

I. Background

In November 2010, DiMartino, through counsel, submitted a request with the PSP, seeking “all documents relating to the death of [Decedent] including cause of death, toxicology, pharmacology and supplemental or amended autopsy reports, samples of bodily fluids, tissue or any other samples of [D]ecedent so they can be examined by an expert of [D]ecedent’s family’s choice. ...” Reproduced Record (R.R.) at 6a.²

The PSP initially informed DiMartino it would require an additional 30 days to evaluate her request. Shortly thereafter, a PSP Deputy Agency Open Records Officer (Agency Officer) issued a letter denying the request for two reasons. First, the Agency Officer explained DiMartino’s request for “all documents” was insufficiently specific to allow the PSP to identify the particular records sought. R.R. at 17a.

In addition, the Agency Officer denied DiMartino’s request on its face, explaining the records sought were expressly exempt from disclosure under the RTKL and the Criminal History Records Information Act (CHRIA), 18 Pa. C.S. §§9101-9183. Specifically, the Agency Officer explained:

Insofar as your request can be inferred to seek access to PSP Non-traffic Death Investigation Report N° P06-0603529, a criminal investigation into the death of several individuals, including Mr. DiMartino and Mr. Mahoney, it is specifically denied because the record is exempt as:

² On the same date, counsel for DiMartino submitted an identical request on behalf of Maureen Mahoney. Mahoney’s RTKL request is the subject of our decision in the companion case of Mahoney v. Pa. State Police (Pa. Cmwlth., 339 C.D. 2011, filed September 19, 2011).

A record of an agency relating to a criminal investigation, including: . . .

(ii) Investigative materials, notes, correspondence, videos and reports. . .

(iv) A record that includes information made confidential by law or court order.

(v) Victim information. . . .

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges, . . .

65 P.S. § 67.708(b)(16). Furthermore, [CHRIA], prohibits the PSP from disseminating its investigative information to any persons or entities, other than to criminal justice agents and agencies. 18 Pa. C.S. § 9106(c)(4). “Investigative Information” is defined under CHRIA 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” 18 Pa.C.S. § 9102. Therefore, PSP is barred by statute from disclosing the requested investigative records to you.

For these reasons, the [OOR] determined in *Grocki v. Pennsylvania State Police*, Docket N° AP 2009-0661, and *McGarvey v. Pennsylvania State Police*, Docket N° AP 2009-0522, that records related to a criminal death investigation are entirely exempt from public disclosure under 65 P.S. § [67.708(b)(16)] and 18 Pa. C.S. § 9106. . . .

The records sought are additionally exempt under the following RTKL provisions:

- Section 67.708(b)(5) relating to an individual's medical history;
- Section 67.708(b)(6) relating to confidential personal identification information;

- Section 67.708(b)(19) relating to DNA or RNA records; and
- Section 67.708(b)(20) relating to autopsy records. ...

To the extent that your request seeks or may be construed to seek PSP records involving covert law enforcement investigations, including intelligence gathering and analysis, PSP can neither confirm, nor deny the existence of such records without risk of compromising investigations and imperiling individuals. UNDER NO CIRCUMSTANCES, therefore, should this response to your request be interpreted as indicating otherwise. In all events, should such records exist, they are entirely exempt from public disclosure under the RTKL and CHRIA. ...

R.R. at 8a-9a (emphasis added).

The Agency Officer also enclosed a verification in which he attested that he performed a search of all accessible PSP databases for any records that responded to DiMartino's request. He stated he identified and retrieved PSP Non-traffic Death Investigation Report P06-0603529, a record assembled by Trooper S. Kelly, arising from an investigation into a criminal incident or an allegation of criminal wrongdoing. However, the Agency Officer stated, he could not confirm whether these were "all documents" regarding the death of Decedent, noting DiMartino's request was insufficiently specific. R.R. at 34a-35a. The Agency Officer further stated the Non-traffic Death Investigation Report that he located was "manifestly related to a criminal investigation ..." for the reasons set forth above. R.R. at 35a. DiMartino appealed the PSP's denial to the OOR.

On appeal to the OOR, DiMartino, through counsel, asserted the records sought did not fall within the exemption set forth in Section 708(b)(16) of

the RTKL because: (1) the requester is seeking information about the analysis of Decedent's body including records or reports or any substances found in Decedent's body that could lead to a cause of death; and, (2) the requester represents the victim's family and thus, revealing the information would not jeopardize any criminal investigation or victim.

In response, the PSP indicated it continued to rely on the reasons set forth in its Agency Officer's denial letter. In addition, the PSP submitted an affidavit executed by the Agency Officer. The affidavit contained sworn statements similar to those contained in the Agency Officer's verification. In particular, Agency Officer attested that he personally examined the Non-traffic Death Investigation Report, and the report contained "[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or allegation of criminal wrongdoing," and, therefore was exempt from disclosure under Section 708(b)(16) of the RTKL. R.R. at 39a (citing 18 Pa. C.S. §9102) (emphasis omitted). He further attested, "[t]he report reflects the physical evidence gathered during the investigation, as well as the findings, conclusions, actions, observations, [and] notes of the investigating trooper" R.R. at 40a.

Thereafter, the OOR issued its final determination. Initially, the OOR determined DiMartino's request was sufficiently specific for the PSP to identify the records sought. Additionally, the OOR determined these records were exempt from disclosure under the criminal investigation exception set forth in Section 708(b)(16) of the RTKL. The OOR also indicated the requester's status as counsel for Decedent's family had no bearing on whether the records were publicly

accessible because the OOR is required to construe the RTKL without regard to the requester's identity. DiMartino now petitions for review.

II. Contentions

Before this Court,³ DiMartino asserts the OOR applied an overly broad interpretation to the criminal investigation exemption in Section 708(b)(16) of the RTKL. DiMartino argues her request did not seek the type of information contained in the specific examples of criminal investigative information enumerated in Sections 708(b)(16)(i)-(vi), such as information that would jeopardize the safety of a victim (given that the victim here is deceased). Rather, her request was specific in that it was designed to establish the cause of death, which would not be available from the county coroner because that information is exempt under Section 708(b)(20) of the RTKL, 65 P.S. §67.708(b)(20).

DiMartino asks this Court to consider the Legislature's intent in enacting the criminal investigation exemption, which, she posits, is to avoid hindering or advancing a criminal investigation or endangering an individual. DiMartino argues her narrowly tailored records request, which only sought information relating to Decedent's cause of death, does not violate the purpose of the criminal investigation exemption. See Cnty. of York v. Office of Open

³ A reviewing court, in its appellate jurisdiction, independently reviews the OOR's orders and may substitute its own findings of fact for that of the agency. While reviewing this appeal in our appellate jurisdiction, we function as a trial court, and we subject this matter to independent review. We are not limited to the rationale offered in the OOR's written decision. Accordingly, we will enter narrative findings and conclusions based on the evidence as a whole, and we will explain our rationale. Bowling v. Office of Open Records, 990 A.2d 813 (Pa. Cmwlth. 2010) (en banc), appeal granted in part, ___ Pa. ___, 15 A.3d 427 (2011).

Records, 13 A.3d 594 (Pa. Cmwlth. 2011) (examining legislative intent when construing language in the RTKL exemption relating to 911 records, see Section 708(b)(18) of the RTKL, 65 P.S. §67.708(b)(18)). As such, DiMartino asks that the requested records be provided or, alternatively, the records be redacted, if the information she seeks cannot be separated from information concerning any criminal investigation.

The PSP counters the OOR correctly denied DiMartino’s request for records relating to Decedent’s cause of death. The PSP asserts the language in the criminal investigation exemption specifically exempts from public disclosure “a record of an agency relating to or resulting in a criminal investigation.” 65 P.S. §67.708(b)(16). Additionally, it contends, the OOR did not misinterpret the language or intent of the RTKL in its determination. The PSP further argues where, as here, statutory language is plain and unambiguous, resort to legislative intent is inappropriate.

In addition to containing information relating to or resulting in a criminal investigation, the PSP maintains the responsive records contain “personal identification information,” which is exempt pursuant to 65 P.S. §67.708(b)(6), “medical information,” which is exempt pursuant to 65 P.S. §67.708(b)(5), “DNA information,” which is exempt pursuant to 65 P.S. §67.708(b)(19), as well as information relating to “autopsy records,” which is exempt pursuant to 65 P.S. §67.708(b)(20). Beyond the RTKL exemptions, the PSP asserts it is barred from producing the requested records pursuant to CHRIA.

The PSP contends DiMartino offers no legal authority to refute its position. Rather, she places misguided reliance on the examples of investigative information in Section 708(b)(16). The PSP points out these subparagraphs are merely examples of criminal investigative records, and they do not provide a justification for overriding the exemption.

III. Analysis

Under the RTKL, records⁴ in the possession of an agency are presumed to be public unless: (1) exempted by Section 708 of the RTKL; (2) protected by privilege; or (3) exempted “under any other Federal or state law or regulation or judicial order or decree.” Section 305 of the RTKL, 65 P.S. §67.305. The Commonwealth agency bears the burden of proving a record is exempt from disclosure. 65 P.S. §67.708. A “preponderance of the evidence” is defined as the greater weight of the evidence. Mitchell v. Office of Open Records, 997 A.2d 1262 (Pa. Cmwlth. 2010).

Section 708(b)(16) states, in relevant part (with emphasis added):

(b) Exceptions.--Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

* * * *

⁴ Under the RTKL, a “record” is defined 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. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.” Section 102 of the RTKL, 65 P.S. §67.102.

(16) A record of an agency relating to or resulting in a criminal investigation, including:

(i) Complaints of potential criminal conduct other than a private criminal complaint.

(ii) Investigative materials, notes, correspondence, videos and reports.

(iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised.

(iv) A record that includes information made confidential by law or court order.

(v) Victim information, including any information that would jeopardize the safety of the victim.

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.

(B) Deprive a person of the right to a fair trial or an impartial adjudication.

(C) Impair the ability to locate a defendant or codefendant.

(D) Hinder an agency's ability to secure an arrest, prosecution or conviction.

(E) Endanger the life or physical safety of an individual.

....

65 P.S. §67.708.

Here, the PSP determined the only responsive record it could locate, PSP Non-traffic Death Investigation Report P06-0603529, a record assembled by a

state trooper, was a criminal investigative record. Pursuant to the RTKL and CHRIA, it was exempt from access by the public. The PSP's denial letter identified the record requested and cited the legal bases for its denial pursuant to Section 903 of the RTKL, 65 P.S. §67.903 (agency denial must be in writing and include description of record requested and specific reasons for denial, including legal authority); Signature Information Solutions, LLC v. Aston Twp., 995A.2d 510 (Pa. Cmwlth. 2010).

Further, during the appeal process, the PSP submitted the sworn and notarized affidavit of the Agency Officer. This affidavit provided sufficient evidence to support the PSP's denial of DiMartino's request on the basis that the record relates to a criminal investigation under Section 708(b)(16) of the RTKL. Further, this affidavit was sufficient to satisfy the PSP's burden of proof. See Mitchell.

In addition, as stated by the PSP, DiMartino's request implicates CHRIA, a statute which concerns the collection, maintenance, dissemination and receipt of criminal history record information. Certain criminal history records information may be released. However, CHRIA defines "Criminal history records information" as:

Information collected by criminal justice agencies concerning individuals, and arising from the initiation of a criminal proceeding, consisting of [1] identifiable descriptions, [2] dates and notations of arrests, [3] indictments, information or other formal criminal charges and [4] any dispositions arising therefrom. The term does not include intelligence information, investigative information or treatment information, including medical

and psychological information, or information and records specified in Section 9104 (relating to scope).

18 Pa. C.S. §9102 (emphasis added).

Further, 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.” *Id.* Under CHRIA, “[i]nvestigative ... information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency which requests the information in connection with its duties, and the request is based upon a name, fingerprints, modus operandi, genetic typing, voice print or other identifying characteristic. ...” 18 Pa. C.S. §9106(c)(4) (emphasis added).

Here, the records requested pertain to a criminal investigation regarding Decedent’s death. In his affidavit, the Agency Officer attested that the record requested contains “[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[,]” which may not be disclosed pursuant to CHRIA. R.R. at 39a. Thus, the PSP was correct in determining the requested record constituted “investigative information,” and was not a public record as defined by CHRIA. See Pa. State Police v. Office of Open Records, 5 A.3d 473 (Pa. Cmwlth. 2010) (en banc) (PSP incident report containing notes of interviews with alleged victims/perpetrators as well as an indication of whether certain investigative tasks were carried out was exempt from disclosure under Section 708(b)(16)(ii) and CHRIA); Mitchell (PSP records showing arrival and departure times of officers

conducting search warrant exempt from disclosure under 65 P.S. §67.708(b)(16) and CHRIA).

Moreover, we reject DiMartino's assertion that the PSP should disclose the records because they do not fall within any of the specific types of information enumerated in Section 708(b)(16)(i)-(vi), such as information that would jeopardize the safety of a victim. Contrary to DiMartino's contentions, Agency Officer's affidavit specifically indicates his review of the responsive record revealed that it contained "investigative materials, notes [and] correspondence" and "would reveal the institution, progress, and result of a criminal investigation" R.R. at 40a. Also contrary to DiMartino's contentions, in Pennsylvania State Police, this Court held "victim information" as set forth in the criminal investigation exemption, is not limited to information that would jeopardize the safety of a victim. Rather, based on the facts presented, we held the term is sufficiently broad to include victims' names and addresses. In short, DiMartino's claim that the requested records do not fall within the types of information specified as investigative records fails.⁵

⁵ DiMartino offers no developed argument that the PSP should redact investigative information from the records requested. DiMartino's entire argument on this point consists of a half-sentence in the Summary of Argument portion of her brief. DiMartino's failure to develop this issue results in waiver. See City of Phila. v. Berman, 863 A.2d 156 (Pa. Cmwlth. 2004) (issue raised in Statement of Questions Presented and Summary of Argument portions of appellants' brief, which was not developed in Argument section, was deemed waived).

Of further note, where a record falls within an exemption under Section 708(b), it is not a public record as defined by the RTKL and an agency is not *required* to redact the record. See Pa. State Police v. Office of Open Records, 5 A.3d 473 (Pa. Cmwlth. 2010).

In addition, although DiMartino argues that release of the requested records would not conflict with what she asserts is the purpose of the criminal investigation exemption, we may not disregard the plain language of the RTKL under the pretext of pursuing its spirit. 1 Pa. C.S. §1921(b); See Kirsch v. Pub. Sch. Employees' Ret. Bd., 603 Pa. 439, 985 A.2d 671 (2009) (when words of statute are clear and free from all ambiguity, they are presumed to be the best indication of legislative intent).

Also, while DiMartino cites our decision in County of York for the proposition that consideration of legislative intent is appropriate when construing the RTKL's exemptions, that case does not support her position. In County of York, we were asked to construe the RTKL exemption relating to 911 records, and, in so doing, we looked to legislative intent when construing the undefined phrase "time response logs" used in that exemption. See 65 P.S. §67.708(b)(18). Because the meaning of that phrase was unclear, we examined the legislative intent behind that exemption. In this case, DiMartino offers no persuasive explanation as to how the language of the criminal investigation exemption is ambiguous so as to warrant an examination of legislative intent. As such, DiMartino's reliance on County of York is misplaced.

As a final point, we note that, the requester's status as representative of Decedent's family has no bearing on whether the requested records are accessible through a RTKL request. We agree with the OOR that the RTKL must be construed without regard to the requester's identity. See, e.g., Section 301(b) of the RTKL, 65 P.S. §67.301(b) (stating that an agency "may not deny a requester

access to a public record due to the intended use of the public record by the requester unless otherwise provided by law”); Weaver v. Dep’t of Corr., 702 A.2d 370 (Pa. Cmwlth. 1997) (under the former Right-to-Know Act, the right to examine a public record is not based on whether the person requesting the disclosure is affected by the records or if her motives are pure in seeking them, but whether any person’s rights are fixed); Furin v. Pittsburgh Sch. Dist., OOR Dkt. No. AP 2010-0181, 2010 PA OORD LEXIS 212 (Pa. OOR 2010) (finding records exempt under Section 708(b) regardless of status of person requesting them); Wheelock v. Dep’t of Corr., OOR Dkt. No. AP 2009-0997, 2009 PA OORD LEXIS 725 (Pa. OOR 2009) (stating the only information available under the RTKL is a “public record” available to all citizens regardless of personal status or stake in requested information).⁶

⁶ As noted above, DiMartino concedes the records requested are not available from the county coroner based on the exemption in Section 708(b)(20) of the RTKL, 65 P.S. §67.708(b)(20) (exempting access to “[a]n 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. This exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death.”). See Pet’r’s Br. at 10, 16. Where the records requested are exempt from access under an exemption set forth in Section 708(b), such records are not accessible, regardless of the agency upon which the request is made. As such, DiMartino cannot obtain from the PSP that which she could not obtain from the county coroner if such records are exempt under Section 708(b) of the RTKL.

We further note that Sections 1251 and 1236.1 of the statute commonly known as the Coroner’s Act, Act of August 9, 1955, P.L. 323, as amended, 16 P.S. §§1251, 1236.1, set forth the procedures for the coroner’s release of “manner of death” records. See Penn Jersey Advance, Inc. v. Grim, 599 Pa. 534, 962 A.2d 632 (2009); Hearst Television, Inc. v. Norris, 8 A.3d 420 (Pa. Cmwlth. 2010). Section 1236.1 was added by the Act of November 29, 1990, P.L. 602.

Based on the foregoing, we are constrained to affirm the OOR's order denying DiMartino's appeal.

ROBERT SIMPSON, Judge

