

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY,
PENNSYLVANIA

LANCASTER COUNTY DISTRICT
ATTORNEY'S OFFICE,

Petitioner,

vs.

CARTER WALKER and
LNP/LANCASTER ONLINE,

Respondents.

and

THE COUNTY OF LANCASTER,

Intervenor.

CIVIL ACTION - LAW

Response to Petitioner's Brief

No. CI-2019-01185

RESPONSE TO PETITIONER'S BRIEF

Kirby Thomas West
PA Supreme Court ID # 321371
Attorney for Respondents,
Carter Walker and
LNP/Lancaster Online
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321
Email: kwest@ij.org

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
FACTS	1
I. Background and Initial Right to Know Law Request.....	1
II. The Office of Open Records Rules for Respondents.....	4
A. The requested records are not confidential under the Controlled Substance Forfeiture Act.....	4
B. The RTKL's criminal investigations exemption does not apply to the requested records	5
C. The RTKL's noncriminal investigations exemption does not apply to the requested records	5
D. The RTKL's personal security exemption does not apply to the requested records.....	5
III. The Office Provides Some Records, Failing to Fully Satisfy the Request	6
A. The records provided do not satisfy Item 1	7
B. The records provided do not satisfy Item 2	8
C. The records provided do not satisfy Item 5	9
IV. Settlement Negotiations	11
LEGAL ARGUMENT	15
I. Right to Know Law.....	15
II. The Office Failed to Prove that the Requested Records Are Exempt.....	16
A. The audit exemption of the Controlled Substances Forfeiture Act does not apply.....	16
B. The RTKL's criminal investigations exemption does not apply to the requested records	18

C. The RTKL's noncriminal investigations exemption and personal security exemption do not apply to the requested records.....19

CONCLUSION.....20

CERTIFICATE OF SERVICE21

CERTIFICATE OF COMPLIANCE22

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Bush v. Westtown-East Goshen Police Dep't</i> , OOR Dkt. App. 2016-1869	18
<i>Cent. Dauphin Sch. Dist. v. Hawkins</i> , 199 A.3d 1005 (Pa. Cmwlth. 2018)	15
<i>DeBartola v. Cambria County District Attorney's Office</i> , No. 2018-0095 (Cambria Cnty. C.C.P. Nov. 19, 2018)	17
<i>DeBartola v. City of Johnstown</i> OOR Dkt. App. 2019-0386	18
<i>Office of Governor v. Scolforo</i> , 65 A.3d 1095 (Pa. Cmwlth. 2013)	18
<i>Pa. Dep't of Health v. Office of Open Records</i> , 4 A.3d 803 (Pa. Cmwlth. 2010)	5
<i>Porter v. Allegheny County Sheriff's Office</i> , OOR Dkt. App. 2014-1910	18
<i>SWB Yankees L.L.C. v. Wintermantel</i> , 45 A.3d 1029 (Pa. 2012)	15
 <u>Statutes</u>	
42 Pa.C.S. 5803(j)	17
65 P.S. § 67.302(b)	14
65 P.S. § 67.503(d)	18
65 P.S. § 67.506(d)(1)	8
65 P.S. § 67.708(b)(16)	3, 5
65 P.S. § 67.708(b)(17)(iv)	5

65 P.S. 67.708(b)(1)(ii).....	6
65 P.S. § 67.302 (b)	13
65 P.S. § 67.706.....	20
65 P.S. § 67.708(a).....	15
65 P.S. § 708(b)(16).....	3, 5, 18

INTRODUCTION

This case presents a straightforward legal question: Does the Controlled Substances Forfeiture Act’s statement that the annual forfeiture audits “shall not be made public” exempt from disclosure all forfeiture-related documents that happen to be in those audits? The Act’s text, existing case law, and the Right to Know Law’s presumption in favor of disclosure all support the Office of Open Records’ determination that it does not. Because that exemption does not apply, and because Petitioner has failed to prove that the requested records fall under any other exemption under the Right to Know Law, the Court should affirm the Office of Open Records’ determination in favor of Respondents.

FACTS

Though not relevant to the clear legal questions at issue, a brief history of the case may be useful in light of factual developments after the case came before this Court. Respondents’ submitted a Right to Know Law (“RTKL”) request to the Lancaster County District Attorney’s Office (“Office”), which denied that request. On appeal, the Office of Open Records (“OOR”) decided in favor of Respondents and ordered that the Office produce the requested records. After appealing the OOR determination to this Court, the Office produced a limited number of documents, failing to fully satisfy Respondents’ request. Despite Respondents’ best efforts, they and the Office were unable to reach a settlement agreement.

I. Background and Initial Right to Know Law Request

Carter Walker is a reporter covering county government issues for the Lancaster newspaper LNP (collectively, “Respondents”). In 2018, concerned by reports of forfeiture abuse around the country, Carter began investigating law enforcement’s use of forfeiture in Lancaster County. Carter found some aggregate information in the state Attorney General’s report on forfeiture, a yearly report which includes an overview of forfeiture in each county in Pennsylvania, including

statistics on the county District Attorney’s total forfeiture revenues and total expenditures from the forfeiture fund. But that was not enough. He wanted to give LNP readers a more detailed picture of forfeiture in Lancaster County, including what kind of property law enforcement has taken through forfeiture, from whom that property was taken, in what context¹ the property was taken, and—importantly—how law enforcement spends the proceeds of forfeited property.

In order to obtain this information, Carter submitted an RTKL request to the Lancaster County District Attorney’s Office (“Office”) on September 11, 2018. Carter’s request contained the following six items:

1. Records of what items were forfeited under this Act, for example, vehicles, real property, cash and/or cash equivalent, or any other item of value. This documentation should identify the property, the date the property that was seized, value of item and context of the forfeiture (seized from whom, where and why). [“Item 1”]
2. After the item was forfeited, documentation that shows how it was processed, whether that was sale, reutilization, or distribution to other law enforcement agenc[ies] or personnel. Documentation should identify the property, what was done with the item (sold or distributed), date sold/distributed, who the item was distributed to if it was distributed, and how much the item was sold for if it was sold. [“Item 2”]
3. Any documentation of a policy, formal or informal, that governs the use and/or disposal of forfeited assets by the DA’s office. For example, a policy that guides the decision to sell forfeited property for profit and later use, or use the property. [“Item 3”]
4. Records of the amount of funds taken in by the agency in a given year as a result of civil asset forfeiture, whether that be through cash forfeitures or sale of forfeited property. This documentation should show the amount of funds coming into the agency’s forfeiture account, where the funds originated and when it was received. [“Item 4”]
5. Records that show how forfeited property proceeds were spent, i.e. officer training, equipment, funding programs, etc., and records that illustrate how these expenditures comply with the Act’s mandate that forfeited funds be used for combating substance abuse. [“Item 5”]
6. Forfeiture account balances at the end of each year, and for 2018, as of the date of this request. [“Item 6”]

¹ By the “context” of the forfeiture, Respondents mean the offense that resulted in the forfeiture, where and when the initial seizure occurred, and how the property was forfeited (either by agreement or through court proceedings).

Carter Walker Request to Lancaster County District Attorney’s Office (“Exhibit 1”). Carter’s request sought the requested records for the time period from January 1, 2008 to the date of the request, September 7, 2018. *Id.*

Among the requested records, Carter sought documentation about specific forfeitures, including the “context” of each forfeiture (“seized from whom, where and why”) and what the Office did with each piece of forfeited property (“what was done with the item . . . who the item was distributed to if it was distributed, and how much the item was sold for if it was sold”). *Id.* Carter already had summary totals of forfeitures; what he sought through his request was a more detailed picture which would allow him to spot trends in the kinds of property law enforcement was taking through forfeiture and the kinds of circumstances in which it was taking that property.

Carter also wanted to examine “[r]ecords that show how forfeited property proceeds were spent.” *Id.* Item 5 of his request sought records of *all* expenditures using the proceeds of forfeited property. It is only through this granular review that Carter could get a full picture of the Office’s expenditures and understand “how [they] comply with the Act’s mandate that forfeited funds be used for combating substance abuse.” *Id.*

The Office denied Carter’s request on October 18, 2018. In a letter explaining the denial, the Office stated, “[Items] 1, 2, 4, 5, and 6 seek information that would be prepared for the Attorney General’s audit[,]” information which the Office claimed “pursuant to [the Controlled Substances Forfeiture Act] . . . is not to be disseminated and shall remain confidential.” Letter from the Office to Carter Walker (October 18, 2018) (“Exhibit 2”). The Office also denied Items 1, 2, 4, 5, and 6 under the RTKL’s criminal investigations exemption, 65 P.S. § 67.708(b)(16), and the noncriminal investigations exemption, *id.* § 67.708(b)(17). Ex. 2. In response to Item 3, the Office stated that

no responsive records exist. *Id.* On November 6, 2018, Respondents appealed to the Office of Open Records (“OOR”) challenging the denial of Items 1, 2, 4, 5, and 6.

II. The Office of Open Records Rules for Respondents

On January 7, 2019, the OOR issued a Final Determination in favor of Respondents and ordered the Office to provide all the requested records. Office of Open Records Final Determination (“Exhibit 3”). In so doing, the OOR considered, and rejected, each of the Office’s justifications for denying Respondents’ request.

A. The requested records are not confidential under the Controlled Substances Forfeiture Act.

The OOR first found that the requested documents are not confidential under the Controlled Substances Forfeiture Act (“Act”). The Act instructs each Pennsylvania district attorney to maintain and create certain forfeiture records, which are subsequently used in compiling an annual audit of forfeited property and proceeds. 42 Pa.C.S. § 5803(j). It also states that “[t]he audit shall not be made public but shall be submitted to the Office of Attorney General.” *Id.* The OOR rejected the Office’s contention that this language exempts all forfeiture records maintained by a district attorney’s office, noting, “[t]he Act makes this audit confidential but is silent as to any other records in the possession of a district attorney’s office, including ‘appropriate records to account for the property forfeited in a fiscal year and the use made of the property forfeited.’” Ex. 3 at 6. As such, the OOR reasoned, “[b]ecause the Act only makes the audit confidential, the requested records are not made confidential under the Act.” *Id.*

The OOR also rejected the Office’s related contention that the Attorney General’s Guidelines, issued by the Attorney General’s office to offer guidance on the disclosure of records under the Act, prohibit the release of the requested records. The OOR found both that the Office failed to demonstrate that the Guidelines prohibit the release of the requested records, and, in any event,

those Guidelines do not “have the force and effect of law.” *Id.* at 7. Consequently, the OOR determined that the Act does not bar disclosure of the requested records.

B. The RTKL’s criminal investigations exemption does not apply to the requested records.

The OOR next turned to the Office’s argument that the requested records could not be produced under the RTKL’s criminal investigations exemption. Under Section 708(b)(16) to the RTKL, “record[s] of an agency relating to or resulting in a criminal investigation” are exempt from disclosure. 65 P.S. § 67.708(b)(16). Where an agency claims an exemption under this section, the appeal will, in certain circumstances, be transferred to an appeals officer appointed by a district attorney. The OOR determined, however, that such a transfer was inappropriate here because the Office provided only a “conclusory affidavit” stating that the criminal investigation exemption applied. Ex. 3 at 8. Because the Office provided “no evidence that the records themselves contain any investigatory material,” the OOR found that the exemption did not apply. *Id.* at 9.

C. The RTKL’s noncriminal investigations exemption does not apply to the requested records.

The OOR also rejected the Office’s argument that the records were protected from disclosure by the RTKL’s exemption for “record[s] of an agency relating to a noncriminal investigation” and “conducted as part of the agency’s official duties.” *Id.* (quoting 65 P.S. § 67.708(b)(17)(iv); *Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810–11 (Pa. Cmwlth. 2010)). The OOR again determined that the Office failed to offer any evidence that the exemption applied. *Id.* at 9–10.

D. The RTKL’s personal security exemption does not apply to the requested records.

The OOR similarly dispatched the Office’s argument that the records should not be disclosed under the personal security exemption to the RTKL. *Id.* at 10. The personal security exemption prohibits disclosure of any information which, if disclosed, “. . . would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an

individual.” *Id.* (quoting 65 P.S. § 67.708(b)(1)(ii)). As with the other claimed exemptions, the OOR again determined that the affidavit provided by the Office was insufficient to prove the exemption applied because “conclusory affidavits or statements made under penalty of perjury are insufficient to meet an agency’s burden of proof.” *Id.* Accordingly, the OOR ordered the release of the requested records.

The Office appealed to this Court on February 6, 2019.

III. The Office Provides Some Records, Failing to Fully Satisfy the Request

At a conference before this Court on April 11, 2019, the Office produced a set of County Asset Forfeiture forms from 1999-2018. The forms, which were prepared by the Lancaster County Controller for the Attorney General, contain categorical summaries of forfeitures and expenditures. The Office claims that those forms fully satisfied Respondents’ request. Suppl. Release & Req. for Expedited J. on Pleadings & Br. in Opp’n Pet. to Intervene, Attachment A (“Attachment A”). This Court stayed the agreed-upon briefing schedule in order to provide time for Respondents to review the forms to determine whether they indeed satisfied Respondents’ request. Order (April 11, 2019). On April 24, Respondents notified the Court that, while the forms satisfied Items 4 and 6 of Respondents’ request, they failed to satisfy Items 1, 2, or 5. Notice of Resp’ts’ Position on Pet’r’s Prod. Forfeiture Summaries (April 24, 2019).

The Office produced two more incomplete batches of records, which it attached to its response to Lancaster County’s motion to intervene. One batch was a list of names and corresponding docket numbers (with no other accompanying information) of individuals from whom property has been forfeited in the past two years. Suppl. Release & Req. for Expedited J. on Pleadings & Br. in Opp’n Pet. to Intervene, Attachment B (“Attachment B”). The other batch was an incomplete collection of letters from community service organizations acknowledging receipt of funds for various

outreach and prevention efforts. Suppl. Release & Req. for Expedited J. on Pleadings & Br. in Opp'n Pet. to Intervene, Attachment D ("Attachment D"). The documents in Attachments A, B, and D likewise fail to satisfy Items 1, 2, and 5 of Respondents' request.

A. The records provided do not satisfy Item 1.

In Item 1 of the initial request, Respondents requested:

Records of what items were forfeited under this Act, for example, vehicles, real property, cash, and/or cash equivalent, or any other item of value. This documentation should identify the property, the date the property was seized, value of item and context of the forfeiture (seized from whom, where, and why).

Ex. 1.

The Office argues that the County Asset Forfeiture forms, as well as the list of names and docket numbers from forfeitures for the past two years, fully satisfy Item 1. Pet'r's Br. ("Exhibit 4") at 10–14.² They fail to do so for several reasons. The County Asset Forfeiture forms list categorical summaries of expenses, items forfeited, and values of property forfeited. While these summaries do list types of property forfeited, they do not provide the detailed information requested in Item 1. Looking, for example, at the County Asset Forfeiture form for 2016–17, one can see that the Office forfeited 10 automobiles, 4 SUVs, and 2 motorcycles during that time period. Attach. A. It is impossible to glean from those numbers, however, the detailed information requested in Item 1, including when each vehicle was seized, how much each was worth, or the context behind each forfeiture. As such, the summaries fail to satisfy Respondents' request.

The Office argues that the list of docket numbers and associated names from the past two years of forfeitures further satisfies Respondents' request, presumably because Respondents could use them to search for specific forfeiture information by docket number. Ex. 4 at 13. These docket numbers and names provide only a small piece of the requested information ("seized from whom")

² For ease of reference, and for the Court's convenience, Respondents attach a paginated copy of Petitioner's Brief as Exhibit 4. The only change made to the brief as submitted by the Office is the addition of page numbers.

for only two years of the ten-year time period for which Respondents requested records. As such, they fail to satisfy Respondents' request.

B. The records provided do not satisfy Item 2.

The documents provided by the Office also fail to satisfy Item 2 of Respondents' request. Here again, the County Asset Forfeiture forms provide only summary information. Looking again at the 2016–17 form, for example, one can see that 9 of the 10 automobiles forfeited were sold for a total of \$54,500, the 4 SUVs forfeited were sold for a total of \$12,100, and the 2 motorcycles forfeited were sold for a total of \$7,500. But, the forms lack information about specific forfeitures; they fail to, among other things, “identify the property” or “how much the item was sold for if it was sold.”³ Ex. 3 at 2. The forms thus fail to satisfy Item 2.

The Office claims that it cannot produce this specific sale information because “it is within the sole custody of the entity that conducts the auction” and, in order to procure this information, the Office would have to “create a record that does not exist.” Ex. 4 at 13. The fact that the auction company retains records of forfeiture sales, however, does not relieve the Office of its duties under the RTKL. Section 506(d)(1) of the RTKL states:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1).

The Office contracted with the auction company to aid it in the disposition of forfeited property, a governmental function, and the auction company's records of the sale of that property are therefore “considered a public record of the [Office].” *See id.*

³ The Office asserts that all forfeited items sold in the relevant time period were sold at a yearly auction held on the third Saturday of May each year. Respondents will consider their request for dates of the sale of property satisfied.

C. *The records provided do not satisfy Item 5.*

The County Asset Forfeiture forms also fail to provide the expenditure information requested in Item 5, which seeks information about specific expenditures made using the proceeds of forfeited property. Ex. 1. Instead, the forms provide only a general picture of these expenditures. The following, for example, are the listed expenses on the 2016–2017 form:

Confidential Case Expenditures ⁴	0
Data Processing Equipment/Supplies	2,700
Investigative Equipment/Supplies	60,153.56
Municipal Task Force Support	584,145.01
Real Estate	56,470
Shared Forfeitures	0
Witness Relocation and/or Protection Expenses	0
Community-Based Drug and Crime Fighting Programs	85,564.08
Education/Training	4,862.72
Maintenance of Forfeited Property	53,260.67
Other Equipment/Supplies	3,185.64
Salaries	0
Vehicles	53,509

Attach. A.

It is true, as the Office observes, that the Controller’s accompanying letter for that year, as for the other years provided, states that forfeiture proceeds were spent in accordance with the law. *See*

⁴ It is worth noting here that, in spite of the Office’s claims that these records will endanger confidential law enforcement activities, none of the records provided show any expenditures under the “Confidential Case Expenditures” category. *See* Attach. A.

id. But that is immaterial; without more detailed expenditure information it is impossible for Respondents to understand “*how* these expenditures comply with the Act’s mandate that forfeited funds be used for combating substance abuse.” Ex. 1 (emphasis added). The fact that the Office spent well over half a million dollars on “Municipal Task Force Support,” for example, sheds little light on how forfeited property proceeds were spent, as requested in Item 5. The Office itself evidently understands the relevance of specific expenditure information. After explaining that “there is no list which explains how each purchase is in compliance,” the Office goes on to state that “almost all purchases are self-evident to the fight against drugs.” Ex. 4 at 15. The Office correctly notes that it should be evident from records of specific expenditures whether and how those expenditures were used to combat substance abuse. That is why Respondents asked for those records. Because the County Asset Forfeiture forms fail to include receipts, or other specific expenditure records, the Office has failed to satisfy Respondents’ request for records demonstrating “how forfeited property proceeds were spent.” Ex. 1.

The Office also claims that the letters from community organizations provided in Attachment D to their Supplemental Release are responsive to Item 5. Ex. 4 at 15. But these records add very little to the hazy picture painted by the County Asset Forfeiture forms. The documents are letters from various community organizations acknowledging receipt of forfeiture funds from the Office. Attach. D. While the letters are certainly responsive to Item 5, they account for only a tiny portion of total expenditures. For the time period of July 2016 through June 2017, for example, the letters account for \$30,000⁵ of the Office’s total \$903,851.90 in expenditures, less than five percent. *See* Attach. D, Attach. A. For the time period of July 2017 through June 2018, the letters account for

⁵ One letter, from Restart Training Center Ministry, acknowledges receipt of funds but provides no dollar amount. That amount is thus not included in this number.

only \$32,000⁶ of a total \$913,214.56 in expenditures. *Id.* The letters provide even less information for other years. There is only one letter, for example, from 2010, which accounts for a mere \$5,000 of the \$297,098.18 spent from the forfeiture fund during the period of July 2009 through June 2010. *See* Attach. D, Attach. A. There are no letters at all from 2008, 2009, or 2011. *See* Attach. D. Although the letters contained in Attachment D are responsive to Item 5, they comprise only a small fraction of the Office’s expenditures. The records produced by the Office again fail to fully satisfy Respondents’ request.

IV. Settlement Negotiations

The Office has, at numerous points, referenced its “offer to requester to review the unredacted documents.” Ex. 4 at 10; *see also id.* at 15 (“It should be noted that Respondent has had an open invitation for months to page through all these records one sheet at a time in case we missed something in the boxes and boxes of records which have been audited by the Controller.”), 16 (“The District Attorney’s Office further asserts that is [sic] endeavored to comply with the requests and has endeavored to work to resolve the issues with the Requester.”). The Office has not, however, been fully forthcoming about the terms of its offer, nor about Respondents’ cooperation in attempting to reach a settlement agreement. Though the terms of settlement negotiations are not relevant to the resolution of legal claims, in the interest of full disclosure to this Court—and in response to repeated allegations of “bad faith” by the Office, *see, e.g.*, Ex. 4 at 17—Respondents offer a brief summary of the parties’ settlement negotiations.

At the April 11 conference, the Office made a verbal offer to Respondents’ attorney offering to permit an LNP representative—though not Respondent Carter Walker—to come examine boxes of forfeiture documents on the condition that LNP would not publish any specific information

⁶ This time period also contains a letter from Restart Training Center Ministry that does not reflect a dollar amount of the contribution.

contained therein. Because of the Office's strict publication restrictions, and because of District Attorney Stedman's repeated insistence that Respondent Carter Walker would not be permitted to review the documents, Respondents were not optimistic that an agreement could be reached. On June 4, however, Respondents' attorney sent an email to the Office seeking to confirm the terms and explore potential settlement. In response to that email, the Office sent Respondents' attorney a new settlement offer on June 10, 2019. Dist. Att'y's June 10 Settlement Offer ("Exhibit 5"). The terms of that new offer still placed heavy restrictions on publication of documents, or on information contained in those documents, giving the Office carte blanche to determine what information could and could not be published on a "case-by-case basis." Ex. 5.

Respondents replied to this offer with a counter-offer articulating their concerns and proposing a reasonable compromise by which the Office could redact sensitive material from documents on a case-by-case basis prior to publication, and any dispute about the necessity of particular redactions could be taken to this Court for resolution. LNP's June 20 Counter-Offer ("Exhibit 6"). The Office rejected this counteroffer because:

The [Office] must make the determination as to what is sensitive information and what is not. The [Office] is the only office which can make the determination as to whether the information contained in a record is sensitive or investigative information. What might seem like an innocuous financial record to an outside observer could risk safety or an investigation if published – and only the [Office] will know.

District Attorney's June 28 Final Offer ("Exhibit 7").

The DA's "final offer" reiterated the same terms as the June 10 offer, including the Office's oversight over publication decisions. *Id.*

Respondents are a reporter and a newspaper. The purpose of their RTKL request is to gather information that can be presented to readers to inform them about forfeiture in Lancaster County, and about how the funds generated by that forfeiture are being spent. Restrictions on publication, which go beyond the Office's undisputed right to redact certain confidential information as

dictated by the RTKL, are contrary to the truth-seeking function of the RTKL. In fact, the RTKL prohibits such restrictions. *See* 65. P.S. § 67.302 (b) (“A local 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.”). Respondents chose not to sacrifice editorial freedom for access to the Office’s records, seeking instead the full fulfillment of their request as ordered by the OOR.

In addition to concerns about publishing restrictions, Respondents had two additional reasons for rejecting the Office’s oft-cited settlement offer. First, the Office was unable to ever definitively say whether the boxes they offered for review contained all responsive documents. *See* June 12 Email from C. Blazier (“Exhibit 8”) (“I can tell you generally that there are the referenced boxes which he is able to review. Whether or not there are specific receipts or what all he will find in each box, I cannot say for certain. The offer is to review the contents of the boxes. As you can imagine, I’m not just the Right to Know Officer for the office and have a trial case load that I manage. So, I myself haven’t combed through every inch of the boxes.”). Accepting the Office’s offer would have been a gamble on the part of Respondents that the boxes did, in fact, contain all the records sought.

Additionally, the Office repeatedly stated that Respondent Carter Walker, who submitted the initial RTKL request, would not be permitted to review any documents. In its final offer, the Office stated that Respondent Carter Walker could not view the documents because he “absolutely has disclosed information which could endanger law enforcement.” Ex. 7. Although the Office never responded to a request for clarification on this point, in its brief the Office states that “[t]he Toyota Highlander, previously identified by Respondent, has been in use in undercover operations. The release of identifying information regarding said vehicle compromise [sic] both personal safety and investigative ability.” Ex. 4 at 14 n.4. The Office seems to reference Mr. Walker’s reporting

on a leased vehicle driven by District Attorney Stedman. *See* Carter Walker, *DA Spent \$21,000, intended for drug enforcement, to lease SUV, records show*, LANCASTERONLINE (Mar. 6, 2019) https://lancasteronline.com/news/local/da-spent-intended-for-drug-enforcement-to-lease-suv-records/article_34d90d86-3f5c-11e9-a42c-035d89dc0997.html (“Exhibit 9”). But while LNP did have specific information about the vehicle, including the vehicle identification number, that article identified only that the vehicle was a 2016 Toyota Highlander. That general description of a commonly-owned vehicle cannot reasonably be believed—particularly when offered without evidence, as here—to have jeopardized law enforcement safety. The Office offers no legal justification for withholding public records from Mr. Walker in response to his reporting. *See* 65 P.S. § 67.302(b) (“A local 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.”).

Unable to reach a settlement, the parties continued this litigation. The chart below sets out the current status of each item of Respondents’ request. Items 1, 2, and 5 remain unsatisfied.

<u>Item Number</u>	<u>Requested Records</u>	<u>Status</u>
1	Records of items that were forfeited under this Act, for example, vehicles, real property, cash, and/or cash equivalent, or any other item of value. This documentation should identify the property, the date the property was seized, value of item and context of the forfeiture (seized from whom, where, and why).	Unsatisfied
2	After the item was forfeited, documentation that shows how it was processed, whether that was sale, reutilization, or distribution to other law enforcement agenc[ies] or personnel. Documentation should identify the property, what was done with the item (sold or distributed), date sold/distributed who the item was distributed to if it was	Unsatisfied

	distributed, and how much the item was sold for if it was sold.	
3	Any documentation of a policy, formal or informal, that governs the use and/or disposal of forfeited assets by the DA's office. For example, a policy that guides the decision to sell forfeited property for profit and later use, or use the property.	No Records Exist/ Not Appealed to OOR
4	Records of the amount of funds taken in by the agency in a given year as a result of civil asset forfeiture, whether that be through cash forfeitures or sale of forfeited property. This documentation should show the amount of funds coming into the agency's forfeiture account, where the funds originated and when it was received.	Satisfied by April 11 Document Production
5	Records that show how forfeited property proceeds were spent, i.e. officer training, equipment, funding programs, etc., and records that illustrate how these expenditures comply with the Act's mandate that forfeited funds be used for combating substance abuse.	Unsatisfied
6	Forfeiture account balances at the end of each year, and for 2018, as of the date of this request.	Satisfied by April 11 Document Production

LEGAL ARGUMENT

I. Right to Know Law

The purpose 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, 1042 (Pa. 2012). To protect this important function, the exemptions set out in the RTKL “must be narrowly construed.” *Cent. Dauphin Sch. Dist. v. Hawkins*, 199 A.3d 1005, 1011 (Pa. Cmwlth. 2018). The RTKL places the burden of proving that a particular agency record is exempt from public access on the agency receiving the request. 65 P.S. § 67.708(a).

II. The Office Failed to Prove that the Requested Records Are Exempt

The OOR correctly determined that the records requested in Items 1, 2, and 5 are not exempt from disclosure. Because the request did not seek the actual audit of forfeited property and proceeds, the requested records are not exempt under the Controlled Substances Forfeiture Act. And, because the Office failed to offer meaningful evidence that the criminal investigations exemption, the noncriminal investigations exemption, or the personal security exemption applied, the requested records are not exempt under the RTKL.⁷

A. *The audit exemption of the Controlled Substances Forfeiture Act does not apply.*

The text of the Controlled Substances Forfeiture Act’s audit disclosure exemption does not apply to the requested records, and at least one other court has declined to broaden that exemption to encompass records like those requested by Respondents. Further, the RTKL’s presumption in favor of disclosure cautions against the Office’s expansive reading of exemptions. Consequently, the Act does not prohibit the Office from providing the requested records.

As previously noted, the Act instructs district attorneys to maintain and create certain forfeiture records to be used in an audit submitted to the Attorney General. 42 Pa.C.S. § 5803(j). Among the records are those requested by Respondents here, including dates property was seized, types of property seized, where the property was seized, the approximate value of the property, and the disposition or use of the property forfeited. *Id.* The Act is silent about disclosure rules for these underlying records, but states that “[t]he audit shall not be made public but shall be submitted to the Office of the Attorney General.” *Id.*

⁷ The Office also offers summary descriptions of Respondents’ similar RTKL requests from district attorney’s offices in other counties. Ex. 4 at 17–19. These requests are, of course, irrelevant to this case. And different approaches in different counties—though Respondents are litigating a similar RTKL request in one other county—certainly do not demonstrate Respondents’ “bad faith,” as the Office contends. *Id.* at 17. Considering the vast amount of forfeiture funds spent by the Office each year, and recently-raised questions about the propriety of some of those expenditures, it is easy to see why Respondents would focus their limited resources and time on vindicating their full rights under the RTKL in Lancaster County. *See* Ex. 8.

The Office argued to the OOR, and reasserts here, that this exemption applies to the requested records because those records are “used to create the audit.” Ex. 4 at 7. Curiously, the Office argues that application of the exemption to the underlying records accords with the Act’s plain meaning. The Office states, “The language is simple and meaning plain. The audit consists of certain listed items which shall not be made public.” *Id.* (emphasis in original). The actual content of that “simple” and “plain” language, however, is that “*the audit* shall not be made public.” 42 Pa.C.S. 5803(j)(emphasis added). The OOR correctly interpreted this straightforward meaning of the Act, explaining, “[b]ecause the Act only makes the audit confidential, the requested records are not made confidential under the Act.” Ex. 3 at 6.

In addition to the plain text of the Act, the OOR cited a recent decision by the Cambria County Court of Common Pleas. Considering the same question, that court held:

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

DeBartola v. Cambria County District Attorney’s Office, No. 2018-0095 (Cambria Cnty. C.C.P. Nov. 19, 2018). The Office’s attempts to distinguish *DeBartola* are inapposite. The Office notes that the *DeBartola* requester “only sought access to two payments out of the Drug Task Force fund” and was not “seeking access to a wholesale release of all forfeiture information as is the Requester presently.” Ex. 4 at 9. This is, however, simply a quantitative difference, not a qualitative one. If those two payments—which would also be found in records used to prepare the forfeiture audit—do not fall under the audit exemption, neither do the same type of forfeiture records requested by Respondents here.

In addition to the plain text of the statute and relevant case law, the OOR’s determination is supported by the principle that exemptions to the RTKL should be “narrowly construed.” *Hawkins*, 199 A.3d at 1012 (Pa. Cmwlth. 2018). The OOR correctly determined that the statute unambiguously applied only to the audit itself. Even if the statute was ambiguous regarding application of the exemption to the audit’s underlying records, though, that ambiguity should be resolved in favor of disclosure. *See Office of Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Cmwlth. 2013) (“Exemptions from disclosure must be narrowly construed due to the RTKL’s remedial nature, which 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.’”).

B. *The RTKL’s criminal investigations exemption does not apply to the requested records.*

Having failed to prove to the OOR the requested documents are covered by the criminal investigations exemption, the Office nevertheless continues to press that argument here.⁸ Ex. 4 at 8. Where an agency provides evidence demonstrating how requested records relate to a specific criminal investigation, or where such a relationship is readily apparent, the RTKL provides a mechanism to transfer cases involving criminal investigations from the OOR to an appeals officer appointed by the District Attorney. *See* 65 P.S. §§ 67.503(d), 708(b)(16); *Bush v. Westtown-East Goshen Police Dep’t*, OOR Dkt. App. 2016-1869; *Porter v. Allegheny County Sheriff’s Office*, OOR Dkt. AP 2014-1910. Here, the Office failed to provide anything other than a brief “conclusory affidavit” parroting the terms of the exemption. Ex. 3 at 8. Even now, the Office can say only that “the OOR erred in not determining that *at least a portion of the documents in*

⁸ The Office’s reliance on *DeBartola v. City of Johnstown* (not to be confused with the Cambria County *DeBartola* case) is misplaced. That recent OOR decision merely demonstrates that a sworn statement may, in some circumstances, serve as proof that the criminal investigations exemption might apply. The OOR correctly determined here that the Office’s “conclusory affidavit” did not carry the Office’s burden of proof on that point. Exhibit 3 at 8.

possession of the Office falls under the criminal investigative exception.” Ex. 4 at 8 (emphasis added). But, the Office fails to identify *which* portions might fall under the criminal investigations exemption. Because the requested records here do not self-evidently relate to criminal investigations, and because the Office failed to offer meaningful evidence that they do relate to such investigations, the OOR’s determination that the criminal investigations exemption does not apply should be affirmed.

C. The RTKL’s noncriminal investigations exemption and personal security exemption do not apply to the requested records.

The Office’s brief fails to raise its arguments, previously made to the OOR, that the RTKL’s noncriminal investigations exemption and the personal security exemption bar production of the requested records. While the Office has waived these arguments by failing to raise them on appeal, it is worth noting that the OOR correctly concluded that the Office failed to meet its burden of proof for either exemption.

Regarding the noncriminal investigations exemption, the OOR explained that “the Office has not provided any evidence that it has conducted a noncriminal investigation,” and, consequently, “it has not met its burden of proof under the RTKL.” Ex. 3 at 10. Because the Office provided no evidence that the requested records related to a noncriminal investigation, or even that a relevant noncriminal investigation existed, the OOR properly determined that this exemption did not apply.

The OOR also correctly rejected the Office’s argument that the requested records are covered by the personal security exemption. While the Office provided an affidavit from Detective Burkhardt that the records contained information subject to the personal security exemption, that affidavit merely recites the terms of the exemption. The OOR correctly determined that this “conclusory” statement failed to meet the Office’s burden of proof. Though the Office’s brief does not mention the personal security exemption, it does again assert, without citation to any evidence,

that “[records underlying the audit] cannot be released as [they] will, first and foremost, endanger lives, but also endanger criminal investigations.”⁹ Ex. 4 at 6. The Office had an opportunity to present evidence on this point, as well as on the application of the noncriminal investigations exemption. It failed to provide any evidence aside from a conclusory sworn statement, which is insufficient to meet an agency’s burden of proof under the RTKL. *See Scolforo*, 65 A.3d at 1103.

CONCLUSION

The OOR correctly determined that the Office’s claimed exemptions are inapplicable to the records requested by Respondents. The documents provided by the Office since the OOR’s Final Determination have not fully satisfied Respondents’ request. Because Respondents are entitled to the requested records under the RTKL, and because the Office has not yet provided those records, Respondents respectfully request that this Court affirm the OOR’s Final Determination and order Petitioner to fully comply with Respondents’ Right to Know request.

Dated: July 29, 2019

Respectfully submitted,

/s/ Kirby Thomas West
Kirby Thomas West
PA Supreme Court ID # 321371
Attorney for Respondents,
Carter Walker and
LNP/Lancaster Online
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321
Email: kwest@ij.org

⁹ Respondents do not, of course, oppose the Office’s right to redact certain confidential information as set forth in the RTKL. The presence of some confidential information, however, does not shield entire records from disclosure. 65. P.S. § 67.706 (“If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted.”).

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2019, a true and correct copy of the forgoing Response to Petitioner's Brief has been filed with the Court and that a true and correct copy was served by first class mail, postage prepaid, upon the following:

FIRST CLASS MAIL

Caitlin B. Blazier, Esquire
Assistant District Attorney
Lancaster County Courthouse
50 North Duke Street, 5th Floor
Lancaster, PA 17608

FIRST CLASS MAIL

Jill Wolfe, Esquire
Appeals Officer
Pennsylvania Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101

FIRST CLASS MAIL

Christina L. Hausner, Esquire
Lancaster County Solicitor
150 North Queen Street, Suite 714
Lancaster, PA 17603

Respectfully submitted,

/s/ Kirby Thomas West

Kirby Thomas West
PA Supreme Court ID # 321371
Attorney for Respondents,
Carter Walker and
LNP/Lancaster Online
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321
Email: kwest@ij.org

CERTIFICATE OF COMPLIANCE

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

Dated: July 29, 2019

Respectfully submitted,

/s/ Kirby Thomas West
Kirby Thomas West
PA Supreme Court ID # 321371
Attorney for Respondents,
Carter Walker and
LNP/Lancaster Online
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321
Email: kwest@ij.org