

IN THE SUPREME COURT OF PENNSYLVANIA

No. _____

PENNSYLVANIA STATE POLICE, Respondent

v.

AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, Petitioner

PETITION FOR ALLOWANCE OF APPEAL

*Petition for Allowance of Appeal from the May 18, 2018 Order
Reversing the Determination of the Office of Open Records
after briefing and argument.*

at the Commonwealth Court, No. 1066 CD 2017, to the Office of Open Records at No.
AP-2017-0593 dated 7-7-17.

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INTRODUCTION

Millions of Pennsylvanians use social media networks every day, an activity the United States Supreme Court has held to be protected by the First Amendment. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Seven in ten Americans use at least one social media service and it is “clear” that “the Internet in general, and social media in particular,” have become “the most important places . . . for the exchange of views.” *Id.*

There is no more important time in which to have rigorous oversight of governmental surveillance activities than when law enforcement agents scrutinize citizens’ protected First Amendment activities. That is why we have the Right-to-Know Law (“RTKL”): “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. Cmwlth. 2010) (*en banc*), *aff’d* 75 A.3d 453 (Pa. 2013).

That principle is the animating force behind this Petition. The Pennsylvania State Police (“PSP”) monitors public activity on social media sites as part of its investigation of past or prospective criminal activity. The ACLU requested a copy of the PSP’s policy governing such activity, which the PSP produced, almost entirely redacted, because disclosing policies (or even definitions) would—according to PSP—threaten public safety.

The Office of Open Records (“OOR”) reviewed the materials *in camera* and concluded that PSP had to produce the entire policy. But the Commonwealth Court reversed, holding that no further disclosure was required. In so holding, the Commonwealth Court construed the RTKL’s public-safety exception to the RTKL broadly and construed the the OOR’s and courts’ ability to use *in camera* review in RTKL cases narrowly. Taken together, these rulings will have the pernicious effect of insulating PSP’s social-media surveillance activities from public scrutiny—and of enabling other agencies to leverage the public-safety exception to insulate other privacy-impinging practices from public oversight. This Court’s review is needed to ensure that the statutory balance is restored to the RTKL, and the principles of governmental transparency it embodies.

REFERENCES TO THE OPINIONS IN THE MATTER

The (currently¹) unpublished panel opinion in the Commonwealth Court is found at No. 1066 C.D. 2017, 2018 WL 2272597 (May 18, 2018) (Hon. Cannon, J.). It is appended hereto at App. A. The unpublished opinion of the Office of Open Records is found at No. AP 2017-0593, 2017 WL 2953645 (July 7, 2017). It is appended hereto at App. B.

¹ On June 11, 2018, PSP asked the Commonwealth Court to publish its decision in this case. A copy of PSP’s motion is attached hereto at App. C.

ORDER IN QUESTION

On May 18, 2018, the Commonwealth Court issued an unreported opinion concluding with this paragraph and order:

AND NOW, this 18th day of May, 2018 the Final Determination of the Pennsylvania Office of Open Records dated July 7, 2017 is REVERSED.

QUESTIONS PRESENTED

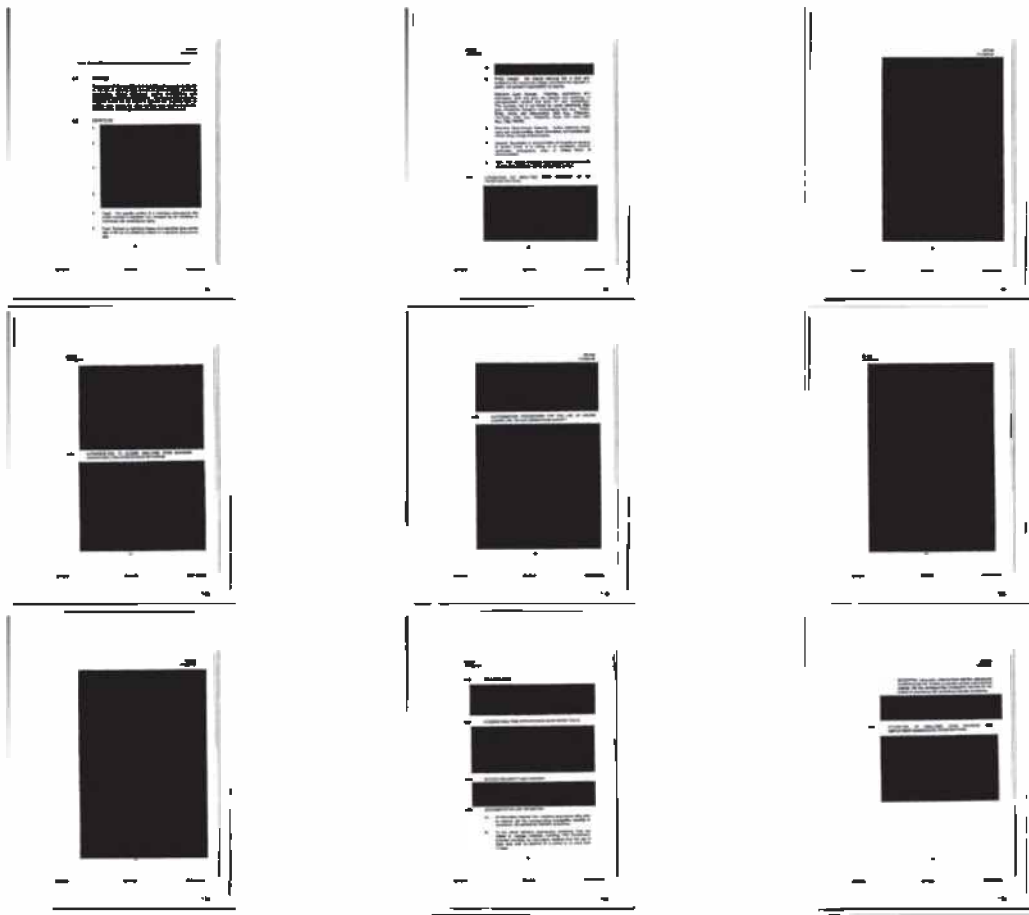
The Office of Open Records reviewed *in camera* the administrative policy the Pennsylvania State Police sought to withhold, but the Commonwealth Court reversed without looking at the documents the Office of Open Records reviewed.

1. Did the Commonwealth Court err in holding that the use of *in camera* review is inappropriate when the public-safety exemption is claimed and should be reserved for cases involving assertions of attorney-client privilege, the work-product protection, and the predecisional-deliberation exception?
2. Given the standard understanding of plenary review, did Commonwealth Court err when it reversed OOR findings of fact without reviewing all of the evidence that OOR reviewed to make those findings?
3. Did the Commonwealth Court err in finding that the Burig Affidavit, on its face, provided sufficient evidence of a threat to public safety to justify each of the redactions to PSP's social media-monitoring policy—including the redaction of the “definitions” section and the provisions regarding social-media research on prospective employees?

CONCISE STATEMENT OF THE CASE

A. Proceedings Before the Agency

The ACLU submitted a RTKL request to PSP seeking “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.2a. In response, PSP produced the nine-page AR 6-9, each page of which is heavily redacted:



R.7a-15a. PSP claimed these redactions were justified by the public safety exception codified in 65 P.S. § 67.708(b)(2). R.3a.

B. Proceedings Before the OOR

The ACLU filed an administrative appeal with OOR and requested that the OOR conduct *in camera* review of the full, unredacted AR 6-9 “to determine whether the [PSP’s] affidavit adequately explains a ‘reasonably likely’ basis for invoking the public safety exemption.” R.21a. In response, PSP submitted the Burig Affidavit, which purported to explain the risk to PSP investigations that would result from releasing AR 6-9 in full. R.31a-33a. The ACLU also submitted publicly available social media monitoring policies from the Philadelphia Police Department, the Salt Lake City Police Department, and the Orange County, California Intelligence Assessment Center. R.48a-72a.

After subsequent briefing, the OOR ordered that PSP submit AR 6-9 for *in camera* review. R.81a. PSP did not object to that review. R.75a. OOR concluded that despite Burig’s “expertise in matters of law enforcement, the threats outlined by PSP’s affidavit simply do not match the text of the policy.” OOR Opinion at 9. According to the OOR, “the processes described throughout [AR 6-9] are strictly internal and administrative in nature,” *id.* at 6; none of the redacted portions of AR 6-9 “could plausibly” be used by a third party to threaten PSP’s investigations; and the affidavit failed to adequately explain otherwise, *id.* at 10. In addition to these general findings, OOR analyzed each redacted section and its corresponding

discussion in the Burig Affidavit to demonstrate why PSP had not met its burden for the redactions in that section:

1. Section 9.02 Definitions

The Burig Affidavit stated that five of the twelve definitions listed under Section 9.02 of the policy had been redacted because they “provide insight into how PSP conducts its investigations” using social media monitoring software, and public disclosure would “provide insight into how PSP would conduct an investigation and what sources and methods it would use.” R.33a. In its opinion, the OOR explained that all of the redacted terms “are broad, and their definitions for each are extremely general,” in line with the unredacted definition of “page” as the “specific portion of a real-time open-source site where content is displayed and managed by an individual or individuals with administrative rights”—in other words, a website. OOR Opinion at 6. That police, including PSP, monitor use of “highly-trafficked” social media websites by individuals they suspect of criminal behavior is well-known. *Id.*

2. Section 9.03 Utilization of Real-Time Open Sources as an Investigative Tool

The Burig Affidavit states that Section 9.03 is fully redacted because it describes how PSP uses social media monitoring during an investigation, including when it uses the software, when it is prohibited from using the software, and when it uses alternative methods. R.32a. According to Major Burig, such information

would allegedly allow “nefarious” individuals to undermine PSP’s investigations by knowing when social media is being monitored. *Id.* The OOR has explained that the text of the authorizations here is “broad,” and the “narrow” prohibitions “are based upon known law.” OOR Opinion at 6-7.

3. Section 9.04 Authorization to Access Real-Time Open Sources and/or Real-Time Open Source Networks

The Burig Affidavit states that Section 9.04 is fully redacted because it describes when a PSP employee must seek approval to monitor social media accounts and the process for seeking that approval, and he avers that disclosing such information would reveal to criminals that PSP uses a specific investigative method. R.32a. The OOR Opinion explains that PSP seems concerned with concealing an investigatory method that is already widely known, and the factors authorizing its use “apply to any possible situation PSP wishes to investigate.” OOR Opinion at 7.

4. Section 9.05 Authorization Procedures for the Use of Online Aliases and Online Undercover Activity

The Burig Affidavit states that Section 9.05 is fully redacted because it concerns PSP’s “ability to use” social media monitoring in an undercover capacity and “provides operational details” of such use. R.33a. Major Burig avers that disclosure would allegedly “jeopardize the ability of PSP” to conduct such investigations and catch criminals by exposing its “tactics.” *Id.* The OOR explains

that the section almost entirely deals with “PSP internal procedures” that cannot be used by a third party—as distinct from operational details—and that the section includes a single prohibition on PSP activity that it described as “narrow.” OOR Opinion at 7.

5. Section 9.06 Deconfliction; Section 9.07 Utilizing Real-Time Open-Source Monitoring Tools; Section 9.08 Source Reliability and Content; Section 9.09 Documentation and Retention

The Burig Affidavit provides a single explanation for the redaction of the four above-named sections, broadly stating that they address when investigations end, when to use social media monitoring, and how to verify investigative information. R.33a. According to the affidavit, release of this information would reveal “how PSP conducts its investigations.” *Id.* The OOR describes these sections as addressing “internal administrative procedures” and generalized information about monitoring social media. OOR Opinion at 8-9.

6. Section 9.10 Utilization of Real-Time Open Sources for Employment Background Investigations

The Burig Affidavit states that Section 9.10 is fully redacted because disclosure would “jeopardize PSP’s ability to hire qualified individuals” and “reveal what specific information may be reviewed” during the hiring process. R.33a. The OOR Opinion explains that this section “encompasses every kind of search and collection not prohibited by law” when hiring employees. OOR Opinion at 9.

* * *

OOR ultimately granted the ACLU of Pennsylvania's appeal and ordered PSP to produce an unredacted copy of AR 6-9. OOR Opinion at 10.

C. Proceedings Before the Commonwealth Court

PSP appealed to the Commonwealth Court, which reversed the OOR's decision requiring disclosure of PSP's administrative policy. Commonwealth Court Opinion ("CC Op.") at 10-12. In so holding, the Commonwealth Court concluded that the OOR should not have looked beyond the affidavit, but should have accepted without question the PSP's description of what lay behind those black boxes. *Id.* at 12-13. The Commonwealth Court declined to review AR 6-9 *in camera* for itself, holding that when an agency submits a detailed affidavit invoking its experienced judgment about a potential threat, OOR and the courts should defer to that judgment. *Id.* at 12. The Commonwealth Court also indicated that *in camera* review generally is appropriate only in a narrow class of cases—*i.e.*, those involving assertions of attorney-client privilege or predecisional deliberations—that did not include those arising under the RTKL's public-safety exception. *Id.* at 13.

CONCISE STATEMENT OF THE REASONS RELIED ON FOR ALLOWANCE OF APPEAL

The laws of this Commonwealth evince a deep and abiding commitment to the principles of transparency and accountability in all branches of government.

Pennsylvania's Sunshine Act requires legislative and executive agencies to deliberate and take action in open, public meetings rather than behind closed doors. *See* 65 Pa. C.S. §§ 701-716. Judges are required to disclose potential conflicts of interest (campaign contribution, financial holdings, and the like). *See* Pa. Code of Judicial Conduct, Rule 2.7 cmt. 3; *id.* Rule 2.11 cmt. 5. And, for the past 10 years, Pennsylvania's Right-to-Know Law, 65 P.S. §§ 67.101-67.3104, has "promote[d] 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. Cmwlth. 2010) (*en banc*), *aff'd* 75 A.3d 453 (Pa. 2013). Because of the importance of the transparency the Right-to-Know Law brings, exceptions from disclosure must be narrowly construed. *Id.*

These norms of **public** transparency are complemented by a parallel recognition that individuals are entitled to have and maintain a sphere of **personal privacy** that is not casually or wantonly invaded by governmental actors. *See, e.g.*, Public Access Policy of the Unified Judicial System §§ 7.0, 8.0 (regulating treatment of confidential information). It is thus ironic that PSP is seeking to shield from scrutiny its own efforts to surveil the free expression of Pennsylvanians on social media networks. The Commonwealth Court's Opinion,

if allowed to stand, would substantially erode the ability of Pennsylvanians to hold their Government accountable for its surveillance activities.

The Commonwealth Court's opinion also suffers from fundamental doctrinal problems. An appeal to the OOR or a court from the denial of a RTKL request is not a typical adversarial dispute, in which the reviewer serves as umpire between the two sides, each armed with relevant facts and applicable law. In a RTKL appeal, the requester has never seen the text of the document at issue and is at a severe disadvantage in its ability to argue that the exemption invoked by the agency does not apply.

The RTKL appeal process includes two key structural features to level this playing field. First, the RTKL makes agency records presumptively public and puts the burden on the *agency* to prove, by a preponderance of the evidence, that one or more of the RTKL's exemptions applies. 65 P.S. §§ 67.305, 67.708(a).

Second, the reviewing bodies (the OOR, the Commonwealth Court, and this Court) may themselves conduct an *in camera* review of the withheld or redacted document in order to evaluate the government's claimed exception. *Bowling*, 990 A.2d at 820; *Office of Open Records v. Center Twp.*, 95 A.3d 354, 370 (Pa. Cmwlth. 2014).

The RTKL tasks the Office of Open Records with determining whether an agency has met its burden of proof. *Center Twp.*, 95 A.3d 354, 358 (Pa. Cmwlth.

2014), citing 65 P.S. § 67.1101(b)(1). The “question of whether a record or document is exempt from disclosure is a factual one,’ that should be made in the first instance by an appeals officer.” *Id.* at 369 (quoting *Bowling*, 75 A.3d at 476). But, under the Commonwealth Court’s opinion in this case, if a police department claims that there is a threat to public safety and submits an affidavit with some level of detail to that effect, then that is the end of the inquiry, and OOR cannot make any factual finding and instead must defer to the agency affidavit. This Court should address these errors.

1. Review Is Warranted Under Pa.R.A.P. 1114(b)(1), Because the Commonwealth Court Opinion Conflicts with Prior Holdings of the Commonwealth Court: *In Camera* Review Is Not Inappropriate When Reviewing a Law Enforcement Affidavit Claiming a Threat to Public Safety.

In holding that *in camera* review cannot be used to test the adequacy of a law enforcement officer’s claim that an otherwise-public record falls under the public-safety exception, the opinion below conflicts with the prior holdings of the Commonwealth Court in, *inter alia*, *Harrisburg Area Community College v. Office of Open Records* (“HACC”), No. 2110 C.D. 2009, 2011 WL 10858088, at *8 (Pa. Cmwlth. May 17, 2011) (*en banc*).

In reviewing an affidavit where the public safety exemption is claimed, the reviewing body must consider whether the affidavit:

- (1) includes detailed information describing the nature of the records sought;
- (2) connects the nature of the various records to the reasonable likelihood that disclosing them would threaten public safety in the

manner described; such tha[t] (3) disclosure would impair [the agency's] ability to perform its public safety functions . . . [in relation to what the agency claims to be] the alleged threatening consequence.

Carey v. Pa. Dep't of Corrections, 61 A.3d 367, 376 (Pa. Cmwlth. Ct. 2013).

“Generally, whether an agency establishes this exception depends on the level of detail in the supporting affidavit.” *Fennell v. Pa. Dep't of Corr.* (Pa. Cmwlth., No. 1827 C.D. 2015, filed March 29, 2016), slip op. at 5 (citing *Carey*); see *Carey*, 61 A.3d at 375 (discussing *Woods*).

In camera review can be used at each step of this analysis. First, of course, it allows the reviewing body to determine whether the affiant has accurately or fairly described the “nature of the records sought.” Here, the OOR found that the Burig Affidavit had not fairly described AR 6-9—that, rather than a document that set forth operational strategies or described the way the PSP’s social media monitoring software works, the OOR found AR 6-9 described processes that “are strictly internal and administrative in nature.” OOR Opinion at 6.

In camera review also allows the reviewing body to evaluate the second and third steps of the *Carey* test—*i.e.*, whether the affiant has connected the “nature” of the record to the reasonable likelihood that disclosure would threaten public safety, such that disclosure would impede the agency’s public-safety mission. This does not require the reviewing body to substitute its own judgment for that of an experienced law enforcement officer—the question is not whether the affiant has

exaggerated the degree of danger that could result from the release of the record, but whether the affiant has adequately shown the nexus between the text of the document and the claimed threat.

In this case, for example, the OOR found that, given the administrative nature of AR 6-9, the Burig Affidavit did not adequately connect its contents to any risk of misuse. *See id.* at 9 (“[T]he threats outlined by PSP’s affidavit simply do not match the text of the policy.”); *id.* at 10 (concluding that the affidavit failed to adequately explain how the redacted portions of the administrative policy “could plausibly” be used by a third party to threaten PSP’s investigations).

In fact, the Commonwealth Court has previously held that the OOR erred in *not* performing an *in camera* review when a law enforcement affidavit offered only vague or conclusory information about the record at issue. *See HACC*, 2011 WL 10958088, at *8. In concurrence in that case, Judge McCullough observed that under the circumstances she “would hold that OOR should have exercised its discretion to conduct a hearing or examine the records *in camera*. Clearly, in establishing the RTKL’s ‘public safety’ exemption, the legislature recognized the significance of these types of concerns.” *Id.* at *9.² Importantly, the court did not

² Even dissenting Judge Pellegrini did not disagree; his dissent was premised not on a quarrel over whether *in camera* review was an appropriate tool, but rather on his belief that it was unnecessary on the facts presented. *Id.* at *10 (Pellegrini, J., dissenting) (“[I]n no way can disclosure of course material related to DUI training possibly be a public safety hazard if released.”).

suggest that it was beyond the OOR's purview to test the logic of the connection between the record and the threat posited by the agency.

It is impossible to reconcile (1) *HACC*'s holding as to the importance of reviewing the documents themselves when the public safety exception is asserted, with (2) the Commonwealth Court's assertion in this case that *in camera* review is unavailable when the agency expresses a concern based on its expertise and experience. Indeed, the current decision turns *HACC* on its head by holding that unless a law enforcement affidavit is vague and conclusory on its face, the reviewing body must adopt the affidavit's representations as the reviewing body's own findings of fact.

In short, *in camera* review is a key component of the OOR's authority to rule on "all 'procedural matters on the basis of justice, fairness, and the expeditious disposition of the dispute'" and is a "first-cousin of the appeals officer's express power to conduct a fact-finding hearing." *Center Twp.*, 95 A.3d at 370. And, historically, *in camera* review has been used whenever premature or unwarranted public disclosure could be prejudicial. *See, e.g., Octave ex rel. Octave v. Walker*, 103 A.3d 1255, 1263 (Pa. 2014) (approving use of *in camera* review for certain mental health records sought in discovery). None of this, of course, means that OOR *must* conduct an *in camera* review in every case—only that it is a tool that is

available to test any affidavit, and the OOR should not be discouraged from employing it.

Here, however, the Commonwealth Court has barred the OOR from using *in camera* to test the accuracy of affidavits based on agency expertise, suggesting that such review is limited to cases involving the attorney-client privilege or the protections afforded predecisional deliberations. CC Op. at 13. In such cases, the court insisted, “the actual words on the page are key to the determination, whereas here . . . the actual words on the page are not at issue;” instead, “it is the effect of the disclosure that is key.” *Id.* Neither the RTKL, nor the decisions of this Court, nor principles of common sense support such a presumptive limitation on the availability of *in camera* review. Indeed, without the factual context provided by the document itself, the OOR and the courts will be forced to simply defer to any passably well-written assertion of danger by the underlying agency—an outcome that is inconsistent with the burden of proof placed on agencies by Section 708(a) of the RTKL. Limiting *in camera* review to the narrow class of cases referenced in the Commonwealth Court’s opinion would greatly increase agencies’ ability to withhold records from public scrutiny.

This Court should grant allowance of appeal to clarify that *in camera* review is not limited to poorly written affidavits or assertions of privilege.

2. Review Is Warranted Under Pa.R.A.P. 1114(b)(3) Because This Case Presents an Issue of First Impression Under the Right-to-Know Law: Given the Common Understanding of Plenary Review, Could the Commonwealth Court Reverse OOR Findings of Fact Without Reviewing *All* of the Evidence That OOR Reviewed?

Bowling was this Court’s initial foray into the scope and standard of review under the then-nascent Right-to-Know Law. As the Court recognized, the two inform each other. 75 A.3d at 475. The record that is to be presented—and as to which the Commonwealth Court is to conduct “plenary” or “broad” review, even supplementing it if need be—is to contain “*any* relevant evidence or matter brought before the appeals officer.” *Id.* at 476 (emphasis added).

The position of the Commonwealth Court, however, appears to be that the Office of Open Records is to provide facts, and that they *may* be reviewed—or not, as the Commonwealth Court chooses. That position may not be entirely foreclosed by this Court’s holding on scope of review in *Bowling*, but at the least *Bowling* creates a deep tension with that position—a tension that requires this Court’s review and resolution.

More broadly, “plenary” and “*de novo*” are widely used terms, and there should be a single understanding as to their meaning. Although there are plenty of cases that simply say that a court may review an entire record on plenary review, there are none that go on to say that a court may pick and choose which parts of the record to review if the evidence presented to it is conflicting. Indeed, the more detailed descriptions suggest the contrary. *See, e.g., Summers v. Certainteed*

Corp., 997 A.2d 1152, 1159 (Pa. 2010) (“To the extent that this Court must resolve a question of law, we shall review the grant of summary judgment *in the context of the entire record.*” (emphasis added)); *Big Bass Lake Community Ass’n v. Warren*, 23 A.3d 619, 625 & n.5 (Pa. Cmwlth. 2011) (holding, on plenary and *de novo* review of a permanent injunction, that “[t]his Court is bound by the trial court’s findings of fact unless those findings are not based on competent evidence in the record”); *Buffalo Twp. v. Jones*, 813 A.2d 659, 664 nn.4, 7 (Pa. 2002) (standard of review for permanent injunction is *de novo* and plenary but “in reviewing fact-laden decisions, an appellate court displays a high level of deference to the trial court as the fact finder”).

As this Court said in *Bowling*, the Commonwealth Court is not *limited* to the record made before the Office of Open Records. It can always develop a fuller record. But this Court should grant the petition for allowance of appeal to say, at the least, that as a reviewing court conducting *de novo* and plenary review, the Commonwealth Court should have the obligation, in addition to the right, to review questions in the context of the entire record that was before the Office of Open Records before it rejects the conclusions that the Office of Open Records reached based upon its review of that record.

3. Review Is Warranted Under Pa.R.A.P. 1114(b)(4) Because These Questions Are of Such Substantial Public Importance as to Require Prompt and Definitive Resolution by the Pennsylvania Supreme Court: The Commonwealth Court’s Opinion Relieves Agencies of Their Burden of Proof Regarding the Application of a RTKL Exemption.

Here, the Commonwealth Court not only held that it did not need to review *this* affidavit based on the facts of *this* case and the type and extent of redactions in *this* document, but also purported to set forth general principles governing the circumstances in which *in camera* review should be conducted.

First, the Commonwealth Court concluded that it could decide—based on the face of the affidavit alone—whether the affidavit “adequately described the nature of the redacted information.” CC Op. at 12. That conclusion is both wrong and dangerous. It is wrong because, as a matter of simple logic, one cannot decide whether a description of a document faithfully reflects the contents of that document without reviewing *both* the description *and* the document. And it is dangerous because it incents careless (or, in some cases perhaps, overly careful) drafting by agency representatives if they know that those representations are all but certain not to be checked by the OOR or the courts.

Indeed, the Commonwealth Court’s pronouncement in this regard is all the more surprising because it is diametrically opposed to the assessment of the OOR. That body, which was the *only* appellate body to date to have reviewed the entire record in making its determination concluded in no uncertain terms that “the threats outlined in PSP’s affidavit simply do not match the text of the policy,”

OOR Opinion at 9, and that “there is no material in [the policy] that is reasonably likely to jeopardize public safety,” *id.* at 5. The OOR reached that conclusion because “the authorizations and prohibitions in each section [of the policy] are generalized, permitting PSP to use various open-source tools whenever it suspects criminal activity,” and, “[w]here the policy does touch upon interaction with outside parties, it merely prohibits PSP Troopers from breaking applicable laws.” *Id.* at 5-6. If there is one theme that runs throughout the OOR’s decision, it is that the representations in the Burig affidavit did not reflect the substance of the policy.³

And lest there be any dispute about the likely impact of this opinion, PSP has removed it by applying to have the Commonwealth Court’s opinion published. *See* App. C. That application makes plain that PSP views this decision as a significant development in RTKL jurisprudence, both because it “provid[es] substantive guidance regarding what an affidavit must contain to be sufficient to support exemption under the public safety exception” and because it “clarifies that when an affidavit is legally sufficient to sustain an agency’s burden, it is not necessary for the OOR or a court to conduct an *in camera* review of the record(s)

³ A fully informed reviewing court, armed with a firsthand assessment of both the affidavit and the underlying policy, might ultimately agree with the Office of Open Records’ conclusion in this regard—or it might not. That is not the question at this stage of the proceedings. Instead, the salient point for present purposes is that the Office of Open Records’ conclusion is *not* one that can be refuted based on the affidavit alone.

at issue.” App. C at 1-2; *see id.* at 2 (“[T]he Court made an important statement of the law regarding the public safety exception. The Court recognized that when analyzing whether a record is exempt from disclosure under the public safety exception, “the actual words on the page are not at issue; rather, the issue is whether disclosure of those words would be reasonably likely to threaten public safety or a public protection activity.”).

Said otherwise, PSP hopes to use the Commonwealth Court’s opinion to further insulate its records from public scrutiny.⁴ Given the conclusory, bare-bones nature of the affidavit at issue in this case, allowing the decision below to stand—even as an unpublished memorandum but even more so if PSP’s application to publish is granted—will substantially erode the public’s ability to watch over some of the most powerful and impactful agencies in the Commonwealth.⁵

This Court’s review is needed in order to restore the role of *in camera* review to its proper place in the RTKL regime: as a check on agencies’ nondisclosure and redaction decisions and a tool that, if used, becomes a part of the

⁴ What is more, the same rationale could very well be invoked by other agencies that could even plausibly claim application of one of the RTKL’s likelihood-of-harm exemptions. *See* 65 P.S. § 67.708(b)(1)-(4). As such, the impact of the Commonwealth Court’s opinion will extend far beyond this case and these parties.

⁵ In addition, if published, the Commonwealth Court’s limitation of the circumstances in which *in camera* is available would become binding on the OOR—a result that would have far-reaching implications for all manner of RTKL cases.

record on appeal and cannot be disregarded without review.⁶ Accordingly, this Court should grant the petition for allowance of appeal.

⁶ The Commonwealth Court’s opinion states that ACLU conceded that in camera review was not required here. That is half right. The ACLU explained that in camera review is not necessary because, on its face, the Burig affidavit lacks the detail necessary to justify the public safety exemption. But once the court determined that the affidavit was facially sufficient, the court needed to perform its own in camera review because of the substantial questions raised by the ACLU—and OOR—about whether “the threats outlined in PSP’s affidavit . . . match the text of the policy.” OOR Opinion at 9.

CONCLUSION

For the foregoing reasons, the Court should grant the ACLU's petition for allowance of appeal.

Dated: June 18, 2018

Respectfully submitted,

/s/ MaryCatherine Roper

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CERTIFICATE OF WORD COUNT

I hereby certify that this brief contains 5,025 words, as determined by the word-count feature of Microsoft Word 2010, the word-processing program used to prepare this petition, and excluding the portions of the petition exempted by Pa.R.A.P. 1115(g).

Dated: June 18, 2018

/s/ MaryCatherine Roper
MaryCatherine Roper

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: June 18, 2018

/s/ MaryCatherine Roper
MaryCatherine Roper

PROOF OF SERVICE

I, MaryCatherine Roper, hereby certify that, on this day, I caused true and correct copies of the foregoing Petition for Allowance of Appeal, together with the associated appendices thereto, to be served upon the following via United States First Class Mail, postage prepaid, which service satisfies the requirements of Pa.R.A.P. 121:

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Counsel for Respondent Pennsylvania State Police

Dated: June 18, 2018

/s/ MaryCatherine Roper
MaryCatherine Roper

Appendix A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State Police,	:	
Petitioner	:	
	:	
v.	:	
	:	
American Civil Liberties	:	
Union of Pennsylvania,	:	No. 1066 C.D. 2017
Respondent	:	Argued: March 8, 2018

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FIZZANO CANNON

FILED: May 18, 2018

The Pennsylvania State Police (PSP) petitions for review of a Final Determination of the Pennsylvania Office of Open Records (OOR) granting the American Civil Liberties Union of Pennsylvania’s (Requester) appeal and ordering PSP to provide Requester with unredacted copies of all responsive records within 30 days of the date of the determination.

Requester submitted a request to PSP pursuant to the Right-to-Know Law (RTKL),¹ seeking PSP’s social media policy. In particular, Requester asked for “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.” Reproduced Record (R.R.) at 2a. PSP

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

responded by granting in part and denying in part the request. R.R. at 3a-4a. Specifically, PSP provided Requester with a copy of the record but redacted non-public information that PSP stated was exempt from disclosure under Section 708(b)(2) of the RTKL,² *id.*, because disclosure of the information would be reasonably likely to threaten public safety or preparedness.

Requester filed an appeal with OOR. Before OOR, PSP argued that release of the requested information would allow individuals with nefarious motives to more easily conceal their criminal activity and evade police scrutiny. *See* R.R. at 29a-30a. PSP submitted an Affidavit from its Director of the Bureau of Criminal Investigation (BCI), Major Douglas J. Burig.³ *See* R.R. at 31a-34a. In his Affidavit, Major Burig addressed each redacted section of AR 6-9, explaining its nature and how disclosure could jeopardize an investigation. *See id.* Requester challenged Major Burig's affidavit, asserting that it failed to link each section's redactions to reasonable public safety concerns. *See* R.R. at 36a-39a. Requester provided copies of unredacted social media policies from other law enforcement agencies in an attempt to show what is likely contained in AR 6-9 and that the disclosure of those sections cannot reasonably be viewed as threatening public safety. *See* R.R. at 48a-72a.

² 65 P.S. § 67.708(b)(2). Section 708(b)(2) of the RTKL, known as the public safety exemption, protects:

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.

Id.

³ The Affidavit was subscribed and sworn to under penalty of perjury. R.R. at 34a.

Subsequently, OOR ordered PSP to produce an unredacted copy of AR 6-9 for *in camera* inspection, R.R. at 78a-79a, and PSP did so. After reviewing the document *in camera*, the OOR Appeals Officer concluded that the redacted information is not reasonably likely to jeopardize public safety and therefore is not exempt from disclosure. Final Determination at 10. OOR ordered PSP to provide Requester with unredacted copies of all responsive records within 30 days. PSP then petitioned this Court for review.

Before this Court, PSP first argues that it provided sufficient evidence, *i.e.*, Major Burig’s Affidavit, to prove that the redacted sections of AR 6-9 are exempt from disclosure. PSP argues that the Appeals Officer’s statement that “there is no evidence that knowledge of the prohibition will threaten public safety”⁴ is erroneous, because the Affidavit is evidence. Second, PSP argues that the OOR Appeals Officer erred when, following his *in camera* review of AR 6-9, he substituted his own judgment for that of Major Burig’s regarding whether disclosure is “reasonably likely” to jeopardize PSP’s ability to conduct investigations using open source methods. Finally, PSP argues that the Appeals Officer applied an erroneous legal standard when determining whether the redacted sections of AR 6-9 are public records under the RTKL. PSP asserts that the Appeals Officer determined that because the information was “generalized,” “common knowledge,” “broad,” “based upon known law,” “sufficiently vague” and that “no detail . . . could be manipulated by third parties[,]” the information is public record.⁵ PSP maintains, however, that these are not the standards by which an exemption is measured; rather, the exemption looks to the harm that would result from disclosure.

⁴ PSP’s Brief at 15-16 (quoting Final Determination at 7).

⁵ PSP’s Brief at 21.

Requester, on the other hand, argues that the Affidavit was not sufficient to sustain PSP's burden. Requester maintains that while the Affidavit has the aura of detail, it is conclusory. Requester urges this Court to conduct an *in camera* review of AR 6-9.

In reviewing a final determination of the OOR involving a Commonwealth agency, this Court's standard of review is *de novo* and our scope of review is broad or plenary. *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013).

A principle underlying the RTKL is to allow citizens to scrutinize government activity and increase transparency. *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029 (Pa. 2012). To that end, the RTKL provides that records in the possession of an agency are presumed to be public. Section 305(a) of the RTKL, 65 P.S. § 67.305(a). That presumption does not apply, however, if the record is exempt under Section 708(b) of the RTKL. Section 305(a)(1) of the RTKL, 65 P.S. § 67.305(a)(1); *Woods v. Office of Open Records*, 998 A.2d 665 (Pa. Cmwlth. 2010). "Exemptions from disclosure must be narrowly construed due to the RTKL's remedial nature" *Office of Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Cmwlth. 2013). "An agency bears the burden of proving, by a preponderance of the evidence, that a record is exempt from disclosure under one of the enumerated exceptions." *Brown v. Pa. Dep't of State*, 123 A.3d 801, 804 (Pa. Cmwlth. 2015); *see* Section 708(a)(1) of the RTKL, 65 P.S. § 67.708(a)(1). "A preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry." *Del. Cty. v. Schaefer ex rel. Phila. Inquirer*, 45 A.3d 1149, 1156 (Pa. Cmwlth. 2012).

PSP relied on the public safety exemption under the RTKL, *see* 65 P.S. § 67.708(b)(2), as the sole reason for redacting information. *See* R.R. at 3a-4a. To establish the public safety exemption, “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. Pa. Dep’t of Corrections*, 61 A.3d 367, 374-75 (Pa. Cmwlth. 2013). Here, OOR concluded that “[t]he record is, on its face, related to PSP’s law enforcement duties, as it concerns procedures for PSP to use while gathering information on line.” Final Determination at 5. Thus, the issue here is whether PSP met its burden of proving the second prong, *i.e.*, whether disclosure of the record would be “reasonably likely” to threaten public safety or a public protection activity.

“In interpreting the ‘reasonably likely’ part of the test, as with all the security-related exceptions, we look to the likelihood that disclosure would cause the alleged harm, requiring more than speculation.” *Carey*, 61 A.3d at 375. However, “as clearly suggested by Section 708(b)(2) of the RTKL itself, the agency’s burden does not include a requirement that the release of a record would *definitely* threaten or jeopardize public safety or protection.” *Harrisburg Area Cmty. Coll. v. Office of Open Records* (Pa. Cmwlth., No. 2110 C.D. 2009, filed May 17, 2011), slip op. at 11 (emphasis in original).⁶ Indeed, in *Woods*, this Court ruled that records were exempt from disclosure where the evidence indicated that a *possible* consequence of releasing the information would be the impairment of the agency’s ability to perform its public safety function of monitoring certain individuals, thereby threatening public safety. *Woods*, 988 A.2d at 670; *see also* *HACC*, slip op.

⁶ While this Court’s unreported memorandum opinions may not be cited as binding precedent, they may be cited for persuasive value. Commonwealth Court Internal Operating Procedure § 414(a), 210 Pa. Code § 69.414(a).

at 11-12 (discussing *Woods* and stating that “evidence of even the potential impairment” of an agency’s public safety function is sufficient to satisfy the agency’s burden to demonstrate that a record is not subject to disclosure under Section 708(b)(2) of the RTKL).

To satisfy its burden of proof, an agency may submit an affidavit. *See Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Cmwlth. 2010); *see also Global Tel*Link Corp. v. Wright*, 147 A.3d 978, 980 (Pa. Cmwlth. 2016) (stating that an agency may satisfy its burden of proof by unsworn declarations made under penalty of perjury). In reviewing an affidavit where the public safety exemption is claimed, this Court must consider whether the affidavit:

(1) includes detailed information describing the nature of the records sought; (2) connects the nature of the various records to the reasonable likelihood that disclosing them would threaten public safety in the manner described; such that[] (3) disclosure would impair [the agency’s] ability to perform its public safety functions . . . [in relation to what the agency claims to be] the alleged threatening consequence.

Carey, 61 A.3d at 376. “Generally, whether an agency establishes this exception depends on the level of detail in the supporting affidavit.” *Fennell v. Pa. Dep’t of Corr.* (Pa. Cmwlth., No. 1827 C.D. 2015, filed March 29, 2016), slip op. at 5 (citing *Carey*); *see Carey*, 61 A.3d at 375 (discussing *Woods*).

For example, in *Woods*, we held that the agency established that its records concerning the Board of Probation and Parole’s (Board) “supervision strategies” were exempt from disclosure. *See Woods*, 998 A.2d at 666. The affiant described her role as deputy executive director for the Board, explained the purpose of the record, and provided details regarding the substance of the record and the

ways in which a sex offender might use the information to evade or avoid detection. *Id.* at 667-68. The critical factor in this Court’s decision was the detail which the affiant provided regarding the substance of the records and the ways in which a sex offender might use the information to evade or avoid detection. *See Carey*, 61 A.3d at 375 (discussing *Woods*).

By contrast, in *HACC*, we found the affidavit submitted did not contain sufficient detail to establish the public safety exemption. There, the requester sought training curricula used to teach police officers about making arrests for driving under the influence (DUI). *HACC*, slip op. at 1. *HACC* submitted an affidavit in which its affiant stated, “[b]ased upon my professional experience and judgment [as director of the Municipal Police Officer Education and Training Commission], a disclosure of the Commission’s DUI curriculum in response to this RTKL request would be reasonably likely to jeopardize or threaten the Commission’s statutorily-mandated public protection activity.” *Id.*, slip op. at 14. This Court found the affidavit conclusory because it did nothing more than assert that the release of the records would jeopardize the agency’s public protection activity without describing in detail how such result might happen by virtue of the disclosure. *Id.*

With these standards and cases in mind, we will review Major Burig’s Affidavit.

In his Affidavit, Major Burig recounted his experience. Major Burig explained that in his current position as Director of BCI, he is:

responsible for overseeing Divisions responsible for intelligence gathering, specialized criminal investigation support units, complex criminal investigations, and drug investigations. In addition, [he is] responsible for making policy recommendations concerning intelligence

gathering/sharing and the conducting of criminal investigations.

R.R. at 31a. Major Burig also stated that prior to his current position,

[he] served as the Director of the Intelligence Division within BCI where [he] oversaw PSP's counterterrorism initiatives, the state's primary Intelligence fusion center, and field intelligence operations throughout the Commonwealth. Over the course of [his] career, [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).

Id. at 31a-32a.

Major Burig then stated that the regulation at issue “concerns investigative and intelligence gathering policies, procedures, and methods.” R.R. at 32a. He explained that “the purpose of the regulation is to establish policies and procedures for PSP Troopers when they use open sources for valid law enforcement purposes.” *Id.* He further explained that the redactions were done “because public release of these sections would jeopardize PSP's ability to conduct criminal investigations and other law enforcement activities it engages in to protect the public.” *Id.* Major Burig then discussed each section that contained redactions. We will review his Affidavit as it pertains to each section.

PSP redacted the entirety of Section 9.03 of AR 6-9 except for the heading, “Utilization of Real-Time Open Sources as an Investigative Tool.” R.R. at 8a-10a. Major Burig stated that this section describes how investigating PSP Troopers are to use open sources during an investigation, when they may and may not use open sources, and when they may want to use alternative methods. *Id.* at 32a. Major Burig explained that disclosure would allow individuals to undermine

investigations and disadvantage PSP because individuals would know when PSP can monitor their activities using open sources and conceal their activities. *Id.*

PSP also redacted the entirety of Section 9.04 of AR 6-9 except for the heading, “Authorization to Access Real-Time Open Sources and/or Real-Time Open Source Networks.” R.R. at 10a-11a. Major Burig stated that this section describes when a Trooper must obtain a supervisor’s approval in an investigation and what steps may be taken to further that investigation, including the approval process to establish a specific investigative method. *Id.* at 32a. Major Burig stated that disclosure would expose the specific investigative method and allow those involved in criminal activity to impede investigations. *Id.*

PSP also redacted the entirety of Section 9.05 of AR 6-9, except for the heading, “Authorization Procedures for the Use of Online Aliases and Online Undercover Activity.” R.R. at 11a-13a. Major Burig explained this section concerns PSP’s ability to use open sources in an undercover capacity and provides policies, procedures and operational details regarding undercover activity. *Id.* at 33a. He further explained that disclosure of this information would provide criminals with tactics PSP uses when conducting undercover investigations, thereby jeopardizing PSP’s investigations and ability to catch individuals. *Id.*

PSP also redacted the entirety of Sections 9.06, 9.07 and 9.08, except for the headings “Deconfliction,” “Utilizing Real-Time Open Source Monitoring Tools,” and “Source Reliability and Content,” respectively, as well as subsection (c) of Section 9.09, entitled “Documentation and Retention.” R.R. at 14a-15a. Major Burig explained that these sections contain information regarding when an investigation may be terminated, situations in which to use open source methods, and procedures used to verify the information obtained. He stated that disclosure of

this information would reveal how PSP conducts its investigations using open sources, thereby jeopardizing PSP's ability to conduct such investigations in the future. *Id.* at 33a.

PSP also redacted the entirety of Section 9.10 of AR 6-9, except for the heading, "Utilization of Real-Time Open Sources for Employment Background Investigations." R.R. at 15a. Major Burig explained that PSP conducts background investigations on employees and may use open sources to determine a candidate's, specifically a candidate for Trooper, suitability for employment. *Id.* at 33a. He explained the information was redacted because it would jeopardize PSP's ability to hire qualified individuals and that disclosure would reveal the specific information that may be reviewed to determine whether a candidate is suitable for employment. *Id.* He further explained that PSP takes steps to ensure candidates are suitable for employment in order to protect the public and the "Department." *Id.* at 33a.

Major Burig also addressed Section 9.02 of AR 6-9, entitled "Definitions," under which some of the terms and their definitions were redacted. R.R. at 7a. Major Burig stated that disclosure would provide insight into how PSP conducts an investigation and what sources and methods it would use. *Id.* at 33a.

Major Burig stated that the redacted procedures, policies, and information are uniform to all PSP investigations using open source methods. *Id.* 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 protection activity of PSP conducting criminal investigations and other valid law enforcement activities using open source methods." *Id.*

After review of Major Burig's Affidavit, we conclude that it was legally sufficient to sustain PSP's burden. In his Affidavit, Major Burig discussed his 22

years of experience involving criminal investigations, criminal investigation assessment, and intelligence operations. He also explained the purpose of AR 6-9 and the role of open sources in relation to PSP's law enforcement activities. Additionally, he addressed each section of AR 6-9 containing redacted information, stating the section title, describing the nature of the information redacted, and explaining how release of the information would jeopardize PSP's ability to conduct criminal investigations and other law enforcement activities. In particular, disclosure would: (i) allow individuals to know when PSP can monitor their activities using open sources and allow them to conceal their activities (concerning Section 9.03); (ii) expose the specific investigative method used (concerning Section 9.04); (iii) provide criminals with tactics PSP uses when conducting undercover investigations (concerning Section 9.05); (iv) reveal how PSP conducts its investigations (concerning Sections 9.06, 9.07, 9.08 and subsection (c) of Section 9.09); and (v) provide insight into how PSP conducts an investigation and what sources and methods it would use (concerning Section 9.02). R.R. at 32a-33a. Additionally, Major Burig explained that disclosure would jeopardize PSP's ability to hire suitable candidates, troopers in particular, because disclosure would reveal the specific information that may be reviewed as part of a background check to determine whether candidates are suitable for employment; candidates must be suitable to employ in order to protect the public (concerning Section 9.10). *Id.* at 33a.

Major Burig also stated there is a reasonable likelihood that disclosure would threaten PSP's public protection activity of conducting investigations and other valid law enforcement activities. *Id.* Where, as here, the affiant bases his conclusion that such harm is reasonably likely on his extensive experience, such

conclusion is not speculative or conclusory. *See Adams v. Pennsylvania State Police*, 51 A.3d 322 (Pa. Cmwlth. 2012) (finding that where the affiant based his conclusions on his extensive experience, the affidavit was the result of this experience and not mere speculation or conjecture).

Further, Major Burig's Affidavit was detailed and not conclusory in that it: (i) described the nature of the records sought; (ii) connected the nature of AR 6-9 to the reasonable likelihood that disclosure would threaten public safety and impair PSP's public safety function; and (iii) noted that disclosure would allow certain individuals to more easily conceal their criminal activities and evade police scrutiny. *See Carey*, 61 A.3d at 376. "This Court's decisions support protection of [records] under the public safety exception when the agency shows a nexus between the disclosure of the information at issue and the alleged harm." *Fennell*, slip op. at 5. Major Burig's Affidavit shows such a nexus. Accordingly, the Affidavit was legally sufficient, as a matter of law, to sustain PSP's burden.⁷ OOR erred in concluding that PSP did not establish that the redacted portions of AR 6-9 are exempt from disclosure under the public safety exemption of the RTKL.

Finally, because Major Burig's Affidavit adequately described the nature of the redacted information and was legally sufficient to sustain PSP's burden, it is not necessary to review the unredacted record *in camera*, as Requester urges this

⁷ Requester argues that it is at a significant disadvantage when challenging Major Burig's Affidavit because Requester cannot review the redacted portions of AR 6-9. As a result, Requester produced publicly available policies from three other police departments that, "based on their headings and language, seem substantially similar to AR 6-9." Requester's Brief at 9. Requester argues that those policies give insight into what is likely contained in the redacted portions of AR 6-9 and none of those sections can be reasonably viewed as threatening public safety. *Id.* We cannot assume that the language is, in fact, substantially similar to the redacted portions of AR 6-9, and what other police departments do with respect to releasing their policies is irrelevant to the present case. *See Woods*, 998 A.2d at 669.

Court to do. We note that Requester conceded at oral argument that this Court could decide this matter without conducting an *in camera* review. More importantly, however, we find it unnecessary to review the unredacted document under the circumstances here. In addition to such review being unnecessary given the detailed nature of Major Burig's Affidavit, in general, where this Court has reviewed an unredacted document *in camera*, those situations usually have involved exemptions claimed under the attorney-client privilege⁸ or the predecisional deliberative process.⁹ *See Twp. of Worcester v. Office of Open Records*, 129 A.3d 44, 60 (Pa. Cmwlth. 2016) (stating *in camera* review is appropriate to assess claims of privilege and predecisional deliberations). However, as PSP argues, those situations are distinguishable. There, the actual words on the page are key to the determination, whereas here, it is the effect of the disclosure that is key. In other words, here, the actual words on the page are not at issue; rather, the issue is whether disclosure of those words "would be 'reasonably likely' to threaten public safety or a public protection activity." *See Carey*. As stated, Major Burig's Affidavit sufficiently addresses that issue.

Accordingly, for the foregoing reasons, we reverse.

CHRISTINE FIZZANO CANNON, Judge

⁸ *See, e.g., Pa. Dep't of Educ. v. Bagwell*, 114 A.3d 1113 (Pa. Cmwlth. 2015) (stating *in camera* review is appropriate to assess claims of attorney-client and work-product privileges and the predecisional deliberative exception); *Office of Open Records v. Center Twp.*, 95 A.3d 354 (Pa. Cmwlth. 2014) (concerning attorney-client privilege and work-product doctrine); *Levy v. Senate*, 34 A.3d 243 (Pa. Cmwlth. 2011) (involving *in camera* review by this Court to assess attorney-client privilege).

⁹ *See, e.g., Bagwell*.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State Police,	:	
Petitioner	:	
	:	
v.	:	
	:	
American Civil Liberties	:	
Union of Pennsylvania,	:	No. 1066 C.D. 2017
Respondent	:	

ORDER

AND NOW, this 18th day of May, 2018 the Final Determination of the Pennsylvania Office of Open Records dated July 7, 2017 is REVERSED.

CHRISTINE FIZZANO CANNON, Judge

Appendix B



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).

Appendix C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State Police,	:	
Petitioner	:	
	:	
v.	:	No. 1066 C.D. 2017
	:	
American Civil Liberties	:	
Union of Pennsylvania,	:	
Respondent	:	

APPLICATION FOR PUBLICATION OF MEMORANDUM OPINION

NOW COMES the Petitioner, the Pennsylvania State Police (PSP), by and through its counsel, Nolan B. Meeks, Assistant Counsel, and pursuant to 210 Pa. Code § 69.416, files this Application for Publication of Memorandum Opinion. In support of its request, PSP avers the following:

1. On May 18, 2018 this Honorable Court filed a Memorandum Opinion in the above-captioned matter, wherein the Court reversed the Final Determination of the Office of Open Records (OOR), holding that PSP met its burden in proving that information that PSP redacted from the responsive records was exempt from disclosure pursuant to the “public safety” exception found in Section 708(b)(2) of the Right-To-Know Law (RTKL).
2. In addition to providing substantive guidance regarding what an affidavit must contain to be sufficient to support exemption under the public safety exception, the Court’s Memorandum Opinion clarifies that when an affidavit is legally sufficient to sustain an agency’s burden, it is not necessary for

the OOR or a court to conduct an *in camera* review of the record(s) at issue. Memorandum Opinion at 12.

3. Furthermore, the Court made an important statement of the law regarding the public safety exception. The Court recognized that when analyzing whether a record is exempt from disclosure under the public safety exception, “the actual words on the page are not at issue; rather, the issue is whether disclosure of those words would be reasonably likely to threaten public safety or a public protection activity.” Memorandum Opinion at 13 (internal quotation marks omitted).

4. Publication of this Memorandum Opinion would:
- a. provide clear guidance regarding the appropriateness of conducting an *in camera* review when there is legally sufficient evidence supporting exemption; and
 - b. make clear that when determining whether the public safety exception applies, it is the effect of disclosure that is at issue.

WHEREFORE, the Pennsylvania State Police respectfully requests that this Court's Memorandum Opinion in Pennsylvania State Police v. American Civil Liberties Union of Pennsylvania, No. 1066 CD 2017, filed May 18, 2018, be designated as an Opinion and reported.

Respectfully submitted:

PENNSYLVANIA STATE POLICE

DATE: June 11, 2018

/s/Nolan B. Meeks

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Appendix D

65 P.S. § 67.708. Exceptions for public records

(a) Burden of proof.--

- (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.
- (2) The burden of proving that a legislative record is exempt from public access shall be on the legislative agency receiving a request by a preponderance of the evidence.
- (3) The burden of proving that a financial record of a judicial agency is exempt from public access shall be on the judicial agency receiving a request by a preponderance of the evidence.

(b) Exceptions.--Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

- (1) A record, the disclosure of which:
 - (i) would result in the loss of Federal or State funds by an agency or the Commonwealth; or
 - (ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.
- (2) 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.
- (3) A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include:

(i) documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act;

(ii) lists of infrastructure, resources and significant special events, including those defined by the Federal Government in the National Infrastructure Protections, which are deemed critical due to their nature and which result from risk analysis; threat assessments; consequences assessments; antiterrorism protective measures and plans; counterterrorism measures and plans; and security and response needs assessments; and

(iii) building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

(4) A record regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security.

(5) A record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

(6) (i) The following personal identification information:

(A) A record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number.

(B) A spouse's name, marital status or beneficiary or dependent information.

(C) The home address of a law enforcement officer or judge.

(ii) Nothing in this paragraph shall preclude the release of the name, position, salary, actual compensation or other payments or expenses, employment contract, employment-related contract or agreement and length of service of a public official or an agency employee.

(iii) An agency may redact the name or other identifying information relating to an individual performing an undercover or covert law enforcement activity from a record.

(7) The following records relating to an agency employee:

(i) A letter of reference or recommendation pertaining to the character or qualifications of an identifiable individual, unless it was prepared in relation to the appointment of an individual to fill a vacancy in an elected office or an appointed office requiring Senate confirmation.

(ii) A performance rating or review.

(iii) The result of a civil service or similar test administered by a Commonwealth agency, legislative agency or judicial agency. The result of a civil service or similar test administered by a local agency shall not be disclosed if restricted by a collective bargaining agreement. Only test scores of individuals who obtained a passing score on a test administered by a local agency may be disclosed.

(iv) The employment application of an individual who is not hired by the agency.

(v) Workplace support services program information.

(vi) Written criticisms of an employee.

(vii) Grievance material, including documents related to discrimination or sexual harassment.

(viii) Information regarding discipline, demotion or discharge contained in a personnel file. This subparagraph shall not apply to the final action of an agency that results in demotion or discharge.

(ix) An academic transcript.

- (8) (i) A record pertaining to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings. This subparagraph shall not apply to a final or executed contract or agreement between the parties in a collective bargaining procedure.
- (ii) In the case of the arbitration of a dispute or grievance under a collective bargaining agreement, an exhibit entered into evidence at an arbitration proceeding, a transcript of the arbitration or the opinion. This subparagraph shall not apply to the final award or order of the arbitrator in a dispute or grievance procedure.
- (9) The draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency.
- (10) (i) A record that reflects:
- (A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.
- (B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.
- (ii) Subparagraph (i)(A) shall apply to agencies subject to 65 Pa.C.S. Ch. 7 (relating to open meetings) in a manner consistent with 65 Pa.C.S. Ch. 7. A record which is not otherwise exempt from access under this act and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 shall be a public record.
- (iii) This paragraph shall not apply to a written or Internet application or other document that has been submitted to request Commonwealth funds.

(iv) This paragraph shall not apply to the results of public opinion surveys, polls, focus groups, marketing research or similar effort designed to measure public opinion.

(11) A record that constitutes or reveals a trade secret or confidential proprietary information.

(12) Notes and working papers prepared by or for a public official or agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.

(13) Records that would disclose the identity of an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

(14) Unpublished lecture notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related material and scholarly correspondence of a community college or an institution of the State System of Higher Education or a faculty member, staff employee, guest speaker or student thereof.

(15) (i) Academic transcripts.

(ii) Examinations, examination questions, scoring keys or answers to examinations. This subparagraph shall include licensing and other examinations relating to the qualifications of an individual and to examinations given in primary and secondary schools and institutions of higher education.

(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 trial 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.

This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b)(relating to accident prevention investigations).

(17) A record of an agency relating to a noncriminal investigation, including:

(i) Complaints submitted to an agency.

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

(iii) A record that includes the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L. 1559, No. 169),¹ known as the Whistleblower Law.

(iv) A record that includes information made confidential by law.

(v) Work papers underlying an audit.

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

(B) Deprive a person of the right to an impartial adjudication.

(C) Constitute an unwarranted invasion of privacy.

(D) Hinder an agency's ability to secure an administrative or civil sanction.

(E) Endanger the life or physical safety of an individual.

(18) (i) Records or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.

(ii) This paragraph shall not apply to a 911 recording, or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure.

(19) DNA and RNA records.

(20) An autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmortem

¹ 43 P.S. § 1421 et seq.

examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner. This exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death.

(21) (i) Draft minutes of any meeting of an agency until the next regularly scheduled meeting of the agency.

(ii) Minutes of an executive session and any record of discussions held in executive session.

(22) (i) The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to the following:

(A) The leasing, acquiring or disposing of real property or an interest in real property.

(B) The purchase of public supplies or equipment included in the real estate transaction.

(C) Construction projects.

(ii) This paragraph shall not apply once the decision is made to proceed with the lease, acquisition or disposal of real property or an interest in real property or the purchase of public supply or construction project.

(23) Library and archive circulation and order records of an identifiable individual or groups of individuals.

(24) Library archived and museum materials, or valuable or rare book collections or documents contributed by gift, grant, bequest or devise, to the extent of any limitations imposed by the donor as a condition of the contribution.

(25) A record identifying the location of an archeological site or an endangered or threatened plant or animal species if not already known to the general public.

(26) A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the

bidder's or offeror's economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

(27) A record or information relating to a communication between an agency and its insurance carrier, administrative service organization or risk management office. This paragraph shall not apply to a contract with an insurance carrier, administrative service organization or risk management office or to financial records relating to the provision of insurance.

(28) A record or information:

(i) identifying an individual who applies for or receives social services; or

(ii) relating to the following:

(A) the type of social services received by an individual;

(B) an individual's application to receive social services, including a record or information related to an agency decision to grant, deny, reduce or restrict benefits, including a quasi-judicial decision of the agency and the identity of a caregiver or others who provide services to the individual; or

(C) eligibility to receive social services, including the individual's income, assets, physical or mental health, age, disability, family circumstances or record of abuse.

(29) Correspondence between a person and a member of the General Assembly and records accompanying the correspondence which would identify a person that requests assistance or constituent services. This paragraph shall not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbying disclosure).

(30) A record identifying the name, home address or date of birth of a child 17 years of age or younger.

(c) Financial records.--The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17). An

agency shall not disclose the identity of an individual performing an undercover or covert law enforcement activity.

(d) Aggregated data.--The exceptions set forth in subsection (b) shall not apply to aggregated data maintained or received by an agency, except for data protected under subsection (b)(1), (2), (3), (4) or (5).

(e) Construction.--In determining whether a record is exempt from access under this section, an agency shall consider and apply each exemption separately.