. §§ 6801-6802; specifically, 42 Pa. C.S. § 6801(i)-(j). The OOR ordered the release of records, holding that the agency "failed to provide any procedures or guidelines adopted by the Attorney General under 42 Pa.C.S. § 6801(j) that would preclude the release of the audits [under the Act]." In addition, the OOR noted that as "[t]he [r]equest seeks revenues and expenses of the fund, the [agency] ... has not demonstrated how

disclosure of these figures would disclose the identity of the forfeited property proceeds that are being used in ongoing drug enforcement activities.” As a result, the OOR concluded that the Controlled Substances Act did not preclude the release of information related to revenues and expenses related to the Drug and Liquor Forfeiture Fund.

Here, like the agency in *Karson*, the Office relies on confidentiality provisions applicable to audits conducted by counties and submitted to the Attorney General without citing any regulations promulgated by the Attorney General governing the release of information “to protect the confidentiality of forfeited property or proceeds used in ongoing drug enforcement activities.” In addition, the Office does not explain how the cited statutes serve as a basis to withhold all information related to the use of Office accounts. As a result, the Office has not met its burden to prove that the requested account information is made confidential by the cited forfeiture statutes.

4. The Request seek financial records

The Request seeks information related to control of Office accounts and expenditures from the Office’s bank accounts. The RTKL defines “financial record” as “[a]ny account, voucher or contract dealing with ... (i) the receipt or disbursement of funds by an agency; or (ii) an agency’s acquisition, use or disposal of services, supplies, materials, equipment or property.” 65 P.S. § 67.102. Because the records at issue deal with the receipt and disbursement of funds from Office accounts, the records are financial records under the RTKL. *See Karson v. County of Lycoming*, OOR Dkt. AP 2014-1926, 2015 PA O.O.R.D. LEXIS 55.

The exemptions found in the RTKL apply in a very limited manner to financial records. Section 708(c) of the RTKL states that “[t]he exemptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record

protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17).” 65 P.S. § 67.708(c); *see also* 65 P.S. § 67.706 (stating that an 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”). Because the records at issue are financial records, the Office may not withhold the records responsive to this Request in their entirety.

5. The Office has not met its burden to prove that Items 2-7 of the Request seek records of a criminal investigation

The Office argues that records responsive to Items 2-7 of the Request are exempt from disclosure pursuant to Section 708(b)(16) of the RTKL. Section 708(b)(16) exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation.” 65 P.S. § 67.708(b)(16). Section 503(d)(2) of the RTKL states that “[t]he district attorney of a county shall designate one or more appeals officers to hear appeals ... relating to access to criminal investigative record in possession of a local agency of that county.” 65 P.S. § 67.503(d)(2). Section 503(d)(2) adds that “[t]he appeals officer ... shall determine if the record requested is a criminal investigative record.” *Id.* As a result, the OOR routinely holds that it lacks jurisdiction over appeals involving criminal investigative records and dismisses appeals when records are alleged to be criminal investigative records in the possession of local law enforcement agencies.

In the instant matter, while the Office alleges that the records are criminal investigative records, the Office submits no evidence to establish that the records – which include copies of checks, money transfers, and other information contained on the Office’s bank statements – are related to any criminal investigation. The requested records pertain to Office expenditures, some of which may reflect the purchase of supplies and equipment that will be used in subsequent criminal investigations by the Office. The mere fact that the records relate to the Office’s activities, however, does not make the records themselves related to criminal investigations, as

there is no evidence that the records contain any investigatory material. *See Levy v. Senate of Pa.*, 94 A.3d 436, 448 (Pa. Commw. Ct. 2014) (“To the extent the documents reference and arguably ‘relate’ a criminal investigation conducted by another agency, the records themselves do not contain any investigatory material”); *Karson v. County of Lycoming*, OOR Dkt. AP 2014-1926, 2015 PA O.O.R.D. LEXIS 55 (holding that records related to revenues and expenditures from a forfeiture fund were not records of a criminal investigation). Further, the Office does not identify any specific criminal investigations to which the requested information relates. Therefore, there is no evidence that these records are or can be exempt under Section 708(b)(16) of the RTKL.

The purpose of the RTKL is to enable citizens to scrutinize their government and make government officials accountable for their actions. *See Bowling*, 990 A.2d at 824. As such, the OOR “must ... interpret the RTKL liberally to effect its purpose.” *Allegheny County Department of Administrative Services v. A Second Chance, Inc.*, 13 A.3d 1025, 1034 (Pa. Commw. Ct. 2011). The Office’s broad interpretation of Section 708(b)(16) frustrates the very purpose of the RTKL by withholding access to financial records merely because they relate to work conducted by the Office. Therefore, the OOR has jurisdiction over this matter because “[t]he requested records are incapable of being exempt under Section 708(b)(16).” *See Silver v. City of Pittsburgh*, OOR Dkt. AP 2013-1395, 2013 PA O.O.R.D. LEXIS 886.

6. The Office has not met its burden to prove that records responsive to Items 2-7 of the Request are records of a noncriminal investigation

The Office also contends that the requested information relates to a noncriminal investigation, and, therefore, is protected from disclosure under Section 708(b)(17) of the RTKL. Section 708(b)(17) exempts from disclosure records of an agency “relating to a noncriminal investigation,” including those “that, if disclosed, would ... 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 or certification or similar authorization issued by an agency or an executed settlement agreement....” 65 P.S. § 67.708(b)(17)(vi). In order for this exception to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012).

The Commonwealth Court held that “[a]n official probe only applies to ‘noncriminal investigations conducted by an agency acting within its legislatively granted fact-finding and investigative powers.’” *Pa. Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257, 259 (Pa. Commw. Ct. 2014) (quoting *Johnson*, 49 A.3d at 925). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure. *Id.* 91 A.3d at 259. *See also Collier v. Pa. Dep’t of State*, OOR Dkt AP 2014-0361; 2014 PA O.O.R.D. LEXIS 398; *Bhaya v. Central Bucks Sch. Dist.*, OOR Dkt. AP 2014-0319; 2014 PA. O.O.R.D. LEXIS 372.

In support of its assertion that the redacted information is a record of a noncriminal investigation, the Office argues that “[f]inancial records of this type are ... exempt under [the noncriminal investigation exemption] ... generally and under sub sections (iv) information made confidential by law and (v) workpapers underlying an audit.” In support of its position, the Office cites to *McDevitt v. Allegheny County District Attorney*, OOR Dkt. AP 2010-0123, 2010 PA O.O.R.D. LEXIS 165. In *McDevitt*, the OOR held that information provided by a district

attorney to a county controller for the purposes of conducting a statutorily required audit were exempt records of a noncriminal investigation—in effect holding that the requested records were workpapers underlying the audit. *See McDevitt*, 2010 PA O.O.R.D. LEXIS 165 *11-*12.

However, *McDevitt* is distinguishable from the facts of this appeal. Here, the Office is not arguing that the Request seeks a subset of its account records gathered for an audit. Instead, Items 2-7 of the Request seeks all Office account information, not only the account information that is collected and submitted for the purposes of a statutorily mandated audit. In *Hockeimer v. City of Harrisburg*, OOR Dkt. AP 2015-1852, 2015 PA O.O.R.D. LEXIS 1654, the OOR held that the Investigating Grand Jury Act (“Act”), 42 Pa.C.S.A. §§ 4541 *et seq.*, did not serve as a basis to withhold records under the RTKL where the records relate to agency operations and existed independently from any grand jury investigation. Like *Hockeimer*, the relevant Items of the Request seek records related to the Office’s bank accounts and not the subset of records collected as part of an audit. Therefore, without any evidence establishing the investigative nature of the withheld information, the Office has failed to meet its burden of proving that the information relates to a noncriminal investigation. *See* 65 P.S. § 67.708(a)(1).

7. The Office has not met its burden to prove that records responsive to Items 2-7 of the Request are subject to the public safety exemption

Section 708(b)(2) of the RTKL, which exempts from disclosure “[a] record maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity.” 65 P.S. § 67.708(b)(2). In order to withhold records under Section 708(b)(2) of the RTKL, an agency must show: (1) the records at issue relate to a law enforcement or public safety activity; and (2) disclosure of the records would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Dep’t of Corr.*, 61 A.3d

367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

Here, District Attorney Parks-Miller attests that:

[R]elease of these records could put drug traffickers on notice as to future steps that this [O]ffice might take in ongoing drug enforcement activities. Identities of payees of checks could tell drug traffickers what types of items and equipment law enforcement is purchasing and what training is being funded. From that information, drug traffickers could develop new plans to lessen the effects of this [O]ffice’s ongoing strategies in the war on illegal drugs and narcotics, which is so important, especially in light of the heroin epidemic that is killing so many of Pennsylvania.

With regard to non-drug forfeiture accounts, Ms. Parks-Miller attests that:

Release of these records, with regard to the Non-Drug Forfeiture Account, could also lead to the disclosure of the names of confidential sources or the identity of suspects who have not been charged with criminal offenses, and people to whom confidentiality has been promised by law enforcement, since these records and specific amounts of checks when compared with information available on the public record could identify those persons....

... [R]elease of these records could put criminals on notice as to future steps that this [O]ffice might take in ongoing enforcement activities. Identities of payees of checks could tell drug traffickers what types of items law enforcement is purchasing and from that information, criminals could develop new plans to lessen the effects of this [O]ffice’s ongoing strategies in the war on crime, which is so important, especially in light of the cost of crime, both economic cost and human cost borne by Pennsylvania’s citizens.

Under the RTKL, a statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Here, however, the Office contends that certain records reveal information about its law enforcement activities and speculates that the release of the requested records would be reasonably likely to jeopardize public safety. *See Pa. State Camp Lessees’ Ass’n v. Pa. Office of the Budget*, OOR Dkt. AP 2014-1158, 2014 PA O.O.R.D. LEXIS 1035 (holding that an agency did not explain the nature of alleged threats or how disclosure of records would cause security issue); *see also*

Haderer v. Pa. Dep't of Transp., OOR Dkt. AP 2014-0879, 2014 PA O.O.R.D. LEXIS 0878.

The Office has not provided evidence establishing that the release of these records would be reasonably likely to threaten public safety. Therefore, the Office has not proven that records are exempt under Section 708(b)(2) of the RTKL.

8. The names of law enforcement officers are not categorically exempt under the RTKL

The Office claims that names of law enforcement officers are exempt under the RTKL, without citing the exemption on which it relies. Law enforcement officers are agency employees and agency employees' names are generally public records under the RTKL. *See* 65 P.S. § 67.708(b)(6)(ii). While the personal identification exemption permits agencies to withhold the "name ... relating to an individual performing an undercover or covert law enforcement activity[,]" 65 P.S. § 67.708(b)(6)(iii), there is no exemption providing for an agency to withhold *all* names of law enforcement officers. As a result, the Office has not met its burden of proving that law enforcement officers' names are exempt from disclosure.

9. The Office has not shown that it provided all records responsive to Items 8 and 9 of the Request

The Office released some information responsive to Items 8 and 9 of the Request. However, the Office submits no evidence demonstrating that all information responsive to those Items have been provided to the Requester. As a result, the appeal is granted to the extent additional responsive records exist.

The OOR is mindful that an agency cannot produce records that do not exist within its "possession, custody or control" and, accordingly, is not ordering the creation of any records listed in the Request. Absent an agency providing a sufficient evidentiary basis as to whether any responsive records, however, the OOR will order the disclosure of responsive public records.

See generally Sindaco v. City of Pittston, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and the Office is required to provide all responsive records within thirty days. 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 Centre County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://www.openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: December 9, 2015



APPEALS OFFICER
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