

FACTUAL BACKGROUND

On June 18, 2010, the Requester sought access to “operating procedure manuals that explain, instruct and/or require officers to follow when stopping a motor vehicle, pertaining to subsequent searches of that vehicle, and the seizure of any property from that vehicle.” (“Request”). On July 22, 2010 the Department responded partially denying access to information it redacted as exempt under section 708(b)(2). It provided a copy of a Search and Seizure Policy and a copy of the Traffic Enforcement Policy (collectively “Policies”). The Search and Seizure Policy contains several numbered sections. The sections titled Purpose, Policy [to abide by the Fourth Amendment] and Definitions were provided without redaction. The remaining sections including General Requirements, Procedures (with subsections Warrant Searches, Warrantless Searches, Search Types, Body Cavity Searches, Consent, Crime Scene, Emergencies and Exigent Circumstances, Frisk, Incident to Arrest, Inventory, Plain Touch/Feel, Plain View, Special Searches, and Strip Searches) were fully redacted except for the title of the section or subsection. The Traffic Enforcement Policy similarly contained several numbered sections. The Purpose and Policy [to save lives, to prevent crashes and to expedite the flow of traffic] sections were provided without redaction. All other sections were fully redacted. On July 30, 2010 the Requester appealed to the OOR.

On August 10, 2010 the Department provided the affidavit of Coleman McDonough, the Chief of Police of Mt. Lebanon stating as follows:

1. “Affiant is intimately familiar with the portions of the Search and Seizure Policy and Traffic Enforcement Policy that were redacted from the Response.”

2. “The redacted information [from the Search and Seizure Policy] consists of comprehensive instructions to be followed by Department personnel when investigating potential crimes and securing evidence, which, if disclosed, could be manipulated by criminals to thwart the Department’s ability to prevent and prosecute illicit activities.”
3. “The redacted information [from the Search and Seizure Policy] consists of procedures designed to protect Department personnel as they investigated potential criminal activity (e.g. how to frisk an individual for a weapon), which if disclosed, could be exploited to jeopardize the health, safety and welfare of Department personnel.”
4. “The redacted information [from the Search and Seizure Policy] could be used by criminals to identify and exploit certain limitations in the Department’s capabilities, which could negatively impact the Department’s ability to prevent illicit activities and/or aid in the prosecution of criminals.”
5. “The redacted information [from the Search and Seizure Policy] could provide an advantage to an individual that desires to provoke police, avoid arrest, or cause public harm or inconvenience by refusing to follow instructions from Department personnel.
6. “The redacted information [from the Traffic Enforcement Policy] consists of comprehensive instructions to be followed by Department personnel to identify areas to be targeted for traffic enforcement procedures that are designed to reduce vehicular accidents, which, if

7. “The redacted information [from the Traffic Enforcement Policy] could be used to identify and exploit certain limitations in the Department’s ability to enforce traffic ordinances, which could promote speeding, reckless driving and/or intoxicated driving, thereby jeopardizing the safety of third parties.”
8. “The redacted information [from the Traffic Enforcement Policy] consists of comprehensive instructions to be followed by Department personnel when addressing drivers believed to be intoxicated and/or having a mental or physical condition that negatively affects their driving, which, if disclosed could be exploited by such drivers to avoid detection by Department personnel.”
9. “The redacted information [from the Traffic Enforcement Policy] could provide an advantage to an individual that desires to provoke police, avoid arrest, or cause public harm or inconvenience by refusing to follow instructions from Department personnel.”
10. “Other than the Search and Seizure Policy and Traffic Enforcement Policy, there are no other records in the Department’s possession responsive to the Request.”

The Department argues that “[t]he preponderance of the evidence standard does not require absolute certainty, [...] but only a reasonable likelihood’ that the reason for invoking the exception applies” citing *Woods v. Office of Open Records*, 2010

WL 2305759, at *4 (Pa. Commw. Ct. 2010). The Department also relies upon *Laigle v. Borough of Mercer*, OOR Dkt. AP 2010-0229 to support its position in support of the redactions.

LEGAL ANALYSIS

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). 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.” 65 P.S. §67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing.

The Department is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §§67.102 and 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. 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 clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a)(1) states: “[t]he 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 "evidence which as a whole shows that the fact sought to be proved is more probable than not," BLACK'S LAW DICTIONARY 1064 (8th ed.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

1. The Department Has Met Its Burden to Prove the Applicability of the Public Safety Exemption

The Department asserts that Section 708(b)(2) applies to exempt the Polices from disclosure. Section 708(b)(2) exempts the following:

“A record maintained by an agency in connection with the military, homeland security, national defense, 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 ...”

65 P.S. §67.708(b)(2). As the OOR held in *Walker v. Macungie Police Department*, OOR Dkt. AP 2009-0509, this exception requires *two* elements, the first being that the record is maintained by the agency in connection with its law enforcement or other public safety activity. It is not disputed that the Department is engaged in a public safety/law enforcement activity, and therefore all of its policies regardless of subject-matter meet this first element. The second element that must be shown to establish that the public safety exception applies is that the release of the record at issue would be “reasonably likely” to jeopardize or threaten public safety. The Department supplied the Affidavit of its Police Chief which attested to the likelihood that disclosure of the redacted portions of the Policies would threaten public safety. The Affidavit substantiates that knowledge of the redacted portions of the Policies would allow individuals to counteract and avoid the

Policy, and thus thwart the Department's attempts to protect the public from criminal activity.

CONCLUSION

For the foregoing reasons, this appeal is **denied**. The parties are advised that this is a Final Determination. Within thirty (30) days of the mailing date of this determination, it may be appealed to the Allegheny County Court of Common Pleas. In the event of an appeal for judicial review, all parties must be served with notice of the appeal. The OOR shall be served notice in accordance with Section 1302 and have an opportunity to respond to any appeal for judicial review. The parties are advised that this Final Determination will be posted on the Office of Open Records website at: <http://openrecords.state.pa.us>

FINAL DETERMINATION ISSUED AND MAILED: August 25, 2010



AUDREY BUGLIONE, ESQ.
Appeals Officer

Sent to: John George, Jason Wrona, Esquire