

FACTUAL BACKGROUND

On May 3, 2010 the PSP received a request for the following records:

1. All training and curriculum materials, including electronic materials such as video, DVD, and/or DC-ROM, relating to the rights of individuals under the First Amendment to the U.S. Constitution created for the training of municipal police officer recruits pursuant to Act 120, 53 Pa. Cons. Stat. §§ 2161-2171;
2. All training and curriculum materials, including electronic materials such as video, DVD, and/or DC-ROM, relating to the citation of individuals for Disorderly Conduct under 18 Pa. Cons. Stat. § 5503 created for the training of municipal police officer recruits pursuant to Act 120, 53 Pa. Cons. Stat. §§ 2161-2171;
3. All training and curriculum materials, including electronic materials such as video, DVD, and/or DC-ROM, relating to the rights of individuals under the First Amendment to the U.S. Constitution created since January 2008 for mandatory in-service training of municipal police officers pursuant to Act 180, 53 Pa. Cons. Stat. §§ 2161-2171;
4. All training and curriculum materials, including electronic materials such as video, DVD, and/or DC-ROM, relating to the citation of individuals for Disorderly Conduct under 18 Pa. Cons. Stat. § 5503 created since January 2008 for mandatory in-service training of municipal police officers pursuant to Act 180, 53 Pa. Cons. Stat. §§ 2161-2171;

(“Request”). On June 9, 2010, after extending the deadline to respond, the PSP denied the Request citing section 708(b)(2) citing *Walker v. Macungie Police Dept.*, OOR Dkt. 2009-0509. The PSP explained the Request “encompasses records maintained by the Municipal Police Officers' Education and Training Commission (“Commission”) in connection with its Act 120-mandated public protection activities...” The PSP provided the sworn Affidavit of Commission Executive Director John Gallaher which states as follows:

1. “Under Act 120, the Commission is required to establish and administer minimum courses of study for the purposes of basic police training and mandatory in-service training of municipal police officers throughout the Commonwealth of Pennsylvania. 53 Pa.C.S. § 2161.”
2. “Under Act 120, the Commission is further required to certify (and, if necessary, decertify) each of more than 23,000 police officers currently serving in one or more of Pennsylvania's 1,139 municipal police departments. 53 Pa.C.S. § 2164(1) & (12).”

3. “It is unlawful for a municipal police department in Pennsylvania to hire and deploy an individual as police officer with full arrest powers, if the individual has not been certified by the Commission. 53 Pa.C.S. § 2167(1)-(c). *Salters v. Municipal Police Officer's Education and Training Commission*, 912 A.2d 347, 349 n.2 (Pa. Commw. Ct. 2006).”
4. “To obtain the Commission's initial police officer certification, an individual must, among other requirements, successfully complete a basic police training course given at a Commission-certified school, by Commission-certified instructors, in strict accordance with Commission training curricula and certification standards (subject to comparable-training waiver). 37 Pa. Code §§ 203.11(a)(11) & 203.13.”
5. “To obtain the Commission's biennial recertification, a municipal police officer must successfully complete mandatory in-service police training courses, given at a Commission-certified school, by Commission-certified instructors, in strict accordance with Commission training curricula and certification standards. 37 Pa. Code §§ 203.11(a)(11), 203.13(c) & 203.52.”
6. “As the Commonwealth Court observed in *Dougherty v. Borough of Meshoppen*, 612 a.2 595, 597 (Pa. Commw. Ct. 1992): ‘*Certainly, the certification requirement provided for in Act 120 is more than a mere technicality, as it reflects the legislature's clear intention that in order for a police officer in this Commonwealth to be qualified for service, he or she must obtain certification from the Commission.*’ (emphasis provided)
7. “To satisfy these statutory requirements, the Commission is vested with extensive powers and duties enumerated in section 2164 of Act 120, including the authority and responsibility:
 - a. To require every municipal police officer to undergo a background investigation to determine the individual's suitability to serve as a police officer;
 - b. To certify municipal police officers who have satisfactorily completed the Commission's basic training requirements;
 - c. To require every municipal police officer to retain certification by obtaining a minimum standard amount of in-service training annually;
 - d. To revoke the certification of municipal police officers who fail to comply with the Commission's basic and in-service police training requirements;
 - e. To establish minimum standard qualification for instructors of the Commission's basic and in-service police training curricula, to certify qualified instructors and to revoke the certification of unqualified instructors;
 - f. To establish minimum standard qualifications for schools presenting the Commission's basic and in-service police training curricula, to evaluate, approve and certify qualified

schools, to annually inspect certified schools and to revoke the certification of unqualified schools; and

g. To promulgate the necessary rules and regulations to implement the Commission's basic and in-service police training requirements for municipal police officers.”

53 P.S. § 2164(1)-(3), (6)-(7) & (12)-(14). Thus, pursuant to Act 120, the Commission is manifestly engaged in public protection activities.”

8. “In accordance with the requirements of Act 120, the Commission prepares or compiles copyright-protected source material and teaching aids for all basic and in-service police training curricula presented to Pennsylvania municipal police officers, which Commission-certified schools are required by law to offer and Commission-certified instructors are required by law to teach. 37 Pa. Code §§ 203.33(b)(12), 203.51-52 & 203.72(a)(3).”

9. “To avoid compromising the Act 120 certification requirement, which is essential to the Commission's public protection activities, the Commission must preserve and protect the integrity of all basic an in-service police training curricula presented to Pennsylvania municipal police officers.”

10. “Accordingly, the Commission holds is certified schools and instructors responsible for properly administering its police officer training curricula, maintaining examination confidentiality and security, enforcing the anti-cheating policy, and restricting the dissemination of Commission-authorized training source materials to certified school staff members, instructors and officer-trainees. 37 Pa. Code §§ 203.33(b)(12), 203.52(c)(8) & 203.54. The Commission's January 1, 2000 Policy Statement issued by my predecessor, Major Richard C. Mooney, is appended to this affidavit as Attachment A and fully incorporated, by reference.”

11. “The requested Commission records contain police training presentation, discussions and exercises involving police procedures and principles of Pennsylvania common law and statutory law regarding free speech issues and disorderly conduct, all of which are critical components of the Commission's basic and in-service police training curricula.”

12. “Public disclosure of the requested Commission records would be reasonably likely to jeopardize the Commission's statutorily-mandated public protection activities by posing a substantial risk of unregulated public dissemination of commission training source materials and teaching aids, which would undermine the integrity of the Commission's basic and in-service police training curricula, thereby compromising the Act 120 certification requirement. [*Walker, supra.*].”

The policy referenced in paragraph 13 of the Affidavit discusses the requirement that all instructors use the same curriculum materials presented in the same order and that instructors may not deviate from the material without prior permission.

On June 28, 2010 the Requester appealed the denial challenging the PSP assertion that Act 120 and Commission regulations prohibit disclosure. The Requester has received training material from other police departments, including from the PSP Bureau of Training and Education.

The parties were invited to submit additional information in support of their respective positions. On July 12, 2010 the PSP responded asking the OOR to convene a hearing so that PSP could present the testimony of various individuals regarding the “detrimental impact that public disclosure of the requested records would have on the integrity of the Commission's statutorily-mandated municipal police officer training certification program.” The PSP noted “absent the requested evidentiary hearing, [the PSP] is obligated to rest on its June 9th final response [which] included, of course, the affidavit of Major Gallaher dated June 8, 2010.” On July 12, 2010 the OOR denied the request for a hearing.

LEGAL ANALYSIS

“The [RTKL] is remedial legislation 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. Cmwlth. 2010).

Under the RTKL, 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. 65 P.S. 67.1102(a)(2). 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. 65 P.S. 67.1102(a)(2).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The PSP is a Commonwealth agency subject to the RTKL. *See* 65 P.S. § 67.301. A record of an agency is presumed public unless (1) exempt under section 708; (2) exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) protected by a privilege. 65 P.S. §67.102. Agencies bear the burden of proving the applicability of any exemptions, section 708(a).

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). 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. *See Walker, supra*. This Requester does not contest PSP assertion that the Commission is engaged in public protection activities and that the records relate to that activity.

To meet its burden of proving that training curricula qualify for protection under Section 708(b)(2), the PSP must also demonstrate that the records would be “reasonably likely” to threaten public protection if released. To establish that the release of requested training material would be “reasonably likely” to jeopardize public safety and/or preparedness, the PSP submitted the Affidavit of Commission Executive Director, Major Gallaher. The Affidavit fails to evidence *how* release of the records would or could jeopardize public safety or preparedness. The PSP provides no evidence or examples as to the

type of harm reasonably likely to occur from public release of training materials. The reference to *Walker, supra* lends little support as the records requested because that case involved police schedules.

Finally, although the PSP requested a hearing to provide evidentiary testimony, the agency could have provided the same evidence via affidavit or other sworn written statement, but chose to rely solely on the affidavit of Major Gallaher. The OOR has accepted written affidavits as sufficient evidence to meet the agency's burden of proof where the affidavit is more than conclusory. *See e.g., McGarvey v. PSP*, OOR Dkt. AP 2009-0522, *Martin v. Dept. of Corrections*, OOR Dkt. AP 2009-0449; *Vonderheide v. Lancaster County*, OOR Dkt. AP 2010-0298; *Thomas v. Dept. of Corrections*, OOR Dkt. AP 2010-0241; *Laigle v. City of Easton*, OOR Dkt. AP 2010-0230; *Laigle v. Borough of Mercer*, OOR Dkt. AP 2010-0229; *Metzli v. Slippery Rock Boro.*, OOR Dkt. AP 2009-1006. However, where an agency fails to provide any evidence of a reasonable likelihood of harm from release of the records, or provides only conclusory affidavits, the requests have been granted. *See Lynch v. Locust Twp.*, OOR Dkt. AP 2010-0420; *Laigle v. City of New Castle*, OOR Dkt. AP 2010-0287.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted** and the PSP is required to provide the requested records within 30 days of the date of this Final Determination. 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: July 27, 2010

A handwritten signature in black ink, appearing to read "Audrey Buglione". The signature is fluid and cursive, with the first name "Audrey" and the last name "Buglione" clearly distinguishable.

**APPEALS OFFICER
AUDREY BUGLIONE, ESQUIRE**

Sent to: Marieke Tuthill; R.H.Hawn, Esquire