INTRODUCTION

Jo Ciavaglia and the Bucks County Courier Times (collectively “Requester”) submitted a request (“Request”) to New Hope Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 et seq., seeking taser usage reports. The Borough denied the Request, arguing that the records relate to criminal and noncriminal investigations, and contain individuals’ medical information. 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 Borough is required to take further action as directed.

FACTUAL BACKGROUND

On April 25, 2019, the Request was filed, seeking “copies of all Taser Usage Report Forms filed with the New Hope Police Chief and/or the police department X26 Taser trainer for the calendar years January 1, 2007 through YTD.” The Requested added that “some redaction of
sensitive information might be required…” On May 2, 2019, the Borough denied the Request, arguing that the records relate to criminal and noncriminal investigations, 65 P.S. §§ 67.708(b)(16)-(17), and contain individuals’ medical information, 65 P.S. § 67.708(b)(5).

On May 3, 2019, 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 Borough to notify any third parties of their ability to participate in the appeal. See 65 P.S. § 67.1101(c).

On May 23, 2019, the Borough submitted a position statement in support of its denial, as well as the affidavit, made under penalty of perjury, of Michael Cummings, the Borough’s Chief of Police. On May 23, 2019, the Requester submitted a response to certain arguments in the Borough’s position statement. On May 30, 2019, upon a request from the OOR, the Borough provided a blank copy of a Taser Usage Report Form (“Form”).

**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.” 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.* 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.* Here, neither party has requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Borough 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. Scalforo,* 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 appeal is limited to the Forms

Chief Cummings attests that “[t]he reports include a description of the incidents in which a Taser was discharged or threatened to be discharged and, along with the incident reports referred to therein and incorporated by that reference, describe the steps taken to investigate the offender(s)….” (emphasis added). A review of a blank Form shows that an incident report is generally attached to this document, and much of the evidence submitted appears to address the contents of these incident reports. However, the Request does not seek incident reports, and the fact that the Forms are generally attached to an incident report does not affect the OOR’s analysis of the public nature of the Forms. See Global Tel*Link Corp v. Wright, 147 A.3d 978, 981 (Pa. Commw. Ct. 2016) (“Although DOC appended GTL’s Financial Information to the contract, there is no support for the theory that these appended materials become part of the contract and, thus, a ‘financial record’”). Instead, as the Forms are generated independently of the incident reports, they are separate records, and the OOR must separately examine the public nature of these documents.

2. The Forms are public records subject to redaction

The Borough argues that the requested Forms are related to criminal and noncriminal investigations, 65 P.S. §§ 67.708(b)(16)-(17), are protected from disclosure by the Criminal History Record Information Act (“CHRIA”), 18 Pa.C.S. §§ 9101 et seq., and contain individually identifiable health information, 65 P.S. § 67.708(b)(5).

a. The OOR maintains jurisdiction over this appeal

The Borough first argues that the OOR lacks jurisdiction over this appeal because the Forms are criminal investigative records. Under Section 503(d)(2) of the RTKL, “[t]he district attorney of a county shall designate one or more appeals officers to hear appeals … 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.” 65 P.S. § 67.503(d)(2). However, a local agency claiming that records are exempt under Section 708(b)(16) of the RTKL 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, such as 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 Borough has provided a copy of a blank Taser Usage Report Form. This Form contains the following fields:
• Date
• Incident Number
• Officer
• Location of the Incident
• TASER discharged (Yes or No)
• Serial Number of TASER Used
• Serial Number of the Cartridge Used
• AFIDS Collected (Yes or No)
• Property Report Number for Deployed Cartridge
• Probe Hit/Drive Stun/Both
• Location of Probe Hits (with entries for Probe #1 and Probe #2)
• Number of Times the Subject was Energized
• Was the Subject Transported to the Hospital (Yes or Not)
• Subject’s Name/Date of Birth/Address/Social Security Number/Phone Number
• Comments

Chief of Police Cummings attests, as follows, in support of the Borough’s denial:

3. I performed a diligent search of Borough records related to this request. I found ten Taser Usage Forms. They are broken down as the following: nine arrested (four Taser not deployed and five in which the Taser was deployed) and one Mental Health Taser in which it was not deployed.

4. I located the ten documents requested, retrieved them from the Police Department files, and reviewed them.

5. There may be an eleventh report prior to 2009 in which the Taser was deployed by missed the subject, but it cannot be currently located according to Taser Instructor, Richard Joyner….

7. The nine documents involving arrests relate to specific criminal investigations, by nine defined individuals, with nine separate and defined victims.

8. The tenth report contains specific information related to a specific individual suffering from mental illness and in need of treatment.

9. The documents detail uses of force, investigation of crimes, and investigative of a mentally ill subject.

10. The documents contain the identify of criminal defendants, and a mentally ill subject who was not charged with a crime.

11. The reports include a description of the incidents in which a Taser was discharged or threatened to be discharged and, along with the incident reports referred to therein and incorporated by that reference, describe the steps taken to investigate the offender(s) after he (or she) was subdued or arrested,
including interviewing witnesses, investigative past criminal activity by the offender and filing charges.

12. In addition, the document lists the investigative techniques utilized by the Police Department, the results of interviews of witnesses and others, and identifies documents and physical evidence chosen and reviewed as part of the criminal investigation of various incidents.

13. The matters contained in the nine reports resulting in arrests are protected by the Criminal History Records Information Act, as they contain investigative information.

14. The remaining document involves the threat of use of the Taser on a mentally ill subject who was not ultimately charged with a crime.…

18. All ten documents … contain specific information related to detailed investigations of discrete crimes, victims and events as part of the Police Department’s official duties.

19. The documents requested contain criminal investigations, CHRIA protected documents, non-criminal investigations and/or mental health information exempted under the [RTKL] and other statutes.

As noted above, this appeal does not concern the incident reports attached to the Forms. However, the majority of the evidence submitted by Chief Cummings addresses information not contained on the Forms. Specifically, while Chief Cummings attests that the records “describe the steps taken to investigate the offender(s) after he (or she) was subdued or arrested, including interviewing witnesses, investigate past criminal activity by the offender and filing charges,” the Forms do not document or collect this information.¹

Instead, the Forms appear to document information that, while tangentially related to a criminal investigation, is not investigative in of itself. See Levy v. Senate of Pa., 94 A.3d 436, 448

¹ In this situation, the focus is on the content of the records, rather than the effect of disclosure. Cf. Pa. State Police v. ACLU of Pa., No. 1066 C.D. 2017, 2018 Pa. Commw. Unpub. LEXIS 275 (Pa. Commw. Ct. 2018) (“… [H]ere, the actual words on the page are not at issue; rather the issue is whether disclosure of those words ‘would be ‘reasonably likely’ to threaten public safety or a public protection activity’”), appeal granted, Pa. State Police v. ACLU, No. 406 MAL 2018, 2018 Pa. LEXIS 6283 (Pa. 2018). As such, it was appropriate for the OOR to request and review the blank Form.
(Pa. Commw. Ct. 2014) (“To the extent the documents reference and arguably ‘relate to’ a criminal investigation, the records themselves do not contain any investigatory material”). In other words, the Forms, as a whole, do not “depict a systematic inquiry or examination into a potential crime.”

**Pa. State Police v. Grove**, 161 A.3d 877, 893 (Pa. 2017). A review of the blank Form indicates that its purpose is outside of the criminal investigation itself. *See Schmitt and the Pittsburgh Tribune-Review v. Churchill Borough*, OOR Dkt. AP 2017-1868, 2017 PA O.O.R.D. LEXIS 1625 (finding that taser discharge reports are not criminal investigative records). Additionally, Chief Cummings’ conclusory statements regarding the Forms’ connections to criminal investigations are insufficient to prove that the records are criminal investigative records.² Therefore, for the reasons set forth above, the Forms are not criminal investigative records, and the OOR retains jurisdiction over this appeal. Because they are not criminal investigative records, the Borough has not met its burden of proving that the records are exempt under Section 708(b)(16) of the RTKL or protected from disclosure by CHRIA.³

Nevertheless, a portion of the Forms may contain criminal investigative information, specifically the “Comments” section, as it is unclear what information is included in that section. Therefore, because the Forms often relate to criminal incidents, the appeal is transferred in part to the Appeals Officer for the Bucks County District Attorney’s Office (“DA’s Office”) to determine

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² Under the RTKL, “a generic determination 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. Commw. Ct. 2013) (en banc); see also *Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL’) (citations omitted); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*); *W. Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) (“The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions”) (citing *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)).

³ The records are not investigative information under CHRIA, for the reasons set forth above. CHRIA defines “investigative information” as “[i]nformation 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.” 18 Pa.C.S. § 9102.
if the “Comments” section of the Forms contain any criminal investigative information. See 65 P.S. § 67.503(d)(2). A copy of this final order and the record before the OOR will be sent to the Appeals Officer for the DA’s Office.

b. The records are not related to a noncriminal investigation

Alternately, the Borough argues that the Forms would be related to noncriminal investigations, to the extent that the OOR finds that they are unrelated to criminal investigations. Section 708(b)(17) of the RTKL which exempts from disclosure “[a] record of an agency relating to a noncriminal investigation,” including “[i]nvestigative materials, notes, correspondence and reports.” 65 P.S. § 67.708(b)(17)(ii). In order for this exemption 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. 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). Additionally, the investigations must specifically involve an agency’s legislatively granted fact-finding powers. See Pa. Dep’t of Pub. Welfare v. Chawaga, 91 A.3d 257 (Pa. Commw. Ct. 2014).

The Borough has not provided any argument or evidence regarding its authority to conduct investigations into the use of tasers by police officers. However, even assuming that such authority exists, for the same reasons noted above, the Borough has not demonstrated that the Forms’ contents are investigative in nature. As a result, the Borough has not met its burden of proving that the Forms are related to noncriminal investigations.
c. The Borough may redact individually identifiable health information

The Borough argues that the records contain an individual’s medical information. Section 708(b)(5) of the RTKL exempts from disclosure “[a] record of an individual’s medical, psychiatric or psychological history or disability status,” as well as “related information that would disclose individually identifiable health information.” 65 P.S. § 67.708(b)(5). While the Form does not contain any fields addressing protected health information, Chief Cummings confirms in his affidavit that one of the Forms pertains to “a mentally ill subject who was not charged with a crime.” Therefore, to the extent the “Comments” section contains any individually identifiable medical information about this individual, including information regarding his or her mental health status, such information can be redacted from that section pursuant to the exemption.4

d. The Borough may redact home addresses, telephone numbers, dates of birth, and social security numbers

The Forms contain various personal identification information that is exempt under Section 708(b)(6)(i)(A) of the RTKL, as well as names, dates of birth, and home addresses. The Borough does not raise this exemption, so the OOR must determine whether the information is protected by the constitutional right to privacy, pursuant to the holding in Pa. State Educ. Ass’n v. Commonwealth, 148 A.3d 142 (Pa. 2016) (“PSEA”).

In PSEA, the Pennsylvania Supreme Court held that individuals possess a right to privacy in certain types of personal information, including their home addresses. 148 A.3d 142 (Pa. 2016). When a request for records implicates personal information not expressly exempt from disclosure under the RTKL, the OOR must balance the individual’s interest in informational privacy with the public’s interest in disclosure and may release the personal information only when the public

4 The Requester acknowledges in the Request that certain “sensitive information” may have to be redacted from the records.

Although the Pennsylvania Supreme Court did not expressly define the types of “personal information” subject to the balancing test, the Court recognized that certain types of information, including home addresses, by their very nature, implicate privacy concerns and require balancing. *PSEA*, 148 A.3d at 156-57; *see also Tribune-Review Publ. Co. v. Bodack*, 961 A.2d 110, 117 (Pa. 2008) (finding telephone numbers to constitute personal information subject to the balancing test); *Pa. State Univ.*, 935 A.2d at 533 (finding home addresses, telephone numbers and social security numbers to be personal information subject to the balancing test); *Sapp Roofing Co. v. Sheet Metal Workers’ International Assoc.*, 713 A.2d 627, 630 (Pa. 1998) (plurality) (finding names, addresses, social security numbers, and telephone numbers of private citizens to be personal information subject to the balancing test).

Here, Section 708(b)(6) of the RTKL exempts from disclosure “a person’s Social Security number” and “home, cellular or personal telephone numbers.” 65 P.S. § 67.708(b)(6)(i)(A). By exempting this information from disclosure under the RTKL, “the General Assembly has already performed the necessary PSEA balancing test.” *Reese*, 173 A.3d at 1160 (citing *PSEA*, 148 A.3d at 156 n.8); *see also Governor’s Office of Admin v. Campbell*, 202 A.3d 890, 894-95 (Pa. Commw. Ct. 2019) (“In performing [the balancing test], we may rely upon, when appropriate, ‘legislative
pronouncements or prior decisions’ of Pennsylvania courts”). Therefore, the Borough may redact this information from the Forms.

With regard to the remaining information, neither the Requester nor the Borough have articulated specific public or privacy interests. The Requester argues that “it is in the public interest for our news organization to have access to these records” without addressing the specific information at issue, while the Borough has not raised the right to privacy as a basis for denial. With respect to home addresses, courts have noted that “[t]he disclosure of personal information such as home addresses, reveals little, if anything, about the workings of government[.]” PSEA, 148 A.3d at 145 (citation omitted). There exists a strong public interest favoring the withholding of home addresses, and in this instance, the OOR cannot discern any public benefit from the disclosure of this information that outweighs the individuals’ right to privacy. Cf. McKelvey, 2019 Pa. Commw. LEXIS 528, *21 (finding that the “OOR struck an appropriate balance in permitting partial redaction of addresses” due to the specific facts of that, case). The OOR has also found that “there is a strong privacy interest” in one’s date of birth. McKelvey et al. v. Pa. Dep’t of Health, OOR Dkt. Ap 2017-1443, 2018 PA O.O.R.D. LEXIS 72 (citing Delaware County v. Schaefer, 45 A.3d 1149, 1153 (Pa. Commw. Ct. 2012) (noting that dates of birth “could be misappropriated or misused”)), aff’d in part, McKelvey, 2019 Pa. Commmw. LEXIS 528. Because a public interest that outweighs this privacy interest has not been articulated, dates of birth may also be redacted from the records.

However, the OOR is unable to determine a privacy interest in the names contained on the Forms. The Commonwealth Court has noted that:

[C]ertain factors are constant when evaluating a privacy interest in information. One is an individual’s reasonable expectation that the information is of a personal nature… When information is public as a matter of statute, it is unreasonable for a person to expect that it is of a personal nature… Another factor is how the agency
obtained the information: when an individual voluntarily submits information, it may be disclosed...; whereas, information obtained by an agency premised on statutory confidentiality is protected.... Also, the context holds additional significance, as does where the information is an essential component of a public record.

_Butler Area Sch. Dist. v. Pennsylvanians for Union Reform_, 172 A.3d 1173, 1184 (Pa. 2017). Here, the Forms contain the names of individuals who have been taken into custody by the Borough Police Department. There does not appear to be a reasonable expectation of privacy in this information, as police blotter information, including the names of individuals arrested, is expressly public under both the RTKL and CHRIA. See 65 P.S. § 67.708(b)(16); 18 Pa.C.S. § 9104(b) (“Court dockets, police blotters and press releases and information contained therein shall, for the purpose of this chapter, be considered public records”). Because one’s interactions with police are not subject to any known privacy interest, the OOR cannot conclude that the individual’s names are subject to the right to privacy balancing test.⁵

_e. Redaction does not implicate the creation of a record_

Finally, the Borough argues that to the extent the Requester seeks redacted documents, such request would require the creation of records. While Section 705 of the RTKL states that “an agency shall not be required to create a record which does not currently exist...,” 65 P.S. § 67.705, Section 706 of the RTKL is clear that “[t]he agency may not deny access to the record if the information which is not subject to access is able to be redacted.” 65 P.S. § 67.706. Therefore, redaction of the Forms does not entail the creation of new records because it is mandated by Section 706 of the RTKL.

⁵ The OOR acknowledges that one of the individuals was “a mentally ill subject who was encountered by the police in crisis to provide services related to obtaining treatment.” However, as stated above, any information regarding that individual’s medical condition may be redacted from the Comments section of the relevant Form.
CONCLUSION

For the foregoing reasons, the Requester’s appeal is granted in part, denied in part, and transferred in part, and upon a final determination issued by the Appeals Officer for the DA’s Office, the Borough shall provide redacted copies of the Taser Usage Report Forms consistent with this Final Determination. 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 Bucks 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.6 This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: June 19, 2019

/s/ Kyle Applegate

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APPEALS OFFICER
KYLE APPLEGATE, ESQ.

Sent to: Jo Ciavaglia (via email only);
EJ Lee (via email only);
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Appeals Officer, DA’s Office (via US Mail only)

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