

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1066 C.D. 2017

Pennsylvania State Police,

Petitioner

v.

American Civil Liberties Union of Pennsylvania,

Respondent

BRIEF OF PETITIONER

Appeal from the Final Determination of the Pennsylvania Office of Open Records

Docket No. AP 2017-0593

Dated, issued and mailed July 7, 2017

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over the appeal taken from the July 7, 2017 Final Determination of the Office of Open Records in the matter of *American Civil Liberties Union of Pennsylvania v. Pennsylvania State Police*, OOR Docket No. AP 2017-0593, pursuant to 65 P.S. § 67.1301(a) of the Right-to-Know Law and 42 Pa. C.S. § 763(a)(2) of the Judicial Code.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

The Commonwealth Court of Pennsylvania’s standard of review for Right-to-Know Law appeals from the Office of Open Records is *de novo*. *Bowling v. Office of Open Records*, 75 A.3d 453, 477 (Pa. 2013). Chapter 13 Courts “are the ultimate finders of fact and . . . are to conduct full de novo reviews of appeals from decisions made by RTKL appeals officers, allowing for the adoption of the appeals officer’s factual findings and legal conclusions when appropriate.” *Id.* at 474.

The Commonwealth Court’s scope of review is broad and plenary. *Id.* at 467-68. Although the statute explains that the record “shall consist of the request, the agency’s response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination,” this is not an exhaustive list of what the court may examine. *Id.* at 476 (citing 65 P.S. § 1303(b)). Chapter 13 courts may expand the record to carry out their statutory duties. *Id.* at 467-77.

STATEMENT OF QUESTIONS INVOLVED

- A. Did PSP provide sufficient evidence to prove that the redacted sections of PSP Administrative Regulation 6-9 are exempt from disclosure pursuant to Section 708(b)(2) of the Right-To-Know Law?

Answered in the negative below

Suggested Answer: Yes

- B. Did the OOR Appeals Officer err when, following an *in camera* review, he substituted his judgement for that of PSP's Director of the Bureau of Criminal Investigation, Major Burig, regarding the effects and harm of public disclosure of the redacted sections of PSP Administrative Regulation 6-9?

Answered in the negative below

Suggested Answer: Yes

- C. Did the OOR Appeals Officer apply an erroneous legal standard in determining that the redacted sections of PSP Administrative Regulation 6-9 are public records under the Right-To-Know Law?

Answered in the negative below

Suggested Answer: Yes

STATEMENT OF THE CASE

This appeal follows the Final Determination of the Office of Open Records (“OOR”), dated July 7, 2017, that granted Requester’s appeal based on the OOR’s determination that information redacted from the Pennsylvania State Police’s (“PSP”) Administrative Regulation 6-9 (“AR 6-9”) is not exempt from disclosure pursuant to Section 708(b)(2) of the RTKL. *American Civil Liberties Union of Pennsylvania v. Pennsylvania State Police*, OOR Dkt. No. AP 2017-0593.

On March 8, 2016, PSP received a Right-To-Know Law (“RTKL”) request from Matt Stroud, a criminal justice researcher at the American Civil Liberties Union of Pennsylvania (collectively “ACLU”). (Reproduced Record at 1a-2a). Stroud requested “a copy, in digital format, of Pennsylvania State Police’s complete, un-redacted AR 6-9 regulation, which establishes policies and procedures for PSP personnel when using social media monitoring software.” (R.R. 2a). In a letter dated March 13, 2017, PSP provided the ACLU with its Final Response, which granted in part and denied in part his request. (R.R. 3a-4a). PSP advised the ACLU that it was providing AR 6-9 Real-Time Open-Source-Based Investigation and Research, with non-public information redacted from the requested record. (R.R. 3a-4a). PSP further advised the ACLU that the redacted information is exempt from disclosure pursuant to Section 708(b)(2) of the RTKL as a record “maintained by an agency in connection with the military, homeland security, national defense, law enforcement

or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority.” (R.R. 3a-4a). In addition to the letter, PSP also provided Requester with a verification signed by Deputy Agency Open Records Officer Kim Grant attesting that the responsive records are exempt from disclosure. (R.R. 5a-6a). Following receipt of PSP’s Final Response, the ACLU filed an appeal with the OOR on April 3, 2017. (R.R. 16a-21a).

On April 21, 2017, PSP submitted a letter brief and an affidavit from PSP’s Director of the Bureau of Criminal Investigation, Major Douglas J. Burig, and, based on the Affidavit, argued that the records are exempt from disclosure. (R.R. 28a-30a). Major Burig attested that “there is a reasonable likelihood that if any of the redacted information were to be disclosed it would threaten the public protection activity of PSP conducting criminal investigations and other valid law enforcement activities using open source methods.” (R.R. 33a). On May 5, 2017, Requester submitted a reply brief along with policies from other law enforcement agencies. (R.R. 35a-72a). On May 10, 2017, PSP filed a sur-reply, arguing that it had met its burden and proved that the responsive record is exempt from disclosure pursuant to the public safety exception. (R.R. 73a-74a). On May 23, 2017, the OOR issued an Order requiring PSP to produce the responsive record for *in camera* inspection, with which PSP

complied. (R.R. 78a-79a). The OOR issued a Final Determination (by Jordan C. Davis, Esq.) on July 7, 2017, whereby Requester's appeal was granted, and PSP was ordered to provide the Requester with unredacted copies of all responsive records within thirty days. On August 4, 2017, PSP filed its petition for review with this Honorable Court, requesting that the Court review the OOR's determination that the responsive report is not exempt from disclosure pursuant to Section 708(b)(2) of the RTKL.

SUMMARY OF ARGUMENT

Under the Right-To-Know Law, 65 P.S. § 67.101 *et seq.*, if a record, or portions of a record, meets an exception found in Section 708 of the law, that record is not a public record and does not have to be disclosed to the Requester. 65 P.S. § 67.305(a); *Department of Health v. Office of Open Records*, 4 A.3d 803, 815-816 (Pa. Cmwlth. 2010). Furthermore, the law places the burden on the agency to prove that a requested record meets one of the exceptions. 65 P.S. § 67.708(a)(1). Here, PSP provided sufficient evidence to sustain its burden that portions of AR 6-9 are exempt from disclosure pursuant to the public safety exception found in Section 708(b)(2) of the RTKL. PSP submitted an affidavit from its director of the Bureau of Criminal Investigation, Major Douglas J. Burig, explaining how the public protection activity of conducting online investigations could be harmed if the contents of the redacted sections were made public. However, the OOR's Appeals Officer, after receiving this affidavit, felt it necessary to conduct an *in camera* review of AR 6-9. As is evident from its in Final Determination, and further explained below, the Appeals Officer used the *in camera* review to improperly substitute his own judgment regarding the effect that public release of the regulation would have on PSP investigations. This was error and the Determination should be reversed.

ARGUMENT

I. PSP PROVIDED SUFFICIENT EVIDENCE DEMONSTRATING THAT PENNSYLVANIA STATE POLICE ADMINISTRATIVE REGULATION 6-9 IS EXEMPT FROM DISCLOSURE PURSUANT TO SECTION 708(b)(2) OF THE RTKL.

Where a Commonwealth agency asserts that a requested record is exempt from public access under one of the exceptions listed in Section 708(b) of the RTKL, the agency has the burden of proving by a preponderance of evidence that the exception asserted applies. 65 P.S. § 67.708 (a)(1); *Heavens v. Pennsylvania Dept. of Environmental Protection*, 65 A.3d 1069 (Pa. Cmwlth. 2013). The preponderance of evidence standard only requires “such proof as leads the fact-finder . . . to find that the existence of a contested fact is more probable than its non-existence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Cmwlth. 2011). It is also the lowest evidentiary standard, which is akin to “a more likely than not review.” *Del. County v. Schaefer*, 45 A.3d 1149, 1156 (Pa. Cmwlth. 2012). Testimonial affidavits offered by the agency that are found to be relevant and credible may provide sufficient evidence in support of a claimed exception. *Id.* at 1073; citing *Michak v. Department of Public Welfare*, 56 A.3d 925, 929 (Pa. Cmwlth. 2012). This court has held that an affidavit is sufficient to prove an exemption is met under the RTKL. *Sherry v. Radnor Twp. Sch. Dist.*, 20 A. 3d 515, 520-521(Pa. Cmwlth. 2011). Here, PSP submitted the Affidavit of PSP Director of the Bureau of Criminal

Investigation, Major Douglas J. Burig.¹ This Affidavit met the legal standard for exemption from public access under Section 708(b)(2) of the RTKL.

Section 708(b)(2) of the RTKL, often referred to as the “public safety” exception, provides that a record is exempt from disclosure if it is:

A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority.

65 P.S. § 67.708(b)(2).

For this exception to apply, an agency must show: (1) the record at issue relates to a law enforcement or public safety activity; and, (2) disclosure of the record would be “reasonably likely” to threaten public safety or a public protection activity.

Carey v. Pennsylvania Dept. of Corrections, 61 A.3d. 367, 374-375 (Pa. Cmwlth. 2013). Furthermore, when interpreting the “reasonably likely” prong of the exception, the Court is to “look to the likelihood that disclosure would cause the

¹ Major Burig has been a PSP Trooper for 22 years. In his current position as Director of the PSP Bureau of Criminal Investigation, he is responsible for overseeing the PSP Divisions responsible for intelligence gathering, specialized criminal investigation support units, complex criminal investigations, and drug investigations. Furthermore, he is responsible for making policy recommendations concerning intelligence gathering/sharing and the conducting of criminal investigations. (R.R. 31a, Burig Affidavit ¶ 3). Prior to his current position, Major Burig was Director of the Intelligence Division, where he oversaw PSP’s counterterrorism initiatives, the state’s primary intelligence fusion center, and field intelligence operations throughout the Commonwealth. Additionally, he has served in numerous disciplines within PSP including: patrol; criminal investigations; criminal investigation assessment; and analytical intelligence, as the commander to the Pennsylvania Criminal Intelligence Center (PaCIC). (R.R. 31a-32a, Burig Affidavit ¶ 5).

alleged harm, requiring more than speculation.” *Id.* at 375. Thus, for the exception to apply, it is not necessarily the words or phrases that are used in the record that make the record exempt from disclosure; instead, it is the effect or harm to the agency in carrying out its public safety or protection duties should the record be released. *Id.* at 376.

In reviewing appeals from OOR Determinations, this Court found that affidavits are important in the adjudication of RTKL appeals. In *Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Cmwlth. 2013), this Court held that the OOR must consider affidavits properly submitted to it by an agency. *Id.* at 1102. The Court, quoting a federal district court opinion concerning the Freedom of Information Act (FOIA), 5 U.S.C. § 552, stated:

Affidavits are the means through which a governmental agency details the search it conducted for the documents requested and justifies nondisclosure of the requested documents under each exemption upon which it relied. The affidavits must be detailed, nonconclusory, and submitted in good faith....Absent evidence of bad faith, the veracity of an agency’s submissions explaining reasons for nondisclosure should not be questioned.

Scolforo, quoting *Manchester v. Drug Enforcement Administration, U.S. Department of Justice*, 823 F. Supp. 1259, 1265 (E.D.Pa. 1993).

Additionally, in *Scolforo*, the Court also addressed the level of detail that must be included in an affidavit for an agency to sustain its burden. An “affidavit must be specific enough to permit the OOR or this Court to ascertain how disclosure

[would meet the asserted exception].” *Scolforo*, 65 A.3d at 1104.

This Court has also had occasion to address the sufficiency of affidavits specific to Section 708(b)(2). In *Woods v. Office of Open Records*, 998 A.2d 665 (Pa. Cmwlth. 2010), the petitioner argued that the OOR erred when it determined that the Pennsylvania Board of Probation and Parole (PBPP) met its burden in proving that the “Supervision Strategies” of the “PBPP Manual Chapter 4 – Sex Offender Supervision Protocol” was exempt from disclosure under Section 708(b)(2) of the RTKL. On appeal to this Court, the respondent, the OOR, argued that it correctly determined that PBPP had met its burden. The court summarized OOR’s position as “the preponderance of the evidence standard does not require absolute certainty that if redacted portions were to be disclosed, there would be a breach of public safety or inhibition of the parole officers to perform their public protection duties, but only a reasonable likelihood that public safety would be jeopardized.” *Id.* at 670. The Court reviewed the affidavit submitted by PBPP, which explained why portions of the requested record were redacted, and affirmed the OOR’s Final Determination. *Id.*

In a later unpublished opinion, this Court expounded on its decision in *Woods*. In *Harrisburg Area Community College (HACC) v. Office of Open Records*, 2011 WL 10858088, (Pa. Cmwlth. No. 2110 C.D. 2009, filed May 17, 2011), the Court reviewed whether course material pertaining to DUI training is exempt from

disclosure under Section 708(b)(2) of the RTKL. In response to the request for course material, HACC withheld some responsive records, asserting that the records are exempt under Section 708(b)(2). In support of the denial, HACC submitted an affidavit from the Executive Director of the Municipal Police Officer's Education and Training Commission, State Police Major John Gallaher.

In *HACC*, the Court considered the *Woods* case as offering substantive guidance in evaluating whether an agency has met its burden in proving that records are exempt from disclosure pursuant to section 708(b)(2). *Id.* at *5. The Court explained that *Woods* set forth the principle that “the agency’s burden does not include a requirement that the release of a record would definitely threaten or jeopardize public safety or protection” and that when an “agency proffers evidence of even the potential impairment of a function that is aimed at preventing public harm and securing the public safety” then the record is exempt from disclosure under Section 708(b)(2) of the RTKL. *Id.* In *HACC*, the Court stated that “[t]he essential factor in this Court’s decision in *Woods* was the detail with which the director of PBPP provided information regarding the substance of the records and the ways in which a sex offender might use the information to evade or avoid detection.” *Id.* at 6.

Lastly, when the assertion is made that the public safety activity of conducting investigations will be undermined, this Court has found that an agency’s burden may

be met when there is a sworn affidavit wherein the affiant bases his or her opinions on extensive experience. *Carey v. Pennsylvania Dept. of Corrections*, 61 A.3d 367, 375-376 (Pa. Cmwlth. 2013) *citing Adams v. Pennsylvania State Police*, 51 A.3d 322 (Pa. Cmwlth. 2012).

Here, PSP provided the OOR with an Affidavit, which meets the preponderance standard. Major Burig's Affidavit is detailed and explains why each section of AR 6-9 was redacted. Addressing each section, Major Burig described the information contained in the section using the sections titles, and where appropriate, how these sections are used when PSP conducts investigations using open sources. Furthermore, for each section of AR 6-9 that is redacted, Major Burig provided an explanation of how PSP's ability to conduct investigations using open sources may be compromised should the redacted sections of AR 6-9 be made public. Additionally, in his affidavit, Major Burig explained that his opinions about the effects of disclosure of AR 6-9 are based on his 22 years of experience as a PSP Trooper, which include his experience as the current Director of the Bureau of Criminal Investigation, and his experience in conducting criminal investigations, criminal investigation assessments, and analytical intelligence. Finally, after detailing why each redacted section should not be disclosed, Major Burig attested that "[t]he procedures, policies and information that have been redacted is uniform to all investigations using open source methods that are conducted by PSP

personnel.” He further stated that [t]here is [a] reasonable likelihood that if any of the redacted information were to be disclosed it would threaten the public protections activity of PSP criminal investigations...using open source methods.”

However, as shown below, the OOR Appeals Officer inappropriately disregarded Major Burig’s affidavit.

The OOR’s Final Determination

In his Final Determination, the Appeals Officer, for each section of the regulation, provided his rationale as to why he felt that each section is a public record. Below is the Appeals Officer’s rationale regarding why each section of the regulation is public:

9.02 – Definitions – “As these definitions are common knowledge, the disclosure of the terms would not threaten public safety.”

9.03 – Utilization of Real-Time Open Sources As An Investigate Tool – “The text of the prohibitions and authorizations within this section, however, is broad, in contrast with the narrow scope of the prohibitions, and the prohibitions are based upon known law.”

9.04 – Authorization to Access Real-Time Open Sources And/Or Real-Time Open Source Networks – “the specific method of information-gathering [] is widespread public knowledge, and the factors that authorize its use appear to apply to any possible situation PSP wishes to investigate. Likewise, the prohibitions articulated in this section are sufficiently vague and limited so that no individual outside of PSP could manipulate them to the detriment of public safety.”

9.05 – Authorization Procedures For The Use Of Online Aliases and Online Undercover Activity – “The majority of the section [] relates to PSP internal procedures that cannot possibly be utilized by third parties in any negative way. The single prohibition on PSP activity discussed within this section is narrow, and there is no evidence that knowledge of the prohibition will threaten public safety.”

9.06 – Deconfliction – “There is no detail in this section that could be manipulated by third parties, nor any information that would allow a third party to jeopardize an investigation.”

9.07 – Utilizing Real-Time Open-Source Monitoring Tools – “there is no situation in which a third party could maneuver to prevent the use of these tools.”

9.08 – Source Reliability And Content – “This paragraph [] imposes no apparent limitations on the PSP that could be exploited.”

9.09 – Documentation and Retention - There is not [] any obvious way that future investigations could be sabotaged with this information.”

9.10 – Utilization of Real-Time Open Sources For Employment Background Investigations – “The section itself provides almost no information that the title does not.”

The Appeals Officer concluded his analysis with “[a]lthough the OOR respects Major Burig’s expertise in matters of law enforcement, the threats outlined in PSP’s affidavit simply do not match the text of the policy. PSP argues that disclosure of this document would permit a third party to circumvent PSP’s investigative prerogatives, but most of the regulation consists of internal, administrative guidance and the substantive authorizations and prohibitions do very little to limit PSP’s activities.”

It is clear from this conclusion that the Appeals Officer rejected Major Burig’s judgments on the issue regarding the effect of disclosure and substituted his own conclusions for those of the PSP Director of the Bureau of Criminal Investigation. Importantly, the Final Determination was incorrect in stating, “...there is no

evidence that knowledge of the prohibition will threaten public safety,” because Major Burig’s Affidavit *is* evidence. The statement that there is no evidence indicating that disclosure would threaten public safety further demonstrates that the Appeals Officer did not give proper evidentiary weight to Major Burig’s Affidavit.

The appeals officer should have credited Major Burig’s Affidavit and determined that AR 6-9 was properly redacted because the information is exempt from disclosure under the public safety exception. *Carey v. Pennsylvania Dept. of Corrections*, 61 A.3d 367, 376 (Pa, Cmwlt. 2013) (explaining what an affidavit must contain for the public safety exception to apply); *see also, McGowan v. Pennsylvania Dept. of Environmental Protection*, 103 A.3d 374, 382-383 (Pa. Cmwlt. 2014)(stating that when “no evidence has been presented to show that the [agency] acted in bad faith, the averments in the [agency’s] affidavits should be accepted as true.”).

II. THE OOR APPEALS OFFICER USED THE OOR’S IN CAMERA REVIEW AUTHORITY TO IMPROPERLY SUBSTITUTE HIS JUDGMENT REGARDING THE LIKELIHOOD OF HARM TO PSP INVESTIGATIONS SHOULD ADMINISTRATIVE REGULATION 6-9 BE PUBLICLY RELEASED IN ITS ENTIRETY.

A review of the Appeals Officer’s rationale clearly demonstrates that the Final Determination was the result of his use of *in camera* review; however, the Appeals Officer misused the *in camera* review authority in this proceeding. Rather than using his judgment to determine whether PSP met its burden in proving the “reasonably

likely” prong of the exception is met, the Appeals Officer used his own judgment to make a determination regarding whether it is “reasonably likely” that PSP investigations would be jeopardized. Hence, the appeals officer relied on his own opinions to make a judgment as to whether PSP investigations would actually be jeopardized. In doing so, the Appeals Officer stepped out of his role as a neutral arbiter adjudicating a dispute and into the role of an advocate for disclosure.

Because the OOR’s Appeals Officer’s use of *in camera* review was integral to his determination that AR 6-9 is a public record, a review of the OOR’s *in camera* review authority is appropriate. This Court has held that the OOR has implied authority to order the production of documents for *in camera* review. *Office of Open Records v. Center Township*, 95 A.3d 354, 370-371 (Pa. Cmwlth. 2014). In a later case, *Township of Worcester v. Office of Open Records*, 129 A.3d 44 (Pa. Cmwlth. 2016), this Court confirmed that the OOR has the authority to conduct an *in camera* review and stated “having now confirmed the law in this area, it is hard to imagine any significant public policy interest supporting judicial review of non-final OOR orders which seek to create an adequate record.” *Id.* at 62. However, the OOR’s use of *in camera* review is not without limits. In *Worcester*, citing to its *en banc* decision in *Bagwell v. Dep’t of Educ.*, 103 A.3d. 409 (Pa. Cmwlth. 2014), this Court stated that *in camera* review is appropriate to assess claims of privilege and predecisional deliberations, issues that have explicit criteria as to whether those

privileges apply to a record. *See Worcester*, 129 A.3d at 60. Additionally, there are limits on the types of records that the OOR may review *in camera*. *Office of Open Records v. Pennsylvania State Police*, 146 A.3d. 814 (Pa. Cmwlth. 2016) (holding that the OOR cannot conduct an *in camera* review of “investigative information” as defined in the Criminal History Record Information Act, 18 Pa.C.S. § 9101 *et seq.*).

Thus, there are some limitations on the OOR’s *in camera* review authority and given this Court’s precedents, issues arising from the OOR’s *in camera* review are properly raised on appeal. *Worcester*, 129 A.3d at 62 (stating “we express concern about the potential for an agency to bypass OOR as the fact-finder in the first instance and seek a more receptive audience in a Chapter 13 court”).

Here, although an Appeals Officer may order *in camera* review of records, his review does not extend to making his own judgment on the likelihood of harm that could occur to public safety should a record be released. Although the distinction between an Appeals Officer determining if an agency met its burden in proving that it is reasonably likely that public safety will be jeopardized and the Appeals Officer using *in camera* review to determine that public safety will not be jeopardized is subtle, the Final Determination issued by the Appeals Officer brings the distinction into stark relief.

The OOR is “a quasi-judicial agency possessing administrative expertise in the area of document disclosure.” *Office of Open Records v. Center Township*, 95

A.3d 354, 363 (Pa. Cmwlth. 2014). It is not an agency that is charged with conducting criminal investigations. *Pennsylvania State Police*, 146 A.3d at 818. Thus, the Appeals Officer, even as an adjudicator, is not able to use *in camera* review to determine what the effect on PSP investigations may be when applying the “reasonably likely” test under the public safety exception. Yet, that is precisely what the Appeals Officer used the *in camera* review procedure to do in this case.

This is demonstrated by an example regarding the redactions made to Sections 9.02 through 9.04 of AR 6-9. The Final Determination stated: (1) “As these definitions are common knowledge, the disclosure of the terms would not threaten public safety;” (2) “The text of the prohibitions and authorizations within this section, however, is broad, in contrast with the narrow scope of the prohibitions, and the prohibitions are based upon known law;” and (3) “The specific method of information-gathering, however, is widespread public knowledge... Likewise, the prohibitions articulated in this section are sufficiently vague and limited so that no individual outside of PSP could manipulate them to the detriment of public safety.”

These statements are the judgments of the appeals officer adjudicating the appeal, whereby he is substituting his own judgment on the matter of what will and will not jeopardize PSP’s ability to conduct investigations using open source methods, thereby discounting the judgment and experience of Major Burig. This is clear error on the part of the OOR.

When the OOR conducts an *in camera* review, the purpose is to review the face of the document and ascertain facts about the document and/or apply clearly established legal standards to determine whether a document is exempt from disclosure. *Office of Open Records v. Center Township*, 95 A.3d 354, 363 (Pa. Cmwlth. 2014) (referencing attorney-client privilege, the work-product doctrine, and confidentiality rules and stating “These privileges are already defined by statute and rules, and the OOR is merely tasked with interpreting their contours pursuant to the RTKL....”); *see also, Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473, 479 (Pa. Cmwlth. 2010) (Court describing its own *in camera* review and describing information contained on the face of the document to determine it is exempt from disclosure); *McGowan v. Dept. of Environmental Protection*, 103 A.3d 374 (Pa. Cmwlth. 2014) (Court remanded to the OOR to determine if records contained purely factual information not exempt under the predecisional deliberation exception). However, the text of the statute leaves it to the agency to prove by a preponderance of the evidence that public release of the record will jeopardize the public safety.

By imposing a “reasonably likely” standard that an agency must meet for the public safety exception to apply to a record, the exception, by its very terms, calls for prediction of what the results may be, should the record be disclosed. *Carey*, 610A.3d at 375 (“we look to the likelihood that disclosure would cause the alleged

harm, requiring more than speculation.”). However, it is the burden of the agency to prove that the exception applies, 65 P.S. § 67.708 (a); rather than the OOR, using *in camera* review, to prove that it does not apply. *See Bowling v. Office Open Records*, 75 A.3d 453, 467 (explaining an appeals officer’s discretionary decision-making under the RTKL only arises “where a determination must be made regarding conflicting evidence pertaining to whether a document falls under one of the statutory exemptions.”).

III. THE APPEALS OFFICER APPLIED ERRONEOUS LEGAL STANDARDS TO DETERMINE THAT THE REDACTED INFORMATION IS PUBLIC RECORD.

In the Final Determination, the Appeals Officer did not apply the correct legal standard in determining that the redacted sections are public records. In the Determination, the Appeals Officer stated that because the information was “generalized,” “common knowledge,” “broad,” “based upon known law,” “sufficiently vague,” or “no detail ...could be manipulated by third parties” that the information is public record. Neither the text of Section 708(b)(2), nor case law, provide that these are the standards by which exemption is measured. As discussed above, the exception looks to the harm that would result in disclosure. Here, as demonstrated, *supra*, PSP provided sufficient evidence to meet its burden in proving that public release of the redacted sections of AR 6-9 would be reasonably likely to impede an investigation. Therefore, those sections are exempt from disclosure under

Section 708(b)(2) of the RTKL.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner, the Pennsylvania State Police, request that this Honorable Court reverse the Final Determination of the Office of Open Records.

Respectfully Submitted:

PENNSYLVANIA STATE POLICE

Date: 10-21-17



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APPENDIX A

APPENDIX A



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
AMERICAN CIVIL LIBERTIES UNION	:	
OF PENNSYLVANIA,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2017-0593
	:	
PENNSYLVANIA STATE POLICE,	:	
Respondent	:	

INTRODUCTION

Andrew Christy, on behalf of the American Civil Liberties Union of Pennsylvania (“Requester”), submitted a request (“Request”) to the Pennsylvania State Police (“PSP”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking PSP’s social media policy. PSP denied the Request in part, arguing that the disclosure of redacted information would threaten public safety. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted**, and the PSP is required to take further action as directed.

FACTUAL BACKGROUND

On March 8, 2017, the Request was filed, seeking “a copy in digital format, of [PSP’s] complete, un-redacted AR 6-9 regulation, which establishes policies and procedures for PSP personnel when using social media monitoring software.” On March 13, 2017, PSP issued a

response, granting access to a heavily-redacted nine-page document entitled “AR 6-9 Real-Time Open-Source-Based Investigation and Research.” PSP explained that they had redacted information from the document that would be reasonably likely to threaten public safety or preparedness. *See* 65 P.S. § 67.708(b)(2).

On April 3, 2017, the Requester appealed to the OOR, arguing that PSP had not demonstrated a sufficient basis for redaction under Section 708(b)(2). The OOR invited both parties to supplement the record and directed PSP to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On April 6, 2017, the OOR approved a briefing schedule. On April 21, 2017, PSP filed their primary brief, arguing that knowledge of the tactics and techniques used by PSP when gathering information would permit various parties to more easily evade police scrutiny. In support of this argument, PSP submitted the affidavit of Major Douglas Burig, PSP’s Director of Criminal Investigation. In his affidavit, Major Burig explains how each redacted section could jeopardize an investigation if the information was widely known.

On May 5, 2017, the Requester submitted a reply brief, challenging Major Burig’s descriptions of the purposes of each section and suggesting why Section 708(b)(2) might be inapplicable to each redaction. In addition, the Requester asked the OOR to conduct an *in camera* review of the policy.

On May 10, 2017, PSP filed its reply brief, arguing that the Requester’s submission was insufficient to challenge Major Burig’s expertise and that PSP had satisfied its burden of proof under Section 708(b)(2).

On May 23, 2017, after consultation with the parties, the OOR ordered that the unredacted policy be provided for *in camera* review. On June 2, 2017, the OOR received the *in camera* records, and the OOR performed an *in camera* review of the records.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the OOR conducted an *in camera* review of the records; as a result, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

PSP is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed

public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The record at issue is PSP Policy AR 6-9, Real-Time Open-Source-Based Investigations And Research, which Major Burig describes as intended to “establish policies and procedures for PSP Troopers when they use open sources for valid law enforcement purposes.” Specifically, the policy describes best practices, authorization procedures, purposes and limitations for PSP Troopers when using internet resources—including, but not limited to, sites commonly described as ‘social media’ sites—in a professional capacity.

PSP argues that the majority of the policy is exempt from disclosure under Section 708(b)(2) of the RTKL. Section 708(b)(2) of the RTKL exempts from disclosure “[a] record maintained by an agency in connection with ... law enforcement or other public safety activity

that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity.” 65 P.S. § 67.708(b)(2). In order to withhold records under Section 708(b)(2) of the RTKL, the PSP must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

The record is, on its face, related to PSP’s law enforcement duties, as it concerns procedures for PSP to use while gathering information online. PSP argues that the disclosure of the record would be reasonably likely to threaten public safety because knowledge of the restrictions and techniques under which PSP Troopers work could permit third parties to more easily evade PSP’s online efforts and hinder PSP’s attempts to investigate criminal matters or perform background checks. In support of this argument, PSP submitted the affidavit of Major Burig, who attested that, based on his 22 years of experience, the various redactions were necessary in order to avoid any threat to the public. Although Major Burig’s rationale varies from section to section, the essential thread of his argument is that a third party with possession of these materials could use them to avoid PSP’s scrutiny online, gauge which platforms of discussion PSP commonly uses, and craft strategies to render PSP unable to effectively monitor their sources.

The OOR conducted an *in camera* review of the materials, and concludes that there is no material in Policy AR 6-9 that is reasonably likely to jeopardize public safety. As a general matter, the authorizations and prohibitions contained in each section are generalized, permitting PSP to use various open-source tools whenever it suspects criminal activity. The processes

described throughout are strictly internal and administrative in nature, providing third parties with no opportunity to intercept or alter any Trooper's request or clearance to conduct any investigation. Where the policy does touch upon interaction with outside parties, it merely prohibits PSP Troopers from breaking applicable laws in furtherance of their investigations. Each section will be separately addressed below.¹

9.02 – Definitions

This section consists of definitions of terms used throughout the Policy, marked A through L. PSP argues that items A-D and G should be redacted because they would provide insight into how PSP conducts investigations, and thereby show the sources and methods PSP would use in conducting an online investigation. The redacted terms, however, are broad, and the definitions for each are extremely general. One unredacted definition that seems reasonably representative of the redacted material, for example, defines "Page" as "[t]he specific portion of a real-time open-source site where content is displayed and managed by an individual or individuals with administrator rights." Most of the definitions in this section are commonly-used terms; where the definitions are use-specific, they reveal only that PSP utilizes certain highly-trafficked web services. As these definitions are common knowledge, the disclosure of the terms would not threaten public safety.

9.03 – Utilization Of Real-Time Open Sources As An Investigative Tool

This section is entirely redacted, and describes how investigating PSP Troopers are to use open sources during an investigation. PSP argues that this section contains information concerning when Troopers are allowed or prohibited from using open sources, and therefore would permit third parties with nefarious motives to avoid PSP surveillance. The text of the

¹ None of the Section titles are redacted, and no redacted information is included or described with specificity in the analysis below. The description of each section is based upon Major Burig's affidavit and the OOR's general impression of each section.

prohibitions and authorizations within this section, however, is broad, in contrast with the narrow scope of the prohibitions, and the prohibitions are based upon known law.

9.04 – Authorization To Access Real-Time Open Sources And/Or Real-Time Open Source Networks

This section is also entirely redacted, and describes when a PSP Trooper must gain a supervisor's approval before undertaking a specific kind of investigation. PSP argues that disclosure of this section this will alert criminals to the fact that a specific method of information-gathering is occasionally used, and provide them with information regarding how to avoid it. The specific method of information-gathering, however, is widespread public knowledge, and the factors that authorize its use appear to apply to any possible situation PSP wishes to investigate. Likewise, the prohibitions articulated in this section are sufficiently vague and limited so that no individual outside of PSP could manipulate them to the detriment of public safety.

9.05 – Authorization Procedures For The Use Of Online Aliases And Online Undercover Activity

This section is also entirely redacted, and provides operational details and procedures related to online aliases. PSP argues that this will allow third parties to evade online undercover activities. The majority of the section, however, relates to PSP internal procedures that cannot possibly be utilized by third parties in any negative way. The single prohibition on PSP activity discussed within this section is narrow, and there is no evidence that knowledge of the prohibition will threaten public safety.

9.06 – Deconfliction

This section is also entirely redacted, and contains information regarding how to end an open-source investigation. PSP argues that it would reveal how such investigations are carried out. The entire paragraph, however, discusses internal administrative procedures. There is no detail in this section that could be manipulated by third parties, nor any information that would allow a third party to jeopardize an investigation.

9.07 – Utilizing Real-Time Open-Source Monitoring Tools

This section is also entirely redacted, and it describes when open-source monitoring tools may be used. PSP argues that disclosure of this information will give third parties an advantage by revealing when open-source monitoring may take place. This section, however, is so general that there is no apparent situation in which PSP would be unable to utilize these tools; therefore, there is no situation in which a third party could maneuver to prevent the use of these tools.

9.08 – Source Reliability And Content

This section is also entirely redacted, and relates to the procedures used to verify information obtained. PSP again argues that this will give third parties an advantage in countering PSP information-gathering. This paragraph, however, imposes no apparent limitations on the PSP that could be exploited. Thus, PSP has not demonstrated how disclosure of this information would threaten public safety.

9.09 – Documentation And Retention

This section is mostly unredacted, with the exception of a single paragraph at the end describing retention procedures. PSP argues that the redacted procedures would give third parties examples of how future investigations might be conducted. There is not, however, any obvious way that future investigations could be sabotaged with this information. Like the

sections described above, the contents of this section are general in nature, and there is no indication that disclosure of the information would threaten public safety.

9.10 – Utilization Of Real-Time Open Sources For Employment Background Investigations

This section is entirely redacted, and describes how PSP may use open-source search techniques to do background investigations prior to hiring a candidate for a position, including what searches may be conducted and what data shall not be collected. PSP argues that knowledge of this section would allow a candidate to hide certain information that would otherwise benefit PSP, leading to the employment of unqualified Troopers or other positions. The authorization contained within this section, however, encompasses every kind of search and collection not prohibited by law. The section itself provides almost no information that the title does not.

Although the OOR respects Major Burig's expertise in matters of law enforcement, the threats outlined in PSP's affidavit simply do not match the text of the policy. PSP argues that disclosure of this document would permit a third party to circumvent PSP's investigative prerogatives, but most of the regulation consists of internal, administrative guidance and the substantive authorizations and prohibitions do very little to limit PSP's activities. In prior cases where the OOR has relied upon the rationale that a document would permit a third party to circumvent procedures to the detriment of the public, the dangers to the public have been clear. In *Irwin v. Pa. State Police*, for example, the OOR found that Section 708(b)(2) applied to a policy regulating the use and handling of firearms; a third party with knowledge of that policy would know when and how PSP Troopers are likely to draw and fire, and might use that knowledge to attack first. OOR Dkt. AP 2016-1634, 2016 PA O.O.R.D. LEXIS 1485.

Meanwhile, in *Thompson v. Pa. State Police*, the OOR found that Section 708(b)(2) applied to a policy regulating vehicular stops, because that policy detailed how a PSP Trooper could set up a traffic stop to ensure that Trooper's safety, and a third party with knowledge of that policy could instead exploit those tactics to endanger the officer in an encounter. OOR Dkt. AP 2015-0423, 2015 PA O.O.R.D. LEXIS 441.

On the other hand, in *Wishnefsky v. Dep't of Corrections*, the OOR rejected the argument that release of a table of contents listing certain drug testing procedures would permit prisoners to circumvent them, because general knowledge that a procedure is used does not, in itself, provide a third party the ability to circumvent it. OOR Dkt. AP 2015-0100, 2015 PA O.O.R.D. LEXIS 183. This appeal is similar to *Wishnefsky*; although the policy is more detailed than a table of contents, the information contained within would not allow a third party to anticipate when or how an online investigation is taking place. Unlike *Irwin* or *Thompson*, the policy does not contain such detail that disclosure of the information would threaten the safety of PSP Troopers or the public.

Because none of the redactions of PSP Policy AR 6-9 contain information that a third party could plausibly use in a way adverse to PSP's interests, the OOR finds that the Policy is not reasonably likely to jeopardize public safety.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted**, and the PSP is required to provide the Requester with unredacted copies of all responsive records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have

an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 7, 2017

/s/ Jordan Davis

APPEALS OFFICER
JORDAN C. DAVIS

Sent to: Andrew Christy (via regular mail);
William Rozier (via e-mail only);
Nolan Meeks, Esq. (via-email only)

² See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).