



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

**IN THE MATTER OF**

**WILLIAM HELTZEL AND  
*PUBLICSOURCE*,  
Requester**

**v.**

**PENNSYLVANIA DEPARTMENT OF  
LABOR AND INDUSTRY,  
Respondent**

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**Docket No.: AP 2014-1203**

**INTRODUCTION**

William Heltzel (“Requester”), a reporter for *PublicSource*, submitted a request (“Request”) to the Pennsylvania Department of Labor and Industry (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking information relating to Pennsylvania’s Tier II hazardous chemicals inventory database (“Tier II information”). The Department denied the Request, arguing that the release of Tier II information would threaten public safety, among other things. 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 Department is required to take further action as directed.

**FACTUAL BACKGROUND**

On June 10, 2014, the Request was filed, seeking electronic copies of the following records:

1. [A]ll Tier II information in the [Department's] possession or control ... including all information pertaining to a "hazardous chemical," "hazardous material," or "hazardous substance" as those terms are defined in Pennsylvania's Hazardous Material Emergency Planning and Response Act ... 35 P.S. § 6022.103.
2. [C]opies of the Tier II information that was used by the Department or [the Pennsylvania Emergency Management Agency ("PEMA")] to prepare the most recent annual report, as well as the Tier II information that the Department or PEMA has received for the purpose of preparing the next annual report.

On June 12, 2014, the Department invoked a thirty-day extension of time to respond pursuant to 65 P.S. § 67.902. On July 17, 2014, the Department denied the Request, arguing that the requested Tier II information, as described in Section 11022(d)(2) of the Federal Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. §§ 11001 *et seq.*, is exempt from disclosure under Sections 708(b)(2) (threatening public safety) and 708(b)(3) (security of a public utility or infrastructure) of the RTKL. 65 P.S. §§ 67.708(b)(2), 67.708(b)(3).

On August 5, 2014, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the Department to notify third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c).

On August 20, 2014, the Department submitted a position statement and the sworn affidavits of Carol Freeman, an employee of the Department's Bureau of Occupational and Industrial Safety, and Captain Garrett Rain, Director of the Domestic Security Division of the Pennsylvania State Police's Bureau of Criminal Investigation. The Department also provided a blank copy of the Tier II information inventory form, the instructions thereto, and other documents. On August 28, 2014, the Requester provided a position statement for our consideration.

## 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; however, the decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the Department requested a hearing before the OOR; however, the request was denied, as the OOR has the necessary information and evidence before it to properly adjudicate this matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth 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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The Department argues that the Tier II information is exempt from public access under Section 708(b)(2) of the RTKL, which 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). 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 Corrections*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013).

In support of its argument, the Department provides the affidavits of Ms. Freeman and Captain Rain, who collectively describe the Tier II information gathering process, including the statutorily mandated information to be reported, and attest that the Department’s maintenance of Tier II information constitutes a public safety activity and that the release of the Tier II

information is reasonably likely to threaten public safety.<sup>1</sup> Specifically, Ms. Freeman attests that “Tier II reports require information about the amounts, specific locations, hazard potential, storage mechanisms and conditions, chemical state (i.e., solid, liquid or gas) of chemicals, as well as particulars about security/manpower and personal contact information at each facility.” Ms. Freeman further attests that “Pennsylvania requires reporting entities to include ... a detailed site plan, providing a clear representation of where each facility is located on/from the road, access point(s), and the specific location(s) of the chemicals reported...” A review of the sample Tier II information reporting form confirms and corroborates these statements.

Additionally, Captain Rain attests that “the release of this information for public examination is reasonably likely to jeopardize or threaten public safety or preparedness by presenting a likelihood of endangering the safety or physical security of the facilities and surrounding facilities or people.” Captain Rain further attests that releasing the Tier II information to the public would:

enabl[e] persons with criminal intent the ... ability to identify, locate, select and target locations for attack or tampering and expedite their attack planning cycle. The release of the [Tier II information] would enable criminal actors to gather intelligence on prospective sites, evaluate and select specific targets, and frame pre-attack surveillance and planning with no risk of detection. Therefore, a release of these records would profoundly minimize the risk of actor identification, and reduce opportunity for attack interruption by site security and law enforcement.

In response to the Department’s submission, the Requester provides a position statement arguing that the evidence presented by the Department is not sufficient enough to demonstrate that the release of the requested Tier II information is “reasonably likely” to threaten public safety because “the Department has not cited a single instance where a criminal or terrorist has

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<sup>1</sup> 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).

used Tier II information to orchestrate an attack on a Commonwealth facility.” The OOR notes, however, that the Department need only prove that the disclosure of the Tier II information would be “reasonably likely” to threaten public safety by a preponderance of the evidence, the lowest evidentiary standard tantamount to a “more likely than not” inquiry, which the Department has done in this case. *See Adams v. Pennsylvania State Police*, 51 A.3d 322, 325 (Pa. Commw. Ct. 2012).

Furthermore, the Requester references the rationale set forth in the dissenting opinion in *Dep’t of Labor and Industry v. Heltzel*, stating that because Pennsylvania’s Hazardous Material Emergency Planning and Response Act (“HAZMAT Act”), 35 P.S. §§ 6022.101 *et seq.*, is a legislative determination that the Tier II information be released to the public, and “there is no provision under the HAZMAT Act that limits access to those records which are required to be kept thereunder, the exemptions contained in Sections 701 and 3101.1 of the RTKL simply do not apply.” 90 A.3d 823, 837 (Pa. Commw. Ct. 2014) (Pellegrini, P.J. dissenting). However, the OOR is bound by the majority opinion in *Heltzel* and, therefore, we are constrained to reach the merits of the RTKL exemptions raised by the Department pursuant to *Heltzel*. *Id.* at 834.

To the extent that the Tier II information is made available for public inspection under EPCRA, 42 U.S.C. §§ 11001 *et seq.*, such information may be made available for inspection, so long as the Requester complies with the procedures and conditions set forth in EPCRA. *See* 42 U.S.C. § 11044. However, based on the evidence provided in this case, the OOR finds that the Department has proven that the release of all other Tier II information possessed by the Department, such as security/manpower information or detailed site plans for each facility,

would be reasonably likely to jeopardize or threaten public safety and is therefore exempt under Section 708(b)(2) of the RTKL.<sup>2</sup>

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part** and the Department is required to make available for inspection the records that are referenced in EPCRA pursuant to the procedures and conditions in that statute. 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 of Pennsylvania. 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: 18 September 2014**



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APPEALS OFFICER  
JOSHUA T. YOUNG, ESQ.

Sent to: Frederick Frank, Esq. (via e-mail only);  
Thomas Howell, Esq. (via e-mail only)

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<sup>2</sup> Because the requested records are exempt from disclosure under Section 708(b)(2) of the RTKL, the OOR need not consider the Department's alternative grounds for denying access. See *Jamison v. Norristown Bor. Police Dep't*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.