FINAL DETERMINATION

IN THE MATTER OF

ROBIN LLOYD,
Requester

v.

LACKAWANNA COUNTY,
Respondent

Docket No: AP 2019-0748

INTRODUCTION

Robin Lloyd (“Requester”), a journalist and adjunct professor at New York University’s Carter Journalism Institute, submitted a request (“Request”) to Lackawanna County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 et seq., seeking records regarding a specific individual’s death. The County denied the Request, arguing that the records are autopsy records. 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 County is required to take additional action as directed.

FACTUAL BACKGROUND

On April 25, 2019, the Request was filed, seeking “a copy of the autopsy of Robert Lasky, deceased on August 13, 2016, in Scranton” and “any documents, such as Mr. Lasky’s autopsy and/or a toxicology report, that might reveal details of his medical condition at death.” On April
26, 2019, the County denied the Request, arguing that the requested records constitute autopsy records. 65 P.S. § 67.708(b)(20).

On May 10, 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 County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On May 22, 2019, the County submitted a position statement, reiterating its grounds for denial and further arguing that the records are protected from disclosure by the Health Information Portability and Accountability Act of 1996 (“HIPAA”) and the constitutional right to privacy. In support of its arguments, the County provided the attestation, made under the penalty of perjury, of Fran Pantuso, the County’s Chief of Staff and Open Records Officer, and the sworn affidavits of Mauri Kelly, the Clerk of Judicial Records of the County, and Timothy Rowland, the County Coroner. The Requester did not submit any additional legal argument or evidence on 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. Winternmantel, 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 necessary information and evidence before it to properly adjudicate the matter.

The County 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)(1). 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 records are not protected by HIPAA

The County argues that the records are protected from disclosure by HIPAA, which 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).

In his affidavit, Mr. Rowland attests, in relevant part, as follows:

The deceased, Robert Lasky, died on August 13, 2016. His death was … directly caused by substance use, as acknowledged by the Requester....
I began my investigation into decedent’s death upon notification that he was deceased and upon viewing the body and taking the deceased into my custody for the determination of the cause and manner of death.

My office had an autopsy conducted on the body of the deceased by a forensic pathologist. The pathologist conducted a gross visual inspection of the body and then performed an internal examination of the body and a toxicological analysis of the tissues. The autopsy confirms the height, weight, eye and hair color of the deceased. It also provides how much each of his major organs weighed, how much bile, urine and vitreous fluids were present, whether he had any medical conditions or was taking any medications. The autopsy is the last medical examination of the body and is a deeply personal medical description of the deceased. The information is [P]rotected Health [I]nformation under [HIPAA] and constitutes “medical/psychological records” defined as records relating to the past, present or future physical or mental health condition of an individual.…


While the County contends that its coroner is a covered entity and, as a result, HIPAA applies to the requested records, coroners do not fall within HIPAA’s definition of a “covered entity,” as they are not health plans, health care clearinghouses, or health care providers. See Wing and the Huffington Post v. Chester County Coroner’s Office, OOR Dkt. AP 2018-1577, 2018 PA O.O.R.D. LEXIS 1205; The Beaver County Times v. Beaver County, OOR Dkt. AP 2017-0349,

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1 Mr. Rowland also affirms that the widow of the deceased was notified of the appeal, stating that she opposed the disclosure of the records and submitted a form requesting to participate in the appeal as an interested third party along with the County’s submission; however, no such form was provided to the OOR by the County or received from the deceased’s widow or any other third party.

2 The County correctly notes that a covered entity may disclose protected health information to coroners or medical examiners for the purpose of identifying the deceased, determining a cause of death, or other duties as authorized by law. 45 C.F.R. § 164.512(g). The County is also correct that a covered entity must comply with the prohibitions set forth in HIPAA for a period of fifty (50) years following the death of an individual. 45 C.F.R. § 164.502 (emphasis added). However, as noted herein, coroners do not meet the definition of covered entities under HIPAA, and the County has not presented legal support demonstrating that information derived from and records created during an autopsy constitute protected health information under HIPAA.
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 County has not established that the forensic pathologist who performed the autopsy on Mr. Lasky was a covered entity. See 45 C.F.R. § 164.512(g). Because neither the County nor the forensic pathologist who performed the autopsy on Mr. Lasky is a covered entity under HIPAA, the County may not deny access to the records based on HIPAA. 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).

2. **The County has not proven that the records are exempt under Section 708(b)(20)**

The County denied the Request pursuant to Section 708(b)(20) of the RTKL, which 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 or 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 records, would be exempt under Section 708(b)(20) of the RTKL, these records are made publicly available by the Coroner’s Act.
(“Coroner’s Act”), 16 P.S. §§ 1201-B et seq.; see 65 P.S. § 67.3101.1 (“If the provisions of th[e RTKL] regarding access to records conflict with any other … state law, the provisions of th[e RTKL] shall not apply”). Under the Coroner’s Act, there are two ways to access records of a coroner: First, Section 1236-B of the Coroner’s Act states that “[i]n counties of the third, fourth, fifth, sixth, seventh and eighth classes, every 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. § 1236-B. The Pennsylvania Supreme Court has found records pertaining “to a duty of a coroner in his or her official capacity,” including autopsy and toxicology reports, to be “official records and papers” of a coroner that are required to be deposited with the county prothonotary. 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 [1236-B]”).

Here, the County does not identify the responsive records within its possession; instead, the County states that it has “fulfilled its obligation to properly deny the requested records” because it “has no obligation to provide the requested information…..” However, Section 1236-B does not permit a coroner to pick and choose which records he or she deposits with a prothonotary or to not deposit them at all; rather, it requires coroners to “deposit all of [their] official records and papers.” 16 P.S. § 1236-B (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

3 The former Coroner’s Act, 16 P.S. §§ 1201 et seq., was repealed and replaced by 16 P.S. §§ 1201-B et seq. on October 24, 2018 and became effective on December 24, 2018. Therefore, any reference to sections of the former Coroner’s Act will be replaced with corresponding sections of the current version of the act.
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 [1236-B]”); 16 P.S. § 1218-B(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 1236-B, the County coroner is required to deposit autopsy and toxicology reports with the County’s prothonotary. 4 See In re: Buchanan, 880 A.2d 568, 573 (Pa. 2005) (“By its plain terms, [Section 1236-B] speaks to the public disclosure obligations of the county coroner with respect to ‘official records.’ And, in setting forth the duties of coroners, it is certainly written in mandatory terms, setting forth what the coroner ‘shall’ do”).

The second means of accessing records under the Coroner’s Act is Section 1252-B, which states:

The coroner shall charge and collect a fee of $500 for an autopsy report, $100 for a toxicology report, $100 for an inquisition or coroner’s report, $50 for a cremation or disposition authorization and other fees as may be established from time to time for other reports or documents requested by nongovernmental agencies in order to investigative a claim asserted under a policy of insurance or to determine liability for the death of the deceased.

16 P.S. § 1252-B. In Penn Jersey, the Court found that this section “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

4 In her affidavit, Ms. Kelly explains that she, as the County Clerk of Judicial Records, is responsible for “serving as the filing depository for all records filed with a [p]rothonotary....” Although it is not clear if Ms. Kelly possesses records responsive to the Request, to the extent the Requester is challenging the County coroner’s compliance with Section 1236-B of the Coroner’s Act, the OOR is not the proper venue for any such challenge. The OOR lacks jurisdiction to order the County coroner to deposit records with a prothonotary, and the appropriate remedy is an action in mandamus. See generally Penn Jersey, 962 A.2d 636 (stemming from mandamus actions to compel a coroner to deposit his “official records and papers”).
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, … or rapid access for those who do not wish to wait and are willing to pay a fee….” 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 [1252-B].” Id. The Court further noted that there was no mention of discretion when charging or collecting these fees; as a result, Section 1252-B “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 (emphasis added). Therefore, pursuant to Norris, the records identified in Section 1252-B of the Coroner’s Act are available through the RTKL for the fees set forth in the Coroner’s Act.

3. The records are not protected by the constitutional right to privacy

Finally, the County argues that the requested records are protected by the constitutional right to privacy. In Pa. State Educ. Ass’n v. Commonwealth, 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 benefit outweighs the privacy interest. Id.; see also Pa. State Univ. v. State Employees’ Retirement Bd., 935 A.2d 530 (Pa. 2007) (employing a balancing test with respect to home addresses sought under the former Right-to-Know Act).

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. *Pa. State Educ. Ass’n*, 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).

On her appeal forms, the Requester states that she is “a journalist and adjunct professor doing research about safety concerns related to the underground pipe repair industry for which Mr. Lasky did some work.” Conversely, the County argues that there is no public interest favoring the release of the records, concluding that “how an individual or family copes with and grieves over the death of a member of its family could not be a more personal matter over which the OOR is unable … to show a compelling, significant interest or purpose in requiring the medical information to be publicly disclosed.”

In adopting Section 1236-B of the Coroner’s Act, which, as noted above, provides that every coroner must, within thirty days after the end of each year, “deposit all of his official records and papers for the preceding year in the [o]ffice of the [p]rothonotary for the inspection of all persons interested therein[,]” 16 P.S. § 1236-B(a) (emphasis added), the General Assembly has already performed the balancing test and determined that the public benefit of disclosure of these records outweighs any privacy interest therein. *Governor’s Office of Admin. v. Campbell*, 202 A.3d 890, 894-95 (Pa. Commw. Ct. 2019) (holding that, when appropriate, “legislative pronouncements or prior decisions of Pennsylvania courts” may be relied upon when performing
the balancing test) (citing Reese v. Pennsylvanians for Union Reform, 173 A.3d 1149, 1159 (Pa. 2017)). Additionally, the Pennsylvania Supreme Court has found records of the coroner to be subject to access. Penn Jersey, supra; see generally Norris, 54 A.3d 23. Accordingly, the County may not withhold the requested records pursuant to the constitutional right to privacy. See, e.g., Marchiano, 2018 PA O.O.R.D. LEXIS 835.

CONCLUSION

For the foregoing reasons, the appeal is granted, and the County shall, within thirty days, provide access to the records, as described in Section 1252-B of the Coroner’s Act, if the Requester chooses to pay the fees set forth therein. 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 Lackawanna 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. 65 P.S. § 67.1303. 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.\(^5\) This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: 8 July 2019

/s/ Joshua T. Young

JOSHUA T. YOUNG
APPEALS OFFICER

Sent to: Robin Lloyd (via email only);
        Susan Shanaman, Esq. (via email only);
        Fran Pantuso, AORO (via email only)