



October 14, 2016

HAND DELIVERED

Michael Krimmel, Esq.
Chief Clerk
Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 4500
Harrisburg, PA 17106-2575

**RE: Submission of Record in:
Joseph Cafoncelli v. Pennsylvania State Police,
No. 1392 CD 2016**

14 OCT 2016 09 41

RECEIVED & FILED
COMMONWEALTH COURT OF PENNSYLVANIA
HARRISBURG, PA

Dear Mr. Krimmel:

We hereby submit the record in the above-referenced matter. Section 1303 of the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*, (“RTKL”), defines the Record on Appeal as “the record before a court shall consist of the request, the agency’s response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer.” Pursuant to *DOT v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010), this record includes all “evidence and documents admitted into evidence by the appeals officer pursuant to Section 1102(a)(2).” The record in this matter consists of the following:

Office of Open Records Docket No. 2016-0930:

1. The appeal filed by Joseph Cafoncelli to the Office of Open Records (“OOR”), received May 26, 2016.
2. Official Notice of Appeal dated May 27, 2016, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Pennsylvania State Police submission dated June 8, 2016.
4. The Final Determination dated July 19, 2016, issued by the OOR.

Clerk of Courts
Commonwealth Court of Pennsylvania

October 14, 2016
Page Two

The OOR has discretion to hold a hearing on appeals filed but chose not to do so in this matter. Therefore, there is no transcript to transmit. Certification of the record in this case is attached to this letter. Please feel free to contact us for any reason in connection with this matter.

Sincerely,

A handwritten signature in black ink, appearing to be 'CRB', written over a horizontal line.

Charles Rees Brown
Chief Counsel

Attachments

cc: Nolan B. Meeks, Esquire (Agency)
Joseph Cafoncelli (Requester)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH CAFONCELLI,
Petitioner

v.

PENNSYLVANIA STATE POLICE,
Respondent

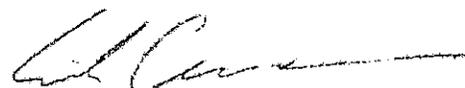
No. 1392 CD 2016

CERTIFICATION OF RECORD

I hereby certify the contents of the record transmitted with this Certification of Record pursuant to Pa.R.A.P. 1952 in *Joseph Cafoncelli v. Pennsylvania State Police*, OOR Dkt. AP 2016-0930, which is the subject of this appeal.

The record transmitted with this certification is generated entirely from the Office of Open Records database. It is our practice to scan in each and every document submitted in an appeal. Thus, no originals are being transmitted to this Court.

Also, my signature on this Certification of Record and on all other correspondence directed to the Commonwealth Court in connection with this matter may be electronic and not original. I hereby certify that this is my true and correct signature and that I have approved the use thereof for these purposes.



Erik Arneson, Executive Director
Office of Open Records
Commonwealth Keystone Building
400 North Street, Plaza Level
Harrisburg, PA 17120-0225
Phone: (717) 346-9903; Fax: (717) 425-5343
E-mail: OpenRecords@pa.gov

Dated: October 14, 2016

14 OCT 2016 09 41

RECEIVED
OFFICE OF OPEN RECORDS
14 OCT 2016 09 41

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH CAFONCELLI,
Petitioner

v.

PENNSYLVANIA STATE POLICE,
Respondent

No. 1392 CD 2016

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Certified Record upon the following by First Class Mail, pre-paid or by e-mail at the e-mail address list below:

Nolan B. Meeks, Esquire
Pennsylvania State Police
1800 Elmerton Avenue
Harrisburg, PA 17110
nomeeks@pa.gov
wrozier@pa.gov
RA-psprighttoknow@pa.gov

Joseph Cafoncelli
3622 Willingham Avenue
Reading, PA 19605
joecafe@comcast.net



Faith Henry, Administrative Officer
Office of Open Records
Commonwealth Keystone Building
400 North Street, Plaza Level
Harrisburg, PA 17120-0225
Phone: (717) 346-9903
Fax: (717) 425-5343
E-mail: fahenry@pa.gov

Dated: October 14, 2016

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH CAFONCELLI,
Petitioner

v.

PENNSYLVANIA STATE POLICE,
Respondent

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: No. 1392 CD 2016
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CERTIFIED RECORD

Charles Rees Brown
Chief Counsel
Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street - Plaza Level
Harrisburg, PA 17120-0225
Phone: (717) 346-9903
Fax: (717) 425-5343
E-mail: Charlebrow@pa.gov

October 14, 2016

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOSEPH CAFONCELLI,
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v.

PENNSYLVANIA STATE POLICE,
Respondent

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No. 1392 CD 2016

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RECORD

Joseph Cafoncelliv. Pennsylvania State Police,
OOR Dkt. No. AP 2016-0930

Office of Open Records Docket No. 2016-0930:

1. The appeal filed by Joseph Cafoncelli to the Office of Open Records ("OOR"), received May 26, 2016.
2. Official Notice of Appeal dated May 27, 2016, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. Pennsylvania State Police submission dated June 8, 2016.
4. The Final Determination dated July 19, 2016, issued by the OOR.

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pennsylvania
OFFICE OF OPEN RECORDS

**RIGHT-TO-KNOW LAW ("RTKL")
APPEAL OF DENIAL, PARTIAL DENIAL, OR DEEMED DENIAL**

RECEIVED

MAY 26 2016

OFFICE OF OPEN RECORDS

Office of Open Records ("OOR")

Email: openrecords@pa.gov

Fax: (717) 425-5343

Commonwealth Keystone Building

400 North St., 4th Floor

Harrisburg, PA 17120-0225

Today's Date: 5-24-16

Requester Name(s): Joseph T. Cafoncelli

Address/City/State/Zip: 3622 Willingham Ave. Reading, PA 19605-1156

Email: Joecafe@comcast.net **Phone/Fax:** 610-921-8501 /

Request Submitted to Agency Via: Email Mail Fax In-Person (*check only one*)

Date of Request: 4-12-16 **Date of Response:** 5-19-16 Check if no response

Name of Agency: Pennsylvania State Police Office of Open Records

Address/City/State/Zip: Commonwealth Keystone Building, 400 North Street, 4th Floor Harrisburg, Pennsylvania 17120

Email: RA-psprighttoknow@pa.gov **Phone/Fax:** 877-785-7771 / 717-525-5795

Name & Title of Person Who Denied Request (if any): Lisa M. Ferguson Deputy Agency Open Records Officer

I was denied access to the following records (**REQUIRED**. Use additional pages if necessary):

All records regarding PSP Initial Crime Report No. L1-2179.

I requested the listed records from the Agency named above. By signing below, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

I am also appealing for the following reasons (*Optional*. Use additional pages if necessary):

The case is 50 years old, all participants are deceased.

- I have attached a copy of my request for records. (**REQUIRED**)
- I have attached a copy of all responses from the Agency regarding my request. (**REQUIRED**)
- I have attached any letters or notices extending the Agency's time to respond to my request.
- I hereby agree to permit the OOR an additional 30 days to issue a final order.
- I am interested in resolving this issue through OOR mediation. *This stays the initial OOR deadline for the issuance of a final determination. If mediation is unsuccessful, the OOR has 30 days from the conclusion of the mediation process to issue a final determination.*

Respectfully submitted,  (**SIGNATURE REQUIRED**)

You should provide the Agency with a copy of this form and any documents you submit to the OOR.



PENNSYLVANIA STATE POLICE
Bureau of Records & Identification
RIGHT-TO-KNOW OFFICE
1800 Elmerton Avenue
Harrisburg, PA 17110

Mailing Date: May 19, 2016

Joseph T. Cafoncelli
joecafe@comcast.net

SENT VIA ELECTRONIC TRANSMISSION ONLY

PSP/RTKL Request N^o 2016-0282

Dear Mr. Cafoncelli:

On April 12, 2016, the Pennsylvania State Police (PSP) received your request for information pursuant to the Pennsylvania Right-To-Know Law (RTKL), 65 P.S. §§ 67.101 – 67.3104, wherein you state:

My name is Joseph T. Cafoncelli, I am the grandson of Mr. and Mrs. Louis Cafoncelli formerly of 120 Mayer Street Pennside Pa., who were murdered on April 3, 1966. State Police Detective Elwood M. Krause of the Reading Barracks was the lead investigator. The killer was Donald C. Guthrie who was convicted and sentenced to life in prison on both counts of 1s degree murder after a bench trial in January of 1967. I have information that Guthrie died in one of the state correctional institutions in July of 2002. I am planning a book on the subject and would request any information police reports, photographs, interviews or any other information that the State Police might have regarding this incident.

A copy of your request is enclosed. By electronic response dated April 19, 2016, you were notified in accordance with RTKL section 67.902(b) 1908 that PSP required an additional thirty days to prepare this final response to your request.

Your request is respectfully denied to the extent that the responsive record you seek is not accessible to the public. The RTKL defines a "public record" as "[a] record . . . of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege." 65 P.S. § 67.102.

Under the first limitation on the public record definition, PSP Initial Crime Report No. L1-2179 and its supporting attachments, which includes interviews, a PSP investigation into a complaint of criminal activity. Thus, the report and each of its components is "[a] record of an agency relating to or resulting in a criminal

investigation," which is exempt from public disclosure under RTKL section 67.708(b)(16). Furthermore:

- The report contains "[c]omplaints of potential criminal conduct other than a private criminal complaint[,]" and, thus, is exempt from public disclosure under RTKL section 67.708(b)(16)(i).
- Because they reflect the findings and conclusions, as well as the actions, observations and notes of investigating troopers, the report's components constitute "[i]nvestigative materials, notes, correspondence, . . . and reports," all of which are exempt from public disclosure under RTKL section 67.708(b)(16)(ii).
- In its entirety, as well as in its components, the report is "[a] record that, if disclosed, would . . . [r]eveal the institution, progress, or result of a criminal investigation," and, therefore, exempt from public disclosure under RTKL section 67.708(b)(16)(vi)(A).
- The report also contains personal identifying information, all of which are exempt from public disclosure under RTKL section 67.708(b)(6)(i)(A).
- Yet, none of the report's components comprises original records of entry, a chronology of arrests, the identification of arrested individuals, the specification of criminal charges or any other "information contained in a police blotter as defined in 18 PA. CONS. STAT. § 9102" that would be accessible to the public.

Pa. State Police v. Office of Open Records, 5 A.3d 473, 478 n.4 (Pa. Commw. Ct. 2010) (en banc). A supporting verification accompanies this letter.

Following the second limitation, disclosing the report or its components to you would violate Pennsylvania's *Criminal History Record Information Act* (CHRIA), 18 Pa. C.S. §§ 9101-9183, which prohibits criminal justice agencies from disseminating investigative information, except to other criminal justice agencies. 18 Pa. C.S. § 9106(c)(4). CHRIA defines "investigative information" 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." *Id.* § 9102. Therefore, PSP is barred by CHRIA from providing you with access to the records you have requested. *See McGarvey v. Pa. State Police*, Dkt. AP 2009-0522 (Glinn) (CHRIA section 9106 protects criminal investigation report, in its entirety, from public disclosure).

Lastly, these records are exempt from public disclosure pursuant to RTKL section 708(30) as records identifying the name, home address or date of birth of a child 17 years of age or younger.

With regard to request for "photographs," the PSP has determined it does not have any records such as you described in its possession, custody, or control. A verification to this effect accompanies this letter. Pursuant to the decision in *Jenkins vs. Pennsylvania Department of State*, OOR Dkt N° AP 2009-0065, "It is not a denial of access when an agency does not possess records and [there is no] legal obligation to obtain them (see, e.g. Section 67.506 (d)(1))." Please be advised, although photographs were taken during the course of this investigation, we were unable to locate the requested photographs when retrieving the archived report.

To the extent that your request seeks or may be construed to seek records involving covert law enforcement investigations, including intelligence gathering and analysis, PSP can neither confirm, nor deny the existence of such records without risk of compromising investigations and imperiling individuals. UNDER NO CIRCUMSTANCES, therefore, should this response to your request be interpreted as indicating otherwise.

In closing, you have a right to appeal this response by submitting an appeal form in writing to the Office of Open Records (OOR), Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. The appeal form may be obtained in the forms section on the OOR website, <http://openrecords.state.pa.us>. Should you choose to file an appeal, you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) this response;
- 2) your request; and
- 3) the reason why you think the agency is wrong in its reasons for withholding information (a statement that addresses any ground stated by the agency for the denial). If the agency gave several reasons why the record is not public, state which ones you think were wrong.

Respectfully,



Lissa M. Ferguson
Deputy Agency Open Records Officer
Pennsylvania State Police
Bureau of Records & Identification
Right-to-Know Office
1800 Elmerton Avenue
Harrisburg, Pennsylvania 17110
Email: RA-psprighttoknow@pa.gov
1.877.785.7771 (Main); 717.525.5795 (Fax)

Enclosures: PSP/RTKL Request N° 2016-0282
Ferguson Verification.

PENNSYLVANIA STATE POLICE
BUREAU OF RECORDS & IDENTIFICATION
RIGHT-TO-KNOW OFFICE

VERIFICATION OF
LISSA M. FERGUSON
DEPUTY AGENCY OPEN RECORDS OFFICER

I, Lissa M. Ferguson, Deputy Agency Open Records Officer of the Pennsylvania State Police (variously, PSP or Department), am authorized to prepare this verification in response to PSP/RTKL Request N° 2016-0282. Accordingly, on this 19th day of May, 2016, I verify the following facts to be true and correct, to the best of my knowledge or information and belief:

1. I am familiar with PSP/RTKL Request N° 2016-0282, which states:

My name is Joseph T. Cafoncelli, I am the grandson of Mr. and Mrs. Louis Cafoncelli formerly of 120 Mayer Street Pennside Pa., who were murdered on April 3, 1966. State Police Detective Elwood M. Krause of the Reading Barracks was the lead investigator. The killer was Donald C. Guthier who was convicted and sentenced to life in prison on both counts of 1s degree murder after a bench trial in January of 1967. I have information that Guthier died in one of the state correctional institutions in July of 2002. I am planning a book on the subject and would request any information police reports, photographs, interviews or any other information that the State Police might have regarding this incident.

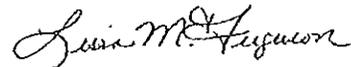
2. Utilizing the information contained in the request, I searched all Department databases to which I have access for evidence of any PSP records that may respond to the request.
3. As a result of my searches, I identified and retrieved the following responsive PSP record: PSP Initial Crime Report No. L1-2179 and its supporting attachments.
4. I personally examined this incident report and found it to be manifestly related to a criminal investigation. PSP Initial Crime Report No. L1-2179, which includes interviews, is a multiple page

record assembled by Trooper Edward Krause on or after April 3, 1966, as a result of an investigation into a criminal incident or an allegation of criminal wrongdoing. Furthermore:

- a. The report contains "[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," 18 Pa. C.S. § 9102, and, thus, is exempt from public disclosure under RTKL section 67.708(b)(16)(i).
 - b. The report's component records reflect the findings and conclusions, as well as the actions, observations and notes of investigating troopers, thus constituting "investigative materials, notes, correspondence, . . . and reports," all of which are exempt from public disclosure under RTKL section 67.708(b)(16)(ii).
 - c. Based on its content, the report is clearly "a record that, if disclosed, would reveal the institution, progress, and result of a criminal investigation," and, therefore, exempt from public disclosure under RTKL section 67.708(b)(16)(vi)(A).
 - d. The report contains personal identifying information, all of which are exempt from public disclosure under RTKL section 67.708(b)(6)(i)(A).
 - e. Yet, none of the report's components comprises original records of entry, a chronology of arrests, the identification of arrested individuals, the specification of criminal charges or any other "information contained in a police blotter as defined in 18 Pa. C.S. § 9102."
5. Furthermore, disclosing the report or its components to you would violate Pennsylvania's Criminal History Record Information Act (CHRIA), Pa. C.S. §§ 9101-9183, which prohibits criminal justice agencies from disseminating investigative information, except to other criminal justice agencies.

6. Lastly, these records are exempt from public disclosure pursuant to RTKL section 708(30) as records identifying the name, home address or date of birth of a child 17 years of age or younger.
7. Accordingly, I withheld this record from public disclosure.
8. With regard to request for "photographs," the PSP has determined it does not have any records such as you described in its possession, custody, or control.
9. Requestor was advised that although photographs were taken during the course of this investigation, we were unable to locate the requested photographs when retrieving the archived report.

I understand that false statements made in this verification are subject to penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.



Lissa M. Ferguson
Deputy Agency Open Records Officer
Pennsylvania State Police

12 APR '16 AM 7:22

4-19-16

2016-282

Ott, Cynthia L

From: Joe Cafoncelli <joecafe@comcast.net>
Sent: Monday, April 11, 2016 7:26 PM
To: SP, PSP RIGHT TO KNOW
Subject: Investigation regarding the double murder of Louis Cafoncelli and his wife Edith On April 3, 1966

To whom it may concern,

My name is Joseph T. Cafoncelli I am the grandson of Mr. and Mrs. Louis Cafoncelli formerly of 120 Mayer Street Pennside Pa. who were murdered on April 3, 1966. State Police Detective Elwood M. Krause of the Reading barracks was the lead investigator. The killer was Donald C. Guthrie who was convicted and sentenced to life in prison on both counts of 1st degree murder after a bench trial in January of 1967. I have information that Guthrie died in one of the state correctional institutions in July of 2002. I am planning a book on the subject and would request any information police reports, photographs, interviews or any other information that the State police might have regarding this incident.

I am a retired Criminal Investigator with Reading City. I work part time for the City as court liaison officer should you have any questions please call me at 610 478-6000 The Berks County District Attorney's Office ext. 5050 or e mail joseph.cafoncelli@readingpa.gov . Thank you for your assistance.

Joseph T. Cafoncelli

2



May 27, 2016

Via E-Mail only:

Joseph T. Cafoncelli
3622 Willingham Avenue
Reading, PA 19605
joecafe@comcast.net

Via E-Mail only:

William Rozier
Agency Open Records Officer
Pennsylvania State Police
1800 Elmerton Avenue
Harrisburg, PA 17110
RA-psprighttoknow@pa.gov
nomeeks@pa.gov
wrozier@pa.gov

RE: OFFICIAL NOTICE OF APPEAL – **DOCKET #AP 2016-0930**

Dear Parties:

Please review this information carefully as it affects your legal rights.

The Office of Open Records (“OOR”) received this appeal under the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101, *et seq.* on May 26, 2016. This letter describes the appeal process. A binding Final Determination will be issued pursuant to the timeline required by the RTKL. In most cases, that means within 30 calendar days.

OOR Mediation: This is a voluntary, informal process to help parties reach a mutually agreeable settlement on records disputes before the OOR. To participate in mediation, both parties must agree in writing. If mediation is unsuccessful, both parties will be able to make submissions to the OOR, and the OOR will have 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Note to Parties: Statements of fact must be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Any factual statements or allegations submitted without an affidavit will not be considered. The agency has the burden of proving that records are exempt from public access (*see* 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.** The law requires the agency position to be supported by sufficient facts *and* citation to all relevant sections of the RTKL, case law, and OOR Final Determinations. An affidavit or attestation is required to show that records do not exist. Blank sample affidavits are available on the OOR’s website.

Submissions to OOR: Both parties may submit information and legal argument to support their positions by **11:59:59 p.m. seven (7) business days from the date of this letter.** *Submissions sent via postal mail and received after 5:00 p.m. will be treated as having been received the next business day.* The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Include the docket number above on all submissions related to this appeal. Also, any information you provide to the OOR must be provided to all parties involved in this appeal. Information shared with the OOR that is not also shared with all parties will not be considered.

Agency Must Notify Third Parties: If records affect a legal or security interest of an employee of the agency; contain confidential, proprietary or trademarked records of a person or business entity; or are held by a contractor or vendor, **the agency must notify such parties of this appeal immediately and provide proof of that notice to the OOR within seven (7) business days from the date on this letter.** Such notice must be made by (1) providing a copy of all documents included with this letter; **and** (2) advising that interested persons may request to participate in this appeal (*see* 65 P.S. § 67.1101(c)).

Commonwealth Court has held that “the burden [is] on third-party contractors ... to prove by a preponderance of the evidence that the [requested] records are exempt.” (*Allegheny County Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)). **Failure of a third-party contractor to participate in an appeal before the OOR may be construed as a waiver of objections regarding release of the requested records.**

Law Enforcement Records of Local Agencies: District Attorneys must appoint Appeals Officers to hear appeals regarding criminal investigative records in the possession of a local law enforcement agency. If access to records was denied in part on that basis, the Requester should consider filing a concurrent appeal with the District Attorney of the relevant county.

If you have any questions about the appeal process, please contact the assigned Appeals Officer (contact information is enclosed) – and be sure to provide a copy of any correspondence to all other parties involved in this appeal.

Sincerely,



Erik Arneson
Executive Director

Enc.: Assigned Appeals Officer contact information
Entire appeal as filed with OOR

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____

Today's date: _____

Name: _____

IF YOU ARE OBJECTING TO THE DISCLOSURE OF YOUR HOME ADDRESS, DO NOT PROVIDE THE OFFICE OF OPEN RECORDS WITH YOUR HOME ADDRESS. PROVIDE AN ALTERNATE ADDRESS IF YOU DO NOT HAVE ACCESS TO E-MAIL.

Address/City/State/Zip _____

E-mail _____

Fax Number: _____

Name of Requester: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Name of Agency: _____

Address/City/State/Zip _____

Telephone/Fax Number: _____ / _____

E-mail _____

Record at issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- An employee of the agency
- The owner of a record containing confidential or proprietary information or trademarked records
- A contractor or vendor
- Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, _____ (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.



pennsylvania

OFFICE OF OPEN RECORDS

APPEALS OFFICER:

J. Chadwick Schnee, Esquire

CONTACT INFORMATION:

Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

PHONE:

(717) 346-9903

FACSIMILE:

(717) 425-5343

E-MAIL:

jschnee@pa.gov

**Preferred method of contact
and submission of information:**

EMAIL

Please direct submissions and correspondence related to this appeal to the above Appeals Officer. Please include the case name and docket number on all submissions.

You must copy the other party on everything you submit to the OOR.

The OOR website, <http://openrecords.pa.gov>, is searchable and both parties are encouraged to review prior final determinations involving similar records and fees that may impact this appeal.



pennsylvania
OFFICE OF OPEN RECORDS

IN THE MATTER OF

JOSEPH CAFONCELLI
Requesters,

v.

PENNSYLVANIA STATE POLICE
Respondent.

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Docket No.: AP 2016-0930

This correspondence confirms the above-referenced Requester's agreement to an additional thirty (30) day extension of time to issue a Final Determination in this matter as indicated in the Requester's appeal form. Accordingly, pursuant to 65 P.S. § 67.1101(b)(1), the Office of Open Records will now issue a Final Determination in the above-captioned matter on or before July 25, 2016.



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

June 8, 2016

Sent Only Via Electronic Transmission

J. Chadwick Schnee, Esquire
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Re: *Joseph Cafoncelli v. Pa. State Police*
AP 2016-0930 (PSP/RTKL 2016-0282)
Brief of Appellee
Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101-67.3104.

Encl. Affidavit of William A. Rozier, AORO

Dear Appeals Officer Schnee:

I am responding on behalf of my client, the Pennsylvania State Police ("PSP"), to the May 26, 2016, appeal filed by Joseph Cafoncelli ("Requester"), regarding the denial of his Right-To-Know Law ("RTKL") request (PSP/RTK No. 2016-0282, now the subject of the Office of Open Records ("OOR") Appeal No. 2016-0930). Please accept this correspondence as my formal entry of appearance in the matter and kindly direct your future communications to me.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On April 12, 2016, PSP received a RTKL request from the Requester wherein he stated:

My name is Joseph T. Cafoncelli, I am the grandson of Mr. and Mrs. Louis Cafoncelli formerly of 120 Mayer Street Pennside Pa., who were murdered on April 3, 1966. State Police Detective Elwood M. Krause of the Reading Barracks was the lead investigator. The killer was Donald C. Guthier who was convicted and sentenced to life in prison on both counts of 1s degree murder after a bench trial in January of 1967. I have information that Guthier died in one of the state correctional institutions in July of 2002. I am planning a book on the subject and would request any information police reports, photographs, interviews or any other information that the State Police might have regarding this incident.

By letter dated April 19, 2016, Requester was notified in accordance with RTKL section 67.902(b) that PSP required an additional thirty (30) days to prepare its final response to his request. In a letter dated May 19, 2016, PSP provided Requester with its final response denying



the request. For the reasons set forth below, PSP continues to rely on the positions set forth in its final response and the arguments made below and requests that Mr. Owen's appeal be dismissed.

ARGUMENT

The RTKL only requires Commonwealth agencies to provide documents that are public records. 65 P.S. § 67.301. It is well settled that PSP is a Commonwealth agency within the meaning of the RTKL. *Id.* at § 67.101; *Dekok v. PSP*, Dkt. AP 2011-0086 * 4. A document is not a public record if: (1) it is specifically exempted from disclosure in section 67.708 of the RTKL; (2) it is exempt under other federal or state law; or (3) it is protected by a privilege. See *id.* § 67.102 (defining "Public Record").

I. THE RESPOSIVE INCIDENT REPORT IS EXEMPT FROM DISCLOSURE PURUSANT TO THE SECTION 708(B)(16) OF THE RTKL AND THE CRIMINAL HISTORY RECORDS INFORMATION ACT.

In response to the request PSP identified and retrieved PSP Initial Crime Report No. L1-2179. This Initial Crime Report is manifestly related to a criminal investigation. Specifically, Initial Crime Report No. L1-2179, its components, and attachments is a 99-page document compiled on or after April 3, 1966 by Tpr.Elwood Krause describing and documenting his investigation into a complaint of criminal activity.

The report and its components constitute "a record of an agency [PSP] relating to or resulting in a criminal investigation," and is therefore specifically exempt from public disclosure under RTKL section 67.708(b)(16). *Pa. State Police v. Office of Open Records*, 5 A.3d 473, 477 (Pa. Commw. Ct. 2010) Further, various subsections of RTKL section 67.708(b)(16) exempt the report from disclosure:

- The report contains "[c]omplaints of potential criminal conduct other than a private criminal complaint," and, thus, is exempt from public disclosure under RTKL section 67.708(b)(16)(i).
- Because they reflect the findings and conclusions, as well as the actions, observations and notes of investigating troopers, the reports' components constitute "[i]nvestigative materials, notes, correspondence and reports," all of which are exempt from public disclosure under RTKL section 67.708(b)(16)(ii).
- In its entirety, as well as its components, the reports are "a record that, if disclosed, would . . . [r]eveal the institution, progress or result of a criminal investigation," and, therefore, are exempt from public disclosure under RTKL section 67.708(b)(16)(vi)(A).
- None of the report's components comprise original records of entry, a chronology of arrests, the identification of arrested individuals, the specification of criminal charges

or any other "information contained in a police blotter as defined in 18 Pa. Cons. Stat. § 9102" that would be accessible to the public.

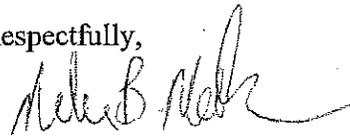
Moreover, disclosing the reports or their components to Requester would violate Pennsylvania's *Criminal History Record Information Act* (CHRIA), 18 Pa.C.S. §§ 9101-9183, which specifically prohibits criminal justice agencies from disseminating investigative information, except to other criminal justice agencies. 18 Pa. C.S. § 9106(c)(4). CHRIA defines "investigative information" 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." 18 Pa.C.S. § 9102. Therefore, CHRIA bars PSP from providing access to the responsive investigative report. *See McGarvey v. Pennsylvania State Police*, OOR Docket N° AP 2009-0522 (Glinn) (CHRIA section 9106 protects criminal investigation report, in its entirety, from public disclosure).

Lastly, the identity of the Requester and the reasons for wanting the record are irrelevant under the RTKL. *Hunsicker v. Pa State Police*, 93 A. 3d 911, 913 (Pa. Cmwlth. 2014)(holding, "[u]nder the RTKL, whether the document is accessible is based only on whether a document is a public record, and, if so, whether it falls within an exemption that allows that it not be disclosed. The status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b)").

CONCLUSION

In conclusion, based upon the RTKL, case law, and the facts contained within the Affidavit of PSP's AORO, William A. Rozier, the Pennsylvania State Police respectfully requests that you dismiss Mr. Cafoncelli's appeal. I thank you in advance for your thoughtful deliberations.

Respectfully,



Nolan B. Meeks, Esquire
Assistant Counsel
Pennsylvania State Police

cc Joseph Cafoncelli (w/ encl.) (*sent only via electronic transmission*)
William A. Rozier (w/ encl.) (*sent only via electronic transmission*)

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA STATE POLICE
RTKL OFFICE

Commonwealth of Pennsylvania :
:
:
County of Dauphin :

AFFIDAVIT OF
WILLIAM A. ROZIER
AGENCY OPEN RECORDS OFFICER

BEFORE ME, the undersigned notary public, appeared the affiant, WILLIAM A. ROZIER, on this 8th day of June 2016, who being duly sworn by me according to law, stated the following:

1. My name is William A. Rozier. Being over eighteen years of age, I am fully competent to execute this affidavit, which avers as true and correct only the facts known to me personally and only such opinions as I am qualified to express.

2. I am an Administrative Officer 2 with the Pennsylvania State Police ("PSP" or "Department"), presently serving as the Agency Open Records Officer. In this capacity, I am authorized to make this statement on behalf of the Department and its Commissioner, Tyree C. Blocker, in the interests of the Commonwealth of Pennsylvania and its citizens.

3. I assumed the duties of my present position on November 15, 2011. My duties encompass the responsibilities specified in the RTKL for Agency Open Records Officers.

4. As the Agency Open Records Officer, I am respectful of the objectives embodied by RTKL and personally committed to their realization. Although I am very familiar with most aspects of the RTKL, I consult regularly with PSP legal counsel regarding those RTKL provisions that impact significantly upon my duties and responsibilities.

5. I have prepared this affidavit in response to a RTKL appeal filed by Joseph Cafoncelli ("Requester") with the Office of Open Records ("OOR"), which has been docketed by OOR as N^o AP 2016-0930. I do so in order to clarify PSP's response to Mr. Cafoncelli's request and subsequent appeal.

6. Requester filed an RTKL request with PSP, wherein he stated:

My name is Joseph T. Cafoncelli, I am the grandson of Mr. and Mrs. Louis Cafoncelli formerly of 120 Mayer Street Pennside Pa., who were murdered on April 3, 1966. State Police Detective Elwood M. Krause of the Reading Barracks was the lead investigator. The killer was Donald C. Guthier who was convicted

and sentenced to life in prison on both counts of 1st degree murder after a bench trial in January of 1967. I have information that Guthrie died in one of the state correctional institutions in July of 2002. I am planning a book on the subject and would request any information police reports, photographs, interviews or any other information that the State Police might have regarding this incident.

7. PSP's RTK Office identified PSP Initial Crime Report No. L1-2179 as the only record responsive to the request.

8. I personally examined PSP Initial Crime Report No. L1-2179 and found that the report is manifestly related to a criminal investigation.

9. Specifically, Initial Crime Report No. L1-2179, its components, and attachments is a 99-page document compiled on or after April 3, 1966 by Tpr. Elwood Krause describing and documenting his investigation into a complaint of criminal activity.

10. Accordingly, the report is "a record of an agency relating to or resulting in a criminal investigation," and is exempt from public disclosure under RTKL section 708(b)(16).

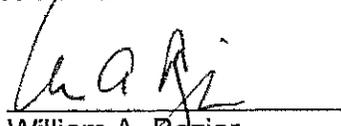
11. Additionally:

- The report contains "[c]omplaints of potential criminal conduct other than a private criminal complaint," and, thus, is exempt from public disclosure under RTKL section 67.708(b)(16)(i).
- Because they reflect the findings and conclusions, as well as the actions, observations and notes of investigating troopers, the reports' components constitute "[i]nvestigative materials, notes, correspondence and reports," all of which are exempt from public disclosure under RTKL section 67.708(b)(16)(ii).
- In its entirety, as well as its components, the report is "a record that, if disclosed, would . . . [r]eveal the institution, progress or result of a criminal investigation," and, therefore, are exempt from public disclosure under RTKL section 67.708(b)(16)(vi)(A).
- None of the reports' components comprise original records of entry, a chronology of arrests, the identification of arrested individuals, the specification of criminal charges or any other "information contained in a police blotter as defined in 18 Pa. Cons. Stat. § 9102" that would be accessible to the public.

12. Furthermore, disclosing the report or its components to Requester would violate Pennsylvania's Criminal History Record Information Act (CHRIA), 18 Pa.C.S. § 9101-9183, which prohibits criminal justice agencies from disseminating investigative information, except to other criminal justice agencies.

13. Accordingly, I withheld PSP Initial Crime Report No. L1-2179 from public disclosure.

FURTHER AFFIANT SAYETH NOT, UNDER PENALTY OF PERJURY.



William A. Rozier
Pennsylvania State Police
Agency Open Records Officer

SUBSCRIBED AND SWORN TO BEFORE ME on this 8th day of June 2016, to certify which witness my hand and seal.



COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Carolee A. Femback, Notary Public
Susquehanna Twp., Dauphin County
My Commission Expires March 23, 2019

4

counts of 1st degree murder after a bench trial in January of 1967. I have information that Guthier died in one of the state correctional institutions in July of 2002. I am planning a book on the subject and would request any information police reports, photographs, interviews or any other information that the State Police might have regarding this incident.

On April 19, 2016, the PSP denied the Request, citing exemptions for records related to a criminal investigation (65 P.S. § 67.708(b)(16)) and CHRIA. The PSP also cited exemptions for personal identification information (65 P.S. § 67.708(b)(6)(i)(A)) and for records that would identify a minor (65 P.S. § 67.708(b)(30))

On May 26, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the PSP to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c). On June 8, 2016, the PSP submitted a position statement, along with a notarized affidavit from its Open Records Officer, who affirms that that it identified PSP Initial Crime Report No. L1-2179 (“Report”), a 99-page document, as the sole responsive record. The PSP’s Open Records Officer affirms that the Report was “compiled on or after April 3, 1966 by Tpr. Elwood Krause describing and documenting his investigation into a complaint of criminal activity.” The PSP’s Open Records Office also affirms that the Report is exempt under 65 P.S. § 67.708(b)(16) and CHRIA.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their

actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The PSP is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable

than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The PSP alleges that the Report is exempt as a record related to a criminal investigation. Section 708(b)(16) of the RTKL exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation,” including “[i]nvestigative ... reports.” 65 P.S. § 67.708(b)(16)(ii). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a criminal matter. *See Department of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pennsylvania Convention Center Authority*, 49 A.3d 920 (Pa. Commw. Ct. 2012).

Here, the PSP has provided evidence establishing that it conducted an investigation and that Trooper Krause created the Report as a result. The Commonwealth Court has previously held that an incident report regarding a criminal matter “is wholly exempt from disclosure because it is a criminal investigative record, which contains investigative materials and victim information.” *Pa. State Police v. Office of Open Records*, 5 A.3d 473, 477 (Pa. Commw. Ct. 2010); *see also Schofield v. Pennsylvania State Police*, OOR Dkt. AP 2011-0738, 2011 PA O.O.R.D. LEXIS 473 (holding that an incident report is exempt under Section 708(b)(16)). Based on a review of the evidence presented, the PSP has established that the requested Report is exempt as a record related to a criminal investigation. *See Grocki v. Pennsylvania State Police*, OOR Dkt. AP 2009-0661, 2009 PA O.O.R.D. LEXIS 75 (holding that records related to a murder investigation occurring 40 years earlier were exempt under 65 P.S. § 67.708(b)(16)).

CONCLUSION

For the foregoing reasons, Requester's appeal is **denied**, and the PSP is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 19, 2016

/s/ J. Chadwick Schnee, Esq.

APPEALS OFFICER/ ASSISTANT CHIEF COUNSEL
J. CHADWICK SCHNEE, ESQ.

Sent to: Joseph Cafoncelli (via e-mail only);
Nolan Meeks, Esq. (via e-mail only);
William Rozier (via e-mail only)

¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).