



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>JEFFREY BENZING AND</b>	:	
<b><i>PUBLICSOURCE,</i></b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2016-1018</b>
	:	
<b>ALLEGHENY COUNTY,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Jeffrey Benzing, on behalf of *PublicSource* (“Requester”), submitted a request (“Request”) to Allegheny County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the County’s SWAT team policy. The County denied the Request, arguing that release of the record would threaten personal security and public safety. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied in part** and **dismissed as moot in part**, and the County is not required to take any further action.

## FACTUAL BACKGROUND

On April 27, 2016, the Request was filed, seeking “a copy of the Allegheny County SWAT policy manual and, if separate, the SWAT policy for assisting local municipalities.” The Request added that, “if records cannot be released because of specific tactical content, I ask that the specific content be redacted to allow for the release of the broader policies.” On June 9, 2016, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b)(2), the County denied the Request, arguing that the release of the policy would threaten personal security, 65 P.S. § 67.708(b)(1)(ii), public safety, 65 P.S. § 67.708(b)(2), and the physical security of information storage systems, 65 P.S. § 67.708(b)(3).

On June 9, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. Specifically, the Requester argues that the County may not withhold the policy in full. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On June 22, 2016, the County provided a redacted copy of the requested SWAT team policy to the Requester. On June 28, 2016, the Requester provided the OOR with a copy of the policy and challenged the redactions made by the County. On July 14, 2016,<sup>1</sup> the County submitted a position statement, along with the affidavit of Coleman McDonough, Superintendent of the Allegheny County Police Department.

## 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

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<sup>1</sup> The Requester also made a submission on this date, noting that “the redactions at issue, based on the layout and organization of the document, do not appear to pertain to information that could harm law enforcement in the field or more broadly impede the agency’s ability to respond appropriately to public safety incidents.”

“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.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local 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. 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 clearly 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). 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)).

On appeal, the County provided redacted copies of the requested SWAT policy. As a result, the County argues that the appeal should be dismissed as moot. Specifically, the County argues that the Request contemplated redacted documents and the appeal did not challenge any redactions made by the County. However, as the record was originally withheld in its entirety, the Requester was not able to challenge any redactions in its appeal. Further, although the Request and the appeal acknowledged that the County may redact any exempt information, the Requester’s argument was predicated on the County demonstrating that the information was, in fact, exempt. As such, the appeal is not fully moot, but rather, dismissed as moot as to the unredacted portions of the document provided to the Requester.

The County argues that disclosure of the redacted information would threaten public safety. 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 preparedness or public protection activity....” 65 P.S. § 67.708(b)(2) (emphasis added). In order to establish this exemption, an agency 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. 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.

A review of the records shows that the County redacted the following portions of the policy:

- Under “SWAT OPERATIONAL SAFETY,” the County redacted the entirety of Section III(A) (under “Firearms Safety Rules”) and portions of Section III(B)(1) (under “General Safety Considerations”) and Section III(D)(1) (under “Safety Procedures”). While it is unclear what specific information is contained in Section III(A) because of its redaction, Section III(B)(1) lists “items [that] SHALL be worn during all operations and live fire training exercises,” and Section III(D)(1) references a weapon, the type of which is redacted, used by the County.
- Under “CALL OUT PROCEDURES FOR SWAT AND CRISIS NEGOTIATION TEAM,” the County redacted portions of Section III(A) (under “Initial call requesting SWAT Team/Crisis Negotiations Team”) and Section III(D) (under “Actions of the Critical Incident Commander following approval of a call out”). Section III(A) lists procedures to be followed “[w]hen a call is received ... requesting the response of the SWAT Team and/or Crisis Negotiations Team. Meanwhile, Section III(D) pertains to “actions” that are to be taken “[o]nce a SWAT call out has been approved by the Superintendent of Police.”

In support of the County’s claim that the information is exempt, Superintendent McDonough attests as follows:

2. ... I authorized the release of a redacted version of the SWAT policy. The redacted portions of the SWAT policy contain security-sensitive information relating to public safety that, if disclosed, could jeopardize the effectiveness of the Allegheny County Police Department’s SWAT team (“SWAT team”).
3. The SWAT team is a highly trained unit who is called upon in a variety of high risk, dangerous situations beyond the training and capabilities of the average patrol officers. In an effort to minimize the risk of harm to everybody involved when entering these situations and apprehending extraordinarily dangerous individuals, the team will utilize the elements of shock and surprise in timing the entry, tactics used, and weapons deployed. If tactical portions of the SWAT policy are disclosed to the public, then the SWAT team loses these elements, thereby endangering the lives and safety of SWAT team members and any civilians in the area. For the SWAT team to be as effective as possible, portions of the SWAT policy must necessarily be kept confidential.
4. For this reason, I have withheld the information in an effort to continue to safeguard police personnel and the civilian population and to ensure that the SWAT team remains capable of fulfilling then needs of the Allegheny County community.

Under the RTKL, an affidavit or statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Here, it is undisputed that the record at issue relates to law enforcement. Further, the County has demonstrated that the redacted information is tactical in nature and describes specific actions to be taken by the SWAT team in the event of an emergency requiring their deployment. Based on the evidence provided, the County has met its burden of proving that disclosure of the redacted information would threaten public safety.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **denied in part** and **dismissed as moot in part**, and the County is not required to take any further action. 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 Allegheny County Court of Common Pleas. 65 P.S. § 67.1302(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.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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

**FINAL DETERMINATION ISSUED AND MAILED: July 27, 2016**

/s/ Kyle Applegate

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APPEALS OFFICER  
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