



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

**IN THE MATTER OF**

**JESSE COLLIER,  
Requester**

**v.**

**INDIANA BOROUGH,  
Respondent**

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**Docket No. AP 2017-2356**

**INTRODUCTION**

Jesse Collier (“Requester”) submitted a request (“Request”) to Indiana Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the use of force continuum of the Borough police. The Borough denied the Request, stating that public disclosure of the record would threaten public safety. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the **granted in part** and **denied in part**, and the Borough is required to take further action as directed.

**FACTUAL BACKGROUND**

On October 20, 2017, the Request was filed, seeking “a copy of Indiana Borough Police Department’s Use of Force Continuum.” On October 26, 2017, the Borough invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902. On November 24, 2017, the Borough denied the Request, stating that the responsive record, if disclosed, would threaten public safety. *See* 65 P.S. § 67.708(b)(2).

On December 15, 2017, 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 Borough to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On January 24, 2018,<sup>1</sup> the Borough submitted a position statement, reiterating its reasons for denial. The Borough identifies the responsive record as “Special Order 09-002 Use of Force” policy (“Policy”). The Borough also submitted the sworn affidavit of Lieutenant Anthony Clement, Open Records Officer for the Borough’s police department.

### **LEGAL ANALYSIS**

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither

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<sup>1</sup> The Borough attempted to send its position statement to the OOR on January 11, 2018; however, it was sent to an incorrect e-mail address and was resubmitted the OOR on January 24, 2018.

party requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Borough 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. *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). 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 Borough argues that the Policy is exempt from disclosure as information that, if disclosed, would threaten public safety. 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, PSP 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). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

There is no dispute that the Borough police department’s Policy on use of force is a law enforcement or public safety activity. In support of the Borough’s position, Lieutenant Clement attests the following:

4. The policy Sections D through I provide tactical guidance to police officers when dealing with a non-compliant subject. Specifically, these sections provide:

- a. Section D-authorizes the police to use force, and dictates what type of force may be used, generally.
- b. Section E-explains the levels of force, how officers are to progress through levels of force, and the amount of force to be used in specific instances, and introduces a depiction of a continuum of force, a training tool for selecting the appropriate level of force.
- c. Section F-Gives specific guidance on applying the continuum of force based on the subject’s behavior during police interaction.
- d. Section G-Advises officers of specific actions to avoid or that are prohibited, including areas of the body and maneuverers that could bring harm to the subjects.
- e. Section H-Describes the occasions when use of less-than lethal weaponry is appropriate.

[f.] Section I-Describes the occasions when the use of deadly force is appropriate.

...

6. The release of the tactical guidance in Sections D through I would undermine police officers’ ability to be prepared to address physical interaction or the threat of physical interaction with the subjects we encounter.

7. Subjects will be able to anticipate or counteract the police officers’ use of force set forth in the progression or continuum as prescribed in the policy.

8. Subjects will be able to anticipate or counteract the type of force available to the Borough police and the order in which they will, according to policy, employ said force.

9. The release of the tactical guidance will empower fleeing or encourage the use of force earlier in the interaction as the subject anticipates the next step of the officer.

10. As a result of Paragraphs 6 through 9 there will be increased injury to police and the public.

The Borough acknowledges that portions of the Policy (A-C, J-K) are administrative in nature. Therefore, disclosure of these section would not threaten public safety. The Borough, through Lieutenant Clement's affidavit, has demonstrated that disclosure of Sections D through I of the Policy regarding the use of deadly force would be reasonably likely to threaten public safety or a public protection activity and would jeopardize police officer safety and ability to defend themselves and the public. *See, e.g., Irwin v Pa. State Police*, OOR Dkt. AP 2016-1634, 2016 PA O.O.R.D. LEXIS 1485 (holding that PSP properly redacted a field regulation under Section 708(b)(2) of the RTKL, because disclosure of the redacted portions would hinder a Trooper's ability to safely and effectively conduct a traffic stop); *Thompson v. Pa. State Police*, OOR Dkt. AP 2015-0423, 2015 PA O.O.R.D. LEXIS 441. Based on the evidence, the Borough has established that Sections D through I of the Policy are exempt under Section 708(b)(2) of the RTKL. *See* 65 P.S. § 67.708(a)(1).

## CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the Borough is required to provide Sections A-C, J-K of the Policy 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 or petition for review to the Indiana 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. 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 website at: <http://www.openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: February 13, 2018**

/s/ Jill S. Wolfe

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APPEALS OFFICER  
JILL S. WOLFE, ESQ.

Sent to: Jesse Collier (via e-mail only);  
Neva Stotler, Esq. (via e-mail only)

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