pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
TIMOTHY MCNAIR AND MCNAIR LAW OFFICES,	:	
Requester	:	
	:	**Docket No: AP 2023-1126**
v.	:	
	:	
ERIE CITY POLICE DEPARTMENT,	:	
Respondent	:	

FACTUAL BACKGROUND

On April 21, 2023, Timothy McNair and McNair Law Offices (collectively "Requester") submitted a request ("Request") to the Erie City Police Department ("Department") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking the "[c]omplete and unredacted settlement agreement[s]" for four specified lawsuits and the "[c]omplete and unredacted copy of the…[Department's] policies and procedures for the [Special Weapons & Tactics ("SWAT")] team."

On May 17, 2023, following a thirty-day extension,[1] 65 P.S. § 67.902(b), the Department partially denied the Request, arguing that its SWAT team policies and procedures are exempt from

[1] On May 2, 2023, the Department invoked a thirty-day extension. 65 P.S. § 67.902(b).

disclosure as release would be reasonably likely to jeopardize or threaten public safety, 65 P.S. § 67.708(b)(2).

On May 19, 2023, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial of the portion of the Request seeking SWAT team policies and procedures and stating grounds for disclosure.[2] The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On June 12, 2023, the Department submitted a position statement reiterating its grounds for denial. In support of its position, the Department submitted the attestation, made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, of its Open Records Officer, Kimberly Snyder ("Snyder Attestation").

On July10, 2023,[3] the Requester provided a statement in support of the appeal and arguing that the Department did not meet its burden of proving that the responsive policies and procedures are exempt from disclosure pursuant to Section 708(b)(2) of the RTKL, 65 P.S. § 67.708(b)(2). Because the Department bears the burden of proof, the OOR afforded it until July 12, 2023 to provide a supplemental submission. *See* 65 P.S. § 67.1102(a)(1) (vesting appeals officers with the discretion to establish a schedule for the parties to submit evidence and argument).

On July 12, 2023, the Department resubmitted its June 12, 2023 position statement and the Snyder Attestation.[4]

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[2] The Requester granted the OOR a 30-day 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).").

[3] The Requester's submission was received after the record closed; however, to develop the record, the submission was considered. *See* 65 P.S. § 67.1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

[4] The Requester, in his July 10, 2023 statement, indicated asked "that any sensitive portions be redacted" and that the parties could discuss those portions later. However, the Department did not provide a response to the Requester's statement.

On that same day, the OOR asked the Department for additional information, affording the Department until July 14, 2023 to provide the supplemental information.

On July 14, 2023, the OOR granted the Department's request for an extension of time until Wednesday July 19, 2023 at 5:00 PM to provide the supplemental information. To date, the Department has not responded or provided the additional information requested by the OOR.

LEGAL ANALYSIS

The Department is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Department is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 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)).

In this instance, the Department argues that disclosure of its SWAT team policies and procedures is reasonably likely to jeopardize or threaten public safety. *See* 65 P.S. § 67.708(b)(2).

The Requester argues that "[t]he release of the requested documents has not been shown to be reasonably likely to jeopardize or threaten public safety[,]" and that the Department "has[,] in the past[,] released copies of policies and procedures."[5]

Section 708(b)(2) exempts "[a]record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that,

[5] While agencies have discretion to grant access to records that would otherwise fall under a RTKL exemption, the OOR has no authority to mandate the exercise of this discretion in favor of disclosure. *See* 65 P.S. § 67.506(c).

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). Regarding the adequacy of an agency's evidence, courts consider whether the attestation:

> (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] the alleged threatening consequence.

Carey v. Pa. Dep't of Corr., 61 A.3d 367, 376 (Pa. Commw. Ct. 2013); *see also Allegheny Cnty. Dist. Attorney's Office v. Wereschagin*, 257 A.3d 1280, 1298 (Commw. Ct. 2021) ("The mere fact that the affidavits discuss a possibility of harm if the…[i]nformation is released does not make the affidavits speculative."); *Woods v. Office of Open Records*, 998 A.2d 665, 670 (Pa. Commw. Ct. 2010) ("the preponderance of evidence standard does not require absolute certainty that if redacted portions were to be disclosed, there would be a breach of public safety….").

In support of the Department's argument, the Snyder Attestation states that "the SWAT team operates in connection with national, state, local and/or homeland security law enforcement agencies as part of their duties as law enforcement officers and/or in the interest public safety and that SWAT team uses these policies and procedures on a regular basis."[6] *See* Snyder Attestation, ¶ 11. In its position statement, the Department explains that its "SWAT team routinely sees dangerous situations with firearms, illegal drugs, bombs and/or persons with violent criminal

[6] 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 evidence that the Department acted in bad faith, "the averments in [the statement] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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)).

records and needs to follow said [p]olicies and [p]rocedures for the public safety of the Officers, the individuals in the dangerous situation and/or any citizens in the area, known or unknown." Because the Requested records are SWAT team policies and procedures, the Department's statement about the types of dangerous situations routinely encountered by its SWAT team was considered by the OOR while analyzing the asserted public safety exemption. *See Pa. Game Comm'n v. Fennell*, 149 A.3d 101, 104-105 (Pa. Commw. Ct. 2016) (holding that the OOR must consider uncontradicted statements in the appeal materials when determining whether an exemption applies); *see also Pigeon v. Bentleyville Borough*, OOR Dkt. 2022-2687, 2023 PA O.O.R.D. LEXIS 249. However, despite the OOR's attempts to further develop the record in this matter,[7] the Department chose not to provide evidence[8] describing the nature of the records, connecting the records to a reasonable likelihood that disclosure would threaten public safety, or establishing that disclosure of the responsive records would impair the Department's ability to perform its public safety functions. *See Carey*, 61 A.3d at 376. Additionally, the Department's affidavit does not address whether previously releasing the policies and procedures had any impact on public safety. Rather, the only evidence provided by the Department is the conclusory Snyder Attestation, which merely repeats the statutory language by stating "the disclosure and/or release of said policies and/or procedures is reasonably likely to jeopardize or threaten the public safety

[7] While it is not incumbent upon the OOR to request additional evidence when developing the record, *Highmark, Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017), the OOR attempted to develop the record by providing the Department with an opportunity to respond to the Requester's late-filed submission arguing that the Department did not meet its burden of proof on appeal and by also requesting additional information from the Department. *See Dep't of Educ. v. Bagwell*, 114 A.3d 1113 (Pa. Commw. 2015) ("An appeals officer has discretion in developing the record and may request evidence or explanation from the parties).

[8] The Department's unsworn position statement does not constitute evidence. "Position statements are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from the *evidentiary* record." *Office of the Governor v. Davis*, 122 A.3d 1185, 1193-94 (Pa. Commw. 2015) (*en banc*) (emphasis in original); *Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that unsworn statements of counsel are not competent evidence); *City of Phila. v. Juzang*, July Term 2010, No. 2048 (Phila. CCP June 28, 2011) ("Because the letter written by City's counsel is a legal brief, it cannot be...evidence at all").

and/or that their disclosure and/or release would be reasonably likely to result in harm." *See* Snyder Attestation, ¶ 12.

Because the applicability of the stated exemption is not clear from the face of the record and because an agency cannot rely on conclusory statements to sustain its burden of proof, the Department did not demonstrate that the responsive policies and procedures are exempt from disclosure under the RTKL, 65 P.S. § 67.708(b)(2). *See Office of the Governor v. Davis,* 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2015) (*en banc*) (holding that an affidavit may be unnecessary when an exemption is clear from the face of the record)*; Scolforo*, 65 A.3d at 1103 ("[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records"); *see also Marshall v. Neshaminy Sch. Dist.*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67 (finding that an agency's conclusory affidavit was insufficient); *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") (citing *Scolforo*).

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Department is required to provide the responsive policies and procedures 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 Erie 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.[9] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

FINAL DETERMINATION ISSUED AND MAILED: July 24, 2023

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO

Sent via email to: Timothy McNair, Esq.
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Kimberly Snyder

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