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DISTRICT ATTORNEY



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

Jessica Garofolo
Director, Open Records Officer
Department of Administrative Services
202 Courthouse
436 Grant Street
Pittsburgh, PA 15219

In re: Open Records Appeal

Dear Mr. Ballard, Mr. McCarthy, and Ms. Garofolo:

I am the Open Records Appeals Officer for the District Attorney of Allegheny County. On April 6, 2022 I received from Mr. Ballard (requester) two appeals from the denial of Right to Know Requests filed with the Office of District Attorney as well as the Office of Medical Examiner. The items requested were almost identical, as they involved “whereabouts” and “test results” of the following:

Firearms and Toolmarks report for .25 caliber Magazine and three 25 auto caliber cartridges inside of it. Two .25 caliber casings for fingerprint and DNA oil/touch. (Jamie Cole's) right and left hand fingernail clippings (for DNA-scrape, etc.). Head pubic hair standards.

See *RTKL Request Forms submitted by Mr. Ballard*. Both requests were denied based on the following reasoning:

Your request must be respectfully denied. The records that you requested are exempt from disclosure because they are 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 ... (ii) investigative materials, notes, correspondence, videos and reports."

See letter of Ms. Garofolo dated March 22, 2022; as well as letter from Mr. McCarthy dated March 18, 2022.

Under 65 P.S. §67.708(b)(16) the following records are exempt from disclosure:

(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).

In this appeal requester has stated that the items he has requested were recovered at the scene of the crime for which he was convicted. This is the very definition of criminal investigative materials. The reasons for any request are irrelevant under the RTKL. See §67.703. I do note that requester's assertion that he needs to know the whereabouts of the evidence in order to pursue a request for DNA testing under the PCRA is an inaccurate statement. A request under 42 Pa.C.S.A. 9543.1 does not need a statement of location of the item being sought for testing. Interestingly, under that statute the items must be "related to the investigation or prosecution that resulted in the judgment of conviction."

As a result, I must decline these two requests and this denial goes to both-the request to the District Attorney and the request to the Medical Examiner. Please be advised that pursuant to 65 P.S. §67.1302 you have 30 days to appeal my decision to the Court of Common Pleas of Allegheny County. Thank you.

Very truly yours,

Michael W. Streily
Deputy District Attorney
Open Records Appeals Officer