

September 10, 2024

Via Online Appeal Portal
Pennsylvania Office of Open Records
333 Market Street, 16th Street
Harrisburg, PA 17101-2234

**Re: America First Legal Foundation & Community College of Allegheny
County, Right to Know Request Appeal**

Dear Sir/Madam:

Pursuant to 65 P.S. § 67.1101 (the “RTKL”), requestor, America First Legal Foundation (“AFL”), submits this appeal of the August 19, 2024, denial of its right to know request (the “Request”) submitted by the Community College of Allegheny County (“CCAC”).

I. Background

On July 17, 2024, AFL submitted a request for records under the RTKL to the CCAC seeking the following records:

1. All student files, records, or documents for Thomas Michael Crooks.
2. All records and communication related to Thomas Michael Crooks.
3. All disciplinary records or complaint concerning Thomas Michael Crooks.
4. All communication, emails, text messages, chat sessions, or other forms of written or electronic communication containing the name “Thomas Michael Crooks”.

A copy of the Request is submitted with this appeal.

On July 17, 2024, CCAC issued an “interim response” to the Request whereby it invoked a thirty-day extension to respond to the Request under 65 P.S. § 67.902(b)(2). A copy of the interim response is submitted with this appeal. On August 19, 2024, CCAC issued a final response where it denied the Request in full. A copy of the final response is submitted with this appeal. CCAC denied the Request because the records requested “relate to an ongoing criminal investigation” and are, therefore, exempt und 65 P.S. 67.708(b)(16). Specifically, CCAC indicated that the records requested fell within the scope of a grand jury subpoena issued by the United States District Court for the Western District of Pennsylvania. CCAC, claims the U.S. Attorney’s Office confirmed that these records relate to an ongoing criminal investigation. The CCAC also denied the Request because it sought “academic transcripts and examination materials” which are exempt under 65 P.S. § 67.708(b)(15)(i)-(ii). *Id.*

II. Argument

Under the RTKL and prevailing judicial interpretations, the OOR should grant AFL's appeal and reverse the CCAC’s denial of the Request. The crux of this argument hinges on the stringent burden of proof the RTKL places on agencies to justify exemptions from disclosure, a principle that has been consistently upheld in case law.

Failure to Demonstrate Exemption

The CCAC has not carried its burden in demonstrating that the documents requested are exempt from disclosure under either Section 708(b)(16) or Section 708(b)(15) of the RTKL. The RTKL’s essence, aimed at fostering transparency and ensuring public access to government records, thereby enhancing governmental accountability, mandates a presumption of openness. This presumption is crucial for ensuring transparency and enabling public scrutiny of government actions.

Judicial interpretations of the RTKL have consistently emphasized its purpose of maximizing public access. The objective of the RTKL is to empower citizens by affording them access to information concerning the activities of their government.” *McGowan v. Pennsylvania Dep’t of Env’t Prot.*, 103 A.3d 374, 380 (Pa. Commw. Ct.

2014) (citation and internal quotations omitted). The RTKL, as remedial legislation, is intended to facilitate access to government information, necessitating a narrow construction of any exemptions from disclosure. *Id.* Agencies must prove, by a preponderance of the evidence, that a record is protected under one of the RTKL's enumerated exceptions. *Id.* (citing 65 P.S. § 67.708(a)(1); *Department of Transportation v. Drack*, 42 A.3d 355, 364 (Pa. Commw. Ct. 2012)).

The CCAC's mere assertion that the records pertain to an ongoing criminal investigation or are academic in nature does not meet this stringent standard. Such a generic denial, devoid of detailed explanations or evidence, fails to fulfill the required burden of proof, making it impossible for AFL to assess the applicability of the claimed exemptions.¹ Without a substantive basis for the denial, the AFL is prevented from effectively challenging the decision, undermining the RTKL's core purpose of promoting transparency and accountability in government operations. The blanket denials from CCAC fall short of the evidentiary standard required under the law.

Improper Blanket Denial Invoking Criminal Investigation

The CCAC's blanket denial of the Request invoking the criminal investigation exemption under Section 708(b)(16) of the RTKL, is also fundamentally flawed and legally insufficient. Section 708(b)(16) exempts records that "relate to or result in a criminal investigation." However, as interpreted by the Court in *Levy v. Senate of Pennsylvania*, 65 A.3d 361 (Pa. Commw. Ct. 2013), not all records tangentially related to an investigation are exempt. Only those records that directly pertain to the investigative process or its outcomes are covered by this exemption. See also *State Police v. Grove*, 161 A.3d 877 (Pa. 2017)) ("The mere fact that a record has some connection to a criminal proceeding, does not automatically exempt it under Section 708(b)(16) of the RTKL."). In fact, our courts have stated that the criminal

¹ See *Heavens v. Department of Environmental Protection*, 65 A.3d 1069, 1073 (Pa. Cmwlth. Ct. 2013) ("testimonial affidavits found to be relevant and credible may provide sufficient evidence in support of a claimed exemption."); *Office of Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. Ct. 2013) ("a generic determination or conclusory statements are not sufficient to justify the exemption of public records").

investigation exemption should be “construed narrowly in accordance with the statute’s remedial nature, and ‘in a manner that comports with the statute’s objective, which is to empower citizens by affording them access to information concerning the activities of their government.’” *Bentley v. Allegheny Cnty. Police Dep’t*, 258 A.3d 1163 (Pa. Commw. Ct. 2021) (quoting *Grove*, 161 A.3d at 892).

Specifically, in *Grove*, our Supreme Court underscored the principle that exemptions under the RTKL, including the police exemption, must be narrowly construed. The court emphasized that such exemptions should not be broadly applied to deny access to public records without a specific, demonstrable justification. This decision highlights the RTKL’s overarching goal of maximizing public access to government records, reinforcing the need for transparency and accountability by requiring a narrow interpretation of any exemptions claimed by agencies to withhold records.

Here, many of the records in the possession of CCAC were not created as part of a criminal investigation. They existed before any criminal act was committed by Crooks.

Furthermore, it strains credulity to assert that *every* record falls within the ambit of materials exempt from disclosure due to an ongoing criminal investigation. Such a sweeping application of Section 708(b)(16) without individualized assessment of each record’s relevance to an active investigation not only undermines the RTKL’s presumption in favor of access but also suggests a disregard for the law’s requirement that exemptions be narrowly construed. The CCAC’s complete denial, absent a detailed demonstration of how each requested record is exempt, suggests a lack of good faith and underscores AFL’s concern that the CCAC has not adequately met its burden of proof as mandated by the RTKL.

Requirement for Segregation and Redaction

While AFL acknowledges the possibility that some of the records it seeks could be protected under the criminal investigation exemption specified in Section 708(b)(16), the blanket denial issued by the CCAC for the entire request is not in

compliance with the law. The RTKL, particularly Section 67.706 requires a more discerning approach. Specifically, if a record contains both information that is accessible and information that is exempt from disclosure, the agency must segregate these components, providing access to the non-exempt information while either withholding or redacting the exempt portions. This requirement ensures that the public's right to access information is not unnecessarily restricted due to the presence of exempt information within the requested records. The statute clearly stipulates that an agency cannot deny access to the entire record if it is feasible to redact the exempt information, thus maintaining the integrity of the accessible information. Accordingly, the CACC's knee-jerk denial of AFL's records because some records requested might be covered by the Section 708(b)(16) exemption or because portions of records might be covered by the exemption is improper.

Crooks' privacy interest terminated upon his death.

Finally, any interest Crook had in the secrecy of his academic records was a personal interest that terminated upon his death.

III. Conclusion

The OOR should grant AFL's appeal and require the CCAC to comply with the RTKL by reassessing the request in accordance with the law's requirements for transparency, narrow construction of exemptions, and the segregation and redaction of exempt information from accessible records.

Respectfully,



Wally Zimolong, Esquire