

Division City Solicitor Christopher DiFusco, Esq., clarified the Request by e-mail, asking whether the Requestor wanted an “office schedule” or something like a personal desk calendar. The Requester sought “the schedule generated by the Mayor and each Council office that details any appointments involving city business or public appearances attended in their role as an elected official. I assumed that would not involve[] personal appointments, but would include private meetings with lobbyists, other public officials, or members of the public to name a few.” [See July 16th E-mail exchange.]

After invoking the thirty-day extension, Joshua Stein, Deputy City Solicitor responded on behalf of the City. The City denied the Request citing the predecisional deliberative exception 708(b)(10), workpapers exception at (b)(12), the personal security exception at (b)(1)(ii) and with regard to the Mayor only, the public preparedness exception at (b)(2) (the “Denial”).¹ With regard to the Mayor, the Denial advised that the Mayor’s daily schedule is maintained in connection with law enforcement and public safety activities because the Mayor is the “chief law enforcement officer of the City.”

The Denial advised that with regard the City Council, that not all members use the City’s calendaring system for daily scheduling: one keeps no calendar, and one uses a web-based system over which the City exercises no control. Counsel for the Requester filed a timely appeal of each denial. In support of the appeals, counsel argues that the daily schedules are public records to which none of the Section 708(b) exceptions applies and contends the City did not meet its burden of proof. The Requester agreed to consolidate the two appeals into OOR Dkt. AP 2009-0787 (the “Appeal”).

With regard to Section 708(b)(12), the Requester contends the daily schedules are not maintained for purely personal use because they track the official functions of the public office.

¹ The City issued two denial letters, one with regard to the Mayor and one with regard to City Council. However, as the arguments are virtually identical in substance, they are referred to collectively as the “Denial.”

With regard to Section 708(b)(10), the Requester contends that there is no evidence to illustrate how the daily schedules are “deliberative” in character as is required under *Werner v. Pittsburgh School District*, OOR Dkt. AP 2009-0551. With regard to the personal security exception, the Requester points out that the City bases its application on hypothetical situations and does not show the requisite risk in accordance with *Swartzwelder v. Butler County*, OOR Dkt. AP 2009-0632. With regard to the Section 708(b)(2), the public safety exception, asserted only as to the Mayor’s daily schedules, the Requester contends do not sufficiently relate to law enforcement.

The City submitted legal position papers in response to the Requester’s appeals, and an affidavit of the Police Commissioner for the City regarding the application of the personal security and public safety exceptions to the Mayor’s daily schedules. The City did not submit any evidence in support of any of other asserted exceptions. The City also did not submit any affidavit or other materials to support its withholding of the Council members’ daily schedules.

The affidavit of Police Commissioner Charles Ramsey specifies that it applies to the daily schedule of the Mayor (the “Police Commissioner Affidavit”). The Police Commissioner Affidavit is notarized and made under penalty of perjury as to the following facts: (1) the Mayor is the chief law enforcement official for the City under the City’s Home Rule Charter; (2) the Mayor has “near constant security comprised of on-duty Philadelphia Police Officers”; and (3) the Mayor shares his daily itinerary with his staff and those responsible for his security, strictly to provide for his protection. The Police Commissioner also attests:

In my professional judgment release of the Mayor’s daily schedule, including past schedules, would be reasonably likely to result in a substantial and demonstrable risk to the personal security of the Mayor and the police detail assigned to protect him, including the risk of physical harm. An individual determined to harm or otherwise confront the Mayor could use the past schedules to discern certain patterns of travel, as well as the security procedures used to protect the Mayor. This information could be used in such a manner as to threaten the physical safety of the Mayor as well as those Police Officers assigned to protect the Mayor, and any innocent bystanders who might be in the area.

[*See Police Commissioner Affidavit at c.*] In addition to his opinion, the Police Commissioner attests that due to his position as chief executive for a large city, the Mayor's personal security "must always be a concern." [*Id. at a.*] No evidence was submitted attesting to the content of the daily schedules. Only public officials' *past* daily schedules from June 1st to July 14th are at issue in this Final Determination because the Request can pertain only to existing records.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The City is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.302. Records of a local agency are presumed to be "public" unless the record is: (1) exempt under Section 708(b); (2) protected by a privilege; or (3) exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. §67.305. The City asserted a number of exceptions under Section 708(b) to protect the daily schedules: (b)(12) as "working papers"; (b)(10) as records reflecting predecisional deliberation; (b)(1)(ii) as records reasonably likely to cause substantial and demonstrable risk to personal security if disclosed; and pertaining to the Mayor's daily schedules, (b)(2) as records reasonably likely to jeopardize public safety and preparedness if disclosed. Under Section 708(a), the City must show that its claimed exceptions apply by a preponderance of the evidence. To prove by "preponderance of the evidence" means to show by the "greater weight of the evidence." *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). Each exception is addressed in turn.

Although the Request seeks records up to the date the Request is fulfilled, that is not permissible. Only public officials' *past* daily schedules from June 1st to July 14th are properly sought. The OOR advises that a proper request for records may only seek records that are in existence as of the date of a request; otherwise, an agency would in effect be "creating" a record in order to respond to a request, which it cannot be compelled to do. *See* 65 P.S. §67.705.

1. The daily schedules do not qualify as “workpapers” under Section 708(b)(12).

The City contends that the daily schedules of the Mayor and Council members are shielded under Section 708(b)(12), known as the “working papers exception.” This exception protects “notes and working papers prepared by or for a public official or agency employee used solely for that official’s or employee’s own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.” 65 P.S. §67.708(b)(12). This exception is designed to protect records that are “solely for [an] official’s...use” which do not have an “official purpose.” The OOR finds the Requester’s statutory construction compelling and more plausible than that of the City.

As described, the daily schedules are prepared for and possibly by the public officials for whom they are requested, *i.e.*, the Mayor and members of City Council. However, the record reflects that at least in the case of the Mayor, the daily schedules are not prepared solely for his use. The Police Commissioner Affidavit attests that the daily schedules are provided to police officers to coordinate the Mayor’s protection. Further, the daily schedules as described in the Request pertain to the official business and official appointments the Mayor and/or City Council members maintain. The daily schedules are not temporary records to keep notes of information for the benefit of the public officials themselves like the routing or message slips listed as examples in the exception. Rather, the daily schedules as described are accessible by the public officials’ offices, staffs, and in the Mayor’s case, security detail, to keep track of the public officials’ daily activities.

To qualify for protection under this exception, the records at issue must not be maintained for an official purpose. The information maintained in the notes or work papers does not need to be “personal” in nature, like a reminder of a doctor’s appointment, but must be purely personal in use.

Here, the daily schedules, described as daily activity sheets to which the Offices and Office Staff have access are not personal to the public officials and therefore cannot be protected on that basis. With regard to members of City Council who maintain a personal calendar that is not shared with, accessed or used by any City staff, such past daily schedules could be properly protected under this exception had such facts been supported by substantial evidence. In this case, the City did not provide evidence of these facts, and therefore failed to meet its burden of proof to show this exception applies.

2. The daily schedules are not protected under Section 708(b)(10).

Pursuant to Section 708(b)(10)(i)(A), a record *reflecting* the “internal, predecisional deliberations of an agency... or predecisional deliberations between agency members, employees or officials...” are protected from mandatory disclosure under the RTKL. 65 P.S. §67.708(b)(10)(i)(A). To qualify for protection under this exception, a record must *reflect* an agency’s deliberations, and relate to a proposed policy or course of action for the agency. The OOR has consistently held that in order to establish that the predecisional deliberative exception applies, an agency must show the following three elements: (1) the communication must be *internal* to the agency, including its representatives, (2) the communication must be *predecisional*, meaning it was made before the deliberative process of decision-making was completed; and (3) the communication must be *deliberative in character* in that it makes recommendations or expresses opinions on legal or policy matters, and is not purely factual in nature. *See Grumet v. Dept. of Ins.*, OOR Dkt. AP 2009-0747. The City fails to establish these three elements and submitted no evidence to show that this exception applies here.

The City did not submit any evidence to show that the daily schedules are part of the City’s internal communications or decision-making processes. To show the daily schedules are “predecisional,” the City needs to show that a decision is being contemplated, and that the daily

schedules reflect information utilized in the decision-making process. The City did not allude to any decisions for which any allegedly protected information would be contained in the daily schedules. Further, the City did not explain how the daily schedules contain information “deliberative” in character. In determining whether information is deliberative in character, the OOR considers whether the information relates to a recommendation for action or policy. *See LaValle v. OGC*, 564 Pa. 482, 496, 769 A.2d 449, 458 (2001).

The City does not substantiate its assertion that the daily schedules reflect “predecisional deliberations,” yet contends that they contain information that would qualify for redaction under this exception. Instead, the City argues that revealing the type of information that may qualify as protected under this exception would nullify the exception itself because information would be revealed. The City cannot avoid its burden of proving this exception by a preponderance of the evidence by asserting that any proof would compromise the exception. Notably, the City did not provide redacted copies of the daily schedules in order to illustrate its assertion that certain parts may reflect deliberations. The OOR declines the City’s invitation to weigh the public interest in disclosure of the daily schedules and apply a balancing test where none is needed. The City had an opportunity to submit material in support of this exception, and neglected to furnish the requisite proof. Therefore, the daily schedules cannot be excepted from disclosure under Section 708(b)(10).

3. The Mayor’s daily schedule is not protected under Section 708(b)(2).

Section 708(b)(2) protects “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 activity.” 65 P.S. §67.708(b)(2). The City asserted this exception solely as it applied to the Mayor’s past daily schedules.

As with all of the exceptions under Section 708(b)(2), the law requires that the City submit evidence to substantiate that the exception applies to the records requested. In support of its denial, the City submitted an affidavit of the Police Commissioner. The Affidavit states that release of the Mayor's schedule "could be" used to threaten the physical safety of the Mayor. The Affidavit does not attest that the daily schedule(s) contain specific traffic patterns in travel or locations. Nor does it attest to the critical facts needed to show that past schedules show future activities to expose potential safety risks.

In order for this exception to apply, two elements are required: (1) the record is maintained by the agency in connection with its law enforcement or other public safety activity; and (2) the record at issue must be "reasonably likely" to threaten public protection if released. *See Walker v. Macungie Police Dept.*, OOR Dkt. AP 2009-0509.

A Mayor's schedule is not in and of itself a law enforcement record. The mere fact that his past daily schedules were shared with the police department does not convert them into law enforcement records, or "a record maintained in connection with the military, homeland security, national defense, law enforcement or other public safety activity." In *Walker*, the requester sought copy of police officers' past schedules. These were denied and the denial upheld on appeal because the schedules of police officers' were directly related to law enforcement or public safety and preparedness activities. Further, in *Walker*, the agency verified the existence of a set rotation to show that past schedules reveal future activity.

Additionally, the fact that the Request seeks *past* daily schedules is significant because absent proof of a pattern, which the City did not assert, the information relayed in the daily schedules regarding the Mayor's prior activities or meetings does not reveal information people can use to target or threaten the Mayor. The release of past daily schedules for the Mayor, the City contends, would be reasonably likely to endanger public safety because his schedules are

shared with the police. Past daily schedules of the Mayor, as opposed to police officers, are not, on their face, records maintained for law enforcement or public safety purposes.

As to the second element, “reasonable likelihood” of “jeopardizing or threatening public safety or preparedness or public protection activity” is likewise not shown by the Police Commissioner Affidavit. The affidavit opines as to harm that “could” occur, and a mere possibility of a threat without any facts to substantiate the likelihood of the threat, does not constitute competent credible evidence. Unlike the Macungie Police Department in *Walker*, the City did not connect the release of the past daily schedules to the risk to public safety. Moreover, the affidavit does not state that it applies to all past daily schedules from June 1st to the date of the Request. As proffered to support the public safety exception, the affidavit is limited to the information released to the police and security detail assigned to protect the Mayor, to the extent the information is “used solely in connection with public safety and public protection.” [See *Police Commissioner Affidavit* ¶d.] Thus, not all past daily schedules would necessarily qualify under Section 708(b)(2). Because the City did not meet its burden to establish that the release of the Mayor’s past daily schedules meets the elements of the public safety exception, the City cannot withhold the records under Section 708(b)(2).

4. The daily schedules are not protected under Section 708(b)(1)(ii).

The City also asserts that the personal security exception, Section 708(b)(1)(ii), applies to shield the daily schedules from release. To establish that the personal security exception applies, again, the City must show two elements: (1) reasonable likelihood; and (2) substantial and demonstrable risk of harm. Both of these elements must be established by the agency asserting the exception. “Substantial and demonstrable risk” are not defined terms in the RTKL. Nor is there case law that offers guidance as to the interpretation of these terms in this context. However, construing these terms in accordance with their plain meaning in accordance with the

Statutory Construction Act, 1 Pa. C.S. §1903, the type of risk of harm must be both “of substance,” *i.e.*, 1. material, 2. real, and 3. ample, and “able to be demonstrated” meaning “obvious or apparent.” *See* American Heritage Dictionary, 2d edition.

The personal security exception within the prior Right-to-Know Law, 65 P.S. §§66.1 *et seq.*, (“Old Law”), merely required that an agency be able to demonstrate “potential impairment.” *See Tribune Review Publ’g v. Bodack*, 599 Pa. 256, 264, 961 A.2d 110, 115 (2008). Under the Old Law, the City would have met that burden of potential impairment and could have withheld the schedules. However, the Legislature created a new – and much higher standard – under the current RTKL which requires more than the “potential impairment” standard under the Old Law. An agency must demonstrate that release would be “reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security an individual.” 65 P.S. §67.708(b)(1)(ii). In this case, the City did not meet this higher standard.

The City did not substantiate a reasonable likelihood of risk from the disclosure of the daily schedules at issue with any evidence as is required to meet its burden. The City did not submit any affidavit or other documentary evidence to illustrate that release of the City Council members’ daily schedules would be reasonably likely to pose a substantial and demonstrable risk to personal security or physical harm. As in *Swartzwelder v. Butler County*, *supra*, the City is required to submit evidence of tangible risks and cannot rest upon vague assertions of potential risks that release of the schedules *could* cause. Thus, the City cannot withhold the past daily schedules of Council members based upon the “personal security” exception.

The City alleges only that a threat “could” exist, which is insufficient to establish the personal security exception. The OOR’s decision in *Swartzwelder v. Butler County*, *supra* underscores the importance of the agency showing the connection between the release of the record to risk posed to personal security based upon specific facts. In *Swartzwelder*, the County

submitted an affidavit that specified prior threats to the assistant district attorney to show a likelihood of risk and connected the release of the past vacation schedule to her security. The Police Commissioner Affidavit attested that a person *could* use the past daily schedules to discern his security procedures, but did not attest that these procedures are within the schedules and did not explain why they could not be redacted and the remainder released. As the City did not support facts demonstrating a reasonable likelihood or a substantial *and* demonstrable risk, as required by law, the City cannot protect the Mayor's daily schedules under this exception.

CONCLUSION

For the foregoing reasons, the Requester's Appeal is **granted**. As it did not establish its asserted exceptions, the City is directed to provide the Requester the daily schedules, from June 1st to July 14th, of the Mayor and of all Council members who keep them, within thirty (30) days.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Philadelphia 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. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: October 13, 2009



**LUCINDA GLINN, ESQ.
APPEALS OFFICER**

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