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September 19, 2023

Mr. James Herb
Herb & Winters Law
464 Perry Highway
Pittsburgh, PA 15229-1819

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

In re: OOR Docket No. AP 2023-1993

Dear Mr. Herb and Ms. Liss,

As you are aware from my previous correspondence, I am the Open Records Appeals Officer for Allegheny County. On August 25, 2023, I received a transferred appeal from the Office of Open Records. Requester had sought a copy of a report relating to the fire investigation of a residential property located at 2812 Sherlock Street, Pittsburgh PA:

“the fire was investigated by Detective Gallman of the Arson Department and that he issued a report dated February 3, 2023, that the fire was accidental in nature.”

Ms. Liss granted the request in part providing requester a “2.0 Pittsburgh Bureau of Police Offense/Incident Report” and withheld all other police records on the basis of her determination that they are investigative in nature, and therefore protected under 65 P.S. § 67.708(B)(16)(ii).

On August 30, 2023, I wrote to the parties and invited them to provide affidavits in support of their arguments. Each has responded and provided an affidavit supporting their positions, and I am now prepared to make a final decision.

Section 67.708(b)(16), of Title 65, exempts the following from disclosure:

- (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.

Moreover, 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.Cmwth. 2010); *Sherry v. Radnor Twp. School District*, 20 A.3d 515 (Pa.Cmwth. 2011).

Mr. Herb states in his appeal that this was not a criminal investigation and that no criminal charges had been filed. See Letter of Mr. Herb filed August 16, 2023. In her affidavit, Lt. Julie Stoops, explains that "a detective from the Arson Department investigated a fire that took place on January 31, 2023 at 2818 Sherlock Street" and that the Pittsburgh Bureau of Police file included a "Summary Incident and Supplemental Reports, and arson report".

Affidavit of Lt. Julie Stoops at ¶¶ 7 and 8. In addition she explains that “[e]ach investigation that is undertaken by the Bureau starts as a criminal investigation whether charges are ultimately filed or not.” Id. at ¶ 9.

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). I have no power in equity and must apply the law as written and elaborated on by the appellate courts. I mention that because I believe that the Agency could make an exception to the general rule in this case, given that no crime has been alleged or prosecution pursued. In addition, I put no credence in Lt. Stoops’ statement that disclosure of the report in this case would compromise investigative techniques or endanger witnesses. While I agree that is a valid concern in criminal investigations generally, I fail to see how that is relevant given the facts of this case where the fire was found not to be suspicious, and the homeowner is seeking information to allow her to decide whether a civil suit against a third party is warranted.

As a result, I must deny the request and affirm denial of access to the fire report. 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,

/s/ Kevin F. McCarthy

Kevin F. McCarthy
Assistant District Attorney
Open Records Appeals Officer