



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:
	:
<b>ERIK STEINHEISER,</b>	:
<b>Requester</b>	:
	:
<b>v.</b>	: <b>Docket No: AP 2022-1908</b>
	:
<b>SOUTHEASTERN PENNSYLVANIA</b>	:
<b>TRANSPORTATION AUTHORITY,</b>	:
<b>Respondent</b>	:

### INTRODUCTION

Erik Steinheiser (“Requester”) submitted a request (“Request”) to the Southeastern Pennsylvania Transportation Authority (“SEPTA”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking train surveillance video. SEPTA denied the Request, arguing that releasing the video would pose a risk of physical harm of an individual. 65 P.S. § 67.708(b)(1)(ii). The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and SEPTA is required to take additional action as directed.

### FACTUAL BACKGROUND

On July 10, 2022, the Request was filed, seeking:

[V]ideo surveillance of all cameras on the West Trenton Line R3 for the 12:31 train scheduled to depart from Langhorne Station on Friday, July 8th, 2022. This would be train number 6321 from the schedule. I am requesting all footage on all cameras on the train from Langhorne Station up to the end of the route. There was a police

action incident at Somerton Station on this train that I also want full and complete footage included in this request.

On July 11, 2022, SEPTA invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b). On August 17, 2022, SEPTA denied the Request, arguing that releasing the video would pose a risk of physical harm to an individual. 65 P.S. § 67.708(b)(1)(ii).

On August 17, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed SEPTA to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On August 26, 2022, the Requester granted an extension for the OOR to issue the final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

On September 12, 2022, SEPTA submitted a position statement, reiterating its grounds for denial, and further arguing that the video relates to a noncriminal investigation and its disclosure would endanger the life or physical safety of an individual. 65 P.S. § 67.708(b)(17)(vi)(E). In support of its position, SEPTA submitted the affidavit of Charles Lawson, the Acting Chief of Police for SEPTA.

On September 13, 2022, the Requester submitted argument contesting the exemptions stated by SEPTA, and further arguing for release of the responsive video.

On September 15, 2022, the OOR sent email correspondence requesting further sworn submissions from SEPTA further detailing the potential risk of harm if the video was to be released.

On September 21, 2022, SEPTA explained that it did not intend to make further sworn submissions and instead supplemented the record with a SEPTA policy.

On September 22, 2022, the Requester made a submission in response, requesting that the Appeals Officer conduct an *in camera* review. On October 11, 2022, the Requester followed-up on this email. Because this Final Determination concerns the effect of the disclosure of the video, rather than the contents of the video itself, and because there is sufficient evidence before the OOR to adjudicate the matter, the request for *in camera* review is denied.

On October 11, 2022, the undersigned was reassigned the appeal.

### **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 decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing. The Requester sought an *in camera* review of the record but as explained above, that request is denied.

SEPTA 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)).

SEPTA contends, among other grounds for denial, that granting access to the responsive video would be reasonably likely to create a substantial and demonstrable risk to a person’s security. 65 P.S. § 67.708(b)(1)(ii). To establish the applicability of this exemption, an agency must show: (1) a “reasonable likelihood” of (2) “substantial and demonstrable risk” to a person’s security. *Delaware County v. Schaefer*, 45 A.3d 1149, 1156 (Pa. Commw. Ct. 2012). The Commonwealth Court has defined substantial and demonstrable risk as “actual or real and apparent.” *Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 180 (Pa. Commw. Ct. 2019) (emphasis in original) (quoting *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 373 (Pa. Commw.

Ct. 2013). Further, “[a]n agency must offer more than speculation or conjecture.” *California Borough v. Rothey*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018).

In his affidavit, Chief Lawson states:

3. On July 8, 2022, SEPTA Police responded to a call on SEPTA’s West Trenton Regional Rail Line reporting a male wearing body armor seated directly next to the train engineer's control stand.
4. SEPTA’s Railroad Supervisor also responded to the scene and spoke with train personnel. The Assistant Conductor stated that he observed a vest under the male passenger’s shirt and observed the passenger behaving abnormally. Due to recent mass shooting events and out of an abundance of caution, the Assistant Conductor notified the engineer to call for police assistance.
5. Upon arriving on scene, Police identified the male passenger wearing the body armor as Erik Steinheiser.
6. Police were also able to ascertain that Mr. Steinheiser was lawfully in possession of and traveling on SEPTA’S West Trenton Regional Rail Line with a loaded firearm.
7. When SEPTA Police arrived on scene, all other passengers but Mr. Steinheiser were moved to the back of the train, then removed and placed on another train.
8. SEPTA Police offered to drive Mr. Steinheiser to his intended destination, SEPTA’s Headquarters, via squad car. Mr. Steinheiser, however, refused to tender his weapon while riding in the squad car. The SEPTA Police Officer who was to drive Mr. Steinheiser did not feel safe allowing a passenger in the back of a police car with a loaded weapon. Instead, Mr. Steinheiser was seated on the next Regional Rail train in a car with a police escort.
9. It is believed that the individual making the subject Right to Know Law request is the same individual who Police identified as Erik Steinheiser on July 8, 2022.
10. The train video depicts the train engineer and conductors who refused to transport a passenger with a loaded firearm. Based on my training and experience in law enforcement there is a risk to the safety of the SEPTA personnel who responded to this incident if the video footage of the incident is provided to Mr. Steinheiser. The risk is that Mr. Steinheiser will be able to identify and find those SEPTA personnel. Mr. Steinheiser could then potentially use his firearm against them and/or harass them via other means.
11. The train video depicts the train engineer and conductors who refused to transport a passenger with a loaded firearm. Based on my training and experience in law enforcement, there is a risk to the safety of the SEPTA personnel who responded to this incident if the video footage of the incident is provided to members of the public. The risk is that members of the public will be able to identify and find those SEPTA personnel, and harass them.

Affidavit ¶¶ 3-11.<sup>1</sup>

Further, SEPTA submitted data compiled by SEPTA Police regarding arrests for aggravated assaults utilizing guns committed from 2020 to 2022 and data compiled by SEPTA Police regarding arrests for robberies utilizing guns committed from 2020 to 2022. SEPTA claims the violent crime rates show a potential threat against employees.

The reports submitted by SEPTA do not specifically denote crimes only against SEPTA employees, but against all people on SEPTA services. In its September 21, 2022 supplemental submissions, SEPTA included the policy regarding the prohibition of threatening items while traveling aboard SEPTA vehicles. In the accompanying unsworn position statement, SEPTA argues that the body armor worn by the Requester is, by its very nature, threatening to SEPTA employees. Meanwhile, in his September 13, 2022 unsworn position statement, the Requester argues:

Merely stating that releasing someone's likeness will put them in danger is insufficient to prove this burden. Additionally, SEPTA is speculating that the surveillance video "could be used to identify the train engineers and conductors on board as of that day" and has no way to prove how merely showing someone's likeness will enable identification of any form to the requestor this is also speculation. In addition to this, they allege that over a lawful activity that the requester could all of a sudden "behave in a manner that could endanger and threaten the engineer and conductor" once again this is pure speculation. How can SEPTA predict how the requester will and will not act?

Requester Position Statement ¶2. The Requester also notes that the train was open to the public at the time of the surveillance footage and that there was not an expectation of privacy at that time.

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<sup>1</sup> Under the RTKL, a sworn affidavit may serve as sufficient evidentiary support. *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). In the absence of any evidence that SEPTA acted in bad faith, "the averments in [the statement] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

The instant matter is similar to *Crocco v. Pa. Dep't of Health*, 214 A.3d 316, 324 (Pa. Commw. Ct. 2019). In *Crocco*, the Commonwealth Court upheld the redaction of names of individuals who served non-hospital abortion facilities under Section 708(b)(1)(ii). The Court acknowledged that, “[n]otwithstanding that ‘the personal security exception does not specifically provide for a blanket exception for certain classes or large groups of individuals[,] ... an agency may establish the existence of an exception covering a large group of individuals based upon evidence that establishes that the release of certain information poses a likelihood of a substantial and demonstrable risk to the personal security of that group of individuals’.” *Crocco*, 214 A.3d at 325 (citing *State Emps. ' Ret. Sys. v. Fultz*, 107 A.3d 860, 866-67 (Pa. Commw. Ct. 2015) (deeming categorical evidence as to vulnerability of individuals over age 60 insufficient)); cf. *Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (rejecting personal security exception when one witness testified generally that police officers' families are frequently threatened).

We find Chief Lawson’s affidavit to be credible as to the potential for harm to SEPTA personnel due to the events captured on the video. Based upon the preponderance of the evidence standard, we find that it is more likely than not that the release of the video would likely create a very real threat of physical harm to those SEPTA personnel. However, SEPTA has not demonstrated that the video is exempt in its entirety. The evidence is silent as to any threat posed to any other member of the public that was captured on the video, and we cannot conclude that there is any expectation of privacy that those individuals may have while riding public transportation. Therefore, while the faces or any other identifying information of SEPTA personnel may be redacted from the video, the remainder of the video shall be disclosed.<sup>2</sup> 65 P.S. § 67.706. The Supreme Court has recognized that video may be redacted of non-public

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<sup>2</sup> With these redactions, it does not appear that any of the other exemptions cited by SEPTA are applicable, as SEPTA’s concerns lie with the identification of SEPTA personnel.

information under the RTKL, *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716 (Pa. 2020), and SEPTA has not provided any evidence that it is not capable of such redactions.

### CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and SEPTA is required to provide the responsive video, with redactions, 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. 65 P.S. § 67.1303. 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>3</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 13, 2022**

/s/ Kyle Applegate

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CHIEF COUNSEL  
KYLE APPLGATE, ESQ.

Sent to: Erik Steinheiser (via email only);  
Mark Gottlieb, Esquire (via email only);  
Justine Baakman, Esquire (via email only);  
SEPTA Open Records Officer (via email only)

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