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: **Docket No: AP 2026-4013**
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system; any payment, bonus, stipend, incentive, premium, or award paid by the agency to an officer or employee in connection with 287(g) participation or immigration enforcement, including the name and title of each person paid, the amount, and the date; and, if the agency's timekeeping does not separately code such hours, the complete time, overtime, assignment, and payroll records of each officer the agency has credentialed, certified, trained, or nominated under 287(g), or assigned to immigration-enforcement duty, at any time during the period.

On August 27, 2026, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Department denied the Request, arguing that the disclosure of the requested records would likely jeopardize the safety and personal security of an individual and the release of records maintained in connection with homeland security would likely jeopardize public safety, 65 P.S. §§ 67.708(b)(1)(ii), 67.708(b)(2). Additionally, the Department stated that “certain records or portions of records responsive to your request are under the control of U.S. Immigration and Customs Enforcement (ICE) and must be requested directly from ICE through the Freedom of Information Act (FOIA) process.”

On September 18, 2026, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Department to notify the OOR if any third parties have a direct interest in the appeal. 65 P.S. § 67.1101(c).

On October 1, 2026, the Department submitted a position statement reiterating its grounds for denial. The Department also indicating that, upon receipt of the appeal, it identified records that are responsive to the “financial-information portion of the [R]equest” and provided the records to the Requester. The Department claims that the “operational and law-enforcement deployment information, including activity logs, CAD and dispatch entries, shift and tour reports, deployment

¹ The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

and staffing schedules, duty rosters, special assignment records, and related materials are exempt under Sections 708(b)(1)(ii) and 708(b)(2) of the RTKL. In support of its position, the Department submitted an attestation authored by Chief Thomas Hornung of the Borough Police Department that was made subject to the penalties set forth in 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities (“Hornung Attestation”).²

On October 8, 2026, the OOR directed the Department to provide a supplemental submission as the Hornung Attestation did not address the security exemptions claimed pursuant to Sections 708(b)(1)(ii) and (b)(2) of the RTKL. To date the Department has not responded.

LEGAL ANALYSIS

The Department is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Department is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The appeal is moot in part

During the pendency of the appeal, the Department provided copies of redacted 287(a) financial documents containing: 287(g) reimbursement, officer time, payroll, compensation, and

² We note that the OOR inquired of the Requester whether the provision of the records on appeal satisfied the appeal and set a reply date for October 14, 2026. While the OOR Appeal Portal shows that the Requester accessed the docket on October 8th, the date of the OOR’s correspondence, to date we have not received a reply.

related reporting records. The Requester has not disputed the receipt of the records. *See* Hornung Attestation, ¶¶ 4-5. Further, the Department submitted a copy of the records provided with the appeal submission. Accordingly, the appeal is moot as to the additional email record. *See Chester Water Auth. v. Pa. Dep’t of Cmty. & Econ. Dev.*, 249 A.3d 1106, 1114 (Pa. 2021) (finding that a matter was settled by provision of records, and thus, “the controversy has been mooted”).

2. The Department proved that no additional responsive financial records exist

The Department asserts that no additional records exist that are responsive to the “financial-information” portion of the Request. In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the identified record[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors ... After obtaining all potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff’d*, 243 A.3d 19 (Pa. 2020). An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency’s records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep’t of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

Chief Hornung attests that he is personally familiar with the Department’s records and recordkeeping practice and, specifically, “records maintained by the Department relating to 287(g)

activity and immigration enforcement.” Hornung Attestation, ¶ 2. Chief Hornung further attests that he search for records responsive to the relative financial, compensation, payroll and officer time records and, the records provided during the course of the appeal are the only responsive records in the Department’s possession. *Id.*, ¶¶ 3, 6-7.³

The Requester has not submitted evidence that additional officer payment related records in fact exist. Therefore, based on the evidence provided, the Department has met its burden of proof that it does not possess additional records responsive to the portion of the Request that sought financial, compensation, payroll and officer time records. *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

3. The Department did not prove that records are exempt under Sections 708(b)(1)(ii) and 708(b)(2) of the RTKL

The Department withheld non-financial records, claiming that the disclosure of the records would likely result in a risk of harm to the personal security of an individual and would likely jeopardize or threaten public safety. Section 708(b)(2) of the RTKL exempts from disclosure “[a] record maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity.” 65 P.S. § 67.708(b)(2). In order to withhold records under Section 708(b)(2) of the RTKL, the Department must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). The term, “substantial and demonstrable risk” is not defined in

³ Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith or that additional responsive records exist, “the averments in [the Hornung Attestation] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

the RTKL; however, “reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375. *California Borough v. Rothey*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018). The Commonwealth Court has “defined substantial and demonstrable [risk] as actual or *real and apparent*.” *Borough of Pottstown v. Suber-Aponte*, 202 A.3d 173, 180 (Pa. Commw. Ct. 2019) (emphasis in original) (quoting *Carey*, 61 A.3d at 373).

Additionally, Section 708(b)(3) of the RTKL exempts from disclosure “[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, infrastructure, facility or information storage system” and includes several subcategories of exempted records. 65 P.S. § 67.708(b)(3). In order for this exemption to apply, “the disclosure of” the records – rather than the records themselves – must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructure. *See* 65 P.S. § 67.708(b)(3). As set forth above, “[a]n agency must offer more than speculation or conjecture to establish the security-related exemptions[.]” *Rothey*, 185 A.3d at 468 (*internal citations omitted*).

Local agencies have the burden of proving that records are exempt from access. 65 P.S. § 67.708(a)(1). Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). The Department’s position statement, which was authored by the Department’s counsel, argues that Departmental operational and law-enforcement deployment information, if disclosed would jeopardize officer and public safety and, therefore, is exempt under Sections 708(b)(1)(ii) and 708(b)(2). However, statements contained in a submission that are not supported by an attestation made pursuant to 18 Pa.C.S. § 4904(b) or a sworn affidavit, are not

competent evidence under the RTKL. *See Off. of the Governor v. Davis*, 122 A.3d 1185, 1193-94 (Pa. Commw. 2015) (*en banc*) (holding that an unsworn position statement does not constitute evidence and unsworn position statements while part of the record, are distinguishable from the evidentiary record.); *Hous. Auth. of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that unsworn statements of counsel are not competent evidence). As set forth above, the OOR endeavored to supplement the appeal record by directing the Department to provide a submission consisting of either unsworn attestation made pursuant to 18 Pa.C.S. § 4904(b) or sworn affidavit to support the factual statements made regarding the application of the security exemptions, but the Department did not provide such evidence. The OOR has not received a reply to the directive. Therefore, the Department has not proven that any records may be withheld pursuant to Sections 708(b)(1)(ii) or 708(b)(2) of the RTKL. *See* 65 P.S. § 67.708(a); *see also Leuba v. Susquehanna Regional Police Department*, OOR Dkt. AP 2026-2075, 2026 PA O.O.R.D. LEXIS 2246.

4. The Department did not prove that certain records are not subject to the RTKL

In the final response, the Department stated, “certain records or portions of records responsive to your request are under the control of U.S. Immigration and Customs Enforcement (ICE) and must be requested directly from ICE through the Freedom of Information Act (FOIA)⁴ process” and provided information on how to make such a request, as well as relevant electronic links. On appeal, the Department states the following in the position statement:

[t]he Agency also notes that some information related to 287(g) activity may be generated by or maintained for federal immigration-enforcement purposes. In its response, the Agency advised the Requester that certain responsive records or portions of records are under the control of U.S. Immigration and Customs Enforcement and must be requested through the federal FOIA process. The Agency’s response directed the Requester to ICE’s FOIA process for records or portions of records under ICE control. The Agency’s position is limited to records

⁴ 5 U.S.C. § 552, *et seq.*

not in the Agency's possession, custody, or control, or records maintained by the federal agency rather than by the Mt. Carmel Borough Police Department.

However, the Department does not explain whether records that may be subject to FOIA are in its possession, or what the records consist of. Further, the issue is not addressed in the Hornung Attestation. The RTKL applies to state and local government agencies, of which the Department is included. 65 P.S. § 67.701 *et seq.* Records in the possession of the local agency, such as the Department, are presumed to be public unless otherwise provided by law. 65 P.S. § 67.305(a); *Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1035 (Pa. Commw. Ct. 2011). While the RTKL defers to Federal law in instances where that law makes a record exempt or confidential, 65 P.S. § 67.306, or establishes a separate procedure for accessing the record, 65 P.S. § 67.3101.1, the Department has provided no evidence to show that records in its possession are exempt under Federal law and therefore has not met its burden of proof.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part** and **dismissed as moot in part**, and the Department is required to provide all responsive non-financial records within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Northumberland 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 65 P.S. § 67.1303, but as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁵ All documents or communications following the issuance of this Final Determination shall be sent to oor-

⁵ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

postfd@pa.gov. This Final Determination shall be placed on the OOR website at:
<http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 20, 2026

/s/ Kelly C. Isenberg

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DEPUTY CHIEF COUNSEL

Sent via OOR E-file Portal to: Darwin Leuba; Michael Smith, Esq.; Edward Cuff, III, AORO