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County of Allegheny

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Ms. Anne Gentry
2315 Old Washington Road
Pittsburgh, PA 15241

July 22, 2021

Honorable Jonathan E. Wharton
Chief of Police
Open Records Officer
Upper St. Clair Police Department
1820 McLaughlin Run Road
Upper St. Clair, PA 15241-2332

In re: Right to Know Law Appeal

Dear Ms. Gentry and Chief Wharton:

I am the Open Records Appeals officer for Allegheny County. On July 21, 2021, I received an appeal from the decision of the Upper St. Clair Police Department in regards to a request for documents filed by Ms. Gentry. Requester had sought the following: All records relating to property damage at 2315 Old Washington Road (vegetation). (See Right to Know Request Form).

In a letter dated July 8, 2021 Chief Wharton responded as follows:

On July 1, 2021, you requested a copy of the police reports for “all records relating to property damage at 2315 Old Washington Road

(vegetation)". These include CCN #19-03913 an incident reported on July 16, 2019 at 1153 hrs., CCN #20-02804 an incident reported in July 16, 2020 at 1642 hours, CCN #20-03776 an incident reported on September 23, 2020 at 1231 hours, CCN #20-03889 an incident reported on September 30, 2020 at 1313 hours, CCN #21-02610 [an] incident reported on June 26, 2021 at 1155 hours to the Upper St. Clair Police Department. Your request is denied as permitted by Section 708 of the Pennsylvania Right To Know Act.

The Township of Upper St. Clair Police Department has denied your request because this record is exempt from disclosure pursuant to Section 708(b)(16) of the Right To Know Law. This section exempts from access any record that relates to or results in a criminal investigation, including investigative materials, notes, and reports.

(See Letter dated July 8, 2021). It is further noted that on the Right To Know Request Form there is a handwritten notation: "Denied-"Investigative" now that the Dept. of Agric is involved."

In her appeal, requester asserts,

During police visits, officers repeatedly informed me and my husband, John Gentry, that we could obtain copies of these police reports if we needed them to pursue legal action against the vandals. We are now considering such legal action and believe we need these police reports to substantiate our complaint.

On July 8, 2021, the PA Department of Agriculture took our testimony as part of their investigation of this vandalism, which involves improper use of pesticides (herbicides). Our potential legal action through the magistrate is separate from the Department of Agriculture's investigation, since ours involves vandalism and damage to our property, while theirs involves improper use of herbicides.

See Appeal Request dated July 12, 2021.

As the parties know, my only authority extends to determining whether a document is exempt from disclosure due to the criminal investigation exemption. 65 P.S. §67.503(d)(2).

The Right to Know Law exempts certain materials from disclosure and in regards to those exemptions, 65 P.S. § 67.708(b)(16) provides as follows:

- (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).

I have no hesitancy in finding that the reports were initially generated as the result of a potential criminal investigation. Ms. Gentry's assertion that officers assured her and her husband that they could obtain the reports causes some pause in light of the Pennsylvania Supreme Court's decision in *Commonwealth v. Cosby*, No. 39 MAP 2020, WL 2674380 (Pa. June 30, 2021) but only because there appears

to be some detrimental reliance by Ms. Gentry and her husband. I note this fact in case further litigation proceeds.

What concerns me is that an alleged victim, who requested a police response, is being denied these records. If anyone not directly connected with the property had requested them, I would have no hesitancy in denying access. But a victim, especially in Pennsylvania where privacy interests of citizens are given greater protection under the state constitution than the federal constitution, should be able to obtain police reports documenting an incident that caused them to seek police assistance. I have been performing this function of Appeals officer since the Right To Know Law became law, and I have seen countless victims try to get reports of criminal victimization for insurance needs, only to be turned down because of 708. I have seen mothers and fathers trying to get copies of police reports detailing investigations into the suicide of a daughter or son at an area college, and not be able to get reports and satisfy the need for closure, because the reports were generated as the result of a police investigation. In refusing to disclose, those Agencies were following the law as it is written. And I believe that Chief Wharton is now following the law as written. But the law is not fair when applied to victims. I have come to the conclusion that the law is unconstitutional when applied to a victim who made a report to a police agency and is now being denied access to that report.

If I were a Judge of the Court of Common Pleas, I would rule that Ms. Gentry should be given access because the law, as applied to her, constitutes a due process violation. I am not a judge, however. I respect the response of the Agency in this matter but I do encourage Ms. Gentry to file an appeal and to raise the unconstitutionality of the law as applied to her. Victims who seek police assistance should be able to obtain documentation of that encounter for insurance purposes, for litigation purposes, and just because we live in a free society where victims have the right to retain an official copy of their interaction with a law enforcement agency.

As a result, I must decline the request and affirm denial of access. 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. My decision is based on my limited authority.

Very truly yours,

Michael W. Streily
Deputy District Attorney
Open Records Appeals Officer