



On August 24, 2018, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the Department denied the Request, arguing that it did not possess records responsive to Item 1 of the Request and that Item 2 of the Request sought exempt public safety records, 65 P.S. § 67.708(b)(2).

On September 11, 2018, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. 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. *See* 65 P.S. § 67.1101(c).

On September 28, 2018, the Department submitted a position statement reiterating its grounds for denial. The Department also argues that the Requester failed to meet the requirements of the appeal under Section 1101(a) of the RTKL and that Item 2 of the Request seeks exempt personal security information, 65 P.S. § 67.708(b)(1)(ii). In support of its position, the Department submitted the affidavit of Chief Edward Cunningham.

### **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 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 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 burden of proving a record does not exist ... is placed on the agency

responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

**1. The appeal is sufficient under Section 1101(a) of the RTKL**

The Department argues that the Requester’s appeal should be dismissed because he did not address any of the Department’s grounds for denial. Pursuant to Section 1101 of the RTKL, a requester “must state the grounds upon which the requester asserts that the record is a public record ... and ... address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a)(1); *see also Pa. Dep’t of Corr. v. Office of Open Records*, 18 A.3d 429, 434 (Pa. Commw. Ct. 2011) (“[I]t is appropriate and, indeed, statutorily required that a requester specify in its appeal to Open Records the particular defects in an agency’s stated reasons for denying a RTKL request”); *Saunders v. Pa. Dep’t of Corr.*, 48 A.3d 540, 543 (Pa. Commw. Ct. 2012) (holding that a requester must “state why the records [do] not fall under the asserted exemptions and, thus, [are] public records subject to access”).

When filing the appeal, the Requester used the OOR’s electronic Appeal Form, which states that “[b]y submitting this form, I am appealing the Agency’s denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation...” Even though the Requester does not specifically address each reason for denial raised by the Department, the Commonwealth Court has held that a general statement that records are public and not subject to an exemption is sufficient to meet the requirements of 1101(a)(1). *See Barnett v. Pa. Dep’t of Pub. Welf.*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013). Therefore, the Requester sufficiently

challenged the Department's grounds for denying access to records, and the OOR may reach the merits of the appeal.

## **2. The Department does not possess records responsive to Item 1 of the Request**

The Department argues that it does not possess records responsive to Item 1 of the Request.

Chief Cunningham attests that:

6. Upon receipt of the [R]equest, I conducted a good faith, thorough examination of files in the possession, custody and control of the Agency for records responsive to the [R]equest underlying this appeal.
7. Additionally, I have inquired with relevant Agency personnel and, if applicable, relevant third party contractors as to whether the requested records exist in their possession.
8. Based upon the Agency's search of files and inquiries with relevant Agency personnel, I have made the determination that the records requested in ... [Item 1] of the [R]equest are not within the Agency's possession, custody or control.
9. The Department does not have a policy on full time and part time definitions, including hours per shift and hours per week within its Department Manual or any other Department policy or procedure. No such records exist.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as 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). In the absence of any evidence that the Department has acted in bad faith or that the records exist, "the averments in [the affidavit] 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)). Based upon the evidence provided, the Department has met its burden of proving that it does not possess records related to Item 1 of the Request. *See Hodges*, 29 A.3d at 1192.

### 3. Item 2 of the Request seeks public safety information

The Department argues that the police officer timesheets responsive to the Request are exempt under Section 708(b)(2) of the RTKL, which exempts from disclosure records “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). 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. 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.

In support of its position, the Department provides the affidavit of Chief Cunningham, who attests as follows:

10. Regarding ... [Item 2] of the Request, the Department understands that the Requester is seeking police officers['] timesheets which would reflect, among other things, overtime pay. Non-police officer staff members do not work overtime. I have made the determination that the requested police officer timesheets are exempt from disclosure pursuant to the law enforcement exemption (Section 708(b)(2) and the personal security exemption (Section 708(b)(1)(ii)) of the Right to Know Law.
11. The Department timesheets, which would reveal police officer schedules including start and end times and days worked, are maintained by the Department as part of its law enforcement activities. Revealing police officer schedules is reasonably likely to jeopardize or threaten public safety or preparedness or a public protection activity. Specifically, disclosure of past work schedules would indicate future police coverage and exposure to vulnerability on certain days.
12. The Department has three set shifts for its officers which are regular and routine. The timesheets would reflect the individual officers start times and end times as well as the days and shifts worked. The officers are on a regular shift rotation which would also be revealed through release of their timesheets. As such, release of the timesheets would allow members of the public to identify which officers are working and at what times. This set schedule would reveal

- the pattern of when specific officers are on duty for the foreseeable future, placing them at risk of harm and exposure.
13. The timesheets would also reveal the patterns of coverage within the Borough, including when and how many officers are on duty at any given time, for the foreseeable future thus revealing when police coverage is limited, which reasonably places the officer and public at risk. The information from the timesheet would compromise the goal of public protection because members of the community could use this information in an attempt to subvert police detection or engage in illegal behaviors during low-coverage periods.
  14. With respect to overtime indication on the timesheets, access to this information would similarly compromise public protection because this information would reveal patterns and times when the Department is low on man-power and staffing. Access to this information could likewise jeopardize officer and public safety.
  15. Because of these safety concerns for the officers discussed above, release of the timesheets is also reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of the officers.
  16. Police officers are subject to threats and violence from members of the public and there are many publicized instances of officers being harmed by members of the public by virtue of their position as a police officer.
  17. When officers are arriving for and departing from their shifts (times which the timesheets reveal), they are not armed, uniformed, and alert in the same manner in which they are armed, uniformed, and alert while on duty. For these reasons, officers are more vulnerable at the start and ending times of their shifts. Knowledge of the officers' schedules can also be used to identify periods of time when the officers-or the officer's families-are vulnerable and exposed. Disclosure of this information would act as a roadmap that reveals where and when officers are most vulnerable to attack.

In *Nolen v. Phila. Police Dep't*, the requester sought shift logs for a specific police district over a two-day period. OOR Dkt. AP 2015-0376, 2015 PA O.O.R.D. LEXIS 481. In holding that the shift logs were exempt from disclosure pursuant to Section 708(b)(2) of the RTKL, the OOR found that because the identities and assignments of the officers contained on the earlier shift logs did not vary from the current practice, the police department proved that the disclosure of the shift logs would be reasonably likely to jeopardize public safety. *See also Varley v. Beaver County*,

OOR Dkt. AP 2010-0582, 2010 PA O.O.R.D. LEXIS 505; *Walker v. Macungie Police Dep't*, OOR Dkt. AP 2009-0509, 2009 PA O.O.R.D. LEXIS 229.

Like in *Nolen*, the police officer timesheets in this case contain information that would enable the public to determine the officers on duty at any given time and would reveal when police coverage is limited. The OOR finds credible the professional opinion of individual assessing the risks of security and will not substitute its judgment for that of those with more familiarity with issues involving public safety. *See Pa. State Police v. ACLU of Pa.*, No. 1066 C.D. 2017, 2018 Pa. Commw. Unpub. LEXIS 275, \*17 (“[H]ere, the actual words on the page are not at issue; rather, the issue is whether disclosure of those words ‘would be reasonably likely’ to threaten public safety or a public protection activity”). Therefore, consistent with the holding in *Nolen*, the Department has proven that requested time sheets are exempt from disclosure under Section 708(b)(2). *See* 65 P.S. § 67.708(a)(1).

### CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the Department is not required to take any further action. 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 Lancaster 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>1</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>1</sup> *See Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).



**FINAL DETERMINATION ISSUED AND MAILED: November 20, 2018**

/s/Benjamin A. Lorah

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