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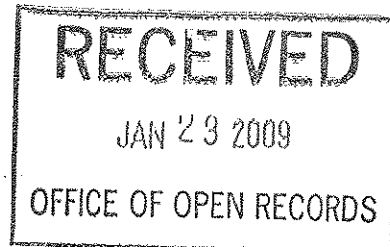
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January 21, 2009



VIA E-MAIL AND REGULAR MAIL

Executive Director of the Office of Open Records  
400 North Street  
Harrisburg, PA 17120

**Re: Lower Makefield Township/ Open Records Act**  
**Our File No. 6632-40433**

To The Executive Director of the Office of Open Records:

This letter is a request by the Township of Lower Makefield, Bucks County, Pennsylvania (the "Township") for an advisory opinion pursuant to section 1310(a)(2) of the Right-To-Know Law (the "Law").

The Township is a "local agency," as defined under § 102 of the Law. The Township maintains the Lower Makefield Township Police Department (the "Department"). The Department has received a memorandum from the Bucks County District Attorney (the "Memorandum". A complete copy of the Memorandum is attached hereto.

In this Memorandum, the District Attorney makes two statements which are the basis of the Advisory Opinion sought by the Township.

1. "The law provides that each police department, by January 1, 2009, must appoint an Open Records Act Officer to record, review and respond to each request made pursuant to the Act."

The Memorandum states that each police department is required to appoint its own Open Records Officer.

It is the understanding of the Township that the Department is not required, and not permitted, to appoint an Open Records Officer. In particular, the Department is not a “local agency” as defined by § 102 of the Law. Rather, it is the understanding of the Township that the Department is a department of the Township, which is itself a local agency subject to the law.

Therefore, the Township is seeking an Advisory Opinion that its Open Records Officer is responsible for all Right To Know Requests made to the Township, and any of its sub-parts, including the Department. In addition, the Township is seeking an Advisory Opinion whether the Department is permitted or prohibited from appointing its own Open Records Officer, as suggested in the Memorandum.

2. “I am requesting that you refer all requests for *criminal investigation records* under the Open Records Act to the Open Records Officer of the District Attorney’s Office in the following cases, regardless of whether the investigation is open, closed or disposed of by arrest of any suspect. . .”

The Memorandum requests that certain Right To Know Requests received by police departments be sent to the Bucks County District Attorney’s Open Records Officer, rather than be answered internally by the local police department.

It is the Township’s understanding that the Open Records Officer’s responsibility under § 502(b) of the Law is to (a) note the date of receipt of a Right to Know Request; (b) calculate the date by which a response is required; and (c) maintain a copy of all requests until the request is fulfilled. In addition, if the record is in the possession of the Township, and is not otherwise exempt under the Law, the documents must be provided to the requester.

In particular, the Township is seeking an Advisory Opinion that it is not permitted under the Law to “refer all requests for criminal investigation records under the Open Records Act to the Open Records Officer of the District Attorney’s Office.” Rather, if the request is for documents that are in the possession of the Township, and are not otherwise exempt, the Township is required to respond directly to the requester and provide the requested information, and not refer the request to the District Attorney’s Office. Further, if the request is for information that is exempt under the Law, then the Township is required to reject the request for information, and again not refer the request to the District Attorney’s Office.

At present, there is no ongoing litigation of which the Township is aware involving the subject matter of this Advisory Opinion.

The Advisory Opinion is not being sought due to an actual Right to Know Request sent to the Township, but rather due to the Memorandum sent from the office of the District Attorney of Bucks County.

Please direct all correspondence regarding this matter to:

Matthew J. Bass  
Curtin & Heefner LLP  
250 N. Pennsylvania Ave.  
Morrisville, PA 19067  
215.736.2521

Very truly yours,



Matthew J. Bass, Esquire  
For CURTIN & HEEFNER, LLP

Enclosure  
cc: Terry S. Fedorchak

MEMORANDUM

**TO: ALL CHIEFS OF POLICE**  
**FROM: MICHELLE A. HENRY, DISTRICT ATTORNEY**  
**DATE: DECEMBER 17, 2008**  
**RE: OPEN RECORDS ACT/RIGHT TO KNOW LAW**

The new Open Records Act/Right to Know Law becomes effective on January 1, 2009. The law provides that each police department, by January 1, 2009, must appoint an Open Records Act Officer to record, review and respond to each request made pursuant to the Act.

For a description of the duties and responsibilities of the Open Records Officer, please see the Open Records Act/Right to Know law, Chapter 5 and Chapter 9 generally, found at:

[www.openrecordspa.org/pdfs/09RTKlaw.pdf](http://www.openrecordspa.org/pdfs/09RTKlaw.pdf)

I am requesting that you refer all requests for *criminal investigation records* under the Open Records Act to the Open Records Officer of the District Attorney's Office in the following cases, regardless of whether the investigation is open, closed or disposed of by arrest of the suspect:

- Any Homicide case
- Any Child Abuse case
- Any Elderly Abuse case
- Any sexual assault case
- Any Arson case
- Child Pornography/Sexual Abuse of Children
- Corrupt Organizations
- Kidnapping and related Offenses
- Retaliation/Intimidation of a Witness

The Open Records Officer for the Bucks County District Attorney's Office is Detective Lt. Robert M. Gorman, District Attorney's Office, 55 E. Court Street, Fourth Floor, Doylestown, PA 18901, #(215) 348-6354

The new law also establishes an appeal process, and requires the District Attorney to appoint appeals officers for all appeals from the local police departments involving criminal investigative records.

Be advised that I have appointed Maureen A. Flannery, Esquire, Bucks County District Attorney's Office, 55 E. Court Street, Fourth Floor, Doylestown, PA 18901, #(215) 348-6311, as the appeals officer for appeals from the police departments of the following municipalities: Bensalem Township, Bristol Borough, Bristol Township, Falls Township, Hulmeville Borough, Langhorne Borough, Langhorne Manor Borough, Lower Makefield Township, Middletown Township, Morrisville Borough, Penndel Borough, Tullytown Borough, and Yardley Borough.

Be advised that I have appointed Abigail T. Fillman, Esquire, Bucks County District Attorney's Office, 55 E. Court Street, Fourth Floor, Doylestown, PA 18901, #(215) 348-6175, as the appeals officer for appeals from the police departments of the following municipalities: Bedminster Township, Buckingham Township, Chalfont Borough, Doylestown Borough, Doylestown Township, Dublin Borough, Hilltown Township, Ivyland Borough, Lower Southampton Township, New Britain Borough, New Britain Township, New Hop Borough, Newtown Borough, Newtown Township, Northampton Township, Penn Ridge Regional, Perkasio Borough, Plumstead Township, Quakertown Borough, Richland Township, Solebury Township, Springfield Township, Telford Borough, Tinicum Township, Upper Makefield Township, Upper Southampton Township, Warminster Township, Warrington Township, and Warwick Township.

Should you have any questions, please contact Karen A. Diaz, Chief Deputy District Attorney at #(215) 348-6331 or any of the above personnel.

**CC: ALL DISTRICT ATTORNEY PERSONNEL**



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF OPEN RECORDS

February 19, 2009

Matthew J. Bass, Esquire  
Curtin & Heefner, LLP  
250 N. Pennsylvania Ave.  
Box 217  
Morrisville, PA 19067

**RE: Advisory Opinion Request regarding Necessity for Separate Appointment of Open Records Officer for Police Department and Referral of Requests for Criminal Investigative records to District Attorney's Open Records Officer**

Dear Attorney Bass:

Thank you for writing to the Office of Open Records ("OOR") with your January 21, 2009, request for an Advisory Opinion pursuant to the Right-to-Know Law, 65 P.S. §§67.101, *et seq.*, ("RTKL").

You asked the OOR review the Memorandum circulated by the Bucks County District Attorney which advises all Chiefs of Police to appoint a separate Open Records Officer (ORO) for each police department, and to refer all requests for criminal investigative records to the ORO of the District Attorney's Office, and advise whether these actions are required or permitted under the RTKL.

Please be advised that the OOR has decided to grant your request for an Advisory Opinion. Unlike Final Determinations, the law does not establish a deadline for the issuance of Advisory Opinions by the Office of Open Records. The OOR will work diligently to provide Advisory Opinions as soon as practicable; however, please be advised that issuance of an Advisory Opinions will take at least ninety (90) days from the date OOR grants a request for an Advisory Opinion. Our response will be mailed to you and also placed on our website at <http://openrecords.state.pa.us>.

The OOR will contact you should any additional facts be necessary to render its Advisory Opinion. We appreciate your cooperation in this regard.

Respectfully,

A handwritten signature in black ink, appearing to read "Terry Mutchler".

Terry Mutchler



January 15, 2010

Matthew J. Bass, Esquire  
Curtin & Heefner, LLP  
250 N. Pennsylvania Ave.  
Box 217  
Morrisville, PA 19067

**RE: Advisory Opinion regarding requirements for open records officers for police departments and process for requests for criminal investigative records**

Dear Mr. Bass:

Thank you for writing to the Office of Open Records ("OOR") with your request for an Advisory Opinion pursuant to the Right-to-Know Law, 65 P.S. §§67.101, *et seq.*, ("RTKL"). Your request is attached to this Advisory Opinion for ease of reference.

You sent the OOR a memorandum circulated by the Bucks County District Attorney's Office and asked us to advise whether (1) a separate open records officer ("ORO") is required for police departments; and (2) all requests for "criminal investigation records" must be directed to the ORO for the District Attorney's Office. This memorandum, which is signed by Michelle Henry, the Bucks County District Attorney, is attached to this Advisory Opinion for ease of reference.

**1. The RTKL does not require but allows separate OROs for police departments.**

The RTKL requires each agency to have an ORO. Generally, a police department is not a separate local agency. Therefore, a separate ORO is not *required* for a police department that is a department of another governmental unit, such as a municipality. Section 502 of the RTKL provides that "an agency shall designate an official or employee to act as the open-records officer." 65 P.S. §67.502(a)(1).

However, the law allows more than one ORO per agency. This office has recommended that municipalities use their discretion in determining whether to appoint a separate ORO for their police departments. Further, an agency may develop its own policies and regulations for administering the RTKL as per Section 504. We read this as permitting an agency to implement a policy calling for separate OROs for police departments, particularly to address records maintained and/or created by police.

Given the unique characteristics of records held by municipal police departments, and the fact that certain such records cannot be reviewed by non law enforcement agency personnel, the OOR recommends that if a police department does not have a separate ORO that there be at a minimum a designee in charge of police and/or law enforcement records upon whom the non law enforcement ORO can rely to review records. The police department staff may be best situated to assess certain grounds for non-disclosure, such as the Criminal History Records Information Act, 18 Pa. C.S. §§9101 *et seq.*, ("CHRIA") or the criminal investigative exception of the RTKL, at Section 708(b)(16).

The OOR strongly suggests that an agency develop a written policy to support any such designation of a designee alternative in accordance with Section 504 of the RTKL. That policy should clearly set forth when the ORO will defer to the police department designee's judgment in applying certain criminal record-related exceptions.

**2. Requests for criminal investigative records should not be forwarded to the ORO for the District Attorney's Office but should be decided by the agency to which they were directed.**

The memorandum from District Attorney Henry directs all chiefs of police to refer "all requests for criminal investigation records" made under the RTKL to the District Attorney's ORO regardless of the status of the investigation. The memorandum explains that the appeals process under the RTKL requires the District Attorney to appoint appeals officers for all appeals of denials made by local police departments of criminal investigative records. There is a blending of the request and the appeals processes here that must be clarified.

Preliminarily, the terms "criminal investigative records" and "law enforcement records" are not defined in the RTKL. Although the RTKL contains a specific exception directed to "a record of an agency relating to or resulting in a criminal investigation" in Section 708(b)(16), the parameters of "criminal investigation" are likewise undefined.

The OOR does not support the District Attorney's interpretation that the RTKL requires that all requests for criminal investigative records must be referred to the DA's ORO. The OOR believes that the RTKL contemplates that the entity to which the request was directed must undertake the analysis required by the RTKL and ultimately make an independent determination whether to release the record requested. And of course, Section 502(b) of the RTKL requires that the agency ORO log the request, track the agency's response and maintain a record of the response. If the District Attorney's ORO makes the decisions on the public nature of records requested from police departments, those police departments will not meet their burden of responding to the requester and stating their reasons for any denial in accordance with Chapter 9 of the RTKL.

The only time a referral of a request to another agency is proper is in the case of a misdirected request, when the record at issue is not in possession or control of the receiving agency, but is instead known to be in control of another agency.



We want to emphasize that District Attorney Henry is correct in identifying that Section 503(d)(2) of the RTKL requires that *appeals* of denials of requests for criminal investigative records in possession of a local agency should be referred to the appeals officer designated by the District Attorney. This referral occurs at the *appeals* stage, however, not the initial request stage.

Finally, the District Attorney's Office does not have the authority under Section 504 to impose its own RTKL regulations and policies for implementing the RTKL upon other agencies. If a local government unit decides to designate a separate ORO for its police department, such a decision should be adopted and implemented in accordance with the local government unit's policies and regulations for the RTKL, not those issued by the District Attorney's Office.

Thank you for your inquiry. We will post this advisory opinion on the OOR website at <http://openrecords.state.pa.us>.

Respectfully,



Terry Mutchler  
Executive Director

cc: Michelle A. Henry, District Attorney, Bucks County