

County of Centre



COMMONWEALTH OF PENNSYLVANIA OFFICE OF THE DISTRICT ATTORNEY

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June 19, 2019

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Derek J. Sherwood
8528 Hornet's Nest Road
Emmitsburg, MD 21727

Re: **Derek J. Sherwood v. State College Police Department**
Appeal of Denial
Final Determination

Dear Mr. Sherwood:

On March 21, 2019, you filed a Right To Know Law (RTKL) request with the State College Police Department (SCPD). You requested "any information on the murder of Dana Bailey on March 4th-5th, 1987." On March 22, 2019, SCPD responded by denying your request citing Section 708(b), Exceptions for Public Records, specifically sections (b)(16)(i) and (b)(16)(ii), stating that the records that are withheld and not subject to access because they are the actual details in a criminal investigative report. You are appealing the denial of your request by SCPD.

Section 503 (d)(2) of the RTKL provides that 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. I have been designated by District Attorney Bernie Cantorna to review your appeal and determine whether the records requested are a criminal investigative record and exempt from disclosure pursuant to Section 708(b).

Discussion

As the Appeals Officer in this matter, I must review the request and the requested records and determine if those records are criminal investigative records. The agency receiving the request bears the burden of proving the record is exempt by a preponderance of the evidence. See Section 708(a). The preponderance of the

evidence standard, which is the lowest evidentiary standard, is tantamount to a more likely than not inquiry. An agency can meet its burden of proof through affidavits of its Open Records Officer. If a record, on its face, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(i) and (ii). Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed.

As part of the appeal process, SCPD Open Records Officer John F. Gardner submitted an Affidavit wherein he certified that he identified the requested record as a police investigative report. He determined that the report documents the results or actions taken by responding and investigating officers through the course of a criminal investigation into a homicide. Gardner certifies that the report includes findings, actions, observations, conclusions, and investigative material obtained throughout the investigation. He notes that the report is a result of a systematic inquiry detailing an investigation that was conducted as part of SCPD's official duties. Gardner certified that the requested records are criminal investigative reports on the murder of Dana Bailey, and that these documents qualify for protection under Section 708(b)(16).

As the Appeals Officer, I conducted an *in camera* inspection of the record. Upon my review, I, too, determined that the report documents the results or actions taken by responding and investigating officers through the course of a criminal investigation into a homicide. I am satisfied that SCPD met its burden of proving that the requested records are exempt from disclosure under Section 708(b)(16)(i) and (ii).

Requestor's argument that the entire record should be made public because a crime scene photo has already been released is meritless. There is nothing in the RTKL that supports this argument. There are times when it is in the public interest to release records which an agency could withhold under the RTKL. The law recognizes this and gives agencies the discretion to do so. Section 506 of the RTKL makes it clear that an agency may exercise its discretion to make any otherwise exempt record accessible for inspection and copying. This type of release is discretionary and in no way imposes an obligation on the agency to release of the entire record.

As support for his position, Requestor submitted the Final Determination filed in the matter of *Derek Sherwood, Requestor v. Lancaster County District Attorney's Office, Respondent*; Docket No.: AP 2018-0238. This opinion is not persuasive because the agency in question failed to prove that the relevant record could be related to a criminal investigation. In the instant matter, the record is clearly the criminal investigative records of a homicide investigation.

Findings

1. The State College Police Department (SCPD) is a "local agency" within Centre County, Pennsylvania. A local agency shall provide public records in accordance with the Right To Know Law (RTKL). See Section 302.
2. Derek Sherwood (Requester) is a legal resident of the United States who may request a record pursuant to the RTKL. See Section 102.
3. SCPD 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. See Section 302(b).
4. Requestor filed a RTKL request with SCPD on March 21, 2019 requesting "any information on the murder of Dana Bailey on March 4th-5th, 1987." See Attachment.
5. On March 22, 2019, SCPD Right to Know Officer Chief F. Gardner responded to the request. Gardner located the requested record and denied the request by stating that the records are criminal investigative records of a homicide investigation and are exempt from disclosure pursuant to RTKL Sections 708(b)(16(i) and 708(b)(16(ii)). See Attachment
6. On March 28, 2019, Requester filed an appeal of the denial with Centre County District Attorney Bernard Cantorna stating that he believed the denial to be incorrect. See Attachment.
7. District Attorney Cantorna designated First Assistant District Attorney Mark S. Smith to review the appeal and make a Final Determination. See Section 503(d)(2).
8. Requestor was invited to submit additional information in support of his position. Requestor submitted a Final Determination filed in the matter of *Derek Sherwood, Requestor v. Lancaster County District Attorney's Office, Respondent*; Docket No.:AP 2018-0238 See Attachment.
9. SCPD was invited to submit additional information in support of its position. SCPD submitted a sworn Affidavit prepared by Chief John F. Gardner, SCPD Open Records Officer. See Attachment.
10. Within the Affidavit, Gardner certifies that he identified the requested record as a police investigative report. He determined and certified that the report documents the results or actions taken by responding and investigating officers through the course of a criminal investigation- a homicide, which includes findings, actions, observations, conclusions, and investigative material obtained throughout the investigation. The report is a result of a systematic inquiry detailing an investigation that was conducted as part of SCPD's official duties.

11. Within the Affidavit, Gardner certifies that the incident report and its components are not public records because they were created, received and retained pursuant to a SCPD criminal homicide investigation and qualify for protection under Section 708(b)(16).
12. As the Appeals Officer In this matter, I conducted an *in camera* inspection of the SCPD criminal investigative reports on the murder of Dana Bailey on March 4th-5th, 1987. The report does in fact contain the detailed examination of the complaint of criminal activity, summaries of interviews, witness statements, notations of findings, etc.. The record contains information assembled as a result of the performance of an inquiry into a criminal incident or an allegation of wrongdoing.

Conclusions of Law

1. The RTKL requires local agencies to provide public records unless the record is exempt under section 708; is protected by a privilege; or is exempt under any other Federal or State law or regulation or judicial order or decree.
2. The record Requestor requested fits squarely within the exemption set forth in RTKL Sections 708 (b)(16)(i) and (ii). These records are exempt from access by a requester.

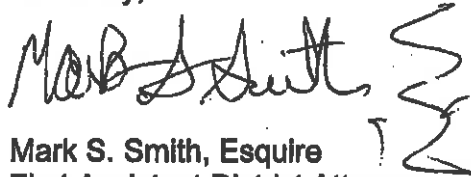
Therefore, following a review of the requested police reports, I affirm the denial by SCPD. The reports requested are a typical criminal investigative record exempt from public disclosure.

Appeal

Pursuant to section 1302 of the RTKL, you may file a petition for review with the Common Pleas Court of Centre County, Pennsylvania. This must be done within 30 days of the mailing date of this letter.

Date of Final Determination: June 19, 2019

Sincerely,


Mark S. Smith, Esquire
First Assistant District Attorney
Right to Know Appeals Officer

MSS/mss
Attachments