



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF:</b>	:	
	:	
<b>JUSTIN MCSHANE</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2009-0718</b>
	:	
<b>HARRISBURG AREA COMMUNITY</b>	:	
<b>COLLEGE,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Justin McShane (the “Requestor”) filed a right-to-know request (the “Request”) with Harrisburg Area Community College (“HACC”) seeking access to course materials and curriculum relating to DUI training through Act 120. HACC partially granted and partially denied the Request. The Requestor timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the appeal is **granted** and HACC is required to provide copies of the requested records.

## **FACTUAL BACKGROUND**

On June 30, 2009, the Requestor filed the Request with HACC requesting “[a]ny and all course material and/or books, videos, manuals pertaining to DUI training through Act 120 including but not limited to Standardized Field Sobriety Testing.” In a letter dated July 1, 2009, Patrick M. Early, Right to Know Officer for HACC, indicated that he would require an additional 30 days to respond. On July 31, 2009, HACC provided the Requestor with a number course materials which are available from public sources and which are used in the course. HACC also withheld information pursuant to 65 P.S. § 67.708(b)(2) stating that it would threaten the safety of the public if released.

In support of the denial, HACC provided the sworn affidavit of John M. Gallaher, a Major of the Pennsylvania State Police. Major Gallaher is the Executive Director of the Municipal Police Officer Education and Training Commission (the “Commission”). Major Gallaher stated that the Commission is administered by the PSP pursuant to the Municipal Officers Education and Training Act (Act 120) 53 Pa.C.S. §§ 2161-2171. Major Gallaher indicated that under Act 120, the Commission is required to establish and administer courses of study for the basic and in-service training of municipal officers throughout the Commonwealth. The Commission is vested with a number of powers and duties enumerated in Act 120. These duties include conducting statutorily mandated training, certifying municipal police officers, and revoking the certification of municipal police officers who fail to comply with Commissions basic in-service training requirements. In addition, the Commission certifies and inspects schools that are used to comply with the commissions educational and training requirements. Major Gallaher

stated that due to the extensive requirements and prohibitions of Act 120, protecting the integrity of the Commission's police officer training curricula and certification protocols is imperative to the Commission's fulfillment of its statutory mandate. HACC is a Commission-certified school for the training of Pennsylvania municipal police officers. Major Gallaher stated that based on his professional experience and judgment, a disclosure of the Commission's DUI curriculum would be reasonably likely to jeopardize or threaten the Commission's statutorily mandated public protection activity.

The Requestor filed a timely appeal with the OOR on August 18, 2009. In his appeal, the Requestor argues that HACC failed to demonstrate how or why the release of the information would threaten the Commission's ability to protect the public.

In its response, HACC argues that the "Public Safety Exception" applies because the records are maintained by an agency in connection with law enforcement/public safety activity and that release of the records would be reasonably likely to threaten public protection. HACC also argued:

If the integral details of legitimate means and methods used to investigate and establish violations of Pennsylvania's DUI laws become widely known, the public protection mission of police will only be made that much more difficult. Any real or perceived vulnerabilities in police training or procedures would be exploited to frustrate and compromise DUI investigations and prosecutions, thus allowing otherwise guilty persons to avoid criminal liability or willingly placing the lives and livelihood of themselves and others at risk by driving while intoxicated.

The Requestor granted the OOR additional time to issue a Final Determination in this appeal.

## LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. See 65 P.S. §67.503(a). HACC is a state-affiliated entity and thus, qualifies as a Commonwealth agency subject to the RTKL. See 65 P.S. §§ 67.301 and 67.102.

Section 102 of the RTKL, defines the term “state-affiliated entity” as:

A Commonwealth authority or Commonwealth entity. The term includes the Pennsylvania Higher Education Assistance Agency and any entity established thereby, the Pennsylvania Gaming Control Board, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, the Pennsylvania Housing Finance Agency, the Pennsylvania Municipal Retirement Board, the State System of Higher Education, **a community college**, the Pennsylvania Turnpike Commission, the Pennsylvania Public Utility Commission, the Pennsylvania Infrastructure Investment Authority, the State Public School Building Authority, the Pennsylvania Interscholastic Athletic Association and the Pennsylvania Educational Facilities Authority. The term does not include a State-related institution.

65 P.S. § 67.102 (emphasis added)

Section 102 of the RTKL, defines the term “record” as:

“Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image- processed document.”

65 P.S. § 67.102

The RTKL provides further clarity in defining a “public record” as:

“A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege.”

65 P.S. §67.102.

The RTKL is clear that agencies bear the burden of proving the applicability of any exceptions. Specifically, § 708 in pertinent part states:

(a) Burden of proof. —

(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.

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. West 2004). *See also Commonwealth v. Williams*, 615 A.2d 716 (PA. 1992).

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). HACC bears the burden of establishing its asserted exceptions by a preponderance of the evidence, meaning the “greater weight of the evidence.” *See Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001). This exception requires *two* elements, one being that the record is maintained by the agency in connection with its law enforcement or other public safety activity and the second that there is a reasonable likelihood that disclosure would threaten public safety.

HACC provides mandatory training for current and future law enforcement officers, a point which is acknowledged by both parties in their submissions. The Requestor argues that the requested training materials/records are not maintained in connection with any law enforcement or public safety activity, but that they consist of general government-produced and funded manuals similar to that of the National Highway Traffic Safety

Administration manual that is promulgated nationally to aid in the training of police officer. The OOR is not persuaded by Requestor's argument. Regardless of their source, the requested records are used as part of HACC's training of law enforcement officers. As such, the requested training materials qualify as a record maintained by an agency in connection with law enforcement and public safety, and thus the first element of the exception is met.

To meet its burden of proving that the requested training materials/ curriculum qualify for protection under Section 708(b)(2), HACC must also demonstrate that the record at issue would be "reasonably likely" to threaten public protection if released. *Id.* To establish that the release of the training materials would be "reasonably likely" to jeopardize public safety and/or preparedness, HACC submitted the sworn affidavit of Major John M. Gallaher. Major Gallaher affirms that the release of the DUI curriculum would be reasonably likely to jeopardize or threaten the Commissions statutorily-mandated public protection activity. However, it is noteworthy that the affidavit does not explain how or why the release of the curriculum would render such a result.

HACC argues in its response that the release of the records would make the protection mission of police more difficult because it would reveal real or perceived vulnerabilities within law enforcement training or procedure. However, HACC does not submit facts or specific examples demonstrating how the release would be reasonably likely to jeopardize or threaten public safety or preparedness. HACC does not claim that release of the requested information will enable DUI offenders to avoid detection nor does it address or demonstrate how the release of the training materials would affect its

ability to initially enforce and immediately remove suspected DUI offenders from the roadways.

HACC presents no argument or statement that the requested materials include specific times, locations, or information for DUI enforcement that would allow an impaired driver to avoid detection, thus allowing an impaired driver to remain on the roadways as a threat to public safety. HACC argues with no factual support that release of the information will threaten public safety. Conclusory statements are insufficient to establish this exception, and mere assertion of reasonable likelihood does not make it so.

Instead HACC points to the potential negative impact on the investigation and eventual prosecution of alleged DUI violations, it does not address or demonstrate how the release of the training materials would affect law enforcement personnel's ability to initially enforce and remove suspected DUI offenders from the roadways or how it would enable DUI offenders to avoid that enforcement. Therefore, in this instance HACC fails to meet its burden to establish both elements of the public safety exception, and thus cannot protect the training materials/curriculum under Section 708(b)(2).

The OOR notes that Major Gallaher's Affidavit references the Commission's anti-cheating policy and dissemination policy set forth in 37 Pa. Code §§ 203.33, 203.52, and 203.54. However, HACC does not show how these policies preclude release under the public safety exception under Section 708(b)(2). Further, HACC points to no other exceptions under the RTKL that would preclude release.

## CONCLUSION

For the foregoing reasons, the Requestor's appeal is **granted** and HACC is required to provide copies of the requested records. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Commonwealth Court. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1301. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

**FINAL DETERMINATION ISSUED AND MAILED** September 30, 2009



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APPEALS OFFICER  
NATHANAEL J. BYERLY, Esquire

Final Determination Sent To:

Justin McShane, Esquire  
David R. Keller, Esquire