

STEPHEN A. ZAPPALA, JR.  
DISTRICT ATTORNEY



OFFICE OF THE DISTRICT ATTORNEY

# County of Allegheny

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Mr. David Bayne  
121 Crystal Drive  
New Kensington, PA 15068

October 9, 2019

Mona Costanza  
Agency Open Records Officer  
Plum Borough  
4575 New Texas Road  
Pittsburgh, PA 15239

In re: Right to Know Law Appeal

Dear Mr. Bayne and Open Records Officer Costanza:

I am the Open Records Appeals officer for Allegheny County. Mr. Bayne had sought the following documents from the Borough of Plum:

1. The location (closest Street address) of the VASCAR used on Leechburg Road on the 20 Aug 2019 for writing citation no. E0001722-0; number of citations issued for speeding by Officer 4340-Michael Demarco at VASCAR Leechburg Rd. location on 20 Sep 2019; and location of all VASCAR area used by the Boro (to include street address).

*See letter dated September 18, 2019 authored by Dayne F. Dice, Esquire.*

In denying the request, the Agency stated *inter alia*:

All three RTKs must be denied due to the criminal investigation exception of the Right to Know Law, 65 P.S. § 67.708(b)(16). The criminal investigative exception of the Right to Know Law provides an exception to disclosure for, “A record of an agency relating to or resulting in a criminal investigation...” Id.

*See Dice letter.*

Despite the fact that an appeal from an Agency’s refusal to produce documents based upon the criminal investigation exemption is within my jurisdiction and not the Office of Open Records, and that both Open Records Officer Costanza and the Borough’s Solicitor had the obligation to inform requester of the proper procedure for filing an appeal (see 65 P.S. §67.503, 903(5), and 1101) both counsel and Ms. Costanza failed in this regard when they informed requester of the following:

You have the right to appeal any aspect of this request for information in writing to the Office of Open Records, 333 Market Street, 16<sup>th</sup> Floor, Harrisburg, PA 17101-2234. If you choose to file an appeal, you must do so within fifteen business days of the mailing date of the Borough’s response. Please be advised that this correspondence will serve to close this record with our office as permitted by law.

*See Dice letter.* The failure of the Borough to follow proper procedure resulted in two appeals being filed. I am left to puzzle the Borough’s response to OOR at AP 2019-1617, dated September 30, 2019 at p.3, wherein the Borough informs OOR that the appeal should be transferred to me. The fact that OOR has an improper appeal before it lies with the Borough. This Officer reminds Plum Borough that where an appeal is denied for multiple reasons and one of those reasons includes a claimed exemption under 708(b)(16), the Agency has a statutory obligation to provide accurate information alerting a requester to the fact that two appeals are involved—one to Office of Open Records and one to the person designated under §503(d)(2). An accurate response would have informed Mr. Bayne that the claimed exemption for criminal investigation material should be appealed to me and the claimed exemption for CHRIA should be appealed to OOR.

As to exempted documents and information, 65 P.S. §67.708(b)(16) provides in relevant part:

(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.

Initially, I do not see how disclosure of the number of citations issued for speeding by Officer Demarco on September 20, 2019 would relate to a criminal investigation. A final tally of citations issued by one officer at one location on a particular day does not single out any particular case or provide any information about police tactics, defendant identities, etc. Beyond a bare bones cite to §708(b)(16) the Borough provides no support for its position. The Right to Know Law places an evidentiary burden on the agency seeking to deny access to a record or document, even when privileges are involved. See *Department of Transportation v. Drack*, 42 A.3d 355 (Pa. Cmwlth. 2012). As a result, I must grant the request as to the number of citations written by Officer Demarco on that date and at that location.

The other requested items certainly are covered by the criminal investigation exemption, however, and I must deny access to them.

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,

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Michael W. Streily  
Deputy District Attorney  
Open Records Appeals Officer