



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

**IN THE MATTER OF**

:

**RANDALL SCOTT,  
Requester**

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:

:

**v.**

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**Docket No: AP 2020-1987**

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**WEST CHESTER BOROUGH POLICE  
DEPARTMENT,  
Respondent**

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### **INTRODUCTION**

Randall Scott (“Requester”) submitted a request (“Request”) to the West Chester Borough Police Department (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records regarding the weapons and other equipment possessed by the Department. The Borough denied the Request, arguing that disclosure of the records is likely to threaten public safety. 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 Borough is required to take further action as directed.

### **FACTUAL BACKGROUND**

On August 24, 2020, the Request was filed, seeking:

[D]ocumentation that shows the number and type of arms, weapons, guns, non-lethal weapons, ammo, Personal Protective Equipment, body armor, body cameras, vehicles, and equipment currently in possession of the ... Department ....

Following a thirty-day extension, 65 P.S. § 67.902(b), on September 25, 2020, the Borough denied the Request, arguing that the disclosure of the records would likely threaten public safety or a public protection activity, 65 P.S. § 67.708(b)(2), and that the portion of the Request seeking “equipment” of the Department is overly broad, 65 P.S. § 67.703.

On October 5, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.<sup>1</sup> The OOR invited both parties to supplement the record and directed the Borough to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 14, 2020, the Department submitted a position statement reiterating its grounds for denial. In support of its position, the Department submitted the affidavit made under penalty of perjury from Chief James Morehead, the Department’s Police Chief (“Chief Morehead”). The Requester did not submit any additional information on appeal.

On December 9, 2020, in response to the OOR’s request for clarification, the Department submitted a supplemental position statement and the affidavit made under penalty of perjury from Lieutenant Martin Deighan (“Lt. Deighan”).

### **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

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<sup>1</sup> In the appeal, the Requester granted the OOR an additional thirty days to issue a Final Determination. See 65 P.S. § 67.1101(b)(1).

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

The Department is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the 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. *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)).

The Department argues that an inventory of “arms, weapons, guns, non-lethal weapons, ammo, Personal Protective Equipment, body armor, body cameras, vehicles,” which it refers to collectively as “Tactical Equipment,” are records related to law enforcement or public safety activities that, if disclosed, would likely threaten public safety. The Department argues that the requested records are exempt pursuant to Section 708(b)(2) of the RTKL. Section 708(b)(2) of the RTKL exempts from disclosure “[a] record maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity.” 65 P.S. § 67.708(b)(2). In order to withhold records under Section 708(b)(2) of the RTKL, the Borough 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. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). The term, “substantial and demonstrable risk” is not defined in the RTKL, however, “reasonably likely” has been interpreted as “requiring more than speculation” *Id.* at 375. In order to show a reasonable likelihood, “[a]n agency must offer more than speculation or conjecture to establish the security-related exceptions under the [RTKL].” *California Borough v. Rothery*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018). 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*, 61 A.3d at 373); *see also Ciavaglia and the Bucks Cnty. Courier Times v. Newtown Borough*, OOR Dkt. AP 2019-0866, 2019 PA O.O.R.D. LEXIS 698.

In support of the Department's position, Chief Morehead attests to his extensive law enforcement and training including, graduating from the FBI National Academy Program, "which offers advanced investigative, management, and fitness training for select police officers." Chief Morehead further attests, the following:

5. The Department is a law enforcement agency that provides protection and safety services to the general public of West Chester Borough (hereinafter "the Borough").

6. In connection with the Department's law enforcement, public protection and public safety services, the Department maintains certain weapons, ammunition, protective equipment, vehicles, and other specialized law enforcement equipment.

7. As a result, the Department has inventory lists concerning the amount and quantity of weapons, ammunition, protective equipment, vehicles, and other related law enforcement equipment in the Department's possession.

8. Anyone who would have access to these inventory lists would be able to determine the capability, power, range, accuracy, and limitations of each weapon in use by the Department.

9. Anyone who would have access to these inventory lists would know the capability and limitations of the ammunition, protective equipment, vehicles, and other law enforcement equipment in use by the Department.

10. Criminals and/or terrorists with direct knowledge of the weapons, ammunition, protective equipment, vehicles, and other law enforcement equipment used by the Department will know which weapons and protective equipment to use to give them a tactical advantage in confrontation with the Department.

11. Further, terrorists with direct knowledge of the capabilities and limitations of the weapons, ammunition, protective equipment, vehicles, and other law related enforcement equipment used by the Department would have the information needed to plan and execute terrorist threats and attacks within the Borough.

12. When confrontations occur between criminals and/or terrorists, and the criminals and/or terrorists are at a tactical advantage, that is a threat to the safety of the Department's officers and the safety of the general public because it hinders the ability of the Department to prevent and deter crime in the Borough.

13. Where terrorists have information to assist in planning and executing terrorist threats and attacks, and are at a tactical advantage over the Department, that is a threat to the safety of the Department's officers and the safety of the general public because it hinders the ability of the Department to prevent and deter terrorist attacks in the Borough.

In response to the OOR's request that the Department clarify what items fall within the categories of "other related law enforcement equipment" and "other specialized law enforcement equipment," the Department submitted a supplemental position statement and the affidavit of Lt. Deighan. Lt. Deighan attests that he is responsible for the Police Records Unit including, "property records pertaining to arms, weapons, guns, non-lethal weapons, ammunition (ammo), Personal Protective Equipment, and body armor, Fleet Management, including all vehicles assigned to the Department, and Camera System Management, including all body cameras in the possession of the Department." Lt. Deighan further attests, the following:

6. In connection with the Department's law enforcement, public protection, and public safety services ..., the Department maintains specialized law enforcement equipment, including arms, weapons, guns, non-lethal weapons, ammo, Personal Protective Equipment, body armor, body cameras, and vehicles.

7. As a result, the Department has inventory lists concerning the amount and quantity of related law enforcement equipment in the Department's possession ....

8. Anyone who would have access to these inventory lists would be able to determine the capability and limitations of each arms, weapons, guns, and non-lethal weapons in use by the Department.

9. Anyone who would have access to these inventory lists would be able to determine the capability and limitations of the ammo, Personal Protective Equipment, body armor, body cameras, and vehicles in use by the Department.

Like Chief Morehead, Lt. Deighan further attests that when criminals and/or terrorists have direct knowledge pertaining to the equipment listed above, it provides a tactical advantage to those individuals, which would hinder the ability of the Department to prevent and deter crime in the Borough and maintain the public safety. Under the RTKL, a sworn affidavit or statement made

under the penalty of perjury is competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

Here, there is no dispute the items listed in the Request, except for "equipment," relate to the Department's law enforcement and public safety activities. Regarding the likelihood of a threat to public safety resulting from the disclosure of the requested inventory, the Department relies on *Rome v. Exeter Borough*, OOR Dkt. AP 2018-1839, 2018 PA O.O.R.D. LEXIS 1519, in support of its position. In *Rome*, the Requester sought documentation regarding all firearms owned by the Exeter Borough Police Department. Relying on well-established OOR precedent, we determined that "weapon inventory lists and reports are not subject to public access because their release would threaten public safety." *Rome*, 2018 PA O.O.R.D. LEXIS 1519, \*8 (citing *Wise v. Borough of Steelton*, OOR Dkt. AP 2015-0063, 2015 PA O.O.R.D. LEXIS 204 (holding that weapon inventory reports are not subject to access under Section 708(b)(2)); *Donahue v. City of Hazleton*, OOR Dkt. AP 2013-1736, 2013 PA O.O.R.D. LEXIS 987. Similarly, in this case, the Department has demonstrated that the release of the documentation detailing the number and types of tactical equipment and weaponry described in the Request and used by the Department to carry out its law enforcement and public safety duties would provide a tactical advantage to individuals intent on committing a crime, harming police officers or interfering with the Department's public safety operations. As a result, the Department has met its burden of proving that the inventory of weaponry and other tactical equipment sought in the Request is not subject to public access.

However, the Department has not demonstrated how a body camera serves such a tactical protection purpose, like weapons, ammunition, and body armor, which serve to protect the police officers while they protect the public body and generally maintain the peace. In addition, body

cameras are worn on the outside of an officer's uniform, making the structure and possibly the brand of the device visible to the public, as well as potential criminals, at all times. By way of comparison, in *Benzig and PublicSource v. Churchill Borough*, the OOR determined that the agency properly withheld portions of its police department's Manual, "which describe procedures for the use of firearms, situational tactics, including officer movement and response procedures, and the types of weaponry available to and used by the Borough's police officers," was proper because the disclosure of such information would be reasonably likely to jeopardize public safety or a public protection activity pursuant to Section 708(b)(2) of the RTKL. OOR Dkt. AP 2018-1518, 2018 PA O.O.R.D. LEXIS 1282, \*11-12. Here, however, the tactical nature of a body camera is not apparent and the Department's evidence does not establish a "defined substantial and demonstrable [risk] that is actual or real and apparent," such that the disclosure inventory list information related to body cameras is likely to threaten public safety or a public protection activity. *Suber-Aponte*, 202 A.3d at 180.

Regarding the portion of the Request seeking "equipment," the Department asserts that it is overly broad and, therefore, insufficiently specific. Section 703 of the RTKL states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested." 65 P.S. §67.703. When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d 813). In determining whether a particular request is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep't of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v.*



*Pa. Dep't of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). Specifically, the OOR examines to what extent the request sets forth (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. *Pa. Dep't of Educ.*, 119 A.3d at 1124-25. Finally, “[t]he fact that a request is burdensome does not deem it overbroad, although it may be considered as a factor in such a determination.” *Pa. Dep't of Env'tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012) (*en banc*).

Here, the Department has not developed its specificity argument with respect to the Request as a whole, and it does not address the elements of the specificity standard for the term “equipment.” However, the Commonwealth Court has noted that “the specificity of a request must be construed in the request’s context, rather than envisioning everything the request might conceivably encompass.” *Montgomery Cnty. v. Iverson*, 50 A.3d 281, 284 (Pa. Commw. Ct. 2012) citing *Pa. State Police v. Pennsylvania Office of Open Records*, 995 A.2d 515, 516-17 (Pa. Commw. Ct. 2020). While the term “equipment” is broad, when read in context with the other items specified in the Request, a reasonable inference is that the Requester is seeking any other tactical types of equipment, similar to weapons and armor, not already particularly named in the Request language. Accordingly, we determine that the portion of the Request seeking “equipment” is sufficiently specific. Nevertheless, as set forth above, because Police Department tactical “equipment” would fall within the same category of records we have determined that the disclosure of which would likely jeopardize public safety, to the extent that any other tactical “equipment” records are detailed in the Department’s inventory, they are exempt under Section 708(b)(2) of the RTKL.

## CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Department is required to provide the requested records as they pertain to body cameras 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 Chester 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.<sup>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: December 15, 2020**

*/s/ Kelly C. Isenberg*

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APPEALS OFFICER  
KELLY C. ISENBERG, ESQ.

Sent to: Randall Scott (via email only);  
Jennifer Breton, Esq. (via email only);  
Lt. Martin Deighan (via email only)

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