



Temple Sheller Center <templeshellercenter2018@gmail.com>

RTK request

Michael Bisignani <bisignani@boro.dormont.pa.us>

Thu, Oct 4, 2018 at 10:14 AM

To: "templeshellercenter2018@gmail.com" <templeshellercenter2018@gmail.com>

As per your Right to Know Request (RTK), no such policies exist within our department.

Mike

Chief Michael J. Bisignani

Dormont Police Department

1444 Hillsdale Avenue, Suite #1

Pittsburgh, PA 15216

Voice: (412) 561-8900 ext. 234

Fax: (412) 561-3516

bisignani@boro.dormont.pa.us



 **Temple Sheller RTK.pdf**
67K

October 25, 2018

Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Re: Dormont Borough Right to Know Appeal

To Whom It May Concern:

We submitted a Right to Know request to Dormont Borough on October 1, 2018 via email to vickie@boro.dormont.pa.us. The request itself is attached. We submitted it as an attachment to the standard Right to Know request form, which is also attached.

Dormont Borough Police Chief Michael Bisignani denied our request via email on October 4, 2018. The denial stated, "no such policies exist within our department." The denial is attached. We appeal that denial.

We have attempted to contact Chief Bisignani directly for clarification. We left him a voicemail message on October 9th. As of today, we have not received a response.

The Borough's denial was generic and unspecific, referencing a lack of policies without otherwise addressing the categories of documents we requested, such as communications. Therefore, it is difficult to know what attempts were made, if any, to search for responsive documents. We believe Dormont Borough is required, at a minimum, to provide a better description of those attempts.

We have reason believe there are documents that exist that are relevant to our request. For example, we have received arrest policies from other departments, which would be responsive to #1 in our request. We have also received reports documenting phone calls between ICE and department personnel, which would be responsive to #3. While these are merely examples and do not necessarily exist within the Dormont Borough Police Department, we mention them to illustrate the types of documents that would be relevant.

Finally, the denial does not comply with the requirements set forth in 65 P.S. § 67.903. It does not describe the records requested, nor does it include a citation to legal authority or the appeal procedure.

For these reasons, we appeal.

Sincerely,

/s/

Solena Laigle
Amy Chin-Arroyo
Sheller Center for Social Justice
Temple University Beasley School of Law



John Q. Stranahan II
jstranahan@cfwws.com

November 5, 2018

VIA US MAIL and electronic mail (openrecords@pa.gov)

Office of Open Records
Commonwealth Keystone Building
333 Market Street, 16th Floor

Re: *Borough of Dormont, Allegheny County, Pennsylvania*
Right To Know Appeal dated October 25, 2018

Dear Sir or Madam:

Cafardi Ferguson Wyrick Weis + Stotler llc and I represent the Borough of Dormont ("Borough"). The Borough's Police Department was recently subject to a Right to Know Request dated October 1, 2018, ("Request") which is enclosed for reference. The Borough's Police Department's Open Records Officer, Chief Michael Bisignani, denied said Request by e-mail correspondence directed to the requesters dated October 4, 2018.

The requesters attempted to effectuate an appeal of the denial by submitting a letter to the Office of Open Records dated October 25, 2018, ("Appeal") which is also enclosed for reference. Not only is the Appeal untimely under Section 1101(a)(1)¹ of the Right-to-Know Law ("Law"), but it has been filed with the incorrect Appeals officer as defined under the Law, which provides that for all "local agencies in possession of criminal investigative records" the Appeals officer is "the individual designated under section 503(d) [of the Law]." The Borough's Police Department is clearly a local agency in possession of criminal investigative records, and Section 503(d)(2) provides in pertinent part the following:

The district attorney of a county shall designate one or more appeals officers to hear appeals under Chapter 11 relating to access to criminal investigative records in possession of a local agency of that county.

¹ "If a written request for access to a record is denied..., the requester may file an appeal with the Office of Open Records or judicial, legislative or other appeals officer designated under section 503(d) **within 15 business days of the mailing date of the agency's response**"

Office of Open Records
November 5, 2018
Page 2

Accordingly, pursuant to Section IV(C)(1)(a) of the Office of Open Records' Statement of Policy, please dismiss the Appeal for being untimely and for being filed with the incorrect Appeals officer.

Best regards,

Cafardi Ferguson Wyrick Weis + Stotler llc



By: John Q. Stranahan II, Esq.

Enclosures

cc: Solena Laigle (*via e-mail*)
Amy Chin-Arroyo (*via e-mail*)





STANDARD RIGHT-TO-KNOW REQUEST FORM

DATE REQUESTED: 10/01/2018

REQUEST SUBMITTED BY: ☒ E-MAIL ☐ U.S. MAIL ☐ FAX ☐ IN-PERSON

REQUEST SUBMITTED TO (Agency name & address): Dormont Borough - Police Department

Vickie McGurk, Dormont Borough, via electronic mail: vickie@boro.dormont.pa.us

NAME OF REQUESTER : Amy Chin-Arroyo, Arik Davidson, Solena Laigle
Sheller Center for Social Justice, Temple University Beasley School of Law

STREET ADDRESS: 1719 North Broad Street

CITY/STATE/COUNTY/ZIP(Required): Philadelphia, PA 19122

TELEPHONE (Optional): 215-204-8800 **EMAIL (optional):** TempleShellerCenter2018@gmail.com

RECORDS REQUESTED: **Provide as much specific detail as possible so the agency can identify the information. Please use additional sheets if necessary*

See attached.

We respectfully request that any fees be waived in the interest of promoting pro bono and academic research, pursuant to 65 P.S. § 67.1307(f)(2).

DO YOU WANT COPIES? ☒ YES ☐ NO Electronic copies if possible.

DO YOU WANT TO INSPECT THE RECORDS? ☐ YES ☒ NO

DO YOU WANT CERTIFIED COPIES OF RECORDS? ☐ YES ☒ NO

DO YOU WANT TO BE NOTIFIED IN ADVANCE IF THE COST EXCEEDS \$100? ☒ YES ☐ NO

**** PLEASE NOTE: RETAIN A COPY OF THIS REQUEST FOR YOUR FILES ****
**** IT IS A REQUIRED DOCUMENT IF YOU WOULD NEED TO FILE AN APPEAL ****

FOR AGENCY USE ONLY

OPEN-RECORDS OFFICER:

☐ I have provided notice to appropriate third parties and given them an opportunity to object to this request

DATE RECEIVED BY THE AGENCY:

AGENCY FIVE (5) BUSINESS DAY RESPONSE DUE:

***Public bodies may fill anonymous verbal or written requests. If the requestor wishes to pursue the relief and remedies provided for in this Act, the request must be in writing. (Section 702.) Written requests need not include an explanation why information is sought or the intended use of the information unless otherwise required by law. (Section 703.)*

Right to Know Request

Sheller Center for Social Justice, Temple University Beasley School of Law

10/01/2018

1. Any department policy, directive, order, training materials, or other document regarding the:
 - a. requesting, recording, investigating, or reporting of any individual's immigration status, national origin, or place of birth;
 - b. contacting, stopping, detaining, arresting, or interrogating an individual to verify their identification or driver's license; or
 - c. the use and acceptance of foreign identification.
2. Any policy, directive, order, training materials, or other document that relates to your department's contact or referral/sharing information with US Immigration and Customs Enforcement (ICE) about an individual's immigration status, national origin, or place of birth. This request includes any documents that reflect providing ICE access to the department's databases.
3. Any documents that reflect communication between your department and ICE from 2015 to the present. This request includes communications related to:
 - a. sharing information (e.g., incident reports, booking or database information);
 - b. collaborating by assisting in roving patrols, the apprehension of suspects, or the creation or implementation of vehicle checkpoints;
 - c. the 287(g) program;
 - d. providing back-up for ICE enforcement activities; or
 - e. providing office space for ICE representatives to use.

October 25, 2018

Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Re: Dormont Borough Right to Know Appeal

To Whom It May Concern:

We submitted a Right to Know request to Dormont Borough on October 1, 2018 via email to vickie@boro.dormont.pa.us. The request itself is attached. We submitted it as an attachment to the standard Right to Know request form, which is also attached.

Dormont Borough Police Chief Michael Bisignani denied our request via email on October 4, 2018. The denial stated, "no such policies exist within our department." The denial is attached. We appeal that denial.

We have attempted to contact Chief Bisignani directly for clarification. We left him a voicemail message on October 9th. As of today, we have not received a response.

The Borough's denial was generic and unspecific, referencing a lack of policies without otherwise addressing the categories of documents we requested, such as communications. Therefore, it is difficult to know what attempts were made, if any, to search for responsive documents. We believe Dormont Borough is required, at a minimum, to provide a better description of those attempts.

We have reason believe there are documents that exist that are relevant to our request. For example, we have received arrest policies from other departments, which would be responsive to #1 in our request. We have also received reports documenting phone calls between ICE and department personnel, which would be responsive to #3. While these are merely examples and do not necessarily exist within the Dormont Borough Police Department, we mention them to illustrate the types of documents that would be relevant.

Finally, the denial does not comply with the requirements set forth in 65 P.S. § 67.903. It does not describe the records requested, nor does it include a citation to legal authority or the appeal procedure.

For these reasons, we appeal.

Sincerely,

/s/

Solena Laigle
Amy Chin-Arroyo
Sheller Center for Social Justice
Temple University Beasley School of Law

November 6, 2018

Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Re: Docket # AP 2018-1925 (Chin-Arroyo v. Dormont Borough)

Dear Jordan Davis:

The following is in response to Dormont Borough's November 5 correspondence.

First, our appeal was timely. Under § 67.1101(a)(1), a requester may file an appeal within "15 business days of the mailing date of the agency's response or within 15 business days of a deemed denial." Detailed instructions on the Office of Open Records website¹ specify further: "The deadline for an appeal submitted electronically (e-mail or fax) is 11:59:59 p.m. on the 15th business day from the mailing date of the Agency's response." The Borough denied the request via e-mail on October 4. We appealed via e-mail on October 25. The appeal was timely.

Second, our appeal was properly submitted to the Office of Open Records. The requested documents were not criminal investigative records. We requested policies, directives, orders, and training materials, none of which are documents created for the purpose of a criminal investigation.² The requirement to appeal to the designee of the county's district attorney is for appeals "relating to access to criminal investigative records." § 67.503(d)(2). The purpose for this specialized appellate process solely exists "in recognition of 'the concerns of non-law enforcement personnel reviewing investigative records[.]'" California Borough v. Rothery, 185 A.3d 456, 462 (Pa. Commw. Ct. 2018) (citing Miller v. County of Centre, 135 A.3d 233, 239 (Pa. Commw. Ct. 2016)).

Further, if in fact the *only* responsive documents were criminal investigative records, exempt under § 67.708(b)(16), the Borough should have specified so in its denial. The Borough was required under § 67.903(2) to state that basis and supporting legal citation in its October 4 denial, which it did not. On the other hand, if *some* of the requested records were denied on those grounds, but others were denied because no records existed and/or on other grounds, our appeal was properly directed to the Office of Open Records. A requester is not required to split an appeal of denial, appealing in part to the District Attorney's designated officer, and in part to the Office of Open Records. See California Borough, 185 A.3d at 463 ("It is not at all clear that this cumbersome procedure was intended by the legislature or that the OOR lacks jurisdiction over an appeal simply because one of several stated reasons for a denial is that the information requested from a local agency relates to a criminal investigation.")

¹ <https://www.openrecords.pa.gov/Appeals/HowToFile.cfm>

² We also requested correspondence with federal agencies, which could in theory have encompassed criminal investigative documents, but were not seeking such documents as they would likely be exempt under § 67.708(b)(16).

If the Borough had complied with § 67.903(5), which requires it to include instructions for appeal in its denial, we would have been informed prior to filing this appeal of the Borough's position and could have sought clarification on the nature of their denial of the records we requested. However, having been denied records and given no instruction to appeal to the district attorney, we properly directed our appeal to the Office of Open Records.

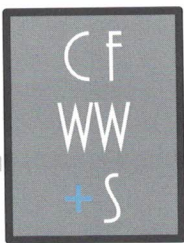
For these reasons, the Office of Open Records has jurisdiction over this appeal. The records requested are not exclusively criminal investigative records, nor were they denied on that basis alone.

Sincerely,

/s/

Solena Laigle
Amy Chin-Arroyo
Sheller Center for Social Justice
Temple University Beasley School of Law

cc: Jstranahan@cfwws.com



John Q. Stranahan II
jstranahan@cfwws.com

November 8, 2018

VIA US MAIL and electronic mail (jorddavis@pa.gov)

Jordan Davis
Office of Open Records
Commonwealth Keystone Building
333 Market Street, 16th Floor
Harrisburg, PA 17101

Re: *Borough of Dormont, Allegheny County, Pennsylvania*
Right To Know Appeal dated October 25, 2018

Dear Jordan Davis:

I am in receipt of your e-mail dated November 6, 2018, and the requesters' response dated the same.

First, we concede that the Appeal¹ was timely filed given the fact that the holiday and weekend days were not business days for purposes of the 15-day filing requirement.

Second, the Borough's jurisdictional argument is bolstered by Section 102 of the Right-to-Know Law ("Law"), which provides the following definition of "Appeals officer":

For the Attorney General, State Treasurer, Auditor General and *local agencies in possession of criminal investigative records*, the individual designated under section 503(d).

65 Pa.C.S. § 67.102 (emphasis added).

Moreover, despite the requesters' characterization of their request as solely requesting "policies, directives, orders and training materials," the request encompasses a much broader range of documents, including:

1. Any... other document regarding the:
 - a. requesting, recording, investigating, or reporting of any individual's immigration status, national origin, or place of birth;

¹ All defined terms herein are consistent with my prior correspondence dated November 2, 2018 unless otherwise noted.

- b. contacting, stopping, detaining, arresting, or interrogating an individual to verify their identification or driver's license; or
 - c. the use and acceptance of foreign identification.
- 2. Any... other document that relates to your department's contact or referral/sharing information with US Immigration and Customs Enforcement (ICE) about an individual's immigration status, national origin, or place of birth. This request includes any documents that reflect providing ICE access to the department's databases.
- 3. Any documents that reflect communication between your department and ICE from 2015 to the present. This request includes communications related to:
 - a. sharing information (e.g., incident reports, booking or database information);
 - b. collaborating by assisting in roving patrols, the apprehension of suspects, or the creation or implementation of vehicle checkpoints;
 - c. the 287(g) program;
 - d. providing back-up for ICE enforcement activities; or
 - e. providing office space for ICE representatives to use.

The requesters' Appeal itself states that "[t]he Borough's denial was generic and unspecific, referencing a lack of policies without otherwise addressing the categories of documents [requesters] requested, such as communications." Regardless, the Borough's Police Department is not in possession of any records that are responsive to the Request.

Under Section 705 of the Law:

When responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.

To satisfy the requesters' concern in their Appeal that "the denial does not comply with the requirements set forth in 65 P.S. § 67.903. It does not describe the records requested, nor does it include a citation to legal authority or the appeal procedure," we hereby incorporate by reference the Request dated October 1, 2018, and reiterate Section 705's requirement that the Borough's Police Department has no duty to create a record where one does not exist. The requesters have obviously not been prejudiced by the absence of the appeal procedure being set forth in the denial as they represent a familiarity with the procedure in their response dated November 6, 2018.



Jordan Davis
November 8, 2018
Page 3

We would be happy to address any further concerns.

Best regards,

Cafardi Ferguson Wyrick Weis + Stotler llc



By: John Q. Stranahan II, Esq.

cc: Solena Laigle (*via e-mail*)
Amy Chin-Arroyo (*via e-mail*)





IN THE MATTER OF

**AMY CHIN-ARROYO, SOLENA
LAIGLE & THE TEMPLE UNIVERSITY
BEASLEY SCHOOL OF LAW SELLER
CENTER FOR SOCIAL JUSTICE,
Requesters**

V.

**DORMONT BOROUGH POLICE
DEPARTMENT,
Respondent**

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Docket No: AP 2018-1925

Amy Chin-Arroyo & Solena Laigle, on behalf of the Temple University Beasley School of Law’s Sheller Center for Social Justice (collectively, the “Requesters”), submitted a request (“Request”) to the Dormont Borough Police Department (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking policies and communications. The Department denied the Request, noting that it possessed no responsive policies. 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 Department is required to take further action as directed.

On October 1, 2018, the Request was filed, seeking:

1. Any department policy, directive, order, training materials, or other document regarding the:
 - a. requesting, recording, investigating, or reporting of any individual's immigration status, national origin, or place of birth;
 - b. contacting, stopping, detaining, arresting, or interrogating an individual to verify their identification or driver's license; or
 - c. the use and acceptance of foreign identification.
2. Any policy, directive, order, training materials, or other document that relates to your department's contact or referral/sharing information with US Immigration and Customs Enforcement (ICE) about an individual's immigration status, national origin, or place of birth. This request includes any documents that reflect providing ICE access to the department's databases.
3. Any documents that reflect communication between your department and ICE from 2015 to the present. This request includes communications related to:
 - a. sharing information (e.g., incident reports, booking or database information);
 - b. collaborating by assisting in roving patrols, the apprehension of suspects, or the creation or implementation of vehicle checkpoints;
 - c. the 287(g) program;
 - d. providing back-up for ICE enforcement activities; or
 - e. providing office space for ICE representatives to use.

On October 4, 2018, the Department denied the Request, asserting that "no such policies" exist.

On October 25, 2018, 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 Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On November 6, 2018, the Department submitted a position statement, arguing that the appeal was untimely and that it should have been filed with the Appeals Officer for the Allegheny County District Attorney's Office. The same day, the OOR sought clarification as to the Department's argument, and asked the Department to identify which records it believed were related to a criminal investigation. Also that day, the Requesters submitted a position statement

arguing that at least some of the requested records could not be criminal investigative records, and that the Department had not raised Section 708(b)(16).

On November 15, 2018, the Department submitted a supplemental response, conceding that the appeal had been timely filed but reiterating its jurisdictional argument. The Department further argued that no responsive records exist.

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” 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, neither party sought a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Department 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)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The OOR retains jurisdiction over this appeal

The Department argues that the OOR lacks jurisdiction over the instant appeal because it is a local agency that possesses criminal investigative records. The Department cites to Section 102 of the RTKL, which defines “Appeals Officer” as:

(1) For a Commonwealth agency, or a local agency, the appeals officer designated under Section 503(a).

(4) For the Attorney General, State Treasurer, Auditor General and *local agencies in possession of criminal investigative records*, the individual designated under Section 503(d).

65 P.S. § 67.102 (emphasis added). The Department implies that any appeal taken from a local agency which possesses criminal records should go to the Appeals Officer for the local District Attorney's Office, as designated in Section 503(d) of the RTKL. However, Section 503(d) of the RTKL provides that:

(2) The district attorney of a county shall designate one or more appeals officers to hear appeals under Chapter 11 *relating to access to criminal investigative records* in possession of a local agency of that county. The appeals officer designated by the district attorney shall determine if the record requested is a criminal investigative record.

65 P.S. § 67.503(d)(2) (emphasis added). As the Commonwealth Court has explained, in all appeals involving local agencies, “[a] DA-designated appeals officer’s review is limited to law enforcement and criminal investigative records, and whether records are protected by Section 708(b)(16), or fall within an exception to its terms ... The OOR may consider all other RTKL exceptions, applicable privileges and legal exemptions.” *Schneller v. Phila. District Attorney’s Office*, 2017 Pa. Commw. Unpub. LEXIS 575 at 7 (Pa. Commw. Ct. 2017); *Cal. Borough v. Rothey*, 185 A.3d 456, 463 (Pa. Commw. Ct. 2018). That is to say, the Appeals Officer for the District Attorney’s Office only has jurisdiction over those records that the Department determines could be exempt under Section 708(b)(16). *See, e.g., LeConte-Spink v. Butler City Police Dep’t.*, OOR Dkt. AP 2018-1546, 2018 PA O.O.R.D. LEXIS 1195 (transferring an appeal to the District Attorney’s Office because the only records not provided were withheld under Section 708(b)(16) of the RTKL)

Accordingly, the OOR only lacks jurisdiction where the agency claims that the records are withheld as criminal investigative records and either submits evidence demonstrating that a

criminal investigation occurred or, based on the appeal documents or the language of the request itself, there is no dispute between the parties regarding the existence of a criminal investigation. *See, e.g., Steinheiser v. Falls Twp.*, OOR Dkt. AP 2015-0323, 2015 PA O.O.R.D. LEXIS 378 (holding that where the plain language of a Request sought a police report and there was evidence of a criminal investigation, Section 708(b)(16) of the RTKL applied); *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, it is unclear whether the Department is withholding any records under Section 708(b)(16). If there are criminal investigative records at issue, it is the Department's burden to identify them. It has not. Further, the Request encompasses a large range of potential records, some of which could possibly be – but are not necessarily – related to criminal investigations and many of which could not be related to criminal investigations, which prevents the OOR from making any facial determination as to the applicability of Section 708(b)(16). *See, e.g., Mattes v. Westtown-East Goshen Regional Police Dep't*, OOR Dkt. AP 2014-1777, 2015 PA O.O.R.D. LEXIS 42 (finding that a department policy regarding MVR use could not be related to any specific criminal investigation under the law). For these reasons, the OOR retains jurisdiction over this appeal.

2. The Department has failed to demonstrate that no responsive records exist

The Department denied the Request, stating that “no such policies exist within our department.” On appeal, the Department argues that:

The [R]equesters' Appeal itself states that '[t]he Borough's denial was generic and unspecific, referencing a lack of policies without otherwise addressing the categories of documents [Requesters] requested, such as communications.'

Regardless, the Borough's Police Department is not in possession of any records that are responsive to the Request.

While a sworn affidavit or statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof, *see Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010), unsworn statements may not be relied upon as competent evidence to prove the non-existence of records. *See Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209 (Pa. Commw. Ct. 2012) (holding that statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) ("Because the letter written by City's counsel is a legal brief, it cannot be ... evidence at all"). Because the Department has failed to submit sufficient evidence, *e.g.* a sworn affidavit or statement made under the penalty of perjury, to establish that no records responsive to the Request exist, the Department has not met its burden of proof under the RTKL. *Hodges*, 29 A.3d at 1192.

The OOR is mindful that an agency cannot produce records that do not exist within its "possession, custody or control" and, accordingly, is not ordering the creation of any records sought in the Request. Absent the Department providing a sufficient evidentiary basis that no records exist, the OOR will order disclosure of responsive public records. *See generally Sindaco v. City of Pittston*, OOR Dkt. AP 2010-0778, 2010 PA O.O.R.D. LEXIS 755; *Schell v. Delaware County*, OOR Dkt. AP 2012-0598, 2012 PA O.O.R.D. LEXIS 641.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted**, and the Department 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 Allegheny 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.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

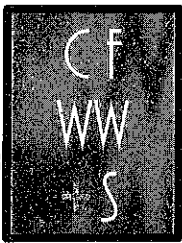
FINAL DETERMINATION ISSUED AND MAILED: December 3, 2018

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS

Sent to: Amy Chin-Arroyo (via email);
Solena Laigle (via email);
John Stranahan, II, Esq. (via email)

¹ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).



CAFARDI FERGUSON WYRICK WEISS + STOTLER LLC

John Q. Stranahan II
jstranahan@cfwws.com

January 2, 2019

**Via Electronic Mail (TempleShellerCenter2018@gmail.com)
& U.S. First-Class Mail**

Amy Chin-Arroyo
Solena Laigle
Sheller Center for Social Justice
Temple University Beasley School of Law
1719 North Broad Street
Philadelphia, PA 19122

Re: *In The Matter Of Amy Chin-Arroyo, Solena Laigle & The Temple University Beasley School of Law Sheller Center For Social Justice v. Dormont Borough Police Department, Docket No. AP 2018-1925*

Dear Ms. Chin-Arroyo and Ms. Laigle:

Pursuant to the Final Determination dated December 3, 2018, in the above-captioned matter, directing the Dormont Borough Police Department ("Department") to provide all responsive records within 30 days, please let this correspondence serve as the Department's response to the directive of the Final Determination on behalf of the Department's Open Records Officer, Chief Michael J. Bisignani.

The Department is in receipt of the contents of your Right-to-Know Law request dated October 1, 2018, ("Request") in which you requested the following:

1. Any department policy, directive, order, training materials, or other document regarding the:
 - a. requesting, recording, investigating, or reporting of any individual's immigration status, national origin, or place of birth;

- b. contacting, stopping, detaining, arresting, or interrogating an individual to verify their identification or driver's license; or
 - c. the use and acceptance of foreign identification.
- 2. Any policy, directive, order, training materials, or other document that relates to your department's contact or referral/sharing information with US Immigration and Customs Enforcement (ICE) about an individual's immigration status, national origin, or place of birth. This request includes any documents that reflect providing ICE access to the department's databases.
- 3. Any documents that reflect communication between your department and ICE from 2015 to the present. This request includes communications related to:
 - a. sharing information (e.g., incident reports, booking or database information);
 - b. collaborating by assisting in roving patrols, the apprehension of suspects, or the creation or implementation of vehicle checkpoints;
 - c. the 287(g) program;
 - d. providing back-up for ICE enforcement activities; or
 - e. providing office space for ICE representatives to use.

Based on a thorough examination of records in the possession, custody and control of the Department, the records you requested do not exist in the possession, custody and control of the Department. As set forth in the enclosed Affidavit executed by the Department's Office of Open Records Officer, there are no records that are responsive to your request. As you are aware, "an



Amy Chin-Arroyo
Solena Laigle
January 2, 2019
Page 3

agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” *See* 65 Pa.C.S. § 67.705. Your Request is, therefore, denied on the basis of 65 Pa.C.S. § 67.705.

Although you have once already appealed your Request to the Office of Open Records in this proceeding, in an abundance of caution, please be aware that you have the right to appeal this denial to: Office of Open Records, 333 Market St., 16th Floor, Harrisburg, PA 17101-2234. Appeals can also be filed online at the Office of Open Records website, <https://www.openrecords.pa.gov>. If you choose to file an appeal you must do so within fifteen (15) business days of the mailing date of the Department’s response. *See* 65 P.S. § 67.1101. Please note that a copy of your original Request and this denial letter must be included when filing an appeal. Also, note that the Department’s Open Records Officer on whose authority this response is being sent is Chief Michael J. Bisignani, Dormont Police Department, 1444 Hillsdale Avenue, Suite #1, Pittsburgh, PA 15216 with a phone number of (412) 561-8900 ext. 234.

Best regards,

Cafardi Ferguson Wyrick Weis + Stotler llc



By: John Q. Stranahan II, Esq.
*On Behalf of The Open Records Officer
For The Borough of Dormont Police Department*

Enclosure

cc: Jordan Davis (via e-mail at jorddavis@pa.gov w/ encl.)



ATTESTATION REGARDING AGENCY POSSESSION OF RECORDS

Name of Requester: Amy Chin-Arroyo and Solena Laigle,
Sheller Center for Social Justice,
Temple University Beasley School of Law

Records Requested:

1. Any department policy, directive, order, training materials, or other document regarding the:
 - a. requesting, recording, investigating, or reporting of any individual's immigration status, national origin, or place of birth;
 - b. contacting, stopping, detaining, arresting, or interrogating an individual to verify their identification or driver's license; or
 - c. the use and acceptance of foreign identification.
2. Any policy, directive, order, training materials, or other document that relates to your department's contact or referral/sharing information with US Immigration and Customs Enforcement (ICE) about an individual's immigration status, national origin, or place of birth. This request includes any documents that reflect providing ICE access to the department's databases.
3. Any documents that reflect communication between your department and ICE from 2015 to the present. This request includes communications related to:
 - a. sharing information (e.g., incident reports, booking or database information);
 - b. collaborating by assisting in roving patrols, the apprehension of suspects, or the creation or implementation of vehicle checkpoints;
 - c. the 287(g) program;
 - d. providing back-up for ICE enforcement activities; or
 - e. providing office space for ICE representatives to use.

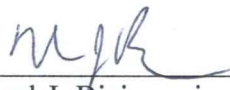
Appeal Caption: *In The Matter Of Amy Chin-Arroyo, Solena Laigle & The Temple University Beasley School Of Law Sheller Center For Social Justice v. Dormont Borough Police Department, Docket No. AP 2018-1925*

I, Michael J. Bisignani, hereby declare, pursuant to 18 Pa.C.S. § 4904, that the following statements are true and correct based upon my personal knowledge information and belief:

1. I serve as the Open Records Officer for the Borough of Dormont Police Department ("Agency") and am responsible for responding to Right-to-Know requests filed with the Agency.
2. In my capacity as the Open Records Officer, I am familiar with the records of the Agency.

3. Upon receipt of the request, I conducted a thorough examination of files in the possession, custody and control of the Agency for records responsive to the request underlying this appeal.
4. Additionally, I have inquired with relevant Agency personnel as to whether the requested records exist in their possession.
5. Based upon the above-described search of the Agency's files and inquiries with relevant Agency personnel, I have made the determination that the records requested are not within the Agency's possession, custody or control.

Date: 1/2/19

Signature: 
Chief Michael J. Bisignani,
Open Records Officer,
Borough of Dormont Police Department