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Mr. Fabian Makhanda

January 27, 2023

Jessica Garofolo
Director and Right to Know Officer
Department of Administrative Services
202 Courthouse
436 Grant Street
Pittsburgh, PA 15219

In re: Right to Know Law Appeal; Final Response #11075

Dear Mr. Makhanda and Ms. Garofolo:

I am the Open Records Appeals officer for Allegheny County. On January 26, 2023, I received an appeal from Mr. Makhanda from the decision of Open Records Officer Garofolo, denying in part, access to certain documents. Specifically, Ms. Garofolo provided requester with a redacted copy of an Allegheny County police report. Requester seeks a report that does not have the factual narrative redacted. In denying access to other records in the agency's possession and providing a heavily redacted report, Ms. Garofolo relied upon the exemption provided in 65 P.S. §67.708(b)(6)(i). (See letter dated 1/24/23).

In this appeal Mr. Makhanda asserts that the prosecution has ended and that he, as the victim's brother and prior legal guardian, should be able to access the narrative, unredacted.

Both parties are aware that I have no power in equity and must apply the law as written and elaborated on by the appellate courts. I mention that because one would normally think that Mr. Makhanda, as the victim's brother, would be able to secure a factual statement written by police, in regard to his brother's death, that is more than just one big blacked out piece of paper.

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

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).

As a result, I must deny the request and affirm denial of access to the police report. 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.

I must note, however, that I have come to believe that Pennsylvania's Open Record Law is unconstitutional as it is applied to victims and their families. I fail to see how some type of narrative could not be provided to requester, without risk of endangering anyone. But the law does not require that, and Open Records Officer Garofolo was doing exactly what the law required her to do when she redacted the document. That said, I would encourage requester to seek this information from the Open Records Officer for the District Attorney of Allegheny County. His name is Kevin F. McCarthy. He can be contacted via email at kmccarthy@alleghenycountyda.us or Office of District Attorney of Allegheny County, 401 Courthouse, 436 Grant Street, Pgh. PA 15219. Given that the case is closed, he might be more willing to provide a narrative from the complaint that was filed in the Court of Common Pleas because anyone walking off the street could go to the Department of Court Records, request to see the court file, and read that complaint for themselves. Unfortunately, the Pennsylvania Legislature has not required the Courts to provide that sort of information under the Right To Know Law. But after administering this law for 15 years, I believe that a victim or relative of a victim might be successful in mounting a constitutional challenge to the law. Perhaps this is the case.

I want to thank both parties for their cooperation in this matter.

Very truly yours,

Michael W. Streily
Deputy District Attorney
Open Records Appeals Officer

