



DISTRICT ATTORNEY'S OFFICE OF CHESTER COUNTY
201 WEST MARKET STREET, SUITE 4450
POST OFFICE BOX 2746
WEST CHESTER, PENNSYLVANIA 19380-0989

TELEPHONE: 610-344-6801
FAX: 610-344-5905

IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
STEVEN BURGESS,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
WILLISTOWN	:	
POLICE DEPARTMENT,	:	DA-RTKL-A NO. 2013-001
Respondent	:	

INTRODUCTION

Steven Burgess ("Requester") filed a right-to-know request with the Willistown Police Department ("Respondent"), pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*, seeking a copy of a police incident report for an occurrence on July 30, 2012. Respondent denied the request *citing* 65 P.S. § 67.708(b). Requester filed a timely appeal with the Chester County District Attorney's Office, pursuant to 65 P.S. § 67.503(d) and 65 P.S. § 67.1101(a). For the reasons set forth in this Final Determination, the appeal is **DENIED** and the Respondent is not required to take any further action.

FACTUAL BACKGROUND

On August 15, 2013, Steven Burgess (“Requester”) filed a right-to-know request with the Willistown Police Department (“Respondent”), pursuant to the Right to Know Law (“RTKL”), 65 P.S. § 67.101, *et. seq.*, seeking a copy of a police incident report for an occurrence on July 30, 2012 at 15 Duffryn Avenue, Malvern, PA. On August 19, 2013, the Respondent denied the request *citing* 65 P.S. § 67.708(b). However, the Respondent provided a copy of the police blotter for the incident. On August 22, 2013, the Requester filed a timely appeal with the Chester County District Attorney’s Office, pursuant to 65 P.S. § 67.503(d) and 65 P.S. § 67.1101(a). On August 27, 2013, the Requester also provided a letter as a Memorandum in Support of the appeal, which also suggested an *in camera* review of the police report. On August 28, 2013, this Appeals Officer gave Notice to the parties of the following:

Unless the Requester agrees otherwise, as the appeals officer, I shall make a final determination which shall be mailed to the Requester and the Respondent within 30 days of August 22, 2013. 65 P.S. § 67.1101(b)(1), which is September 23, 2013, as the thirtieth day falls on Saturday. If a final determination is not made within 30 days, the appeal is deemed denied by operation of law. 65 P.S. § 67.1101(b)(2). Prior to issuing a final determination, a hearing may be conducted. However, a hearing is generally not needed to make a final determination. The final determination shall be a final appealable order, and shall include a written explanation of the reason for the decision. 65 P.S. § 67.1101(b)(3).

The Supreme Court of Pennsylvania has held that a Respondent is permitted to assert exemptions on appeal, even if the agency did not assert them when the request was originally denied. Levy v. Senate of Pennsylvania, ___ Pa. ___, 65 A.3d 361 (2013).

If the Respondent wishes to supplement the reasons for the denial of the Right to Know request, or respond to the request for an *in camera* review, it must do so on or before September 4, 2013. The Requester shall submit any response on or before September 11, 2013.

Any statements of fact must be supported by an affidavit made under penalty of perjury by a person with actual knowledge. However, legal arguments and citation to authority do not require affidavits.

August 28, 2013 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

On September 4, 2013, Robert T. McClintock, Esquire, submitted a response on behalf of Respondent, which included an "Attestation of Record" by Chief of Police of the Willistown Police Department John M. Narcise. On September 6, 2013, Matthew D. Dupee, Esquire, submitted a response on behalf of Requester.

LEGAL ANALYSIS

The Chester County District Attorney's Office is authorized to hear appeals relating to access to criminal investigative records in the possession of a local agency located within Chester County. 65 P.S. § 67.503(d)(2) ("The district attorney of a county shall designate one or more appeals officers to hear appeals under Chapter 11 relating to access to criminal investigative records in possession of a local agency of that county. The appeals officer designated by the district attorney shall determine if the record requested is a criminal investigative record."). The Willistown Police Department ("Respondent") is a local agency subject to the RTKL that is required to disclose public documents. 65 P.S. § 67.302. Records of a local agency are presumed "public" unless

the record: (1) is exempt under 65 P.S. § 67.708(b); (2) is protected by privilege; or (3) is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. § 67.305.

Respondent denied the request *citing* 65 P.S. § 67.708(b). On September 4, 2013, Robert T. McClintock, Esquire, submitted a response on behalf of Respondent, which included an “Attestation of Record” by Chief of Police of the Willistown Police Department John M. Narcise. This response was more specific as to the reason for the request denial:

The Request sought a police incident report in the possession of the Township. Section 708(b)(16) of the RTKL, 65 P.S. § 67.701(b)(16), exempts criminal investigative material from disclosure under the RTKL. Reports are expressly stated in the list of records that fall under criminal investigative materials. 65 P.S. § 67.701(b)(16)(ii). For a police incident report to fall under the criminal investigative record exemption, the report must “contain information from an inquiry, formal or informal, into a criminal incident.” Mitchell v. OOR, 997 A.2d 1262, 1266 (Pa. Cmwlth. 2010) (*See, Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Cmwlth. 2010) (holding a police incident report to be exempt under Section 708(b)(16) of the RTKL); Pennsylvania State Police v. Office of Open Records, 2010 Pa. Cmwlth. Unpub. LEXIS 698 (holding a police incident report containing “the narrative of the investigations, which generally consist of the investigator’s observations ... statements of victims, witnesses, suspects...” are exempt under Section 708(b)(16)(ii) of the RTKL) (Attached as Exhibit “B”).

Here, the Police Department investigated an alleged criminal activity, the “incident” the Requester references in the Request. The investigation of the alleged criminal matter resulted in the creation of the police incident report sought by Requester. The police incident report contains the narrative of the investigation, including statements from the alleged victim, suspect, and witnesses. *See* Chief Narcise’s Attestation attached as Exhibit “A”. As the police incident report was generated as part of a criminal investigation and contained the narrative of said investigation, the

police incident report is exempt under Section 708(b)(16)(ii) of the RCTL.

September 4, 2013 Letter of Robert T. McClintock, Esquire, at 2. The “Attestation of Record” by Chief Narcise states in part:

I, JOHN M. NARCISE am this agency’s Chief of Police and I make this statement under penalty of perjury as more fully set forth in 18 Pa.C.S. § 4904.

I attest that I reviewed the agency’s records requested as set forth above which included a police blotter and the police incident report pertaining to the criminal investigation. Both records were prepared in the normal course of investigating a criminal matter. The police incident report contains the narrative of the officer’s investigation into the July 30, 2012 incident involving Mr. Burgess.

“Attestation of Record” by Chief of Police John M. Narcise.

The Respondent has denied the request *citing* 65 P.S. § 67.708(b)(16)(ii) (“(b) Exceptions. -- Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act: ... (16) A record of an agency relating to or resulting in a criminal investigation, including: ... (ii) Investigative materials, notes, correspondence, videos and reports.”).

The Respondent asserts that the document requested is a criminal investigative record. The Respondent bears the burden of proving, by a preponderance of the evidence, that the document requested is exempt from public access. 65 P.S. § 67.708(a)(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.”).

A preponderance of the evidence, means is, by a greater weight of the evidence. Commonwealth v. Brown, 567 Pa. 272, 284, 786 A.2d 961, 968 (2001). “A ‘preponderance of the evidence’ is defined as ‘the greater weight of the evidence ... evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other....’ Black’s Law Dictionary 1301 (9th ed. 2009).” Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 n.3 (Pa. Cmwlth. 2010); *See also* Commonwealth v. Williams, 532 Pa. 265, 284-286, 615 A.2d 726 (1992).

In this case, there is sufficient evidence to support the determination that the document requested, the police incident report, is a criminal investigative record that is exempt from disclosure. The RTKL provides that records of an agency relating to or resulting in a criminal investigation, such as investigative materials, notes, correspondence, videos, reports, and records, may be withheld as exempt. 65 P.S. § 67.708(b), titled, “Exceptions for public records”, provides in part as follows:

(b) Exceptions. -- Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

...

(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 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.

This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b)(relating to accident prevention investigations).

65 P.S. § 67.708(b).

18 Pa.C.S.A. § 9102 (relating to definitions) states in part: “ ‘**Police blotter.**’ A chronological listing of arrests, usually documented contemporaneous with the incident, which may include, but is not limited to, the name and address of the individual charged and the alleged offenses.” ... “ ‘**Investigative information.**’

Information 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.”

In Pennsylvania State Police v. Office of Open Records, 5 A.3d 473 (Pa. Cmwlth. 2010), the *en banc* Commonwealth Court found an incident report exempt from disclosure pursuant to 65 P.S. § 67.708(b)(16). The Court held that the incident report was not a public record because the incident report was not the equivalent of a police blotter under the RTKL and the Criminal History Records Information Act (“CHRIA”). The incident report contained notes of interviews with the alleged victims / perpetrators, as well as another witness. This information contained within the incident report was assembled as a result of an investigation into a criminal incident or an allegation of criminal wrongdoing. Consequently, the incident report was not a public record subject to disclosure. The Court also held that a victim’s name and address is “victim information,” *i.e.* information about the victim, and that the unwanted disclosure of a victim’s name may prove to be a second victimization, whether due to retaliation, the fear of retaliation, stigma, embarrassment, or other reasons.

In this case, there is sufficient evidence to support the determination that the document requested, the police incident report, is a criminal investigative record that is exempt from disclosure. Pursuant to 65 P.S. § 67.708(b)(16), records of an agency are exempt from access by a requester if the records relate to or result in a criminal investigation. On September 6, 2013, Matthew D. Dupee, Esquire, submitted a letter

brief on behalf of Requester requesting that police incident report be review *in camera* by the Appeals Officer and redacted:

As indicated in our August 22, 2013 appeal, we request a copy of a police report which is held by Williston Township Police Department regarding a July 30, 2012 incident occurring at 15 Duffryn Avenue, Malvern, PA 19355. Our request for information was partially denied and partially approved in that the Williston Township Police Department provided us with a copy of the police blotter but refused to provide us with a copy of the entire report without a subpoena or court order. The denied records/information are in the possession, custody or control of the Willistown Police Department Williston Township Police Department based its actions upon Section 708(b) of the P A Right to Know Law. We believe that all or part of the records / information / documents are not subject to the exemptions cited by the Williston Township Police Department and are subject to public access.

Although the PA Right to Know Law Section 708 (b) does permit the police to withhold from public request reports regarding criminal investigations, we would respectfully request that the Hearing Officer review the requested records privately (*in camera* inspection) to determine whether we are entitled to information / documentation as to the names and addresses of the parties and witnesses and statements or perhaps a redacted copy of the report. According to the Respondent's September 4, 2003 Attestation of Record, the Willistown Township Police Department is holding a police incident report. We believe information regarding the names and addresses of the parties and witnesses and witness statements are not exempt from public access under the PA Right to Know Law. Williston Township Police Department's Attestation of Record does not make any dire claims under Right to Know Section 708(b) 16 such as the parties / witnesses are confidential, have safety issues, hinder ability to secure arrest / prosecution / conviction or concerns over ability to locate etc.

Williston Township Police Department claims that the entire police incident report is exempt from public access and rejects an *in camera* review by the Hearing Officer and bases its position upon an Affidavit of Police Chief John M. Narcise. Under the agency's theory, we, as the Requester lacking access to the contested

document, would have no practical mechanism for challenging the Affidavit and the Respondent's resulting legal arguments, thereby undermining the process for adjudicating these disputes. Williston Township Police Department's interpretation of the scope of the right to public access may be misguided but practically could not be contested under the procedures it proposes. Furthermore, a general policy of merely permitting a blanket denial from public access of a police incident report without an in camera review and possibility of access to the police incident report with redaction by the Hearing Officer may encourage an agency (police department) to place information subject to public access into a document the agency believes is protected from public access (police incident report), thereby undermining the purpose of the Pennsylvania Right to Know Law.

September 6, 2013 Letter of Matthew D. Dupee, Esquire, at 2.

Where a record falls within an exemption under 67.708(b), it is not a public record as defined by the RTKL, and an agency is not required to redact the record. 65

P.S. § 67.706, titled, "Redaction", provides as follows:

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9. [65 P.S. § 67.901 *et seq.*]

65 P.S. § 67.706.

In Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540 (Pa. Cmwlth. 2012), the Commonwealth Court stated in part:

Petitioner's argument that the Department was required to produce the requested records subject to redaction of the exempt information is without merit. Section 706 provides that if an agency determines that a public record contains information that is both subject to disclosure and exempt from the disclosure, the agency shall grant access and redact from the record the information which is subject to disclosure. Pursuant to Section 706, the redaction requirement only applies to records that are determined to be "public records." A "public record" is defined in part as "a record, including a financial record, of a Commonwealth ... agency that: (1) is not exempt under section 708." Section 102, 65 P.S. § 67.102 (emphasis added). Thus, a record that falls within one of the exemptions set forth in Section 708 does not constitute a "public record." Dept. of Health v. Office of Open Records, 4 A.3d 803 (Pa. Cmwlth. 2010).

Saunders at 543.

In Heavens v. Pennsylvania Department of Environmental Protection, 65 A.3d 1069 (Pa. Cmwlth. 2013), the Commonwealth Court stated in part:

Furthermore, under the RTKL, records that are exempt under Section 708 or privileged are not considered public records and are therefore not subject to the redaction requirement contained in Section 706, which applies only to records that are public and contain information that is not subject to access. 65 P.S. § 67.706; Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540, 543 (Pa. Cmwlth. 2012).

Heavens at 1077.

Attorney Dupee, in his letter brief on behalf of Requester, also indicated that the Requester had a compelling need for the police incident report and there is no other source for this information:

As you know, the undersigned has been retained to represent Steven Burges in connection with an incident at 15 Duffryn Avenue, Malvern, PA 19355 occurring on July 30, 2012. It is our intention to use the requested information to pursue a civil action involving a verbal altercation which my client was assaulted, broke his femur bone in two places and was hospitalized for a significant period of time. Access to the requested records, including party and witness names addresses and statements, held by Williston Township Police Department would allow us to evaluate our civil claim. The information requested regards a one-time incident without charges being filed. We do not believe that this is an ongoing police investigation. We have no other source for this information. Without access to the requested records, Mr. Burgess's ability to pursue a civil action would be prejudiced.

September 6, 2013 Letter of Matthew D. Dupee, Esquire, at 1.

In DiMartino v. Pennsylvania State Police, 2011 WL 10841570 (Pa. Cmwlth. 2011),

the Commonwealth Court, in a memorandum opinion,¹ stated in part:

As a final point, we note that, the requester's status as representative of Decedent's family has no bearing on whether the requested records are accessible through a RTKL request. We agree with the OOR that the RTKL must be construed without regard to the requester's identity. *See, e.g.*, Section 301(b) of the RTKL, 65 P.S. § 67.301(b) (stating that an agency "may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law"); Weaver v. Dep't of Corr., 702 A.2d 370 (Pa. Cmwlth. 1997) (under the former Right-to-Know Act, the right to examine a public record is not based on whether the person requesting the disclosure is affected by the records or if her motives are pure in seeking them, but whether any person's rights are fixed); Furin v. Pittsburgh Sch. Dist., OOR Dkt. No. AP 2010-0181, 2010 PA OORD LEXIS 212 (Pa. OOR 2010) (finding records exempt under Section 708(b) regardless of status of person requesting them); Wheelock v. Dep't of Corr., OOR Dkt. No. AP 2009-0997, 2009 PA OORD LEXIS 725 (Pa. OOR 2009) (stating the only information available under the RTKL is a

¹ DiMartino v. Pennsylvania State Police, 2011 WL 10841570 (Pa. Cmwlth. 2011) is an unreported panel decision of the Commonwealth Court. As such, it may be cited for its persuasive value, but not as binding precedent. *See* Section 414 of the Commonwealth Court's Internal Operating Procedures.

“public record” available to all citizens regardless of personal status or stake in requested information).

DiMartino at *6 (footnote omitted).

CONCLUSION

For the foregoing reasons, the appeal is **DENIED**, and the Respondent is not required to take any further action. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may petition for review, to the Chester County Court of Common Pleas, pursuant to 65 P.S. § 67.1302(a). All parties must be served with a copy of the petition for review. The Chester County District Attorney’s Office shall also be served with a copy of the petition for review, pursuant to 65 P.S. § 67.1303(a), for the purpose of transmitting the record to the reviewing court. See East Stroudsburg University Foundation v. Office of Open Records, 995 A.2d 496, 507 (Pa. Cmwlth. 2010).

FINAL DETERMINATION ISSUED AND MAILED ON: September 18, 2013

APPEALS OFFICER:

Nicholas J. Casenta, Jr., Esquire
Attorney I.D. No. 43844
Chief Deputy District Attorney
District Attorney’s Office
Chester County Justice Center
201 West Market Street, P.O. Box 2746
West Chester, PA 19380-0989
(610) 344-6801

FINAL DETERMINATION MAILED AND EMAILED TO:

Steven Burgess; c/o

Matthew Dupee, Esquire

P.O. Box 76

Gwynedd Valley, PA 19437-0768

PHONE: (215) 699-6363

FAX: (215) 699-6003 FAX

EMAIL: mdupee6@comcast.net

Willistown Police Department; c/o

Robert T. McClintock, Esquire

24 E. Market Street, PO Box 565

West Chester, PA 19381

PHONE: (610) 430-8000

FAX: (610) 692-6210

EMAIL: rmcclintock@lambmcerlane.com

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Attorney for Requester
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Attorney for Requester