

**IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY
CIVIL DIVISION**

COUNTY of BUCKS,	:	
Petitioner	:	
v.	:	No. 2020-05950
	:	
BRETT SHOLTIS,	:	
Respondent	:	

RESPONSE TO PETITION FOR REVIEW OF THE OCTOBER 16, 2020 FINAL DETERMINATION OF THE OFFICE OF OPEN RECORDS

AND NOW comes Brett Sholtis (Requester), by his attorney, Paula Knudsen Burke of the Reporters Committee for Freedom of the Press, and files the following response to the County of Bucks’ (County) Petition for Review of the October 16, 2020 Final Determination of the Pennsylvania Office of Open Records and avers in support thereof as follows:

JURISDICTION

1. Admitted.

PARTIES

2. Admitted.

3. Admitted. By way of further response, Requester is an adult individual employed as a reporter at WITF, a company comprised of public broadcasting stations WITF TV, WITF 89.5 & 93.3, witf.org, WITF Educational Services, and Media Solutions.

PROCEDURAL HISTORY AND RELEVANT BACKGROUND

4. Admitted in part and denied in part. Admitted that Requester filed a public records request seeking a May 20, 2020 video recording of an incident involving a Bucks County Correctional Facility inmate. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 4 about when the County received his request, and thus denies. By way of further response, Requester sent his request for the video on July 14, 2020 via U.S. mail to the Bucks County Correctional Facility. Upon information and belief, the Bucks County Correctional Facility forwarded the request to Bucks County District Attorney Matt Weintraub, who in turn forwarded the request to the County.

5. Admitted.

6. Admitted.

7. Admitted in part and denied in part. Admitted that the County filed its response to the Office of Open Records on August 14, 2020, including an affidavit of Bucks County District Attorney Matthew D. Weintraub. Denied to the extent that the paragraph asserts a conclusion of law as to the weight and applicability of the Weintraub affidavit.
8. Admitted.
9. Admitted in part and denied in part. Admitted that the County has submitted the affidavit of David Kratz as Exhibit F. Denied that the trial court is required to take Exhibit F into consideration on appeal. “[I]t is the parties’ burden to submit sufficient evidence to establish material facts” at the Office of Open Records level. *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Cmwlth. 2017). Courts are not mandated to accept new evidence on appeal, particularly “when the parties and participants had a full opportunity to submit evidence to the fact-finder.” *Mission Pennsylvania, LLC v. McKelvey*, 212 A.3d 119, 129 (Pa. Cmwlth. 2019). By way of further response, while the trial court may exercise plenary review and apply a *de novo* standard of review, there is “nothing in the RTKL that would prevent a Chapter 13 court from simply adopting the findings of fact and conclusions of law of an appeals officer when appropriate, thus, in the proper case, effectively achieving the result sought by the OOR.” *Bowling v. Office of Open Records*, 75 A.3d 453, 473 (Pa. 2013).
10. Paragraph 10 is a request for relief to which no responsive pleading is required. To the extent a response is deemed appropriate, Paragraph 10 is denied.

THE COUNTY’S APPEAL

11. Denied as a legal conclusion. By way of further response, the last sentence of paragraph 9 above is incorporated herein by reference.
12. Denied as a legal conclusion. By way of further response, the denial portions of paragraph 9 above are incorporated herein by reference.
13. Denied as a legal conclusion. By way of further response, the denial portions of paragraph 9 above are incorporated herein by reference.
14. Denied as a legal conclusion.
15. Denied as a legal conclusion. By way of further response, the last sentence of paragraph 9 above is incorporated herein by reference.

THE COUNTY’S POSITION THAT THE OCTOBER 16, 2020 FINAL DETERMINATION SHOULD BE REVERSED

16. Denied as a legal conclusion. By way of further response, this Honorable Court is not required to hold a hearing on the matter and may adopt the findings of fact and conclusions of law of an appeals officer when appropriate. *Bowling v. Office of Open Records*, 75 A.3d 453, 473 (Pa. 2013).
17. Denied as a legal conclusion. By way of further response, this Honorable Court is not required to incorporate the testimony or affidavit of Deputy Director Kratz and may adopt the findings of fact and conclusions of law of an appeals officer when appropriate. *Bowling v. Office of Open Records*, 75 A.3d 453, 473 (Pa. 2013). Holding a hearing or supplementing the record on appeal should be reserved for a developed argument explaining why the party seeking to introduce additional information did not take advantage of the opportunity to submit such supplemental documents to the Office of

- Open Records. *See, e.g., Sheils v. Pennsylvania Dep't of Educ.*, No. 967 C.D. 2014, at 2, 2015 WL 5436770, (Pa. Cmwlth. April 10, 2015), app. denied, 125 A.3d 779 (Pa. 2015).
18. Denied as a legal conclusion. By way of further answer, prison video surveillance is not a criminal investigatory tool per se and the Office of Open Records has granted access in similar cases, such as in *Owens v. Dauphin County*, OOR Dkt. AP 2016-1819, where the OOR granted access to prison surveillance video because it contained no material that the agency had used to conduct a criminal investigation, nor had it been recorded for that purpose.
 19. Denied as a legal conclusion. By way of further answer, in *Gaikwad v. Clearfield County*, OOR Dkt. AP 2020-0407, footnote 1, the appeals officer found—based upon a submission by Clearfield County—that a county correctional facility would not meet the definition of a law enforcement agency. Here, the County could not be performing its own criminal investigation of an incident at the Bucks County Correctional Facility because it is not a law enforcement agency.
 20. Denied as a legal conclusion. In *California Borough v. Rothey*, 185 A.3d 456 (Pa. Cmwlth. 2018), California Borough presented similar arguments to the County's arguments about potential exploitation by future prisoners of facility information if video was released showing its interrogation room. The Commonwealth Court rejected the Borough's speculative purported safety concerns: "An agency must offer more than speculation or conjecture to establish the security-related exceptions under the Right-to-Know Law. *Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Cmwlth. 2010). The Borough failed to satisfy its burden of proving that the video recording is exempt from disclosure under the security-related exceptions under the Right-to-Know Law, 65 P.S. § 67.708(b)(1)–(3)." *Rothey*, 185 A.3d at 468. Further, when security or safety exemptions are asserted, "speculation and conclusory statements in an affidavit do not show a reasonable likelihood of a threat to security." *Carey v. Pennsylvania Dep't of Corr.*, 61 A.3d 367, 376 (Pa. Commwlth. 2013).
 21. Denied as a legal conclusion. By way of further response, in order for an agency to assert the noncriminal investigation exemption, any agency must demonstrate that "a systemic 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. 2010). Further, the inquiry, examination or probe must be "conducted as part of an agency's official duties." *Id.* at 814. An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Johnson v. Pa. Convention Center Auth.*, 49 A.3d 920 (Pa. Commw. 2012).
 22. Denied as a legal conclusion. Respondent incorporates its answers to Paragraphs 1–21 above by reference as if set forth fully herein.
 23. Denied as a legal conclusion. Respondent incorporates its answers to Paragraphs 1–21 above by reference as if set forth fully herein.
 24. Denied as a legal conclusion. By way of further response, as pointed out by the appeals officer in *James Halpin v. Luzerne County*, OOR Dkt. AP 2020-1714, the 708(b)(16) exemption may only be invoked by the agency which actually conducts the investigation. In *Halpin*, the Office of Open Records granted access to a newspaper reporter seeking "fixed camera surveillance footage related to the June 6, 2018, struggle at the Luzerne County Correctional Facility that resulted in the death of Shaheen Mackey."

25. Denied as a legal conclusion. Respondent incorporates its answers to Paragraphs 1–24 above by reference as if set forth fully herein.
26. Denied as a legal conclusion. Respondent incorporates its answers to Paragraphs 1–24 above by reference as if set forth fully herein. By way of further answer, the County cannot rely on generalized and unsupported affidavits speculating about the possibility of future harm.
27. Denied as a legal conclusion. Respondent incorporates its answers to Paragraphs 1–24 above by reference as if set forth fully herein.
28. Denied as a legal conclusion. Respondent incorporates its answers to Paragraphs 1–24 above by reference as if set forth fully herein.
29. Denied as a legal conclusion. Respondent incorporates its answers to Paragraphs 1–24 above by reference as if set forth fully herein.

WHEREFORE, Brett Sholtis, Respondent, respectfully requests the court adopt the findings and conclusions of the Appeals Officer and summarily AFFIRM the Final Determination of the Office of Open Records, or, alternatively, that the Court conduct an *in camera* review of the requested records and order disclosure subject to limited redaction of any specific information that the Court determines is exempt from public disclosure.

Respectfully submitted,

/s/Paula Knudsen Burke

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Attorneys for Brett Sholtis

Dated: December 21, 2020

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by:

Signature: */s/Paula Knudsen Burke*

Name: Paula Knudsen Burke

PA Attorney ID: 87607

PROOF OF SERVICE

I hereby certify that I have served the foregoing document, Response to Petition for Review, upon the persons listed on the date and in the manner indicated below, which satisfies the requirements of Pa.R.A.P. 121:

Notification by email:

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Dated: December 21, 2020

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