



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**JO CIAVAGLIA AND THE BUCKS
COUNTY COURIER TIMES,
Requester**

v.

**PENNDEL BOROUGH,
Respondent**

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Docket No: AP 2019-0907

INTRODUCTION

Jo Ciavaglia and the Bucks County Courier Times (“Requester”) submitted a request (“Request”) to PennDel Borough (“Borough”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking, among other items, the Borough Police Department’s (“Department”) use of force and Taser use policies. The Borough partially denied the Request, arguing that the disclosure of the policies would threaten personal security and public safety. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Borough is not required to take any further action.

FACTUAL BACKGROUND

On May 2, 2019, the eight (8) Item Request was filed, seeking, in pertinent part:

2. Copies of the [D]epartment’s current Taser use directive or policy.
3. Copies of the [D]epartment’s current use of force policy.

4. Records that reflect the training completion and annual certification for the conducted energy device (including Taser or stun guns) assigned to each officer including the police chief for the calendar years 2005 through YTD....

7. Records that reflect the type and model(s) of conducted energy devices the ... [D]epartment has used between January 1, 2005 and YTD. This request should include the year(s) the model was used.

8. Records of all Taser Usage Report forms or other records that the [D]epartment uses to reflect when Tasers are deployed and/or discharged for the calendar years of 2005 to YTD....¹

On June 10, 2019, after extending its time to respond by thirty days, 65 P.S. § 67.902(b), the Borough partially denied the Request, by providing redacted records and arguing that the Department does not have a Taser use directive separate from its use of force policy, that disclosure of the requested policies and the information redacted from the training and certification records would threaten personal security and public safety, 65 P.S. §§ 67.708(b)(1)(ii)-(2), and that no additional records responsive to Item 7 exist other than the partially redacted records provided in response to Items 4 and 6 of the Request.

On June 11, 2019, the Requester appealed to the OOR, challenging the denial of Items 2, 3, 4, 7 and 8, and stating grounds for disclosure.² 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 June 20, 2019, the Borough submitted the affidavit, made subject to the penalty of perjury, of Sean Perry, Chief of the Department. On July 2, 2019, the Borough submitted a position statement indicating that, upon further review, it would grant access to copies of training

¹ Because the Requester does not dispute the other Items of the Request, any challenge to the Borough's responses to those Items is waived. *See Pa. Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

² The Requester granted the OOR an extension of time to issue a final determination in this matter until August 21, 2019.

certificates containing fewer redactions. The Borough also reiterated its grounds for denial as to the other Items.

In two separate July 3, 2019 emails, the Requester acknowledged receipt of records responsive to Items 4 and 7 of the Request and withdrew the appeal as to those Items. In addition, the Requester stated that, upon further review of records provided in response to Item 8 of the Request, the Request was satisfied and that her challenge to Item 8 should be withdrawn. Also, on July 26, 2019, in response to the OOR's request for clarification, the Requester confirmed that only Items 2 and 3 of the Request remained at issue on appeal.

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 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)(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 provided the Requester a redacted version of General Order 1.3, an internal policy maintained by the Department for “its operations preparedness and procedures

relating to the use of force” that includes the “Use of Force Continuum” (“Policy”).³ The Borough asserts that the disclosure of the redacted portions of the Policy would threaten personal security and public safety. *See* 65 P.S. §§ 67.708(b)(1)(ii)-(2). Section 708(b)(1)(ii) of the RTKL exempts from disclosure a record that “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” 65 P.S. § 67.708(b)(1)(ii). Under the RTKL, “reasonable likelihood” of “substantial and demonstrable risk” is necessary to trigger the personal security exception. *Del. County v. Schaefer*, 45 A.3d 1149 (Pa. Commw. Ct. 2012).

Meanwhile, 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. Rothey*, 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

³ In the Borough’s final response, it explained that a Taser use directive or policy does not exist separate from the Policy. Based on a review of the appeal, the Requester is not challenging the Borough’s assertion that the Policy is also the responsive record relating to the Department’s use of Tasers.

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 Perry attests that he has extensive experience in law enforcement as well as criminal investigations and that he is trained and certified in the use of firearms, tasers and other weapons. Chief Perry also attests that his role with the Department includes "supervis[ing] patrol functions" and managing "internal Use of Force and disciplinary investigations." Chief Perry further attests the following:

4. ... I am personally familiar with [the Policy] and the context in which it is to be applied. This [P]olicy, which is formally known as General Order 1.3 Use of Force, is maintained by the Department, a law enforcement and criminal justice agency, and if disclosed is reasonably likely to jeopardize and threaten public safety, preparedness or public protection activity...and is reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual....

5. General Order 1.3 Use of Force includes information regarding the operations preparedness and procedures of the Department. Section 1.3.1(B) – Use of Force Continuum Established (the "Continuum") describes the types of force to be used by the officers, the procedures and tactics to be used by the officer, and the types of weapons to be used by officers. The Continuum establishes fluid guidelines for officers and where an officer falls within the Continuum will change rapidly depending on whether a subject escalates or de-escalates an encounter, the perception of the subject's actions by the officers, and the safety needs to the officer, the subject, and nearby members of the public. Disclosure of the Continuum will allow criminals to anticipate an officer's tactics or encourage a criminal to flee, which endangers the criminal, a larger number of members of the public, and the officer and requires an additional number of responding officers. Additionally, knowledge of the Continuum to untrained and inexperienced members of the public and criminal subjects could result in their misapprehending the purpose of the Continuum and the context within which it is to be applied. This misapprehension may result in untrained and inexperienced individuals incorrectly anticipating an officer's reaction to their behavior and inadvertently triggering a higher level of force, up to and including deadly force, based on that officer's reasonable and subjective assessment of the interaction.

6. Section 1.3.2 – Use of Deadly Force describes specific situations in which an officer may use deadly force and specific tactics to be used during the employment

of deadly force. Disclosing this information would allow individuals to anticipate and counteract officers' use of deadly force....

7. Section 1.3.3 – Prohibited Use of Weapons describes specific situations where an officer is prohibited from discharging weapons and the exceptions thereto. Disclosure of this information will not only allow criminals to anticipate and counteract the officers' tactics, but will also encourage criminals to flee, which ... endangers a much larger number of innocent bystanders and police officers. Disclosure will further encourage criminals to take steps that actively endanger members of the public.

8. Section 1.3.4 – Use of Authorized Less Lethal Weapons describes a range of weapons and tactics that will be used by officers, including not only 'reactionary' use of these weapons, as set forth in the Continuum, where necessary to affect an arrest or take individual[s] into custody but also the procedures and situations for active, tactical use of these weapons....

9. Section 1.3.6 – Written Reports and Investigations Required redacts mention of an authorized weapon in order to prevent knowledge of this weapon from being disclosed to the public in connection with the above paragraph describing Section 1.3.4.

10. Section 1.3.8(E) – Weapons and Ammunition Approved by the Chief of Police describes storage procedures. Disclosure of these procedures will allow criminals or members of the public to learn when, where, and how weapons are to be stored. This knowledge increases risk of theft and risk of arming individuals who may be on Borough property or are prohibited from possessing firearms, endangering both officers and members of the public.

11. Section 1.3.8(F) describes tactics relating to weapons of last resort. Disclosure of these tactics will allow criminals to anticipate and counteract actions by the officer that are absolutely necessary to save his or her own life or the life of another individual.

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).

In *Collier v. Indiana Borough*, the agency denied a request for its police department's use of force continuum policy, arguing that the policy, if disclosed, would threaten public safety. OOR

Dkt. AP 2017-2356, 2018 PA O.O.R.D. LEXIS 229. On appeal, the agency distinguished portions of the withheld policy that were administrative in nature versus those that were tactical in nature. The agency also provided a description of each redacted section, explaining that the sections “provide[d] tactical guidance to police officers when dealing with a non-compliant subject.” Based upon the evidence submitted in the case, the OOR upheld the agency’s redaction of tactical information contained within the policy, noting that the portions relating to “the use of deadly force would be reasonably likely to threaten public safety or a public protection activity and would jeopardize police officer safety....” *Id.*; *see also Sees v. Northumberland Borough*, OOR Dkt. AP 2018-0729, 2018 PA O.O.R.D. LEXIS 1019 (permitting the redaction of tactical information from a use of force policy pursuant to Section 708(b)(2) of the RTKL).

Here, there is no dispute that the Policy relates to a law enforcement or public safety activity. Furthermore, based upon the evidence presented, the Borough has proven that disclosure of the redacted portions of the Policy and Special Order 1.3.8, which describe procedures for the use of firearms and less lethal weapons such as Tasers, and situational tactics, including officer movement and response procedures, would be reasonably like to jeopardize public safety or a public protection activity. 65 P.S. § 67.708(a)(1); *see also Benzing and PublicSource v. Churchill Borough*, OOR Dkt. AP 2018-1518, 2018 PA O.O.R.D. LEXIS 1282 (permitting the redaction of procedures for the use of firearms, situational tactics, including officer movement and response procedures, and the types of weaponry available to and used by police officers pursuant to Section 708(b)(2) of the RTKL); *Sees, supra*. Accordingly, the Borough has met its burden of proving that it properly redacted information pursuant to 65 P.S. § 67.708(b)(2).⁴ *See* 65 P.S. § 67.708(a).

CONCLUSION

⁴ Because we have determined that the records are exempt pursuant to 65 P.S. § 708(b)(2), we need not address the Borough’s argument based on 65 P.S. § 708(b)(1)(ii).

For the foregoing reasons, the appeal is **denied**, and the Borough 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 Bucks 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.⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 21, 2019

/s/ Kelly C. Isenberg

APPEALS OFFICER
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Sent to: Jo Ciavaglia (via email only);
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⁵ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).