



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

|                                  |   |                                 |
|----------------------------------|---|---------------------------------|
| <b>IN THE MATTER OF</b>          | : |                                 |
|                                  | : |                                 |
| <b>CARTER WALKER</b>             | : |                                 |
| <b>AND LNP NEWS,</b>             | : |                                 |
| <b>Requester</b>                 | : |                                 |
|                                  | : |                                 |
| <b>v.</b>                        | : | <b>Docket No.: AP 2018-1992</b> |
|                                  | : |                                 |
| <b>LANCASTER COUNTY DISTRICT</b> | : |                                 |
| <b>ATTORNEY’S OFFICE,</b>        | : |                                 |
| <b>Respondent</b>                | : |                                 |

**INTRODUCTION**

Carter Walker, a reporter for LNP News (collectively, “Requester”), submitted a request (“Request”) to the Lancaster County District Attorney’s Office (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various records pertaining to civil asset forfeiture. The Office denied the Request, arguing, among other reasons, that certain information is confidential. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the Office is required to take further action as directed.

## FACTUAL BACKGROUND

On September 7, 2018, the Request was filed, stating:

... I am requesting documentation [in electronic format] related to forfeitures and expenses under Pennsylvania Title 42, Chapter [5]801<sup>1</sup> – Controlled Substance Forfeitures. Specifically, I am requesting complete documentation in each year from 1/1/2008 to present which shows the following information:

- Records of what items were forfeited under this Act, for example, vehicles, real property, cash and/or cash equivalent, or any other item of value. This documentation should identify the property, the date the property ... was seized, value of item and context of the forfeiture (seized from whom, where and why). [“Item 1”]
- After the item was forfeited, documentation that shows how it was processed, whether that was sale, reutilization, or distribution to other law enforcement agenc[ies] or personnel. Documentation should identify the property, what was done with the item (sold or distributed), date sold/distributed, who the item was distributed to if it was distributed, and how much the item was sold for if it was sold. [“Item 2”]
- Any documentation of a policy, formal or information, that governs the use and/or disposal of forfeited assets by the DA’s office. For example, a policy that guides the decision to sell forfeited property for profit and later use, or use the property. [“Item 3”]
- Records of the amount of funds taken in by the agency in a given year as a result of civil asset forfeiture, whether that be through cash forfeitures or sale of forfeited property. This documentation should show the amount of funds coming into the agency’s forfeiture account, where the funds originated and when it was received. [“Item 4”]
- Records that show how forfeited property proceeds were spent, i.e. officer training, equipment, funding programs, etc., and records that illustrate how these expenditures comply with the Act’s mandate that forfeited funds be used for combating substance abuse. [“Item 5”]

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<sup>1</sup> The Request referenced Chapter 6801; however, this chapter was repealed and replaced with Chapter 5801 on July 1, 2017.

- Forfeiture account balances at the end of each year, and for 2018, as of the date of this request. [“Item 6”]

Please note that I am not requesting a copy of the audit sent to the Attorney General’s Office each year, as required by 42 Pa.C.S. § 5803(j), Act 13 of 2017.

On September 18, 2018, the Office invoked a thirty-day extension of time to respond to the Request. 65 P.S. § 67.902(b)(2). On October 18, 2018, the Office denied the Request, stating that Items “1, 2, 4, 5 and 6 seek documents that would be prepared for the Attorney General’s audit” and that “pursuant to 42 Pa.C.S.A. §5803 et seq., this information is not to be disseminated and shall remain confidential.” The Office also denied the records responsive to Items 1, 2, 4, 5 and 6 as criminal investigative records, 65 P.S. § 67.708(b)(16), and noncriminal investigative records, 65 P.S. § 67.708(b)(17). Finally, with respect to Item 3, the Office stated that no responsive records exist.

On November 6, 2018, the Requester appealed to the OOR, challenging the denial of records responsive to Items 1, 2, 4, 5, and 6 of the Request.<sup>2</sup> The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On November 18, 2018, the Office submitted a position statement in support of its position, as a statement made under penalty of perjury from Craig Stedman, District Attorney, and John Burkhart, the lead detective of the Lancaster County Drug Task Force. The Office also provided a copy of the Attorney General’s guidelines pertaining to 42 Pa.C.S. §§ 5801 *et seq.* (“Guidelines”).

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<sup>2</sup> The Requester does not challenge the denial of Item 3 of the Request; therefore, the Requester has waived any objections regarding the Office’s response to Item 3. *See Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

## 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 requested 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 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. 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)).

**1. The information is not confidential pursuant to the Controlled Substances Forfeiture Act**

The Controlled Substances Forfeiture Act (“Act”) states, in relevant part:

**(j) Annual audit of forfeited property.** — Every county in this Commonwealth shall provide, through the controller, board of auditors or other appropriate auditor and the district attorney, an annual audit of all forfeited property and proceeds obtained under this chapter. The audit shall not be made public but shall be submitted to the Office of Attorney General. By September 30 of each year, the county shall report all forfeited property and proceeds obtained under this chapter and the disposition of the property during the preceding year to the Attorney General. The Attorney General and each district attorney shall maintain and create appropriate records to account for the property forfeited in a fiscal year and the use made of the property forfeited. Each audit shall include:

- (1) Date property was seized.
- (2) The type of property seized.
- (3) Where property was seized.
- (4) The approximate value.
- (5) The alleged criminal behavior with which the property is associated.
- (6) The disposition or use of property forfeited.
- (7) Whether the forfeiture was related to a criminal case and the outcome of the criminal case.
- (8) Date of forfeiture decision.

**(k) Annual report and confidential information.** — The Attorney General shall annually submit a report to the Appropriations Committee and Judiciary Committee of the Senate and to the Appropriations Committee and Judiciary Committee of the House of Representatives specifying the forfeited property or proceeds of the forfeited property obtained under this chapter during the fiscal year beginning July 1 and the following shall apply:

(1) The report shall include all information required under subsection (j) subject to the limitations provided under paragraph (2).

(2) The Attorney General shall adopt procedures and guidelines, which shall be public, governing the release of information by the Attorney General or the district attorney to protect the confidentiality of forfeited property or proceeds used in ongoing law enforcement activities.

42 Pa.C.S. §§ 5803(j)-(k). The Office argues that the records responsive to Items 1, 2, 4, 5, and 6 of the Request are confidential under the Act because the audit submitted to the Attorney General's Office containing the underlying information is made confidential under the Act. Further, the Office points to the Guidelines adopted by the Attorney General's Office pursuant to 42 Pa.C.S. § 5803(k)(2), arguing that these Guidelines support the Office's decision to withhold the records.

As a preliminary matter, the Act itself does not prohibit the release of the requested records. The audit, referenced in 42 Pa.C.S. § 5803(j), is conducted by a county controller/auditor and the district attorney's office collectively. The Act makes this audit confidential but is silent as to any other records in the possession of a district attorney's office, including "appropriate records to account for the property forfeited in a fiscal year and the use made of the property forfeited."

Regarding this omission, the Cambria County Court of Common Pleas recently held:

Section 5803(j) however does not contain any provision protecting records other than the annual audit from disclosure.... [Its] language limits the protection to only the audit and not any other financial records related to the forfeiture accounts. Had the Legislature intended to prevent the release of any records related to the forfeiture accounts they would have used language indicating such intent. As such the limited protection of this section does not extend to other financial records related to the forfeiture accounts....

*DeBartola v. Cambria County District Attorney's Office*, No. 2018-0095 (Cambria Cnty. C.C.P. Nov. 19, 2018). Because the Act only makes the audit confidential, the requested records are not made confidential under the Act.

The Office also references the Guidelines issued by the Attorney General's Office. Section VII of the Guidelines, titled "Release of Information," states, in relevant part:

d. The District Attorney ... shall maintain proper documentation on all property forfeited under this Act and the disposition thereof and shall not release information that could identify, among other confidential matters, police officers, informants and/or targets of law enforcement activities.

e. The District Attorney ... may release all other forfeiture matters which will not jeopardize law enforcement activities in his/her county or in any other county....

The Office argues that Section VII permits the district attorney to withhold records from the controller-auditor preparing the audit if the disclosure of the records would adversely affect law enforcement activities.

However, the Guidelines do not prohibit the release of the requested information. While it is concerned with maintaining the confidentiality of information that may jeopardize law enforcement activities, the Office does not advance any argument or provide any evidence that release of the requested information would jeopardize law enforcement activities.<sup>3</sup> Regardless, the Guidelines do not appear to have the force and effect of law. *See, e.g., Bowling v. Office of Open Records*, 75 A.3d 453, 480 (Pa. 2013) ("[The OOR's] Interim Guidelines are not formal regulations promulgated in accordance with the process required by the Commonwealth Documents Law and the Commonwealth Attorneys' Act (which require, *inter alia*, a period of public comment and review by the Attorney General for form and legality)") (citing, among other statutes, 45 P.S. §§ 1201-1208); *Walker v. Dauphin County District Attorney's Office*, OOR Dkt. AP 2018-1852, 2018 PA O.O.R.D. LEXIS 1993. Therefore, the Guidelines are unable to make any information confidential that is not confidential under the Act.

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<sup>3</sup> Further, as explained above, much of the requested information is contained in court filings that are not made confidential under the Act. It is unclear how any information contained in these filings, which are not under seal, would jeopardize law enforcement activities.

## **2. The OOR has jurisdiction over the appeal**

The Office also cited Section 708(b)(16) to support withholding the requested records. 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, Detective Burkhart attests that the release of the information would disrupt active criminal investigations; however, the fact that the requested records pertain to the seizure of

property related to criminal offenses does not, in and of itself, make the records related to criminal investigations. The Requester seeks records of 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 requested information is related to a criminal investigation, the OOR retains jurisdiction over the appeal.

### **3. The requested records do not relate to noncriminal investigations**

The Office argues 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.” 65 P.S. § 67.708(b)(17)(iv). 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, the Office has not provided any evidence that it has conducted a noncriminal investigation. As such, it has not met its burden of proof under the RTKL. 65 P.S. § 67.708(a)(1).

**4. The Office has not proven that the information is exempt from disclosure under the personal security exemption**

Additionally, the Office states that if the information requested in Items 1 and 2 of the Request was released to the public, it "... would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." 65 P.S. § 67.708(b)(1)(ii). While Detective Burkhardt generally attests that the disclosure of the requested records "would become a safety issue for the detective assigned to the Drug Task Force ... [and] would disrupt active criminal investigations, uncover the identity of confidential individual and police officers....," *see* 65 P.S. § 67.708(b)(1), these conclusory statements are not sufficient evidence to demonstrate that the camera log is exempt from disclosure. *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) ("[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records"). The only evidence submitted to support the Office's argument is Detective Burkhardt's conclusory statement, and, as provided above, conclusory affidavits or statements made under penalty of perjury are insufficient to meet an agency's burden of proof. *See id.*; *Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67.

## CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the Office is required to provide all responsive records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Lancaster 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.<sup>4</sup> This Final Determination shall be placed on the OOR website at.

**FINAL DETERMINATION ISSUED AND MAILED: January 7, 2019**

/s/ Jill S. Wolfe

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APPEALS OFFICER  
JILL S. WOLFE, ESQ.

Sent to: Carter Walker (via email only);  
Caitlin Blazier, Esq. (via email only)

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<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).