

STEPHEN A. ZAPPALA, JR.
DISTRICT ATTORNEY



OFFICE OF THE DISTRICT ATTORNEY

County of Allegheny

436 GRANT STREET, 401 COURTHOUSE ♦ PITTSBURGH, PENNSYLVANIA 15219-2489
PHONE (412) 350-4377 ♦ FAX (412) 350-3312

Mr. Demetrius Bailey
#CP 7819
SCI-Albion
10745 Route 18
Albion, PA 16475

May 4, 2017

Mr. Kevin McCarthy, Esquire
Open Records Officer
Office of District Attorney
401 Courthouse
436 Grant Street
Pittsburgh, PA 15219

In re: Open Records Appeal

Dear Mr. Bailey and Attorney McCarthy:

I am the Open Records Appeals officer for Allegheny County. On May 3, 2017 I received an appeal from Mr. Bailey. The appeal was from the decision of Mr. McCarthy, Open Records Officer, which denied Mr. Bailey's request for "all witnesses' statements during trial on December 20, 1994." Mr. Bailey has indicated that his request was denied based upon the criminal investigation exemption, 65 P.S. §67.708(b)(16)(i). Mr. Bailey makes the argument that application of that exemption denies him due process. Mr. Bailey notes that he had the documents at one time, as they were provided in pretrial discovery; but they have been lost. He asserts that under "Brady v. Maryland" he is entitled to discovery at this point in time.

With all respect to Mr. Bailey's arguments, I must affirm Mr. McCarthy's denial.

As an initial matter, it is noted that even in the context of a Post Conviction Relief Act Petition, a defendant is not automatically entitled to discovery. See Pa.R.Crim.P. 902.

As the Office of Open Records explained in *Jones v. Pennsylvania Game Commission*, OOR Dkt. AP 2009-0196 records pertaining to a closed criminal investigation remain protected because Section 708(b)(16) expressly protects records relating to the result of a criminal investigation and thus remain protected even after the investigation ends. See also, *State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Cmwlth. 2010); *Sherry v. Radnor Twp. School District*, 20 A.3d 515 (Pa. Cmwlth. 2011).

I have no powers of equity and do not have authority to declare the Section 708(b)(16) exemption unconstitutional. That decision will have to be made by either the Court of Common Pleas or a Pennsylvania Appellate Court.

As a result, I must decline Mr. Bailey's request and affirm Allegheny County's denial of access. Please be advised that pursuant to Section 65 P.S. §67.1302 the parties have 30 days to appeal my decision to the Court of Common Pleas of Allegheny County.

Very truly yours,

Michael W. Streily
Deputy District Attorney
Open Records Appeals Officer