

NORTHAMPTON COUNTY, PENNSYLVANIA
DISTRICT ATTORNEY'S OFFICE

FINAL DETERMINATION

ANDREW FETKO,	:	
Requester,	:	No. 8-ORA-2021
	:	
v.	:	
	:	
COLONIAL REGIONAL POLICE	:	
DEPARTMENT,	:	
Respondent.	:	

BACKGROUND

On December 28, 2021, Attorney Ololade T. Moses on behalf of Andrew Fetko (“Requester”) submitted a written request to the Colonial Regional Police Department (“Respondent”) pursuant to the Right to Know Law (“RTKL”). The request was for:

Arrest records for Andrew Fetko case #08-1099[.] Andrew Fetko was charged with Theft (M3) by Colonial Regional Police Department on or about April 19, 2008[,] when he was 15 years old. He was placed on informal probation and his case [was] closed on 12/25/2008. We need all arrest records, transcripts or any documentation you have regarding it by 1/6/22 for immigration purposes.

Attachment “A.” On December 29, 2021, the Respondent denied the request under Section 708(b)(16) and (17) of the RTKL, finding that “[a]ll records are either relating to a criminal investigation or a non-criminal investigation[;] therefore, they are exempt.” Attachment “B.”

On December 29, 2021, the Requester appealed to Northampton County District Attorney’s Office, challenging the denial and stated grounds for disclosure. *See* Attachment “C.” The Requester avers that “this is simply a record that includes an arrest history of a minor which is needed for his own benefit and immigration purpose.” *Id.* at 2. The Requester denies that this record includes investigative materials, but alleges that “if this arrest record is not released it will deprive [Requester] of the right to a fair trial or an impartial adjudication.” *Id.* This Officer received the appeal on December 30, 2021. *Id.* at 1.

LEGAL ANALYSIS

Under Section 102 of the RTKL, a “public record” is defined as:

A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under 708; (2) is not exempt from being disclosed under any other Federal or State laws or regulation or judicial order or decree; or (3) is not protected by a privilege.

65 P.S. § 67.102. The burden of proving that the record is exempt rests with the public body by a preponderance of the evidence. Preponderance of the evidence requires proof “by a greater weight of the evidence.” *Commonwealth v. Williams*, 732 A.2d 1167, 1187 (Pa. 1999). In *Commonwealth v. McJett*, 811 A.2d 104, 110 (Pa. Commw. 2002), the Commonwealth Court explained that “preponderance of the evidence is tantamount to a ‘more likely than not’ standard.”

The Respondent contends that the requested records are exempt from disclosure under 65 P.S. §§ 67.708(b)(16),(17). In that Section, records of an agency relating to or resulting in a criminal investigation, “including . . . [i]nvestigative materials, notes, correspondence, videos and reports,” are exempt from disclosure. 65 P.S. § 67.708(b)(16)(ii). As the records sought led to an arrest for the crime of Theft, graded as a misdemeanor of the third degree, this Officer finds that the Respondent has proven that the requested records relate to a criminal investigation and are exempt.

In *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473, 479 (Pa. Commw. 2010), the Commonwealth Court held that incident reports which contain investigative materials are exempt from the definition of a public record and are not subject to disclosure or redaction. Further, Section 708 exempts release of “[a] record of an agency relating to or resulting in a criminal investigation.” 65 P.S. § 67.708(b)(16). The records at issue here are related to a criminal investigation, which resulted in an arrest and the prosecution of a criminal charge, as is admitted

by the Requester. *See* Attachments “A,” “C.” Accordingly, it is clear that the requested material falls within the definition of items that are exempt from disclosure.


Additionally, the Criminal History Record Information Act (“CHRIA”), 18 Pa.C.S.A. § 9101, *et seq.*, prohibits the disclosure of the information requested. This information is “investigative information” which is defined by CHRIA as: “[I]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include *modus operandi* information.” 18 Pa.C.S.A. § 9102. Importantly, 18 Pa.C.S.A. § 9106(c)(4) specifies that: “Investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency which requests the information in connection with its duties, and the request is based upon a name, fingerprints, *modus operandi*, genetic typing, voice print or other identifying characteristic.” The Requester is not a “criminal justice agency” as defined by 18 Pa.C.S.A. § 9102. Therefore, the requested information cannot be disseminated to the Requester under CHRIA.

Finally, in *Barros v. Martin*, 92 A.3d 1243 (Pa. Commw. 2014), a prisoner who requested documents relating to the homicide investigation for which he was incarcerated was denied access because the documents were exempt under both the RTKL and CHRIA. The Commonwealth Court cited to *Sullivan v. City of Pittsburgh, Dept. of Public Safety*, 561 A.2d 863, 864-65 (Pa. Commw. 1989), and found that criminal investigative records remain exempt from disclosure even if the investigation is completed. *Barros*, 92 A.3d at 1250. The court held: “Thus, if a record, *on its face*, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(ii).” *Id.* (emphasis added) (citing *Coley v. Philadelphia Dist. Attorney’s Office*, 77 A.3d 694, 697 (Pa. Commw. 2013); *Mitchell v. Office of Open Records*, 997 A.2d 1262, 1264

(Pa. Commw. 2010)). Here, the requested records are, on their face, related to a police investigation and prosecution, and are thus exempt from disclosure. These records remain exempt from disclosure even though the investigation and prosecution in this matter are complete. *See Barros*, 92 A.3d at 1250.

CONCLUSION

For the foregoing reasons, and because the Respondent has met its burden of proof by the preponderance of the evidence in showing that the requested records are exempt from disclosure, the Requester's appeal is denied. This Final Determination is binding on the parties. Within thirty (30) days of the mailing of this determination, any party may appeal to the Northampton County Court of Common Pleas under 65 P.S. § 67.1302(a). All parties must be served with the notice of the appeal.



KATHARINE R. KURNAS, ESQUIRE
Appeals Officer for Northampton County
District Attorney's Office

Date: December 30, 2021

DISTRICT ATTORNEY'S OFFICE
2022 DEC 30 AM 11:42



Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: Colonial Regional Police Department (Attn: AORO)

Date of Request: 12/28/2021 Submitted via: Email U.S. Mail Fax In Person

PERSON MAKING REQUEST:

Name: Dolade Moses for Andrew Fetko Company (if applicable): Cohen Tucker Ades

Mailing Address: 32 BROADWAY Suite 1818

City: New York State: NY Zip: 10004 Email: lola@cohentuckerlaw.com

Telephone: (347) 981-4184 / (212) 840-0050 Fax: (212) 840-0050

How do you prefer to be contacted if the agency has questions? Telephone Email U.S. Mail

RECORDS REQUESTED: Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.

ARREST RECORDS for ANDREW FETKO CASE # 08-1099
ANDREW FETKO WAS charged with Theft (m3)
by Colonial Regional Police Department on or ABOUT
April 19, 2008 when he was 15 years old. He was placed on
informal probation and his case closed on 12, 25, 2008 we need

DO YOU WANT COPIES? Yes, printed copies (default if none are checked) Yes, electronic copies preferred if available No, in-person inspection of records preferred (may request copies later)
regarding it by 1/6/22 for immigration purposes.

Do you want certified copies? Yes (may be subject to additional costs) No
RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.
Please notify me if fees associated with this request will be more than \$100 (or) \$_____.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? Yes No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: Granted Partially Granted & Denied Denied Date Approved: _____

Appropriate third parties notified and given an opportunity to object to the release of requested records.

NOTE: In most cases, a completed RTKL request form is a public record. More information about the RTKL is available at <https://www.openrecords.pa.gov> Form updated Feb. 3, 2020

Attachment "A"



Colonial Regional Police Department

248 Brodhead Road, Suite 1

Bethlehem, Pennsylvania 18017

Phone (610) 861-4820 Fax (610) 861-4829

www.colonialregionalpd.org

James DePalma
Chief of Police

December 29, 2021

Dear Ms. Moses:

Thank you for writing to the Colonial Regional Police Department with your request for information pursuant to the Pennsylvania Right-To-Know Law.

On December 28, 2021 you provided a written request for information regarding any incident that involved the arrest of a juvenile that occurred on February 1, 2008. Your request is denied under section 708 Exceptions for Public Records, sub section b 16 and 17. All records are either relating to a criminal investigation or a non-criminal investigation, therefore, they are exempt.

You have a right to appeal this denial of information in writing to Liz Wagenseller, Executive Director, Commonwealth of Pennsylvania, Office of Open Records, 333 Market Street, 16th Floor, Harrisburg PA 17101-2234.

An appeal for criminal records should be addressed to District Attorney Terence Houck, 669 Washington Street, Easton, PA 18042.

If you choose to file an appeal, you must do so within 15 business days of the mailing due date of the agency's response. See Section 1101. Please note that a copy of your original Right-to-Know request and this denial letter must be included when filing an appeal. The law also requires that you state the reasons why the record is a public record and address each of the reasons your request was denied. Visit the Office of Open Records website at openrecords.state.pa.us 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,

James DePalma

Chief of Police

Open Records Officer

Attachment "B"


Cohen + Tucker PC
IMMIGRATION LAW

2022 DEC 30 AM 8:41
DISTRICT ATTORNEY'S OFFICE

December 29, 2021

Northampton County Courthouse
District Attorney
669 Washington St,
Easton, PA 18042
ATTN: MS. KURNAS

Re: APPEAL of Right-to-Know Denial
Defendant: Andrew Fetko
Date of arrest: On or about February 1, 2008
Case No.: 08-1099

Dear Ms. Kurnas,

On December 28, 2021, we submitted a right to know law request form requesting arrest records for Andrew Fetko who was arrested for theft (M3) on or about February 1, 2008 at the age of 15. The purpose of the request was specifically for immigration and denying the request would put my client, Mr. Fetko at a serious disadvantage and at danger of not obtaining his citizenship. The colonial Regional police denied our request under section 708 Exceptions for Public Records, subsection b 16 and 17, citing that all records are either related to a criminal investigation or a non-criminal investigation and therefore claim that these records are exempt.

Section 708 Exceptions for Public Records, subsection b 16 and 17 states in pertinent part that 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

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Website: www.cohentuckerlaw.com

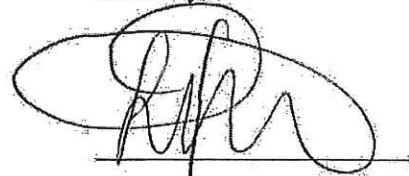
Attachment "C"

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 trial 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.

Moreover, this case is not a record of an agency related to a non-criminal investigation so subsection 17 of the the exception does not apply in this case.

Here, this is simply a record that includes an arrest history of a minor which is needed for his own benefit and immigration purpose. This record does not include: complaints of a potential criminal conduct, investigative materials, 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, information made confidential by law or court order, Victim information, Impair the ability to locate a defendant or codefendant, Hinder an agency's ability to secure an arrest, prosecution or conviction nor does it endanger the life or physical safety of an individual. However, if this arrest record is not released it will deprive Mr. Fetko of the right to a fair trial or an impartial adjudication. He has been in this country for more than half of his life, has paid his dues and deserves to have his records released so that the immigration officer can base her decision based on the availability of his past criminal history. He is the only person who will suffer if the records are not released and the denial is allowed to stand. We respectfully request that you overturn Chief DePalmer's decision to deny our request for Mr. Fetko's arrest records. If you have any questions or concerns, please feel free to contact our office via phone or email. Thank you for your prompt attention to this matter.

Sincerely,



Ololade T. Moses, Esq.