



(the “Request”). He explains that the most important component is the fire department apparatus dispatch listing for each fire department’s box card system.

After invoking an extension, Regina Armitage, Open Records Officer (“ORO”) for the County, denied the request under the following Section 708(b) exceptions: 1) personal security under (b)(1)(ii); 2) public safety under (b)(2); and 3) physical security in (b)(3). The County explains the records are maintained by the Department of Emergency Communications, prepared by the fire departments and used by the County for the overall emergency response system. The box cards identify the address and geography of each department’s responsible jurisdiction and define how many response vehicles and type of apparatus are needed on a call and the assigned successive departments (on second and third call) when the first responders need assistance. The County advises that disclosure of departmental protocol would expose potential weaknesses and vulnerabilities and thus compromise the safety and security of residents and infrastructures.

The Requester timely appealed, arguing that information regarding deployment of fire protection to the community should be open to public inspection. He argues the information does not implicate vulnerabilities in the fire safety system, and illustrates his point by noting that William Penn Fire Company, Station 7 and sub-station 77, posts their box card assignments on-line. He claims the information is in the public interest to ensure the closest apparatus is assigned to a call.

The County supplemented the record with background on prior requests for the geography served by the named fire departments to which the County responded. The County represents the Requester had various conversations with the County Department of Emergency Communications and representatives of the named fire departments to assess what the Requester wanted in seeking the “fire department apparatus listing.” The County advises it is the “listing”

that had been denied as the “box card data,” including the address component and responsible geographic area information had been disclosed in response to a November 2010 request. Thus, only the “listing” information is at issue in this appeal.

The County submits a notarized affidavit of Jim McFadden, Chairman of Skyline Fire District, to support exemption of the listing under Section 708(b)(2) and (b)(3), (“Affidavit”), and a letter of Senator Charles T. McIlhinney, addressed to Executive Director Terry Mutchler, regarding the three security exceptions asserted. The County reiterated its arguments regarding the personal security exception, the public safety and security exceptions in its submission.

Chairman McFadden has over forty-seven years in volunteer fire service and represents the fire departments involved. He attests that the records requested are for the “specific pieces and types of fire apparatus from each fire company dispatched to each fire company dispatched to various types of incidents with in all areas of Middletown Township.” He attests the information is supplied to the County to enable its 911 center to dispatch the proper equipment to each type of incident, *e.g.*, “a dumpster fire require[s] one engine (pumper) but a building fire requires four engines and two ladders.” He attests the information is “proprietary to the essence of the safety of the emergency responders” and offers a “playbook” for how the fire companies respond, which may be used for nefarious purposes. He attests the disclosure will reveal which fire companies respond and with which pieces of apparatus, and allow a requester to make a plan to overflow the emergency responders and their resources, as by explosive devices, using the information to firefighters’ detriment.

The OOR issued a Final Determination on March 16, 2011, in which it held that the County did not meet its burden of proving the public safety and physical security exceptions.

The County sought reconsideration on April 6, 2011, *nunc pro tunc*. The OOR agreed to accept the request for reconsideration out of time, and granted the request for reconsideration on April 7, 2011. Pursuant to the General Rules of Administrative Practice and Procedure, 1 Pa. Code Section 35.241, the Requester had the opportunity to respond to the request for reconsideration.

The Requester objected to the reconsideration because the OOR's decision is final and binding, and "based on two previous court cases, [and] proven law." He states the County did not identify any errors in the Final Determination to be reconsidered.

From closer review of the record submitted, the "fire department apparatus listing" is a separate record to which three security exceptions had been asserted. The County explained the listings are prepared by fire departments and provided to the County Department of Emergency Communications to be used as an integral part of the overall emergency response system, and their release would pose a threat to homeland security and the firefighters who are the first line of defense.

McFadden attested the fire districts requested include Sesame Place and Oxford Valley Mall, which are on terrorist watch lists, and that by knowing the order and location to which certain fire companies respond, a person with the listing "could [attack a specific target and] plant secondary devices with timed detonation at each response station thereby wiping out the whole first wave of emergency responders and their resources." He states "our volunteer firefighter's job is dangerous enough without the government releasing sensitive information that can be utilized to their detriment." He also explains that the information posted on fire-company websites do not explain the number and type of apparatus, and order in which stations respond to a particular area.

The OOR did not consider supplemental evidence and looked only to the applicable law.

## 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. Ct. 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 and the OOR has the requisite and necessary information before it to properly adjudicate the matter.

The County is a local agency subject to the RTKL and required to disclose public records. *See* 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. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. §67.708(b). Here, the County asserted Section 708(b)(2), the public safety exception, (b)(3), the physical security exception, and (b)(1)(ii), the personal security exception in its Denial and on appeal. However, the Final Determination did not address the personal security exception for which evidence was submitted as part of the initial appeal.

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) states: “(1) [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).

The “personal security exception” at Section 708(b)(1)(ii) protects records that, if disclosed, “would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.” The County must show the personal security element and the “reasonable likelihood” element in order to establish this exception.

Although the County noted in its submission that the Affidavit pertained to Section 708(b)(2) and (b)(3), lack of a reference to the specific exception is not fatal to the appropriate application of a properly cited exception. *See, e.g., Fulmer v. Dept. of Ins.*, OOR Dkt. AP 2010-0574, 2010 Pa. O.O.R.D. LEXIS 499 (omission of reference to proper exception in title of affidavit does not undermine its contents). The County submitted the Affidavit of McFadden regarding the substantial and demonstrable risk of harm to firefighters, emergency responders and those the emergency responders protect. The Affidavit explains that the listing can be used to target emergency responders through use of secondary timed detonation devices and thus presents a substantial and demonstrable risk of physical harm to certain individuals. By identifying the use of the secondary detonation technique in past terrorist attacks, the County shows the risk is more than speculative, and satisfies its burden of proof that the records are exempt for personal security reasons. The OOR thus abrogates and reverses its March 16, 2011 Final Determination.

## CONCLUSION

For the foregoing reasons, the March 16, 2011, Final Determination is **reversed and the County is not required to disclose the listing.**

This Final Determination is binding on all parties. Within thirty (30) 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 according to court rules as per Section 1303. This Final Determination shall be posted on the website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: May 5, 2011**

A handwritten signature in cursive script, appearing to read "Lucinda Glinn".

**LUCINDA GLINN, ESQ.  
APPEALS OFFICER**

Sent to: Kevin Reed; Regina Armitage