

STEPHEN A. ZAPPALA, JR.
DISTRICT ATTORNEY

OFFICE OF THE DISTRICT ATTORNEY



County of Allegheny

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Tara Hopper Rice, Esquire
Dickie McCamey & Chilcote, P.C.
Two PPG Place, Suite 400
Pittsburgh, PA 15222-5402

July 12, 2022

Honorable Jonathan E. Wharton
Chief of Police/Open Records Officer
Department of Police Upper St. Clair
1820 McLaughlin Run Road
Upper St. Clair, PA 15241-2332

In re: Right to Know Law Appeal; CCN #22-02384

Dear Attorney Rice and Chief Wharton:

I am the Open Records Appeals officer for Allegheny County. On June 29, 2022, I received an appeal from the decision of the Upper St. Clair Police Department denying requester's request for the following document:

[Information regarding CCN #22-02384, incident reported on June 06, 2022 at 1912 hours to the Upper St. Clair Police Department.

See letter of Chief Wharton dated June 17, 2022 attached hereto as Appendix A.

The appellate record in this case is sparse. In her letter dated June 29, 2022, requester's counsel indicated that requester "does not have a copy of the request." *See letter of Attorney Rice dated June 29, 2022 attached hereto as Appendix B.* It is clear from Chief Wharton's response that a request for a police incident report was made. Absence of the original request is not a detriment to my ability to decide this appeal but requester's counsel is directed to footnote #2 herein.

I also note that 65 P.S. §67.1101 **Filing of appeal** does place a burden on a requester to: "state the grounds upon which the requester asserts that the record is a public record...and shall address any grounds stated by the agency for delaying or denying the request.

Chief Wharton invoked the criminal investigative exemption as his reason for denying this request. Requester is reminded that the Right to Know Law exempts certain materials from disclosure and 65 P.S. § 67.708(b)(16) makes the following documents unavailable to public access:

- (16) A record of an agency relating to or resulting in a criminal investigation, including:
 - (i) Complaints of potential criminal conduct other than a private criminal complaint.
 - (ii) Investigative materials, notes, correspondence, videos and reports.
 - (iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised.
 - (iv) A record that includes information made confidential by law or court order.
 - (v) Victim information, including any information that would jeopardize the safety of the victim.
 - (vi) A record that if disclosed, would do any of the following:
 - (A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.
 - (B) Deprive a person of the right to a fair or an impartial adjudication.
 - (C) Impair the ability to locate a defendant or codefendant.
 - (D) Hinder an agency's ability to secure an arrest, prosecution or conviction.
 - (E) Endanger the life or physical safety of an individual.

The only discussion provided by the requester in response to Chief Wharton's refusal to produce the police report is as follows:

The request was denied on grounds that the record was exempt from disclosure pursuant to Section 708(b)(16) of the Pennsylvania Right to Know Law. Ms. Hernandez is unaware of any ongoing criminal investigation and requests the police report from the captioned incident for use at a Protection from Abuse hearing scheduled for July 25, 2022, before the Honorable Sabrina Korbel of the Court of Common Pleas of Allegheny County-Family Division.

Ms. Hernandez files this appeal on the grounds that the denial letter failed to properly describe the record requested. Additionally, pursuant to 65 P.S. § 67.706, Ms. Hernandez requests that in the event that the requested record contains information which is not subject to access, a redacted record is provided. An appeal has also been filed online.

See Appendix B.

Pursuant to §67.1102 I reached out to requester's counsel seeking clarification as to whether she was also appealing this decision to Office of Open Records. I also inquired about the assertion that the request wasn't properly described by the Agency, noting the difficulty in deciding that issue given the fact that requester did not provide me with a copy of her request. Counsel replied that requester does not object to my exercise of jurisdiction.¹ Counsel went on to note that the item requested was "the police report from June 6, 2022, for use at the PFA hearing." Counsel noted, upon further inquiry from me, that requester is the party seeking the PFA Order. *See email correspondence attached hereto as Appendix C.*²

¹ OOR would simply transfer this appeal to me anyways. It is noted that Chief Wharton did provide requester with the proper procedure to follow in filing the appeal with me.

² Production of the original request serves to prove that the request was in writing. This is crucial since §67.702 mandates that "[i]f the requester wishes to pursue the relief and remedies provided for in this act, the request for access to the records must be a written request." As Chief Wharton directed requester to follow proper appellate procedure by appealing the claimed criminal investigation exemption to me, and attorney Rice describes the request made as having been "a formal Right to Know request" I assume the request was in writing.

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 further note that the motivation for a request is irrelevant under §67.703: "A written request need not include any explanation of the requester's reason for requesting or intended use of the records unless otherwise required by law."

Quite honestly, Chief Wharton has acted within the parameter of the law and requester's counsel has not rebutted his reasoning. However, there is a due process issue in denying a victim access to police reports generated as a result of a citizen's call for assistance from their public law enforcement agency when that citizen/victim needs those documents for a court proceeding. I have nothing but respect for Chief Wharton. But I think that Upper St. Clair will be committing a constitutional due process violation, should access be denied in this instance.

I have been the Open Records appeals officer for Allegheny County since the law was enacted. The law, as written, is not hospitable to victims of crimes. A person who reports a crime and later seeks documentation to provide to their Insurance company, often cannot obtain a copy of the report because of the exemption provided in 708 (b)(16). Nor is the Law friendly to parents who have had children commit suicide and have attempted to get police reports in order to seek closure for their traumatic loss, only to be denied access because of 708(b)(16).

The parties do not need me to discuss the extreme danger confronting any police officer who responds to a call of domestic violence. Nor do the parties need me to discuss how hard it often is for a victim to seek a court's protection from abuse. Many times victims don't follow through with the procedure, putting themselves and any officer who has to respond to a future call of domestic violence, at further, additional risk. Also, there is no need to remind the parties that a subpoena could issue to compel attendance at the PFA hearing of any responding officer, which would reduce police presence for that specific period of time and add costs. I know what the law holds. I just don't think that justice is being done in this case by not providing a redacted copy of the police report to requester so that it can be used in a court proceeding.

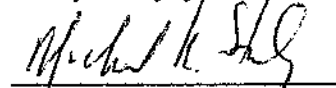
Section 708 excludes private complaints from the exemption protection:

- (i) Complaints of potential criminal conduct other than a private criminal complaint.

I find that this police report, issued as a result of a call of domestic violence, is in the nature of a private criminal complaint that is not covered by the exemption. Further, I have become convinced that withholding a police report from a victim, especially one who is asserting abuse, and has properly invoked the assistance of her local police department and local courts in seeking protection from that abuse, is a violation of the Pennsylvania Constitution which provides much greater liberty and privacy protection to its citizens than does the Federal Constitution. No victim should be put in a position of not being able to prove to a Court of Common Pleas that she or he sought police assistance for a matter that is now pending before that Court.

As a result, I must grant the request and affirm access to the police report. It should be redacted to protect any confidential or sensitive material. 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



Department of Police
Calls for Service 412.833.7500
Administration 412.833.1113
Fax 412.854.5320

Jonathan E. Wharton
Chief of Police

Aimee Hernandez
213 Barberry Lane
Pittsburgh, PA 15241

June 17, 2022

Dear Ms. Hernandez:

On June 16, 2022, you requested information regarding CCN #22-02384, incident reported on June 06, 2022, at 1912 hours to the Upper St. Clair Police Department. Your request is denied as permitted by Section 708 of the Pennsylvania Right To Know Act.

The Township of Upper St. Clair Police Department has denied your request because this record is exempt from disclosure pursuant to Section 708(b) (16) of the Right To Know Law. This section exempts from access any record that relates to or results in a criminal investigation, including investigative materials, notes, and reports.

You have a right to appeal this determination in writing to the District Attorney of Allegheny County. See 65 P.S. § 67.503(d)(2) of the Right To Know Law. The Open Records Appeals Officer for the District Attorney of Allegheny County is Michael W. Streily, Esquire, Office of the District Attorney, 401 Courthouse, 436 Grant Street, Pittsburgh, PA 15219.

If you choose to file an appeal, you must do so within 15 business days of the mailing date of the agency's response. See 65 P.S. § 67.1101. Please note that a copy of your original RTKL request and this denial letter must be included when filing an appeal. The RTKL also requires that you state the reasons why the record is a public record and address each of the reasons the Agency denies your request. Visit the Office of Open Records website at <http://www.openrecords.pa.gov> for further information on filing an appeal.

Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Respectfully,

Jonathan E. Wharton
Chief of Police
Open Records Officer (Police Department)

mm

1820 McLaughlin Run Road Upper St. Clair, PA 15241-2332

Appendix A

Tara Hopper Rice
Attorney at Law
Admitted in PA, WV and WY

412-392-5547
Fax: 888-811-7144
trice@dmclaw.com

June 29, 2022

Michael W. Streily, Esquire
Open Records Appeals Officer for the District Attorney of Allegheny County
Office of the District Attorney, 401 Courthouse
436 Grant Street
Pittsburgh, PA 15219

RE: Formal Appeal of Denied RTKL Request
CCN #22-02384
Date of the incident: June 06, 2022.

Dear Attorney Streily:

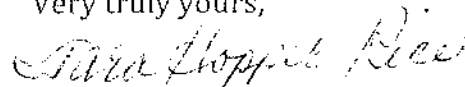
Our office represents Ms. Aimee Hernandez. On June 16, 2022, Ms. Hernandez made a formal Right to Know request to obtain a copy of the police report from the captioned incident. She does not have a copy of the request. On June 17, 2022, Upper St. Clair Police Department denied Ms. Hernandez request for information regarding CCN #22-02384.

The request was denied on grounds that the record was exempt from disclosure pursuant to Section 708(b) (16) of the Pennsylvania Right to Know Law. Ms. Hernandez is unaware of any ongoing criminal investigation and requests the police report from the captioned incident for use at a Protection from Abuse hearing scheduled for July 25, 2022, before the Honorable Sabrina Korbelt of the Court of Common Pleas of Allegheny County - Family Division.

Ms. Hernandez files this appeal on the grounds that the denial letter failed to properly describe the record requested. Additionally, pursuant to 65 P.S. § 67. 706, Ms. Hernandez requests that in the event that the requested record contains information which is not subject to access, a redacted record is provided. An appeal has also been filed online.

Thank you for your attention to this matter.

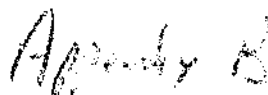
Very truly yours,



Tara Hopper Rice

THR/psb

cc: Ryan Liggitt, Esquire



Thank you

Tara

Tara H. Rice, Esquire
412-392-5547 Office
888-811-7144 Fax
trice@dmclaw.com | [Bio/vCard](#)



ATTORNEYS AT LAW

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From: Streily, Mike <MStreily@alleghenycountyda.us>
Sent: Thursday, July 7, 2022 4:00 PM
To: Rice, Tara <trice@dmclaw.com>
Subject: RTKL Appeal

This Message Originated From Outside DMC

Attorney Rice, I received a letter dated 6/29/22 appealing the decision of Upper St. Clair Police Department not to give access to an incident report. You note in your letter that "[a]n appeal has also been filed online." Does that mean you have also appealed this decision to Office of Open Records? If so, do you see any issue with me deciding an issue which is formally before OOR?

Also, you mention that your client "files this appeal on the grounds that the denial letter failed to properly describe the record requested." But you also state that "[s]he does not have a copy of the request." I am in a difficult position to judge what was requested, when you don't have a copy of the original request and assert that the Agency's response does not accurately describe the request. To the best of your understanding, what was the exact/specific content of your client's request?

Thank you in advance for your cooperation. Michael W. Streily, Open Records appeal officer.

Appendix C

Streily, Mike

From: Rice, Tara <trice@dmclaw.com>
Sent: Friday, July 8, 2022 3:53 PM
To: Streily, Mike
Subject: Re: RTKL Appeal

Yes.

Sent from my iPhone

Tara H. Rice, Esquire
412-392-5547 Office
888-811-7144 Fax
trice@dmclaw.com | [Bio/vCard](#)



ATTORNEYS AT LAW

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On Jul 8, 2022, at 12:11 PM, Streily, Mike <MStreily@alleghenycountyda.us> wrote:

This Message Originated From Outside DMC

Is your client the party seeking the PFA (i.e., is your client the alleged victim of abuse?)

From: Rice, Tara <trice@dmclaw.com>
Sent: Friday, July 8, 2022 10:31 AM
To: Streily, Mike <MStreily@alleghenycountyda.us>
Subject: RE: RTKL Appeal

Mike,

Thank you for your email. I have no issue with you deciding this appeal. All we want is the police report from June 6, 2022, for use at the PFA hearing. My client was told that she should not have it because of an ongoing criminal investigation. She is not aware of any ongoing investigation and has not been contacted by the police department since the incident. I have never been told that I could not have a police report for a PFA hearing.