



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JAMES BRIDY,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2022-2112
	:	
NORTHUMBERLAND COUNTY,	:	
Respondent	:	

INTRODUCTION

James Bridy (“Requester”) submitted a request (“Request”) to Northumberland County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, among other things, contracts, studies, and other information related to a specific property known as Boyer’s Knob and other potential locations for a new 911 tower. The Request was deemed denied, and 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 the County is required to take further action as directed.

FACTUAL BACKGROUND

On August 2, 2022, the Request was filed with the County, seeking, in relevant part:

. . . please provide all documents, records, and other materials that:

1. Identify other locations that are currently being considered or which has been chosen for the construction of a new 911 tower as a replacement of the 911 tower currently situated at the Site.¹

¹ For clarity, Item 1 will be referenced in the following manner:

Item 1(a) seeking records that “[i]dentify other locations that are currently being considered . . . for the construction of a new 911 tower as a replacement of the 911 tower currently situated at the Site.”

2. All engineering reports, feasibility studies and cost estimates prepared by or for the County of Northumberland related to the construction of a new 911 tower at an alternative location other than at the Site, including with respect to ground preparation, infrastructure (tower costs) and all related ancillary costs including but not limited to the delivery of electricity to said alternative location.
3. All studies related to the quality of transmission (including radio frequency studies) at the Site or at any other location chosen or under consideration.
4. All contracts entered into or considered and/or cost estimates related to the construction of a new 911 tower at the Site or at an alternative location, including rental payments under any applicable land lease(s) or purchase price under any applicable agreement to purchase, price of construction, or the like.²
5. All documents related to the current 911 Tower at the Site regarding radio frequency studies, costs estimates to upgrade the current site; and agreements to add additional antenna at the site, including a WISP antenna.³

On August 8, 2022, the County invoked a thirty-day extension to respond to the Request. 65 P.S. § 67.902(b). The County asserts that it prepared a response to the Request which was intended to be sent to the Requester on September 8, 2022; however, the response was never sent to the Requester and the Request was deemed denied.⁴

On September 12, 2022, the Requester appealed to the OOR, stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third

Item 1(b) seeking records that “[i]dentify other locations . . . which [have] been chosen for the construction of a new 911 tower as a replacement of the 911 tower currently situated at the Site.”

² For clarity, Item 4 will be referenced in the following manner:

Item 4(a) seeking “[a]ll contracts entered into . . . related to the construction of a new 911 tower at the Site or at an alternative location, including rental payments under any applicable land lease(s) or purchase price under any applicable agreement to purchase, price of construction, or the like.”

Item 4(b) seeking [a]ll contracts . . . considered and/or cost estimates related to the construction of a new 911 tower at the site or at an alternate location[.]”

³ For clarity, Item 5 will be referenced in the following manner:

Item 5(a) requesting “documents related to the current 911 Tower at the Site regarding radio frequency studies[.]”

Item 5(b) requesting “documents related to the current 911 Tower at the Site regarding . . . cost estimate to upgrade the current site[.]”

Item 5(c) requesting “agreements to add additional antenna at the site, including a WISP antenna.”

⁴ Although the Request was deemed denied, the County is not prohibited from raising reasons for denying access on appeal to the OOR. See *McClintock v. Coatesville Area School District*, No. 1262 C.D. 2012, 2013 Pa. Commw. LEXIS 322 (Pa. Commw. Ct. Aug. 9, 2013).

parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

The County did not provide a submission by the record closing date and, on September 22, 2022, the OOR contacted the County to confirm whether a submission would be provided.⁵ On September 22, 2022, the County provided the draft response that the County intended to send to the Requester on September 8, 2022. On September 22, 2022, the OOR again contacted the County to determine whether the County intended to submit any sworn statements to be considered prior to the entry of a Final Determination. On September 23, 2022, the County submitted a position statement arguing that (1) the Request does not seek records;⁶ (2) certain records requested do not exist; and (3) the remaining records requested are exempt under the public safety exemption (section 708(b)(2)); building, infrastructure, and utility security exemption (section 708(b)(3)(i & ii)); computer security exemption (section 708(b)(4)); internal, predecisional deliberation exemption (section 708(b)(10)); and engineering and feasibility estimate exemption (section 708(b)(22)). In support of its position, the County submitted the attestation, made under penalty of perjury, from Nathan Savidge, the County's Chief Clerk. On September 29, 2022, the Requester submitted a response to the County's September 23, 2022 submission.

On October 5, 2022, the OOR requested clarification from the County, as the County's position statement contained statements of fact that were not supported by an attestation from an individual with actual knowledge and the September 23, 2022 affidavit did not address certain

⁵ The RTKL grants appeals officers wide discretion with respect to procedure and the manner in which a record is developed. *Bowling v. Office of Open Records*, 621 Pa. 133, 75 A.3d 453, 467 (Pa. 2013); *Highmark Inc. v. Voltz*, 163 A.3d 485 (Pa. Cmwlth. 2017) (*en banc*); *Dep't of Educ. v. Bagwell*, 114 A.3d 1113 (Pa. Cmwlth. 2015). Though not required, an appeals officer may request additional evidence or explanation from the parties to develop the record. *Schackner v. Edinboro Univ.*, 227 A.3d 975 (Pa. Commw. Ct. 2020).

⁶ Upon review of the Request, this argument is meritless as the Request clearly states: "please provide all documents, records, and other materials that . . ."

records sought by the Requester in the Request. On October 13, 2022,⁷ the County submitted a supplemental position statement, the supplemental attestation of Mr. Savidge, and the attestation of Russell Fellman (“Mr. Fellman”), the County 911 Project Manager. In addition to the various exemptions raised in the County’s denial and position statement submitted on September 23, 2022, the County’s supplemental position statement and attestations raised three additional exemptions—(1) the loss of federal funding and personal security (section 708(b)(1)(i & ii)); (2) radio transmissions received by emergency dispatch personnel (section 708(b)(18)(i)); and (3) pre-award bid information (section 708(b)(26))—as bases for the denial of the requested records.

On October 17, 2022, the OOR requested further clarification on the County’s position that disclosure of the requested records would result in the loss of federal funding and would be reasonably likely to threaten public safety. In response to the attestation of Mr. Fellman, the Requester “respectfully request[ed] that the [OOR] demand evidence in support of those statements.” *See* Requester Submission, October 21, 2022. The County submitted a supplemental attestation from Russell Fellman on October 25, 2022. The County specifically identified two reports generated by Motorola that are responsive to Items 3 and 5(a) of the Request—(1) a County-wide report created by Motorola containing information regarding the frequencies, signal strength, and coverage area for the County’s 911 towers, and (2) a preliminary report created by Motorola related to possible new tower locations. On October 27, 2022, the County solicitor indicated that Motorola was informed of this pending appeal involving records created by Motorola and Motorola did not seek to participate in the appeal as a direct interest participant.

The Requester submitted position statements on October 21, 2022, October 26, 2022, and

⁷ The Requester granted the OOR a five-week extension to issue a 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).”).

October 30, 2022. The Requester submitted evidence in the form of a news article, a site plan he received from the County, and cost estimates and a 2016 frequency study of the County that the Requester obtained from a federal agency. Requester challenges the competency of the evidence submitted by the County, the qualifications of affiants, and requests sanctions “where appropriate.”⁸ The record in this matter closed on October 30, 2022.

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). 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.*

⁸ The OOR is without authority to impose sanctions on agencies. *See* 65 P.S. § 67.1304; *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013) (“As we observed, Section 1304 of the RTKL permits a Chapter 13 court to award costs and attorneys’ fees, and to impose sanctions, after the court, not the appeals officer, makes relevant factual findings and legal conclusions. . . . Section 1304(a)(1) requires a court to make factual findings regarding whether an agency denying access to records acted ‘willfully or with wanton disregard’ or ‘otherwise . . . in bad faith.’”); *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 138 (Pa. Commw. Ct. 2019) *aff’d in part*, 255 A.3d 385 (Pa. 2021) (“the statute is clear that only a court may make a finding regarding an agency’s bad faith”); *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161, 1172 (Pa. Commw. Ct. 2018), *aff’d*, 243 A.3d 19 (Pa. 2020).

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. 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 or that a record does not exist. *See* 65 P.S. § 67.708(b); *see also, Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011) (“The burden of proving a record does not exist . . . is placed on the agency responding to the right-to-know request.”).

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)).

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury 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 competent evidence that the County has acted in bad faith or that additional responsive records exist, “the averments in [the attestations] 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)).

1. The County proved that certain records do not exist within the County’s possession, custody or control

a. Contracts and Agreements Related to New Site Locations, Construction, and Antennae

The County argues that certain records requested by the Requester do not exist. In support of the County’s position, Mr. Savidge attests that after diligent search, there are no responsive records for Items 1(b), 4(a), and 5(c) of the Request, which sought the following:

1. Identify other locations . . . which ha[ve] been chosen for the construction of a new 911 tower as a replacement of the 911 tower currently situated at the Site.
4. All contracts entered into . . . related to the construction of a new 911 tower at the Site or at an alternative location, including rental payments under any applicable land lease(s) or purchase price under any applicable agreement to purchase, price of construction, or the like.
5. All . . . agreements to add additional antenna at the site, including a WISP antenna.

See Savidge Attestation, September 23, 2022, ¶¶ 4-5. Mr. Savidge attests that agreements or actions to commence with construction, improvements, or the procurement of real estate are required to be undertaken by the county commissioners. *Id.* Having reviewed the records of the commissioners’ meetings, Mr. Savidge has determined that such actions have not been taken by the commissioners *Id.* Having searched the existing contracts of Northumberland County, Mr. Savidge attests that “there are no contracts pertaining to the building or replacement of a transmission tower to replace the existing Boyer’s Knob tower” and that there are no executed contracts for rental payments, purchase agreements, or land leases related to an alternate 911 tower site. *See* Savidge Attestation, October 13, 2022, ¶¶ 2-4; *see also* Savidge Attestation, September 23, 2022, ¶ 6. Mr. Savidge further attests that no agreements exist in the County records for the addition of an antenna at the Site. *See* Savidge Attestation, September 23, 2022, ¶ 7. Based on the evidence provided, the County has met its burden of proof that it does not possess records

responsive to the quoted portions of Nos. 1, 4, and 5 of the Request. *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

b. Radio Frequency & Transmission Quality Studies for Improvements Under Consideration

The County identified a preliminary transmission quality study created by Motorola as a potentially responsive record to Items 3 and 5(a) of the Request. The County argues that it does not possess or have control over the preliminary transmission quality studies for new tower locations or improvements to the current 911 site. To support this argument, the County submitted the attestation of Mr. Fellman which states:

In addition to the study referenced in #2 above, Motorola has begun preliminary reports related to possible new tower locations for a Boyer's Knob tower replacement and what coverage would be expected to be provided by other towers if the County were to hypothetically build a tower, purchase a tower, or place equipment on an existing tower. However, these preliminary reports, while shown to the County, have never been the property of the County and are not in the possession of the County. The County has been informed by Motorola that these reports are the proprietary information of Motorola until such time as the County executes a contract to proceed with a plan. In addition, these plans are preliminary and not finalized because the County has not firmly committed to a plan for Boyer's Knob.

See Fellman Attestation, October 25, 2022 ¶ 3.

Mr. Fellman attests that while the County has been shown the preliminary transmission quality study, it does not have the preliminary transmission quality study for the current 911 site in its possession, custody, or control because such preliminary studies are the proprietary information of Motorola until such time as the County executes a contract to proceed with a plan. *Id.* Mr. Savidge attests that no contracts have been executed for improvements to the current 911 tower site. *See* Savidge Attestation, September 23, 2022, ¶ 7. The solicitor states in an unsworn statement that this preliminary report is "in the possession of Motorola [was] prepared for Motorola internally and [is] not the County's property." *See* Garrigan Unsworn Statement, October

27, 2022. The solicitor further states in the County’s communications with Motorola, Motorola has stated “until the County signs a contract, the reports are Motorola's property. There is no contract in place between Motorola and the County either to build a new [tower] or prepare these reports.” *Id.* Requester challenges the veracity of the County’s statements but has not offered evidence that the County has possession, custody, or control of the preliminary report created by Motorola contrary to the County’s sworn and unsworn statements. Accordingly, the County has met its burden that it does not possess the preliminary report identified in Paragraph Three of Mr. Fellman’s October 25, 2022 attestation.

2. The County proved that certain requested records are exempt under Section 708(b)(22) of the RTKL

The County argues that the following portions of Requests No. 1-5 are exempt under Section 708(b)(22):

1. Identify other locations that are currently being considered . . . for the construction of a new 911 tower as a replacement of the 911 tower currently situated at the Site.
2. All engineering reports, feasibility studies and cost estimates prepared by or for the County of Northumberland related to the construction of a new 911 tower at an alternative location other than at the Site, including with respect to ground preparation, infrastructure (tower costs) and all related ancillary costs including but not limited to the delivery of electricity to said alternative location.
3. All studies related to the quality of transmission (including radio frequency studies) . . . at any other location chosen or under consideration.
4. All contracts . . . considered and/or cost estimates related to the construction of a new 911 tower at the Site or at an alternative location
5. [a] All documents related to the current 911 tower at the Site regarding radio frequency studies,
[b] costs estimates to upgrade the current site

a. Items 2, 4(b) & 5(b)

Unless a decision has been made to proceed with the acquisition or disposal of real estate or a construction project, the plain language of Section 708(b)(22)(i) unambiguously exempts

contents of: (1) engineering or feasibility estimates, (2) real estate appraisals, (3) evaluations made by or for an agency for construction projects; (4) evaluations made by or for an agency the leasing, acquiring or disposing of real property or an interest in real property; and (5) the purchase of public equipment included in a real estate transaction. *See* 65 P.S. § 67.708(b)(22); *see also, Voit v Concord Township*, OOR Dkt. AP 2021-1568 (holding that records of “all documents related to the purchase of [a farm]” are exempt under (b)(22) where the agency has not made a decision to acquire the farm); *Hooper & King of Prussia Historical Society v Upper Merion Township*, OOR Dkt. AP 2022-0045, 2022 PA O.O.R.D. LEXIS 508 (holding that a facility condition assessment report relating to water damage and structural deficiencies is exempt under (b)(22) as an evaluation related to a construction project where no decision had been made to proceed with the project); *Baran v Pa Turnpike Comm’n*, OOR Dkt. AP 2013-0970, 2013 PA O.O.R.D. LEXIS 538 (holding that a noise study performed to evaluate engineering and environmental conditions related to a construction project is exempt under (b)(22) where no decision has been made to proceed with construction).

The County maintains that no contracts or agreements have been entered into by the County for construction projects or acquisition of real estate for the current or prospective 911 tower sites.

Mr. Savidge attests, in relevant part:

4. After diligent search, I have determined that there are no responsive records regarding whether *any locations have been chosen by the County of Northumberland for a new 911 tower at the Site (i.e. on Boyer's Knob or to replace the 911 tower located on Requester's property)* because no decision has been made regarding the same. The choice of a new tower location would be “action” by the Commissioners and would have to have been made by the Northumberland County Commissioners at a public meeting and the same would be reflected in the minutes of the meetings of the Commissioners. After diligent search I have reviewed the same and determined that no such decision has been made.
5. After diligent search, I have determined that there are no responsive records regarding *any contracts entered into by the County of Northumberland related*

to the construction of a new 911 tower at the site (i.e. Boyer 's Knob or the property owned by Requester) or an alternative location, because no contracts exist. . .

6. After diligent search, I have determined that there are no responsive records regarding *(r)ental payments under any applicable land lease(s) or purchase price under any applicable agreement purchase, price of construction. or the like.* The power to contract on behalf of the County of Northumberland lies exclusively with the Northumberland County Commissioners, Any such action to enter into a “land lease” or “agreement to purchase” would have had to have been made by the Northumberland County Commissioners at a public meeting and the same would be reflected in the minutes of the meetings of the Commissioners, I have reviewed the same and determined that no such decision has been made. Any rental payments would have had to have been processed via a rider submitted by the Commissioners' Office to the County Controller to process such a payment.
7. After diligent search I have determined that no such rider exists. After diligent search, I have determined that there are no responsive records regarding *(a)greements to add additional antenna at the site. including a WISP antenna.* Any such “agreement” would be a contract and the power to contract on behalf of the County of Northumberland lies exclusively with the Northumberland County Commissioners. Any such action to enter into such a contract would have had to have been made by the Northumberland County Commissioners at a public meeting and, the same would be reflected in the minutes of the meetings of the Commissioners. I have reviewed the same and determined that no such decision has been made. Even if such an “agreement” was not a contract per se, entering into any such agreement still would have been "action" taken by the Commissioners and thus would be required to have occurred at a public meeting which, again, would be reflected in the minutes of said meetings. After diligent search I have determined that there are no minutes reflecting any entry into any such “agreements”.

See Savidge Attestation, September 23, 2022, ¶¶ 4-7 (emphasis in original). Mr. Savidge further

attests:

. . . All contracts pertaining to Northumberland County's 911 towers or towers utilized by Northumberland County for 911 transmission are kept at the Northumberland County Commissioners' Office. I have searched the existing contracts of the County of Northumberland and have determined there are no contracts pertaining to the building or replacement of a transmission tower to replace the existing Boyer's Knob tower.

4. To reiterate, any and all files pertaining to Northumberland County 911 towers or towers utilized by Northumberland County for 911 services are contained in the Northumberland County Commissioners' Office. I am familiar with and have reviewed these files. These are documents which pertain to potentially

constructing a replacement tower for the existing Boyer’s Knob tower. These records consist of: engineering or feasibility estimates; environmental reviews; evaluations relative to a potential construction project; the procurement of supplies, services or construction prior to the award of a contract or prior to the opening and rejection of all bids. Again, there are no contracts that have been voted on or executed by Northumberland County or its Commissioners.

See Savidge Attestation, October 13, 2022 ¶¶ 3-4. The attestations submitted by the County substantiate that no decision has been made with regard to the location of any new 911 tower site, the acquisition of real estate, the acquisition and construction of a new antenna, or the construction of a new 911 tower. Items 2, 4(b), and 5(b) of the Request seek records that are explicitly exempt under Section 708(b)(22)—engineering reports, feasibility studies and cost estimates for construction projects. Thus, the records responsive to Items 2, 4(b), and 5(b) relate to the potential acquisition of real property and construction to be undertaken by the County and until a decision has been made to proceed with the acquisition of real property or a construction project, such records are exempt under Section 708(b)(22).

Because the County has met its burden of proof that Section 708(b)(22) applies to Items 2, 4(b) and 5(b) of the Request⁹, the following requested records are exempted from disclosure:

1. Engineering reports, feasibility studies and cost estimates related to the construction of a new 911 tower at an alternative location.
2. All contracts under consideration and/or cost estimates related to the construction of a new 911 tower at the Site or at an alternative location.
3. Cost estimates for construction to upgrade the current site.

However, this exemption ceases to “apply once the decision is made [by the County] to proceed” with the construction projects or acquiring of real estate. 65 P.S. § 67.708(b)(22)(ii).

⁹ Because the County has demonstrated that the records in Items 2, 4(b) and 5(b) are exempt under Section 708(b)(22), the OOR need not reach the County’s alternative grounds for denying access. See *Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

b. Items 1(a), 3 & 5(a)

Item 1(a) of the Request seeks records that “[i]dentify other locations that are currently being considered . . . for the construction of a new 911 tower[.]” The County argues that documents that identify other locations currently under consideration for a new 911 tower are exempt under Section 708(b)(22). The County provides no evidence as to the nature of the responsive records or why any document which identifies potential new 911 tower locations falls into the category of “contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to . . . leasing, acquiring or disposing of real property or an interest in real property[,] . . . purchase of public supplies or equipment included in the real estate transaction[,] . . . [c]onstruction projects.”

Item 3 seeks “[a]ll studies related to the quality of transmission (including radio frequency studies) at the Site or at any other location chosen or under consideration” and Item 5(a) seeks “[a]ll documents related to the current 911 tower at the Site regarding radio frequency studies[.]” The County argues that the quality transmission and radio frequency studies for the current 911 tower site and locations under consideration are exempt under Section 708(b)(22); however, the County submitted no evidence as to why these studies meet the criteria of this exemption and has not demonstrated that Section 708(b)(22) applies. *See Scolforo v. Off. of the Governor*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) (holding that conclusory affidavits or affidavits that merely cite an exemption are insufficient).

Based on the evidence submitted, the County has not met its burden to show that (1) any records which identify other locations under consideration for a new 911 tower and (2) radio

frequency/transmission quality studies, are exempt under Section 708(b)(22) as records relating to construction or real estate transactions where no decision has been made to proceed with those projects. 65 P.S. § 67.708(b)(22). Accordingly, the County has not met its burden to demonstrate that Section 708(b)(22) applies to Items 1(a), 3, and 5(a) of the Request.

3. The County did not prove that certain records are exempt as the internal, predecisional deliberations of the County

Item 1(a) of the Request seeks documents, records, and other materials that identify other locations that are currently being considered for the construction of a new 911 tower. Item 3 seeks “[a]ll studies related to the quality of transmission (including radio frequency studies) at the Site or at any other location chosen or under consideration” and Item 5(a) seeks “[a]ll documents related to the current 911 tower at the Site regarding radio frequency studies[.]” The County denied these portions of the Request arguing in its position statement that the information requested in Items 1(a), 3, and 5(a) is exempt under Section 708(b)(10)(i)(A) and 708(b)(22)(i)(A-C).¹⁰

Section 708(b)(10) exempts from disclosure records that reflect:

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, . . . contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

To prove the predecisional deliberation exception, an agency is required to show three things: “(1) the information is internal to the agency; (2) the information is deliberative in character; and, (3) the information is prior to a related decision, and thus ‘predecisional.’” *Carey v. Department of Corrections*, 61 A.3d 367, 379 (Pa. Cmwlth. 2013).

In the instant case, the County satisfies the third prong of the analysis by establishing that

¹⁰ The analysis of Section 708(b)(22) as it applies to Items 1(a), 3, and 5(a) of the Request is located in Section (2)(b) of this Final Determination.

no decision has been made by the County regarding (1) an alternate site for a new 911 tower and (2) improvements to the current 911 site. However, the County submitted no evidence to demonstrate that the radio frequency or transmission quality studies are internal to the agency or are deliberative in nature. Similarly, the County submitted no evidence to demonstrate that all documents which identify other locations under consideration for a new 911 tower are internal to the agency or are deliberative in nature. To be deliberative in nature, a record must make recommendations or express opinions on legal or policy matters and cannot be purely factual in nature. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011). The term deliberation is generally defined as “[t]he act of carefully considering issues and options before making a decision or taking some action...” BLACK’S LAW DICTIONARY 492 (9th ed. 2009); *see also Heintzelman v. Pa. Dep’t of Cmty. & Econ. Dev.*, OOR Dkt. AP 2014-0061, 2014 PA O.O.R.D. LEXIS 254, *aff’d* No. 512 C.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 644 (Pa. Commw. Ct. 2014). In addition, to prove that a record is exempt under this section, an agency must explain how the information withheld reflects or shows the deliberative process in which an agency engages during its decision-making. *See Twp. of Worcester v. Off. of Open Records*, 129 A.3d 44, 61 (Pa. Commw. Ct. 2016).

Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014). However, factual material can still qualify as deliberative information if its “disclosure would so expose the deliberative process within an agency that it must be deemed excepted”; or in other words, when disclosure of the factual material “would be tantamount to the publication of the [agency’s] evaluation and analysis.” *Id.* at 387-88 (citing *Trentadue v. Integrity Committee*, 501 F.3d 1215, 1228-29 (10th Cir. 2007)).

The County argues that the records to Items 1(a), 3, and 5(a) were withheld because they contain internal, predecisional deliberations, but does not describe the responsive records or explain their role in the deliberative process. *See Scolforo v. Off. of the Governor*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) (“Affidavits that are conclusory or merely parrot the exemption do not suffice”); *W. Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) (holding that evidence must be specific enough to permit the court to ascertain how the records sought fall within the proffered exemptions). Thus, the County has failed to meet its burden that (1) records which identify other locations that are being considered for alternate 911 sites and (2) the radio frequency or transmission quality studies for the current 911 site or alternate sites are exempt as records of the County’s internal, predecisional deliberations.

4. The County did not prove that certain records are exempt under various security exemptions

Item 3 of the Request seeks “[a]ll studies related to the quality of transmission (including radio frequency studies) at the Site or at any other location chosen or under consideration.” Item 5(a) of the Request, the Requester seeks “[a]ll documents related to the current 911 Tower at the Site regarding radio frequency studies”

The County has identified records responsive to Items 3 and 5(a) of the Request. The County argues that the records responsive to Items 3 and 5(a) are exempt under the RTKL pursuant to exemptions regarding (1) the loss of federal funding (section 708(b)(1)(i)); (2) personal security (section 708(b)(1)(ii)); (3) public safety (section 708(b)(2)); (4) building, infrastructure, and utility security (section 708(b)(3)(i & ii)); (4) computer security (section 708(b)(4)); and (5) radio transmissions received by emergency dispatch personnel (section 708(b)(18)(i)). Specifically, the

County argues that the requested radio frequency studies and other studies related to the quality of transmission are exempt because “information pertaining to the frequency, power, etc. of emergency transmissions obviously contains information that could permit a nefarious actor to seek to interfere with the same.” *See* Garrigan Unsworn Statement, October 13, 2022.

a. Section 708(b)(1)(i & ii)

Section 708(b)(1) exempts the following records from access by a requester:

(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.

The County argues that the disclosure of the quality of transmission studies and radio frequency studies for the current 911 tower site “would result in the loss of federal funds . . . [and] would potentially be illegal[.]” *See* County Position Statement, October 13, 2022. In its position statement, the County also argues that the records are exempt pursuant to the personal security exemption, 65 P.S. § 67.708(b)(1)(ii), in that disclosure would be reasonably likely to result in risk of harm to the personal security of an individual, but provided no argument in support of it. The County submitted no evidence or statements of fact in the form of a sworn affidavit regarding this proffered exemption. When asked by the OOR to provide support for the contention that disclosure of the studies would result in the loss of federal funding, the solicitor stated that he is “unable to locate any federal guidelines that would place federal funding for 911 service to [the County] in jeopardy. . . . That is not to say there is no such regulation” *See* Garrigan Unsworn Statement, October 25, 2022, ¶ 1. The County’s unsupported arguments are insufficient to prove the applicability of an exemption even under a preponderance of the evidence standard. *See Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 129 (Pa. Commw. Ct. 2019), *appeal denied by* 223 A3d 675

(Pa. 2020) (“A preponderance of the evidence may be the lowest burden of proof, but it still requires evidence unless the facts are uncontested or clear from the face of the RTKL request or the exemption”). Accordingly, the County has not met its burden to prove that the disclosure of the contents of transmission quality and/or radio frequency studies for the current tower site are exempt under either subsection of Section 708(b)(1).

b. Section 708(b)(2)

Section 708(b)(2) exempts from public disclosure:

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

65 P.S. § 67.708(b)(2). In order to withhold records under Section 708(b)(2) of the RTKL, the County 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. To determine the adequacy of an affidavit the Commonwealth Court considered whether it (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; (3) shows that such disclosure would impair the agency’s ability to perform the public safety functions. *Allegheny Cnty. Dist. Attorney's Office v. Wereschagin*, 257 A.3d 1280, 1298 (Commw. Ct. 2021).

The County argues in the supplemental position statement that the disclosure of the quality of transmission studies for the current 911 tower site are exempt under Section 708(b)(2), and

provided the following sworn statement of Mr. Fellman:

As 911 Project Coordinator for Northumberland County, I am intimately familiar with the workings of the Northumberland County 911 communication system. The same is utilized to notify and dispatch first responders to all manner of police, medical, fire, disaster and other emergencies both within and outside of the County of Northumberland. I am of the opinion, based upon my knowledge and experience, that the release of information pertaining to the quality of transmissions from various 911 tower sites, including but not limited to the means of transmission, coverage areas, penetration of frequencies and the frequencies utilized by these towers would expose or create vulnerability through disclosure of the location, configuration or security of critical emergency first responder systems.

See Fellman Attestation, October 13, 2022, ¶ 2. When asked by the OOR to provide a “supplemental attestation that describes in greater detail (1) the nature of transmission quality/radio frequency studies and (2) connects how public disclosure of these studies is likely to threaten public safety”, the County provided the supplemental attestation of Russell Fellman, which states:

The County contracted with Motorola and obtained a County-wide report detailing the frequencies utilized, the strength of signal and coverage area for all of the County’s 911 towers, including the existing Boyer’s Knob tower. Again, this study pertains to all towers in the County. This study indicates how each tower’s coverage area intersects / overlaps with the other towers, the frequencies utilized by these towers, and the strength of signal. It is my belief, based upon my years of experience, that providing this information would create the real danger to the community. Specifically, publicizing this information could realistically assist a person or persons who wanted to interfere, whether temporarily or longer, with the County’s ability to dispatch EMS or police to a location the ability to do so.

See Fellman Supplemental Attestation, October 25, 2022, ¶ 2.

By operating 911 towers, the County, through its Department of Public Safety, performs law enforcement and public safety functions. The County alleges that the requested studies would “expose or create vulnerability through disclosure of the location, configuration or security of critical emergency first responder systems.” *See* Fellman Attestation, October 13, 2022, ¶ 2. Mr. Fellman attests that the study “indicates how each tower’s coverage area intersects /overlaps with

the other towers, the frequencies utilized by these towers, and the strength of signal.” See Fellman Attestation, October 25, 2022, ¶ 2. The County further argues that “providing this information would create the real danger to the community” and “publicizing this information could realistically assist a person or persons who wanted to interfere, whether temporarily or longer, with the County’s ability to dispatch EMS or police to a location the ability to do so.” *Id.*

The Commonwealth Court has held for an attestation to be sufficient to connect how public safety is threatened by the disclosure of records, it must provide specific details to support a reasonable likelihood of a threat to public safety. See *ACLU of Pa. v. Pa. State Police*, 659 Pa. 504, 510, 232 A.3d 654, 658 (2020) (“[m]erely citing the affiant’s experience and alleging a general risk of a threat to public safety or an impairment of the agency’s public protection activities will not suffice.”); see also, *Allegheny Cty. Dist. Attorney's Office v. Wereschagin*, 257 A.3d 1280, 1297 (Pa. Commw. Ct. 2021); *Woods v. Office of Open Records*, 998 A.2d 665, 670 (Pa. Commw. Ct. 2010); *Bressler & Kane Volunteer Fire Dept. v McKean County*, OOR Dkt. AP 2022-1067, 2022 PA O.O.R.D. LEXIS 1664. The County’s attestations do not demonstrate *how* disclosure of such records presents a reasonable likelihood to threaten public safety but state a generalized concern that someone who wanted to interfere with EMS or police dispatch within the County could do so. Accordingly, the County has not met its burden to demonstrate that Section 708(b)(2) exempts the disclosure of the quality of transmission studies and radio frequency studies for the current 911 tower site.

c. Section 708(3)(i & iii)

Section 708(b)(3) exempts from public disclosure:

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; . . .

(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.

65 P.S. § 67.708(b)(3). For the public infrastructure exemption to apply “the disclosure of the records, rather than the records themselves, must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructures.” *Smith on behalf of Smith Butz, LLC v. Pennsylvania Department of Environmental Protection*, 161 A.3d 1049, 1062 (Pa. Cmwlth. 2017). Reasonably likely has been interpreted as “requiring more than speculation.” *Id.* at 1062-63 (citing *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 375 (Pa. Commw. Ct. 2013)).

The attestation of Mr. Fellman states “that the release of information pertaining to the quality of transmissions from various 911 tower sites . . . would expose or create vulnerability through disclosure of the location, configuration or security of critical emergency first responder systems.” *See* Fellman Attestation, October 13, 2022, ¶ 2. Similar to the analysis in Section (4)(b) above, the County’s attestations do not demonstrate *how* disclosure of such records presents a reasonable likelihood to threaten the safety of public building, resource, or infrastructure, but states a generalized concern that someone who wanted to interfere with EMS or police dispatch within the County could do so. Accordingly, the County has not met its burden to prove that the disclosure of the contents of transmission quality and/or radio frequency studies for the current tower site would create a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, or facility. *See* 65 P.S. § 67.708(b)(3).

d. Section 708(b)(4)

Section 708(b)(4) exempts from public disclosure records “regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security.” Other than a recitation of the statutory citation, the County provided no evidence or argument that demonstrate that the public disclosure of the quality of transmission studies for the current 911 tower site would be reasonably likely to jeopardize computer security.

e. Section 708(b)(18)(i)

Section 708(b)(18)(i) exempts from public disclosure “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.” 65 P.S. § 67.708(b)(18)(i). While quality of transmission studies for the current 911 tower site may contain some categories of information Section 708(b)(18) that was intended to protect, the courts have concluded that certain elements of an emergency dispatch record are not protected. *Sapp v Phila. Fire Dept.*, OOR Dkt. AP 2021-1051, 2021 PA O.O.R.D. LEXIS 1678. The attestation of Mr. Fellman does not specify how quality of transmission studies or radio frequency studies of a 911 tower equate to radio transmissions received by emergency dispatch personnel protected under Section 708(b)(18). Thus, the County’s evidence is not sufficient to demonstrate that the public disclosure of the quality of transmission studies for the current 911 tower site pertain to “audio recordings, telephone or radio transmissions received by emergency dispatch personnel.” *See* 65 P.S. § 67.708(b)(18).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the County is required to provide (1) the requested records which identify “other locations that are currently being considered ... for the construction of a new 911 tower as a replacement of the 911

tower currently situated at the Site” and (2) all studies in the County’s possession, control, or custody “related to the quality of transmission (including radio frequency studies)” at the Boyer’s Knob site and other sites under consideration to the Requester 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 Northumberland 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. 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.¹¹ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: November 15, 2022

/s/ Catherine R. Hecker

CATHERINE R. HECKER, ESQ.
APPEALS OFFICER

Sent to: James Bridy (via email only);
Frank Garrigan, Esq. (via email only);
Nathan Savidge, AORO (via email only)

¹¹ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).