



## **FACTUAL BACKGROUND**

On August 16, 2018, the Request was filed, stating as follows:

... I was just reading about the June 27 death of Caleb Sturgis ... and wanted to see if it would be possible to get copies of his autopsy and toxicology reports.

On August 20, 2018, the Office denied the Request, arguing that the records contain individually identifiable medical information, 65 P.S. § 67.708(b)(5), and constitute autopsy records, 65 P.S. § 67.708(b)(20). The Office did, however, provide the Requester with a “View of Form,” which identifies the decedent as well as the cause and manner of death.

On August 31, 2018, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited the parties to supplement the record and directed the Office to notify third parties of their ability to participate in the appeal. 65 P.S. § 67.1101(c).

On September 13, 2018, the Office submitted a position statement, reiterating the arguments above and further arguing that the requested records contain information protected by the Health Information Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C.S. §§ 1320d *et seq.*; 45 C.F.R. § 164.502(a). In support of its arguments, the Office provided the sworn affidavit of Christina VandePol, M.D., the Coroner of Chester County, as well as various court decisions and final determinations of the OOR. The Requester did not submit any additional information during the appeal.

## **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, the parties did not request a hearing; however, the OOR has the 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 the possession of a local agency are presumed to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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)).

**1. The Request may not be modified on appeal**

On appeal, the Requester states that he is seeking the “[a]utopsy records and toxicology report for Caleb Sturgis....” However, the Request seeks only “autopsy and toxicology reports” for the decedent. Under the RTKL, a requester may not modify, explain or expand upon a request on appeal. *See Michak v. Pa. Dep’t of Pub. Welfare*, 56 A.3d 925, 930 (Pa. Commw. Ct. 2012) (holding that “where a requestor requests a specific type of record ... the requestor may not, on appeal, argue that an agency must instead disclose a different record in response to the request”); *Staley v. Pittsburgh Water and Sewer Auth.*, OOR Dkt. AP 2010-0275, 2010 PA O.O.R.D. LEXIS 256 (“A requester may not modify the original request as the denial, if any, is premised upon the original request as written”). Therefore, the OOR’s review on appeal is confined to the Request as written, and this Final Determination will address only the autopsy and toxicology reports. *See, e.g., Brown v. Pa. Turnpike Comm’n*, OOR Dkt. AP 2011-1287, 2011 PA O.O.R.D. LEXIS 998.

**2. The Office has not proven that the records constitute autopsy records**

The Office argues that the records at issue in this appeal—autopsy and toxicology reports prepared by the Coroner—are exempt under the RTKL. Section 708(b)(20) of the RTKL exempts from disclosure:

An autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction of facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or

in the course of a postmortem examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner.

65 P.S. § 67.708(b)(20). However, the exemption “shall not limit the reporting of the name of the deceased individual and the cause and manner of death.” *Id.*

While certain records of a coroner, such as autopsy reports, are exempt from disclosure under Section 708(b)(20) of the RTKL, these records are available pursuant to the Coroner’s Act, 16 P.S. §§ 1231-1253.<sup>1</sup> *See* 65 P.S. § 67.3101.1 (“If the provisions of this act regarding access to records conflict with any other ... state law, the provisions of this act shall not apply”). Under the Coroner’s Act, there are two ways to access records of a coroner. First, Section 1251 of the Coroner’s Act states that “[e]very coroner, within thirty (30) days after the end of each year, shall deposit all of his official records and papers for the preceding year in the office of the prothonotary for the inspection of all persons interested therein.” 16 P.S. § 1251. The Pennsylvania Supreme Court has found that records pertaining “to a duty of a coroner in his or her official capacity,” including autopsy reports, are “official records and papers” of a coroner that are required to be deposited with the county prothonotary. *See Penn Jersey Advance, Inc. v. Grim*, 962 A.2d 632, 636 (Pa. 2009) (“It is clear ... that conducting autopsies is one of the official duties of a coroner. It follows logically that a coroner’s resulting autopsy reports constitute ‘official records and papers’ within the meaning of Section 1251”).

In this case, the Office argues that it “only deposits the public ‘View of Form’ which includes the decedent’s cause and manner of death with the Chester County Prothonotary.” However, Section 1251 does not permit coroners to pick and choose which records they deposit with a prothonotary; instead, it requires coroners to “deposit *all* of [their] official records and

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<sup>1</sup> The Coroner’s Act, as part of the County Code, is applicable “to all counties of the third, fourth, fifth, sixth, seventh and eighth classes.” 16 P.S. § 102(b). Therefore, because Chester County is a county of the third class, its Coroner is subject to the provisions of the Coroner’s Act.

papers.” 16 P.S. § 1251 (emphasis added). The Court in *Penn Jersey* held that autopsy reports are “official records and papers” of a coroner, and because toxicology reports also pertain to a coroner’s official duties, those records constitute “official records and papers” of a coroner. 962 A.2d at 636-37 (“... [T]o the extent that [there is] any room for doubt, we now hold expressly that autopsy reports are ‘official records and papers’ under Section 1251”); 16 P.S. § 1237(a)(2) (stating that a coroner “shall investigate the facts and circumstances concerning deaths which appear to have happened within the county” in situations where those deaths “occur[ed] under suspicious circumstances, including those where alcohol, drugs or other toxic substances may have had a direct bearing on the outcome”). As a result, pursuant to Section 1251, the Coroner is required to deposit autopsy and toxicology reports with the Prothonotary.

However, to the extent that the Requester challenges the Office’s compliance with Section 1251 of the Coroner’s Act, the OOR is not the proper venue for any such challenge. The OOR lacks jurisdiction to order a coroner to deposit records with the Prothonotary; rather, the appropriate remedy appears to be a mandamus action. *See generally Penn Jersey*, 962 A.2d 636 (stemming from mandamus actions to compel a coroner to deposit his “official records and papers”).

The second means of accessing records under the Coroner’s Act is Section 1236.1(c), which provides as follows:

The coroner may charge and collect a fee of up to one hundred dollars (\$100) for each autopsy report, up to fifty dollars (\$50) for each toxicology report, up to fifty dollars (\$50) for each inquisition or coroner’s report and such other fees as may be established from time to time for other reports and documents requested by nongovernmental agencies....

16 P.S. § 1236.1(c). In *Penn Jersey*, the Court found that “Section 1236.1 ... provides a rapid means of procuring an autopsy report for those who do not wish to wait until after the end of the year, and who are also willing to pay the charges associated with procuring it.” 962 A.2d at 637.

In *Hearst Television, Inc. v. Norris*, the Court examined the interaction between Section 708(b)(20) of the RTKL and the Coroner’s Act and found that “the Coroner’s Act provides two methods of public access: the coroner’s year-end archiving of all ‘official records and papers’ with the prothonotary, in accord with Section 1251, or rapid access for those who do not wish to wait and are willing to pay a fee, in accord with Section 1236.1(c).” 54 A.3d 23, 33 (Pa. 2012). The Court then found that “[t]he RTKL provides the procedure for accessing those records that are available for immediate release for a fee pursuant to Section 1236.1(c).” *Id.* The Court further noted that “[t]here is no mention in Section 1236.1(c) of discretion”; as a result, “Section 1236.1(c) allows the coroner to charge fees for records, but does not afford the coroner any discretion with regard to releasing such records.” 54 A.3d at 32. Therefore, pursuant to *Norris*, the records identified in Section 1236.1(c) of the Coroner’s Act are available through the RTKL for the fees set forth in the Coroner’s Act.<sup>2</sup>

Here, the Request seeks autopsy and toxicology reports, which are both available for a fee under Section 1236.1(c). If the Requester chooses to pay the fees set forth in Section 1236.1(c), the records must be made available to the Requester pursuant to that Section. While Section 708(b)(20) of the RTKL exempts from disclosure autopsy records of a coroner, that exemption

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<sup>2</sup> The Office cites a decision of the Chester County Court of Common Pleas in which the Court found that a coroner’s report was exempt from disclosure under Section 708(b)(20) of the RTKL because the *Norris* and *Penn Jersey* decisions were inapplicable. Here, however, the Requester seeks autopsy and toxicology reports, which have been expressly declared by the Supreme Court to be available under Section 1236.1(c) of the Coroner’s Act. *Norris*, 54 A.3d at 32 (concluding that the release of toxicology reports is mandated in Section 1236.1 of the Coroner’s Act, subject to the payment of the appropriate fees, because Section 1236.1 “does not afford the coroner any discretion with regard to releasing such records”); *Penn Jersey*, 962 A.2d at 636-37 (finding that autopsy reports are part of a coroner’s “official records and papers”).

does not control in this instance, as the records are available from the Office pursuant to the Coroner's Act. *See* 65 P.S. § 67.306 (“Nothing in t[he RTKL] 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. § 67.3101.1.

**3. The Office has not proven that the records constitute medical records**

The Office denied access to the requested records pursuant to Section 708(b)(5) of the RTKL, 65 P.S. § 67.708(b)(5); however, this exemption does not apply to the records at issue in this appeal. Section 708(b)(5) of the RTKL, in addition to generally exempting from disclosure medical records and “individually identifiable health information,” specifically exempts from disclosure “results of tests, including drug tests.” 65 P.S. § 67.708(b)(5). Conversely, toxicology reports are specifically delineated as records that may be obtained under Section 1236.1(c) of the Coroner's Act and, therefore, can be accessed from a coroner pursuant to the Coroner's Act and through the RTKL. The Court's holding in *Norris* would create an absurd result if coroners were permitted to withhold toxicology reports, or any other records listed in Section 1236.1(c) of the Coroner's Act, pursuant to Section 708(b)(5) of the RTKL because they contain medical information, as the records cannot be both publicly accessible under the Coroner's Act and exempt under the RTKL. Section 1236.1(c) of the Coroner's Act controls.

**4. The Office has not proven that the records are protected by the HIPAA Privacy Rule**

The Office also argues that the records contain information protected by the HIPAA Privacy Rule. HIPAA states that “[a] covered entity may not use or disclose protected health information.” 45 C.F.R. § 164.502(a). HIPAA defines a “covered entity” as “(1) A health plan; (2) A health care clearinghouse; (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.” 45 C.F.R. §

160.103. Pursuant to HIPAA, “[a] covered entity may not use or disclose protected health information[,]” including “individually identifiable health information.” 45 C.F.R. § 164.502(a).

HIPAA defines “individually identifiable health information” as:

information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
  - (i) That identifies the individual; or
  - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 C.F.R. § 160.103; *see also Opis Mgmt. Res. LLC v. Sec’y Fla. Agency for Health Care Admin.*, 713 F.3d 1291, 1294-95 (11th Cir. 2013) (noting that the enactment of HIPAA was to address concerns about the confidentiality of patients’ individually identifiable health information); *S.C. Med. Ass’n v. Thompson*, 327 F.3d 346, 348 (4th Cir. 2003); *Citizens for Health v. Leavitt*, 428 F.3d 167, 172-74 (3d Cir. 2005) (detailing the history of the Privacy Rule’s promulgation and explaining its requirements).

The Office contends that the coroner is a covered entity and, as a result, HIPAA applies to the requested records because “[t]he autopsy and toxicology work for Caleb Sturgis was conducted by a Medical Doctor in Chester County Hospital” and “the autopsy performed by the doctor was a very detailed external and internal assessment of Caleb Sturgis[’] body, which included toxicological and medical test results of blood and other bodily fluids.” However, a coroner does not fall within HIPAA’s definition of a “covered entity,” as a coroner is not a health plan, health care clearinghouse, or health care provider. *See generally The Beaver County Times v. Beaver County*, OOR Dkt. AP 2017-0349, 2017 PA O.O.R.D. LEXIS 458 (noting that coroners are not

covered entities under HIPAA). Further, there is no evidence that the withheld records were created by or received from a covered entity, as the Office has not demonstrated that the medical doctor who performed the postmortem examination on Mr. Sturgis was a covered entity. *See* 45 C.F.R. § 164.512(g). Because neither the Office nor the medical doctor who performed the autopsy on Mr. Sturgis is a covered entity under HIPAA, the Office may not deny access to the records based on HIPAA's Privacy Rule. *See, e.g., Marchiano and the Republican Herald v. Schuylkill County*, OOR Dkt. AP 2018-0958, 2018 PA O.O.R.D. LEXIS 835; *Segelbaum and the York Daily Record v. York County*, OOR Dkt. AP 2017-1459, 2017 PA O.O.R.D. LEXIS 1332 (finding that HIPAA's Privacy Rule did not protect information collected during a postmortem examination and accompanying mortuary services), *affirmed in part by, Cnty. of York v. Segelbaum*, No. 2017-SU-002770 (York Cnty. Ct. Com. Pl., Apr. 3, 2018).

### CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Office shall provide access to the records as set forth in Section 1236.1(c) of the Coroner's Act. 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). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules 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.<sup>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>3</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: 1 October 2018**

*/s/ Joshua T. Young*

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