

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

ACLU OF PENNSYLVANIA Plaintiff/Appellant	:	PHILADELPHIA COUNTY COURT OF COMMON PLEAS
vs.	:	DECEMBER TERM, 2020
PHILADELPHIA DISTRICT ATTORNEY'S OFFICE	:	NO. 00217
Defendant/Appellee	:	995 CD 2021

OPINION

Patrick, J.

December 30, 2021

Plaintiff/Appellant, ACLU of Pennsylvania filed an appeal from this Court’s Order dated August 11, 2021, denying Appellant’s appeal of the final determination of the Appeals Officer for the Philadelphia District Attorney’s Office. This Court now submits the following Opinion in support of its ruling and in accordance with the requirements of Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure. For the reasons set forth below, this Court’s decision should be affirmed.

FACTUAL/PROCEDURAL HISTORY

This appeal stems from a Right-to-Know Law (“RTKL”) request made by the ALCU of Pennsylvania (“Appellant”) to the Philadelphia District Attorney’s Office (“Appellee”). On August 6, 2020, Appellant submitted a RTKL request to Appellee seeking, “[a]ll criminal complaints the District Attorney’s Office filed with the court, including any supporting statements of probable cause or other factual averments that are filed with the court, from January 2020 to the

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present, with the charge of solicitation” (“requested documents”).¹ On August 10, 2020, Appellee denied Appellant’s RTKL request stating the requested documents were exempt from disclosure because they were “criminal investigative records”.² On August 21, 2020, Appellant filed an appeal seeking review of this decision by a Philadelphia District Attorney Appeals Officer (“DAO Appeals Officer”).³ On October 2, 2020, Appellee submitted its response to Appellant’s appeal reiterating that Appellant’s request was properly denied because the requested documents were exempt as criminal investigative records. Appellee further indicated that even if any part of Appellant’s request could be considered as encompassing public records, any such public records requested would be judicial records and thus must be obtained from the First District Judicial of Pennsylvania. On November 4, 2020, the DAO Appeals Officer issued a formal opinion denying Appellant’s request indicating the requested documents were exempt as criminal investigative records. On December 3, 2020, Appellant filed a Notice of Appeal to this Court seeking review of the final determination of the DAO Appeals Officer.⁴ On August 11, 2021, this Court held a hearing on the matter and heard argument from both parties as to the underlying merits of the appeal.

That same day, this Court entered an Order denying Appellant’s appeal and affirmed the Final Determination of the DAO Appeals Officer.⁵ On September 3, 2021, Appellee filed a Notice of Appeal to the Commonwealth Court of Pennsylvania from this Court’s August 11, 2021, Order. On September 8, 2021, this Court ordered Appellant to file a Concise Statement of Matters

¹ See June 7, 2021, Brief of Appellee Philadelphia District Attorney’s Office at pg. 3.

² *Id.*

³ See May 3, 2021, Brief of Appellant ACLU of Pennsylvania at pg. 10.

⁴ See December 3, 2020, Notice of Appeal.

⁵ See August 11, 2021, Order.

Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). Appellant filed a timely 1925(b) Statement on September 27, 2021.

ISSUES

Appellant raised the following issues in its 1925(b) Statement of Matters Complained of on Appeal:

1. The trial court erred in denying Appellant's appeal and affirming the final determination of the DAO Appeals Officer because Appellee did not meet its statutory burden.
2. The trial court erred in denying Appellant's appeal and affirming the final determination of the DAO Appeals Officer because the requested documents are not criminal investigative records that are exempt from disclosure.
3. The trial court erred in denying Appellant's appeal and affirming the final determination of the DAO Appeals Officer because the requested documents are not "judicial" records.

DISCUSSION

I. **THIS COURT PROPERLY DENIED APPELLANT'S APPEAL OF THE FINAL DETERMINATION OF THE DAO APPEALS OFFICER BECAUSE APPELLEE DEMONSTRATED BY A PREPONDERANCE OF THE EVIDENCE THAT THE REQUESTED DOCUMENTS WERE EXEMPT FROM DISCLOSURE.**

On Appeal, Appellant claims this Court erred by denying Appellant's appeal of the final determination of the DAO appeals officer because Appellee did not meet its statutory burden when this Court denied Appellant's RTKL request. Appellant's claim must fail. This Court properly considered and denied Appellant's appeal because Appellee properly met the required statutory burden by a preponderance of the evidence. Accordingly, Appellant's claim should be dismissed.

Under the RTKL local agencies, “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.” 5 Pa. Stat. Ann. §67.302; *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 724 (Pa. 2020); *Off. of the Dist. Att’y of Philadelphia v. Bagwell*, 155 A.3d 1119, 1129 (Pa. Cmwlth. 2017). Further, under the RTKL, agency records are presumed to be public records, accessible for inspection and copying by anyone requesting them, and must be made available to a requester unless they fall within specific, enumerated exceptions or are privileged. *Off. of the Dist. Att’y of Philadelphia v. Bagwell*, 155 A.3d 1119, 1129 (Pa. Cmwlth. 2017). Under Section 305 of the RTKL, a record in possession of a local agency “shall be presumed to be a public record,” however, the presumption shall not apply if “(1) the record is exempt under section 708 of the RTKL; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree.” *Off. of the Dist. Att’y of Philadelphia v. Bagwell*, 155 A.3d 1119, 1129 (Pa. Cmwlth. 2017).

Accordingly, records are presumed public unless and until the local agency proves by a preponderance of evidence that the record “is exempt from public access.” *Payne v. Pa. Dep’t of Health*, 240 A.3d 221, 225-26 (Pa. Cmwlth. 2020) (discussing 65 P.S. §§ 67.305(a) and 67.708(a)(1)). A preponderance of the evidence is such evidence as would lead a fact-finder to find that the existence of a contested fact is more probable than the nonexistence of the contested fact.⁶ *Off. of the Dist. Att’y of Philadelphia v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Cmwlth. 2017); see also *Pennsylvania Office of Attorney General v. Bumsted*, 134 A.3d 1204, 1210 (Pa. Cmwlth. 2016); *Pennsylvania State Troopers Association v. Scolforo*, 18 A.3d 435, 438–439 (Pa. Cmwlth.

⁶ “A preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry.” *Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 180 (Pa. Cmwlth. 2019) (citing *Del. Cty. v. Schaefer*, 45 A.3d 1149, 1156 (Pa. Cmwlth. 2012)).

2011). “A local agency may provide affidavits to detail the search its RTKL officer conducted for documents responsive to a RTKL request”. *Office of Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013). Moreover, the RTKL is remedial in nature and “is designed to promote access to official government information ... to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions.” *Pennsylvania State Police v. McGill*, 83 A.3d 476, 479 (Pa. Cmwlth. 2014). Further, if a requester appeals a denial issued by a local agency, the burden remains on the local agency to demonstrate by a preponderance of evidence the request was denied because the records sought were not subject to disclosure under Section 305 of the RTKL. *Off. of the Dist. Att’y of Philadelphia v. Bagwell*, 155 A.3d 1119, 1129 (Pa. Cmwlth. 2017); see also *Bowling v. Off. of Open Recs.*, 140, 75 A.3d 453, 457 (Pa. 2013); *Ali v. Philadelphia City Plan. Comm’n*, 125 A.3d 92, 99 (Pa. Cmwlth. 2015).

It is well established that whether a record is exempt from disclosure under the RTKL must be narrowly construed so as not to frustrate the remedial purpose of the RTKL.⁷ In this case, Appellee possessed the burden of establishing by a preponderance of evidence that Appellant’s request was denied because the requested documents sought were exempt from disclosure. Here, as discussed *infra*, Appellee clearly showed by a preponderance of the evidence that the requested documents sought were not subject to disclosure under the RTKL pursuant to the criminal investigative records exemption contained in Section 708(b)(16). Appellant further demonstrated that any portion of Appellant’s request that could be deemed a public record, more likely than not constituted a judicial record and thus must be requested from the First Judicial District of Pennsylvania rather than Appellant’s Office.

⁷ *Off. of the Dist. Att’y of Philadelphia v. Bagwell*, 155 A.3d 1119, 1129 (Pa. Cmwlth 2017); *Off. of Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Cmwlth. 2013).

On August 11, 2021, Appellee appeared before this Court representing that the matter before it was purely a matter of law and that the plain language of Section 708(b)(16) clearly exempts criminal complaints from disclosure. This Court agrees. The evidence further shows in this case that Appellant did not simply seek individual criminal complaints that were filed with the court publically, but also “any supporting statements of probable cause or other factual averments that were filed with the court, from January 2020 to the present, with the charge of solicitation.” As such, Appellant in this case is not just seeking publically filed criminal complaints, but also supporting statements and factual averments related to these same complaints. As explained *infra*, such records are clearly within the scope of criminal investigative records under Section 708(b)(16) of the RTKL and thus are exempt from disclosure.⁸ Appellee therefore has properly satisfied its burden to show beyond a preponderance of the evidence that Appellant’s requested documents are exempt under the RTKL.

Appellant further argues that Appellee provided, “no declarations, no affidavits, and no documents for *in camera* review”.⁹ However, Pennsylvania case law makes it clear that while affidavits can be admitted as evidence, they are not required as part of the burden of proof for the preponderance of the evidence standard.¹⁰ Further, Appellant’s contentions fail to acknowledge that this is purely a question of law since the documents at issue are clearly exempt as criminal investigative records.¹¹ As such, further *in-camera* review of documentary evidence would only serve to be unnecessarily cumulative and cumbersome. More specifically, the type of *in-camera*

⁸ “[I]f a record, on its face, relates to a criminal investigation, it is exempt under the RTKL” *Barros v. Martin*, 92 A.3d 1243, 1250 (Pa. Cmwlth. 2014) (holding the criminal complaint file was protected from disclosure under the RTKL as records ‘relating to a criminal investigation’ and ‘investigative information,’ respectively).

⁹ See Appellant’s September 27, 2021, 1925(b) Statement of Matters.

¹⁰ See *Office of Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013).

¹¹ See *Barros v. Martin*, 92 A.3d 1243, 1250 (Pa. Cmwlth. 2014).

review sought by Appellant for purely a question law such as the one at issue would likely only prove to waste both the time of the parties as well as valuable judicial resources. Thus, *in-camera* review of any requested documents at issue in this case would serve no beneficial interest to the parties. As such, this Court properly denied Appellant's appeal of the final determination of the DAO Appeals Officer because Appellee met its statutory burden by a preponderance of the evidence. Accordingly, Appellant's claims should be dismissed.

II. THIS COURT PROPERLY DENIED APPELLANT'S APPEAL OF THE FINAL DETERMINATION OF THE DAO APPEALS OFFICER BECAUSE THE REQUESTED DOCUMENTS ARE PLAINLY EXEMPT UNDER SECTION 708(b)(16) AS CRIMINAL INVESTIGATIVE RECORDS.

On Appeal, Appellant claims this Court erred in denying Appellant's appeal of the final determination of the DAO Appeals Officer because the requested documents are not criminal investigative records that are exempt from disclosure. Appellant's claim must fail. This Court properly considered and denied Appellant's appeal because the requested documents here are plainly exempt under the RTKL as they are criminal investigative records. Accordingly, Appellant's claim should be dismissed.

As stated *supra*, under the RTKL local agencies "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." 5 Pa. Stat. Ann. §67.302; *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 724 (Pa. 2020); *Off. of the Dist. Att'y of Philadelphia v. Bagwell*, 155 A.3d 1119, 1129 (Pa. Cmwlth. 2017). Further, "under the RTKL, agency records are presumed to be public records, accessible for inspection and copying by anyone requesting them, and must be made available to a requester unless they fall within specific, enumerated exceptions or are privileged." *Id.* Under Section 305 of the RTKL, a record in possession of a local agency "shall be presumed to be a public record,"

however, the presumption shall not apply if “(1) the record is exempt under section 708 of the RTKL; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree.” *Off. of the Dist. Att’y of Philadelphia v. Bagwell*, 155 A.3d 1119, 1129 (Pa. Cmwlth. 2017).

The RTKL contains a specific exemption for any records “relating to or resulting in a criminal investigation.” 65 P.S. § 67.708(b)(16). Section 708(b)(16)(i) explicitly states that criminal investigative records include “[c]omplaints of potential criminal conduct other than a private criminal complaint.” 65 P.S. § 67.708(b)(16)(i). See also *Barros v. Martin*, 92 A.3d 1243, 1250 (Pa. Cmwlth. 2014). This exemption also remains during and after any investigation is completed. See *Coley v. Philadelphia Dist. Attorney’s Office*, 77 A.3d 694, 697 (Pa. Cmwlth. 2013); see also *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473, 479 (Pa. Cmwlth. 2010) (holding that criminal investigative record exemption of RTKL exempts records of “whether certain investigative tasks have been carried out or whether certain information was discovered”). Further, “[I]f a record, on its face, relates to a criminal investigation, it is [deemed] exempt under the RTKL” *Barros v. Martin*, 92 A.3d 1243, 1250 (Pa. Cmwlth. 2014) (holding the criminal complaint file was protected from disclosure under the RTKL as records ‘relating to a criminal investigation’ and ‘investigative information,’ respectively).

Notably, “[t]he RTKL does not define the central phrase “criminal investigation” as used in Section 708(16)(b)(ii). Courts however, have indicated that the plain meaning, of a “criminal investigation” clearly and obviously refers to an official inquiry into a possible crime. *Pennsylvania State Police v. Grove*, 161 A.3d 877, 892–93 (Pa. 2017). Courts have held “that material exempt from disclosure as ‘criminal investigative information’ under the RTKL includes: statements compiled by district attorneys, forensic reports, and reports of police, including notes

of interviews with victims, suspects and witnesses assembled for the specific purpose of investigation.” *Id.* Section 506(c)(3) of the RTKL, 65 P.S. § 67.506(c)(3), also allows an agency, at its discretion, to make a record available if “public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access.” *Barros v. Martin*, 92 A.3d 1243, 1249 (Pa. Cmwlth. 2014). “Although Section 506(c) grants an agency the discretion to release an otherwise exempt record under certain circumstances, it does not require an agency to do so.” *Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 815 (Pa. Cmwlth. 2010); see also *Dep’t of Conservation and Natural Res. v. Office of Open Records*, 1 A.3d 929, 939 (Pa. Cmwlth. 2010).

In the present case, Appellant requested criminal complaints with the charge of solicitation, which are expressly exempt as criminal investigative records under the plain language of Section 708(b)(16) and relevant case law. While it is true this statutory exemption contains a caveat excluding private criminal complaints, such complaints are not presently at issue in this appeal. Further, Courts have consistently held that a criminal complaint file is protected from disclosure as records relating to a criminal investigation under Section 708(b)(16).¹² Thus, even if a criminal complaint has been made public such as the complaints at issue here, this does automatically result in the loss of the exemption status under the RTKL.

Appellant specifically argues that the sought criminal complaints are not exempt under Section 708 because they will not reveal any information related to a criminal investigation, and therefore should not be considered exempt as criminal investigative records. Appellant further

¹² “[I]f a record, on its face, relates to a criminal investigation, it is exempt under the RTKL” *Barros v. Martin*, 92 A.3d 1243, 1250 (Pa. Cmwlth. 2014) (holding the criminal complaint file was protected from disclosure under the RTKL as records ‘relating to a criminal investigation’ and ‘investigative information,’ respectively).

indicates it “sought only records that reflected the DAO’s choice to file criminal charges publically.” This assertion, however, is not consistent with the evidentiary record at hand because the language of Appellant’s initial request clearly delineates that it is seeking “[a]ll criminal complaints the District Attorney’s Office filed with the court, including any supporting statements of probable cause or other factual averments.”¹³

It should also be noted that a record must not satisfy every subsection of the criminal investigative record exemption to be exempt from disclosure and that Appellant’s assertions are directly contradictory to the relevant case law.¹⁴ Interestingly, Appellant does acknowledge a criminal complaint is a criminal investigative record under the language of Section 708 before it is filed with the court, however Appellant appears to believe that this characterization changes once a record has been filed. This Court is strained to understand how Appellant can make this assertion when there is case law directly contradictory to the proposition stating that such records maintain their characterization even after a criminal investigation has concluded and documents have been filed with the court.¹⁵

Appellant also attempts to distinguish the holding of *Barros* by indicating that the “criminal complaint file” held to be exempt from disclosure in *Barros*, is somehow different than the criminal complaints at issue here regarding solicitation. Despite Appellant’s contentions, the Court in *Barros* held that the entire criminal complaint file constituted exempt records relating to a criminal

¹³ See June 7, 2021, Brief of Appellee Philadelphia District Attorney’s Office at pg. 3.

¹⁴ *Barros v. Martin*, 92 A.3d 1243, 1250 (Pa. Cmwlth. 2014) see also *Sullivan v. City of Pittsburgh, Dep’t of Pub. Safety*, 561 A.2d 863, 865 (Pa. Cmwlth. 1989).

¹⁵ “Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed.” *Barros v. Martin*, 92 A.3d 1243, 1249 (Pa. Cmwlth. 2014) (finding the character of the record does not change once it is filed, thus a criminal complaint file is criminal investigative record even after it is filed, the investigation is completed and individual is convicted).

investigation. As such, the requested documents here sought by Appellant are too also unmistakably exempt because they are likewise a clear a component of the Appellee's internal criminal complaint files. As such, this Court properly denied Appellant's appeal of the final determination of the DAO Appeals Officer because the requested documents at issue are clearly criminal investigative records. Accordingly, Appellant's claims should be dismissed.

III. THIS COURT PROPERLY DENIED APPELLANT'S APPEAL OF THE FINAL DETERMINATION OF THE DAO APPEALS OFFICER BECAUSE THEY ARE JUDICIAL RECORDS THAT APPELLEE IS NOT PERMITTED TO DISCLOSE.

On Appeal, Appellant claims this Court erred by denying Appellant's appeal of the final determination of the DAO Appeals Officer because the requested documents are not judicial records that are exempt from disclosure by Appellee. Appellant's claim must fail. This Court properly considered and denied Appellant's appeal because the requested documents are plainly exempt as criminal investigative records. Further, even if a portion Appellant's request could be considered to be within the proper scope of disclosure under the RTKL, such records would best be characterized as judicial records, and thus must be requested from the First Judicial District of Pennsylvania not Appellee's Office. Accordingly, Appellant's claim should be dismissed.

The judicial branch its own separate branch of government that is entitled to exclusive authority over judicial records. See, e.g., *Grine v. Cnty. of Ctr.*, 138 A.3d 88, 100 (Pa. Cmwlth. 2016). The judiciary has a clear right to retain control over "[N]either the General Assembly nor the executive branch of government, acting through [the Office of Open Records], may constitutionally infringe upon the powers or duties of the judiciary". *Court of Common Pleas of Lackawanna Cnty. v. Pennsylvania Office of Open Records*, 2 A.3d 810, 814 (Pa. Cmwlth. 2010); see also 42 Pa.C.S. § 4301(b) ("All system and related personnel engaged in clerical functions

shall establish and maintain all dockets, indices and other records and make and file such entries and reports, at such times, in such manner and pursuant to such procedures and standards as may be prescribed by the Administrative Office of Pennsylvania Courts with the approval of the governing authority.”).

Under Section 102 of the RTKL, a “judicial agency” is defined as “[a] Court of the Commonwealth or any other entity or office of the unified judicial system.” 65 P.S. § 67.102. See also *Philadelphia District Attorney’s Office v. Storer*, 176 A.3d 1024, 1029 (Pa. Cmwlth. 2017). “[T]he RTKL offers limited access restricted by its terms to a defined type of records of judicial agencies. Thus, unlike records of Commonwealth or local agencies, where all records in their possession are presumed public, only ‘financial records’ of judicial agencies are accessible through the RTKL.” *Faulk v. Philadelphia Clerk of Courts*, 116 A.3d 1183, 1187 (Pa. Cmwlth. 2015). However, “documents that are filed with the court and, in particular, those that are used by the judge in rendering a decision are clearly considered public judicial documents.” See, e.g., *Commonwealth v. Long*, 922 A.2d 892, 898 (Pa. 2007) “[T]he right to inspect judicial documents is not absolute, and courts do have supervisory power over their records and files.” *Commonwealth v. Martinez*, 917 A.2d 856, 862 (Pa. Super. 2007). “It is within the discretion of the trial court to determine whether access to a judicial document is appropriate.” *Barros v. Martin*, 92 A.3d 1243, 1251 (Pa. Cmwlth. 2014).

In the present case, Appellant seeks “all criminal complaints the District Attorney’s Office filed with the court, including any supporting statements of probable cause or other factual averments that are filed with the court, from January 2020 to the present, with the charge of solicitation.”¹⁶ Appellant asserts that criminal complaints become public judicial records once

¹⁶ See June 7, 2021, Brief of Appellee Philadelphia District Attorney’s Office at pg. 3.

they are filed. However, Pennsylvania law is clear once individual criminal complaints are filed in court, they become judicial records that cannot be disclosed by other agencies through the RTKL. Though it may be true that a portion of the criminal complaints sought are public judicial records, the relevant case law is clear that the trial court has the “discretion to determine whether access to a judicial document is appropriate.”¹⁷ Although the public has access to courtrooms and can generally attend court proceedings, details of many events that occur inside a courtroom are not widely available to the public after the fact, and records recording court events must be requested directly through the judicial system.¹⁸ Further, Pennsylvania court proceedings cannot be recorded by the public.¹⁹ As such, even if filed criminal complaints are public judicial documents as Appellant claims, Appellant did not properly seek to obtain the requested documents through the proper channels. Further, Appellee in this matter has no discretion to disclose such judicial records under the RTKL because the courts maintain exclusive authority over access to them.²⁰ As such, this Court properly denied Appellant’s appeal of the final determination of the DAO Appeals Officer because any potentially public records encompassed in Appellant’s request would be judicial records and must be requested from the First Judicial District of Pennsylvania not Appellee’s Office. Accordingly, Appellant’s claims should be dismissed.

¹⁷ *Barros v. Martin*, 92 A.3d 1243, 1251 (Pa. Cmwlth. 2014).

¹⁸ *See* 201 Pa. Code R. 4008 and 4015.

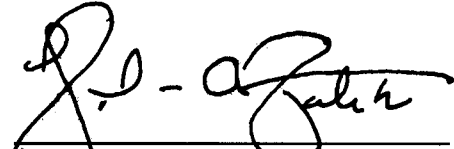
¹⁹ *See* Pa. R. Crim. Proc. 112(C).

²⁰ *See Commonwealth v. Martinez*, 917 A.2d 856, 862 (Pa. Super. 2007).

CONCLUSION

For all the foregoing reasons, this Court respectfully requests that its judgment be affirmed in its entirety.

BY THE COURT:



PAULA A. PATRICK, J.