



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**JOHN DEBARTOLA,
Requester**

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:

:

v.

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Docket No.: AP 2017-0399

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**CAMBRIA COUNTY DISTRICT
ATTORNEY’S OFFICE,
Respondent**

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INTRODUCTION

John DeBartola (“Requester”) submitted a request (“Request”) to the Cambria County District Attorney’s Office (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various records related to asset forfeiture accounts. The Office partially denied the Request, asserting that certain records are exempt from disclosure because they relate to noncriminal investigations and are confidential under the Controlled Substances Forfeiture Act. 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** and **denied in part**, and the Office is required to take further action as directed.

FACTUAL BACKGROUND

On January 19, 2017, the Request was filed, seeking:

[1.] [A]ll the records for a full accounting of all payroll wages and overtime wages paid from the drug forfeiture account to any county employees and police officers of Cambria [C]ounty from January 1, 2000 to present.

[2.] [A]ll records of all official audits involving forfeiture accounts and reports filed with the state of Pennsylvania regarding the use of funds from drug forfeiture accounts from January 1, 2000 to present.

[3.] [I]nternal audit report from the DA's office with the [C]ity of Johnstown for the drug forfeiture account that was listed on the news that was done to verify how the [C]ity of Johnstown spent the drug forfeiture account from the DA's office from January 1, 2000 to present.

[4.] [A]ll records and official audits involving the DUI accounts and reports filed with the state of Pennsylvania regarding the use of funds from the DUI account from January 1, 2000 to present.

On January 24, 2017, the Office invoked a thirty day extension during which to respond. *See* 65 P.S. § 67.902. On February 24, 2017, the Office partially denied the Request, asserting that certain of the requested records are confidential under the Controlled Substances Forfeiture Act, 42 Pa.C.S. §§ 6801-6802, and are exempt from disclosure because they relate to criminal and noncriminal investigations, 65 P.S. §§ 67.708(b)(16)-(17), threaten personal security and public safety, 65 P.S. §§ 67.708(b)(1)-(2), and contain personal identification information, 65 P.S. § 67.708(b)(6). Lastly, the Office asserts that no records exist prior to 2010.

On February 27, 2017, the Requester appealed to the OOR, challenging the denial and asserting grounds for disclosure. 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 March 9, 2017, the Office submitted a position statement, along with the affidavit of Kelly Callihan, Esq., the District Attorney. The Office asserts that the annual audit submitted to the Pennsylvania Office of the Attorney General and work papers underlying the audit are confidential under the Controlled Substances Forfeiture Act, 42 Pa.C.S. §§ 6801-6802. The Office states that records provided to the Requester have been redacted to protect personal security and public safety, 65 P.S. §§ 67.708(b)(1)-(2), personal identifying information, 65 P.S.

§§ 67.708(b)(6), and information related to its criminal and noncriminal investigations. 65 P.S. §§ 67.708(b)(16)-(17).

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 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.

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 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)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The Office does not possess records responsive to the Request prior to 2010

The Office states that it is not in possession of any records responsive to the Request prior to 2010. District Attorney Callihan attests that the Office does not possess records of the audits of drug forfeiture accounts for years that pre-date her service. She concludes that records prior to 2010 are not in the possession, custody or control of the Office.

Under the RTKL, an affidavit may serve as sufficient evidentiary support for the nonexistence of records. See *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). In the absence of any competent evidence that the Office acted in bad faith or that the records exist, “the averments in [the 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) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based on the evidence provided, the Office has met its burden of proving that no responsive records prior to 2010 exist in the Office's possession, custody or control.

2. The Office has not met its burden of proving that records are confidential under the Controlled Substances Forfeiture Act

The Office argues that the records responsive to Items 1 through 3 relating to audits of the drug forfeiture accounts, including deposits and disbursements, are not public records. The Office states that there are no reports, ledgers, payroll information or other records responsive to the Request, other than the records that are a part of the audit of the drug forfeiture accounts which are made confidential under the Controlled Substances Forfeiture Act ("Act"), 42 Pa.C.S. §§ 6801-6802. Specifically, the Office cites to Section 6801 of the Act, 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) (emphasis added).

District Attorney Callihan explains in her affidavit that the Office prepares a monthly report for submission to the Cambria County controller's office for the purpose of assembling the information into the annual report required to be submitted to the Pennsylvania Office of the Attorney General pursuant to 42 Pa.C.S. § 6801. She further attests that:

all records, account statements, deposits, checks or disbursements, and monthly reports maintained or prepared by my Office relative to the drug forfeiture accounts constitutes work papers underlying the audit of forfeited property and proceeds, without which the annual audit required by Section 6801(i) ...could not be compiled, and upon which the audit is specifically based.

Lastly, District Attorney Callihan confirms that other than the work papers underlying the audit of forfeited property, the Office has no other records that document monies deposited in or expended from the drug forfeiture accounts.

The Office further asks the OOR to reexamine its previous decisions on releasing such information, arguing that the audits of the controlled substance forfeitures and the underlying work papers are not public records and must remain confidential under 42 Pa.C.S. §§ 6801(i)-(j). However, the Office fails to address or 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. Where the Attorney General has not established procedures and guidelines to maintain the confidentiality of records under the Act, an agency may not withhold financial records regarding drug forfeiture proceedings. *Karson v. County of Lycoming*, OOR Dkt. AP 2014-1926, 2015 PA O.O.R.D. LEXIS 55 (holding that an 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 information under the Act); *see also Pennsylvanians for Union Reform v. Center County District Attorney's Office*, OOR Dkt. AP 2015-2557, 2015 PA O.O.R.D. LEXIS 2124.

Therefore, the Office has not established that the audits and underlying work papers are confidential under the Act.

Further the Office argues that we do not have jurisdiction over this matter. Rather, the OOR should allow these cases to be addressed by the Attorney General since the forfeiture information is in the custody and control of the Pennsylvania Attorney General. However, the RTKL defines a “record” as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is *created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.*

65 P.S. § 67.102 (emphasis added). As the Office acknowledges that these records were created by the Office as required by the Act, the responsive records are records of the Office for purposes of the RTKL. Additionally, the Request was submitted to the Office and the Requester properly appealed the Office’s denial of access to the OOR, as the OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). The mere fact that the Attorney General may also possess the responsive records does not divest the OOR of jurisdiction in this matter.

3. The Office’s conclusory statements are not sufficient evidence to demonstrate records relate to noncriminal investigations

The Office provides a footnote in its submission that responsive records are not subject to public disclosure under Section 708(b)(17) of the RTKL, which exempts from disclosure “[a] record of an agency relating to a noncriminal investigation, ... including [a] record that includes information made confidential by law” and “[w]ork papers underlying an audit.” 65 P.S. §§ 67.708(b)(17)(iv)-(v). In order for Section 708(b)(17) of the RTKL 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. Pennsylvania Convention Ctr. Auth.*, 49 A.3d 920, 925 (Pa. Commw. Ct. 2012).

Here, the Office has not provided any evidence that an inquiry, examination, or official probe was conducted as part of the Office’s official duties. *Pa. Dep't of Health*, 4 A.3d at 810-11; *Johnson*, 49 A.3d at 925. Not all agency fact-finding constitutes a noncriminal investigation. *Pa. Dep't of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). ...” In *Chawaga*, the Court held that a performance audit was not part the Department of Public Welfare’s legislatively granted fact-finding and investigative powers, and that the audit was ancillary to the Department’s public assistance services. *Chawaga*, 91 A.3d at 259. The Court noted that “[a] contrary determination of an “official probe” would craft a gaping exemption, under which any governmental information-gathering could be shielded from disclosure.” *Id.* Here, like in *Chawaga*, the Office’s responsibility to provide an annual audit of all forfeited property to the Office of the Attorney General is ancillary to the overall function and operation of the Office. Such fact-finding does not amount to a noncriminal investigation under the RTKL. Therefore, the Office has not met its burden of proving that responsive records relate to a noncriminal investigation. 65 P.S. § 67.708(a)(1).

4. The OOR has jurisdiction over the Office’s redactions in Item 4 of the Request

The Office also cited Section 708(b)(16) to support its redactions of records related to audits of DUI accounts. 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). A local agency

claiming that records are exempt under Section 708(b)(16) does not automatically divest the OOR of jurisdiction over an appeal.

Section 503(d) creates a two-step analysis for determining when cases should be heard by the OOR and when they should be heard by the appeals officer appointed by a District Attorney. First, jurisdiction is properly transferred from the OOR to the District Attorney's Office when an appeal on its face involves records that relate to a criminal investigation. (*e.g.*, search warrants, witness statements, etc.) *See Porter v. Allegheny County Sheriff's Office*, OOR Dkt. AP 2014-1910, 2014 PA O.O.R.D. LEXIS 1444 (Appeal transferred to DA where the request for a search warrant was on its face related to a criminal investigation). Second, when it is unclear whether the requested records relate to a criminal investigation, the local agency must provide some evidence showing how the records relate to a specific criminal investigation. While a very low threshold for transferring a case is needed, an agency must provide more than a conclusory affidavit that merely repeats the language of Sections 503(d) and 708(b)(16). *See Bush v. Westtown-East Goshen Police Dep't*, OOR Dkt. AP 2016-1869; 2016 PA O.O.R.D. LEXIS 1708 (Agency submitted affidavit demonstrating how the requested records related to a specific criminal investigation); *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).

Here, the fact that the requested records pertain to the seizure of property related to DUI offenses does not, in and of itself, make the records related to criminal investigations. The Requester seeks records related to the audits of these financial accounts, not records that would reveal an investigation. There is no evidence that the records themselves contain any

investigatory material. *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”). Accordingly, as the Office has failed to meet the threshold of proving that any of the redacted information is related to a criminal investigation, the OOR retains jurisdiction over Item 4 of the Request.

5. The Office has proven that certain information is exempt from disclosure under the personal security or public safety exemptions

The Office asserts that it provided all records responsive to Item 3 and 4 of the Request pertaining to disbursements to the Johnstown Police Department and DUI Task Force information subject to the redaction of information that would threaten personal safety and public security.

Section 708(b)(1) exempts from public disclosure “[a] record the disclosure of which ... would be reasonably likely to result in 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 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, 1156 (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). Based on the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *See Bowling*, 990 A.2d at 824.

Similarly, Section 708(b)(2) of the RTKL exempts from disclosure records “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). To establish this exemption, an agency must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013); *Adams v. Pa. State Police*, 51 A.3d 322 (Pa. Commw. Ct. 2012).

Item 3 of the Request

District Attorney Callihan attests that the Office is responsible for splitting proceeds of forfeiture equally with the police department that made the arrest and that the Office does not maintain ledgers of such transactions, but has an accounting of monies split between the Office and Johnstown Police Department and has provided that to the Requester. However, the records of the Johnstown Police Department that have been provided to the Requester and redacted pursuant to Sections 708(b)(1)-(2), stating:

...the redacted information would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual, specifically confidential reporting sources named in the records and officers who are named who work in an undercover capacity in drug investigations. Allowing such information to become public would endanger the safety of these individuals and subject them to potential retaliation from the criminal element. For the same reasons, the redacted information, if released, would be reasonably likely to jeopardize or threaten public safety ...in that disclosure of the named participants, whether confidential informants giving information to police or the officers who are working undercover, would jeopardize on-going investigations and render it impossible to use these individuals in future transactions as their identity would be known, thereby placing them at risk for retaliation and harm, and making it extremely difficult to arrest and prosecute individuals involved in the drug trade.

District Attorney Callihan’s affidavit is sufficient to establish that the identities of undercover officers and confidential informants contained in the records responsive to Item 3 are not subject to public access. Furthermore, Section 708(b)(6)(iii) of the RTKL states that “[a]n

agency may redact the name or other identifying information relating to an individual performing an undercover or covert law enforcement activity from a record.” 65 P.S. § 67.708(b)(6)(iii). Therefore, the Office may redact the names of undercover officers, confidential informants and any “individual performing an undercover or covert law enforcement activity” from the requested record. *See* 65 P.S. § 67.708(a)(1).

Item 4 of the Request

District Attorney Callihan attests that the DUI Task Force information responsive to Item 4 of the Request was provided to the Requester, but that certain information was redacted pursuant to Sections 708(b)(1)-(2), including:

information as to the locations used throughout the county for sobriety checkpoints and lists the names and addresses of officers who take part in sobriety checkpoints, roving patrols and saturation patrols. DUI Task Force enforcement events must be generally advertised prior to the event, without reference to specific location, to alert the public and encourage deterrence of impaired driving. Releasing the redacted information from past events would provide details of potential upcoming locations of planned events and would hinder the ability of police to secure an arrest if the locations become known. Furthermore, the redacted information would provide the names of officers who regularly work enforcement details in known areas of the county, allowing the potential for the criminal element to retaliate, which creates a demonstrable risk of physical harm.

With respect to the redactions of the records responsive to Item 4, District Attorney Callihan’s affidavit is insufficient to establish that the release of the information would be reasonably likely to result in harm to an individual or to public safety. *See Scolforo*, 65 at 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). The release of the locations and identities of officers who conducted the patrols in the past is not sufficient to create a reasonable likelihood of harm to the personal security of an individual or to jeopardize public safety. *See generally Hous.*

Auth. of the City of Pittsburgh v. Van Osdol, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012); *see also Schmitz v. Pa. Emgcy. Mgmt. Agcy.*, OOR Dkt. AP 2014-1055, 2014 PA O.O.R.D. LEXIS 1094.

Conversely, the Office does not sufficiently explain *how* disclosure of the redacted information of checkpoint locations and the identities of officers would result in harm to the officers or public safety. These checkpoints, roving patrols and saturation patrols are performed in the open and visible to the public; further, the officers who are conducting such operations identify themselves to an individual. Accordingly, the Office failed to demonstrate that this information is likely to result in substantial risk of physical harm to the personal security of any individual, or to jeopardize public safety. *See* 65 P.S. § 67.708(a)(1). Therefore, the Office may not redact this information from the records.

Finally, with respect to the redacted home addresses of law enforcement officers, Section 708(b)(6) of the RTKL states that “home addresses of law enforcement officer...” is not subject to public access. As such, the redaction of law enforcement officers’ home addresses was proper under the RTKL. 65 P.S. § 67.708(b)(6).

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **denied in part**, and the Office shall provide the Requester with the records responsive to Items 1-2 and Item 3-4, subject to the redactions discussed above, 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 Cambria 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 respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be

named as a party.¹ This Final Determination shall be placed on the OOR website at:
<http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: April 25, 2017

/s/ Jill S. Wolfe

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: John DeBartola (via e-mail only);
Jessica Aurandt, Esq. (via e-mail only);
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¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).