

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

Daniel Wemhoff
4600 S, Four Mile Run
#831
Arlington, Virginia 22204

May 23, 2018

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

In re: Open Records Appeal

Dear Mr. Wemhoff and Attorney McCarthy:

I am the Open Records Appeals Officer for the District Attorney of Allegheny County. On May 18, 2018, I received from Mr. Wemhoff, an appeal of a denial of a Right to Know Request. Mr. Wemhoff had requested access to nine (9) items (See letters of the parties dated July 31, 2017 and April 17, 2018). Mr. McCarthy stated that the District Attorney did not possess items 3, 6, and 7. As to the remaining requested documents, Mr. McCarthy invoked the criminal investigative exemption. As you both know, I only have jurisdiction to decide whether Mr. McCarthy properly invoked exemptions under the criminal investigation exemption.

65 P.S. §67.708 (a)(16) exempts from disclosure:

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

* * * *

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

* * * *

(v) Victim information, including any information made confidential by law or court order.

* * * *

(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.

“Thus, if a record on its face, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(ii).” *Barros v. Martis*, 92 A.3d 1243, 1250 (Pa. Cmwlth. 2014). “[N]o matter what is contained in an incident report, incident reports are considered investigative materials and are covered by that exemption.” *Hunsicker v. Pennsylvania State Police*, 93 A.3d 911, 913 (Pa. Cmwlth. 2014). “[U]nder the investigative exemption, the entire investigative report falls within the investigative exemption.” *Id.*, at 913. 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 an 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 reviewing the request and the above case law, I must agree that police reports, black box recordings from police officers, a drone report from the scene of the incident, recordings of police communications, and all data involving the “hot pursuit” are covered by the criminal investigative exemption. With all respect, the Requester is simply incorrect in asserting that a closed investigation loses exemption status.

As a result, I must decline the request for disclosure and affirm the decision of the Open Records Officer. Please be advised that pursuant to 65 P.S. §67.1302 parties to this action 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