

STEPHEN A. ZAPPALA, JR.
DISTRICT ATTORNEY



OFFICE OF THE DISTRICT ATTORNEY

County of Allegheny

436 GRANT STREET, 401 COURTHOUSE ♦ PITTSBURGH, PENNSYLVANIA 15219-2489
PHONE (412) 350-4377 ♦ FAX (412) 350-3312

Sean Hamill
Pittsburgh Post-Gazette
358 North Shore Drive
Pittsburgh, PA 15212

January 18, 2019

Celia B. Liss, Esquire
Open-Records Officer
City of Pittsburgh
Department of Open-Records
313 City County Building
414 Grant Street
Pittsburgh, PA 15219

In re: Open-Records Appeal; Anthony J. Cipolla

Dear Mr. Hamill and Open-Records Officer Liss:

I am the Open-Records Appeals Officer for the District Attorney of Allegheny County. On January 14, 2019, I received an appeal filed by the requester, Mr. Hamill, from the decision of the City of Pittsburgh denying his request for the following documents related to the arrest of Anthony J. Cipolla on July 25, 1978:

1. copies of any arrest records, investigatory notes either from police or prosecutors, as well as any warrant documents related to his case.
2. copies of any ledgers, schedules, memos, notes, letters or other documents indicating who would have been the assistant district attorney who was assigned to handle his case at arraignment or other court hearing on August 28, 1978, in then-Magistrate Judge Stephen Laffey's courtroom in Pittsburgh.

See Mr. Hamill's letter to Ms. Liss dated November 28, 2018.

65 P.S. §67.901 states in relevant part: “The time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency. If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied.” The Open-Records Officer did not respond to the request within five business days of receipt of the request nor did that Officer seek an extension under §67.902. Further, the Open-Records Officer did not treat her lack of a response as a “deemed denied” because the Open-Records Officer issued a written denial dated January 3, 2019, stating:

Upon investigation, I have determined that the records you have requested are exempt from production under RTKL and your request is denied in its entirety. RTKL states that investigative reports and other records associated with a criminal investigation are not subject to release. See 65 P.S. §§67.708(b)(16)(ii). Further, to the extent that this request is protected under the Criminal History Record Information Act, 18 PA C.S. 9101 *et seq.*, the City is prohibited from forwarding this information to you.

To the extent anything requested does not exist, the RTKL instructs that the City is not required to create records which do not currently exist. See 65 P.S. §67.705. Additionally, nothing in the RTKL shall be construed to modify, rescind or supersede any of the City’s record retention policies. See 65 P.S. §67.507.

See Ms. Liss’ letter to Mr. Hamill dated January 3, 2019.

The Open-Records Officer could have taken the position that the City’s failure to respond constituted a “deemed denied.” See §67.901. She did not take that position. Given the City’s response to requester, I find that this appeal is properly before me.

Under §§67.1101(b)(1) I must decide this appeal by February 13, 2019. §67.1102(a)(1) permits an appeals officer to “[s]et a schedule for the requester and the open-records officer to submit documents in support of their positions.”

Pursuant to §67.901, the City of Pittsburgh was required to make a “good faith effort” to determine if it has possession of the items. The statement of the Open-Records Officer that “to the extent anything requested does not exist,” causes doubt as to whether the City actually knows whether it possesses the requested items. That doubt is further strengthened by the unwillingness of the City to address each requested item individually and provide a specific reason as to why the item is exempt as criminal investigative material. The duty of the City was to determine exactly what it possessed and whether each item is exempt or not exempt. As noted by the Court in *Department of Labor and Industry v. Earley*, 126 A.3d 355, 357 (Pa. Cmwlth. 2015):

Under the RTKL, an agency bears the burden of demonstrating that it has reasonably searched its records to establish that a record does not exist. An affidavit may serve as sufficient evidence of the non-existence of requested records.

Reading the City’s response, I don’t know if it has any letter or note indicating the identity of the prosecutor. If it has such documents, I don’t understand how any document which

merely lists the name of the prosecutor who attended the arraignment or conducted the preliminary hearing on August 28, 1978, is exempt from disclosure due to §67.708(b)(16)(ii):

(16) A record of an agency relating to or resulting in a criminal investigation, including:

* * * *

(ii) Investigative materials, notes, correspondence, videos and reports.

If the City has “schedules” showing which police officers attended hearings in the case, “ledgers” showing which officers were paid for attending a preliminary hearing or other court proceeding in the case, or “letters” that note the identities of the officers or prosecutor involved in the arrest, prosecution, and ultimate dismissal of charges, it is hard to understand why any criminal investigative material can’t be redacted from those documents pursuant to §67.706. Right now, it is simply not known what documents the City possesses and why each of those documents is exempt from disclosure.

Pursuant to §67.1102 I direct the City to submit an affidavit in which it lists all the documents in its possession that are either related to the 1978 investigation/prosecution of Anthony J. Cipolla or encompassed within the requester’s demand. The City is directed to inform this appeals officer of the documents that were examined by its Open-Records Officer prior to issuance of its denial on January 3, 2019. For each item in its possession, the City is directed to submit reasons why that item is exempt under §67.708(b)(16)(ii). The City must submit its response to this officer by February 8, 2019. The City is directed to serve requester with a true and accurate copy of any response it submits to this officer. Failure of the City to respond in a timely and complete fashion will result in the grant of requester’s appeal.

Very truly yours,

Michael W. Streily
Deputy District Attorney
Open-Records Appeals Officer