

IN THE SUPREME COURT OF PENNSYLVANIA

No. 66 MAP 2018

American Civil Liberties Union of Pennsylvania,

Appellant

v.

Pennsylvania State Police,

Appellee.

BRIEF OF THE PENNSYLVANIA STATE POLICE

Appeal from the Order of the Commonwealth Court at No. 1066 CD 2017, dated May 18, 2018, reversing the Final Determination of the Office of Open Records at No. AP 2017 – 0593, dated July 7, 2017.

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COUNTER-STATEMENT OF THE CASE

This discretionary Right-To-Know Law (“RTKL”) appeal follows the Memorandum Opinion and Order of the Commonwealth Court dated May 18, 2018—which reversed the Final Determination of the Office of Open Records (“OOR”)—and held that the Pennsylvania State Police (“PSP”) met its burden in proving that PSP’s redactions to Administrative Regulation 6-9 (“AR 6-9”) were proper, as the redacted information is exempt from disclosure pursuant to Section 708(b)(2) of the RTKL.

A. The Initial Request and PSP’s Final Response

On March 8, 2016, PSP received a RTKL request from Matt Stroud, a criminal justice researcher at the American Civil Liberties Union of Pennsylvania (collectively “ACLU”). (Reproduced Record (“R.R.”) at 1a – 2a). Stroud requested “...a copy, in digital format, of Pennsylvania State Police’s complete, un-redacted AR 6-9 regulation, which establishes policies and procedures for PSP personnel when using social media monitoring software.” (R.R. 2a). In a letter dated March 13, 2017, PSP provided the ACLU with its Final Response, which granted in part and denied in part the request. (R.R. 3a-4a).

PSP provided the ACLU with the responsive regulation AR 6-9, Real-Time Open-Source-Based Investigation and Research, and redacted non-public information from the responsive record. (R.R. 3a). PSP advised the ACLU that the

redacted information is exempt from disclosure pursuant to Section 708(b)(2) of the RTKL as 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 or a record that is designated classified by an appropriate Federal or State military authority.” (R.R. 3a). In addition to the letter, PSP also provided the ACLU with a verification signed by Deputy Agency Open Records Officer Kim Grant attesting that the responsive records are exempt from disclosure. (R.R. 5a-6a).

B. The ACLU’s appeal to the OOR

Following its receipt of PSP’s Final Response, the ACLU filed an appeal with the OOR on April 3, 2017. (R.R. 16a – 21a). On April 21, 2017, PSP submitted a letter brief and an Affidavit from the Director of PSP’s Bureau of Criminal Investigation, Major Douglas J. Burig, and, based on the Affidavit, argued that the records are exempt from disclosure. (R.R. 28a – 34a). In his Affidavit, Major Burig explained that AR 6-9 “concerns investigative and intelligence gathering policies, procedures, and methods,” and its purpose is “to establish policies and procedures for PSP Troopers when they use open sources for valid law enforcement purposes.” (R.R. 32a, ¶6).

Major Burig further explained that sections of AR 6-9 were redacted pursuant

to section 708(b)(2) of the RTKL because “public release of these sections would jeopardize PSP’s ability to conduct criminal investigations and other law enforcement activities that it engages in to protect the public.” (R.R. 32a, ¶6). Moreover, Major Burig explained that he based his opinions and judgments regarding the effect of disclosing the redacted portions of AR 6-9 on his 22 years of career experience as a PSP Trooper. (R.R. 31a, ¶5). The Major’s career began as a patrol trooper and eventually resulted in him being promoted to the rank of Major and serving as the Director of the PSP’s Bureau of Criminal Investigation, where he oversees, among other things, divisions responsible for intelligence gathering, complex criminal investigations, and drug investigations. (R.R. 31a, ¶¶ 3, 5).

On May 5, 2017, the ACLU submitted a reply brief along with policies from other law enforcement agencies. (R.R. 35a – 72a). On May 10, 2017, PSP filed a sur-reply, arguing that it had met its burden and proven that the responsive record was exempt from disclosure pursuant to the public safety exception. (R.R. 73a – 74a). On May 23, 2017, the OOR issued an Order requiring PSP to produce the responsive record for *in camera* inspection, with which PSP complied. (R.R. 77a – 79a). The OOR issued a Final Determination (by Jordan C. Davis, Esq.) on July 7, 2017, granting Requester’s appeal and requiring PSP to provide the Requester with unredacted copies of all responsive records within thirty days. (R.R. 10). Specifically, the OOR determined that the redacted information was not exempt

under section 708(b)(2) of the RTKL.

C. PSP's Appeal to the Commonwealth Court

On August 4, 2017, PSP filed its Petition for Review with the Commonwealth Court, requesting that the Court review the OOR's Final Determination. Following briefing and oral argument, the Commonwealth Court issued a memorandum opinion, wherein Judges Simpson, Covey, and Fizzano Cannon reversed the OOR's Final Determination. The court held that Major Burig's Affidavit "[was] legally sufficient to sustain PSP's burden." *Pennsylvania State Police v. American Civil Liberties Union (ACLU)*, 2018 WL 2272597 (Pa. Cmwlth. No. 1066 C.D. 2017, filed May 18, 2018), slip op. at 10. The court further held that "because Major Burig's Affidavit adequately described the nature of the redacted information and was legally sufficient to sustain PSP's burden, it is not necessary to review the unredacted record in camera, as [the ACLU] urges this Court to do." *Id.* slip op. at 12-13.

On June 18, 2018, the ACLU filed a Petition for Allowance of Appeal with this Honorable Court. On December 3, 2018, this Court granted the Petition.

SUMMARY OF ARGUMENT

The RTKL places the burden on the agency to prove that a requested record meets one of the RTKL's exceptions to disclosure. 65 P.S. § 67.708(a)(1). Here, PSP provided sufficient evidence to sustain its burden that portions of AR 6-9 are exempt from disclosure under the public safety exception of Section 708(b)(2) of the RTKL. PSP submitted an Affidavit from the Director of its Bureau of Criminal Investigation, Major Douglas J. Burig, wherein Major Burig provided his expert opinion regarding how PSP's public protection activity of conducting criminal investigations using open sources could be harmed if the contents of the redacted sections were made public. The Commonwealth Court, in its *de novo* review, correctly determined that Major Burig's Affidavit was legally sufficient to sustain PSP's burden, and properly ended its analysis of the issue without conducting an *in camera* review of AR 6-9.

Moreover, when the public safety exception is at issue, an *in camera* review is incongruous with the role of the finder of fact, as the exception may only be met by the agency's submission of expert opinion evidence regarding the likelihood that public disclosure will jeopardize public safety. To that end, the role of the finder of fact is to review that opinion evidence and determine whether it is legally sufficient to sustain the agency's burden.

ARGUMENT

I. THE COMMONWEALTH COURT, IN ITS *DE NOVO* REVIEW, CORRECTLY HELD THAT MAJOR BURIG'S AFFIDAVIT WAS LEGALLY SUFFICIENT TO SUSTAIN PSP'S BURDEN; THEREFORE, AN *IN CAMERA* REVIEW WAS NOT WARRANTED.

Where a Commonwealth agency asserts that a requested record is exempt from public access under one of the exceptions listed in Section 708(b) of the RTKL, the agency has the burden of proving by a preponderance of evidence that the exception asserted applies. 65 P.S. § 67.708 (a)(1); *Heavens v. Pennsylvania Dept. of Environmental Protection*, 65 A.3d 1069 (Pa. Cmwlth. 2013). Moreover, it is within the discretion of the agency to determine what evidence to submit in support of the claimed exemption. *United Healthcare of Pennsylvania v. Pennsylvania Department of Human Service*, 187 A.3d 1046, 1058 fn 12 (Pa. Cmwlth. 2018). In RTKL litigation, testimonial affidavits are essential and serve as the primary evidence upon which facts are established and legal conclusions are drawn in RTKL cases. *Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Cmwlth. 2013).

One need only review the ACLU's Statement of Questions Involved to understand that the ACLU's entire argument is premised upon its belief that the averments in Major Burig's Affidavit are not credible. Appellant Br. at 4; *see also* Appellant Br. at 16 ("Given the affiant's obvious goal of shielding the contents of the disputed record, there is significant risk that the affiant's description will be imprecise, incomplete, or overly generalized..."). However, in contrast to ACLU's

protestations, the Commonwealth Court, in its *de novo* review of this case, properly determined that Major Burig's Affidavit is credible and meets the well-settled standards for affidavits supporting exemptions under section 708(b)(2) of the RTKL.

- A. Major Burig's Affidavit is legally sufficient to meet PSP's burden in proving that the redacted information is exempt from disclosure pursuant to the public safety exception.

Section 708(b)(2) of the RTKL, often referred to as the "public safety" exception, provides that a record is exempt from disclosure if it is:

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 or a record that is designated classified by an appropriate Federal or State military authority.

65 P.S. § 67.708(b)(2).

For this exception to apply, an agency must show: (1) the record at issue relates to a 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. Pennsylvania Dept. of Corrections*, 61 A.3d. 367, 374-375 (Pa. Cmwlth. 2013). Furthermore, when interpreting the "reasonably likely" prong of the exception, the Court is to "look to the likelihood that disclosure would cause the alleged harm, requiring more than speculation." *Id.* at 375. Thus, for the exception to apply, it is not necessarily the words or phrases that are used in the record that make the record exempt from disclosure; instead, it is the effect or harm to the

agency in carrying out its public safety or protection duties should the record be released. *Id.* at 376; *see also Pennsylvania State Police v. American Civil Liberties Union (ACLU)*, (Pa. Cmwlth. No. 1066 C.D. 2017, filed May 18, 2018), slip op. at 13.

For an agency to prove that the public safety exception is applicable to a record, the agency must present sufficient evidence demonstrating that the exception applies. Here, PSP submitted as evidence a testimonial Affidavit from the Director of its Bureau of Criminal Investigation, Major Burig.¹ The Burig Affidavit, when tested against the specific criteria for determining the sufficiency of an affidavit in support of the public safety exception, meets the mark.

The Commonwealth Court has a well-established legal framework for determining whether an affidavit supports an agency's position that a record is exempt from disclosure pursuant to the public safety exception; specifically, the reviewing court must determine whether the affidavit:

(1) includes detailed information describing the nature of the records

¹ Major Burig has been a PSP Trooper for 22 years. In his current position as Director of the PSP Bureau of Criminal Investigation, he is responsible for overseeing the PSP Divisions responsible for intelligence gathering, specialized criminal investigation support units, complex criminal investigations, and drug investigations. Furthermore, he is responsible for making policy recommendations concerning intelligence gathering/sharing and the conducting of criminal investigations. (R.R. 31a, ¶ 3). Over the course of his career, he has been the Director of the Intelligence Division, where he oversaw PSP's counterterrorism initiatives, the state's primary intelligence fusion center, and field intelligence operations throughout the Commonwealth. Additionally, he has served in numerous disciplines within PSP including: patrol; criminal investigations; criminal investigation assessment; and analytical intelligence, as the commander to the Pennsylvania Criminal Intelligence Center (PaCIC). (R.R. 31a-32a, ¶ 5).

sought; (2) connects the nature of the various records to the reasonable likelihood that disclosing them would threaten public safety in the manner described; such that [(3) disclosure would impair [the agency's] ability to perform its public safety functions...[in relation to what the agency claims to be] the alleged threatening consequence.

Pennsylvania State Police v. American Civil Liberties Union (ACLU), (Pa. Cmwlth. No. 1066 C.D. 2017, filed May 18, 2018), slip op. at 6, (citing, *Carey*, 61 A.3d at 376).

In so holding here, Commonwealth Court relied upon an extensive body of law. For example, in *Woods v. Office of Open Records*, 998 A.2d 665 (Pa. Cmwlth. 2010), the court held that the Pennsylvania Board of Probation and Parole (“PBPP”) met its burden in proving that the “Supervision Strategies” section of the “PBPP” Manual Chapter 4 – Sex Offender Supervision Protocol” was exempt from disclosure under Section 708(b)(2) of the RTKL. In its opinion affirming the OOR, the court disclaimed any assertion that “the preponderance of the evidence standard [requires] absolute certainty that if redacted portions were to be disclosed, there would be a breach of public safety or inhibition of the parole officers to perform their public protection duties, but only a reasonable likelihood that public safety would be jeopardized.” *Id.* at 670. The affidavit submitted by PBPP, in that matter, which, like Major Burig’s affidavit in this matter, explained why portions of the requested record were redacted. Based on that affidavit, the Court held, as it should here, that the agency had met its burden. *Id.*

In a later unreported memorandum opinion, the Commonwealth Court further developed the law in this area by explaining its decision in *Woods*. In *Harrisburg Area Community College (HACC) v. Office of Open Records*, 2011 WL 10858088, (Pa. Cmwlth. No. 2110 C.D. 2009, filed May 17, 2011),² the Court reviewed whether course material pertaining to DUI training is exempt from disclosure under Section 708(b)(2) of the RTKL. *Id.* at *1. In response to the request for course material, HACC withheld some responsive records, asserting that the records were exempt under Section 708(b)(2). *Id.*

In support of the denial, HACC submitted an affidavit from the Executive Director of the Municipal Police Officer's Education and Training Commission, State Police Major John Gallaher. *Id.* at *2. The Commonwealth Court considered the matter on appeal, and therein cited to *Woods* as offering substantive guidance in evaluating whether an agency has met its burden in proving that records are exempt from disclosure pursuant to section 708(b)(2). *Id.* at *5. The Court explained that *Woods* set forth the principle that “the agency’s burden does not include a requirement that the release of a record would definitely threaten or jeopardize public safety or protection” and that when an “agency proffers evidence of even the potential impairment of a function that is aimed at preventing public harm and

² Unreported memorandum opinions may be cited for their persuasive value. Commonwealth Court Internal Operating Procedure § 414(a), 210 Pa. Code § 69.414(a).

securing the public safety” then the record is exempt from disclosure under Section 708(b)(2) of the RTKL. *Id.*

Specifically, “[t]he essential factor in this Court’s decision in *Woods* was the detail with which the director of PBPP provided information regarding the substance of the records and the ways in which a sex offender might use the information to evade or avoid detection.” *Id.* at 6.]. Moreover, the Commonwealth Court has recognized that agencies must in such circumstances use opinion as evidence to meet its burden and thus appropriately held that an agency’s burden may be met by a sworn affidavit wherein the affiant bases his or her opinions on extensive experience. *Carey*, 61 A.3d 367, 375-376 (Pa. Cmwlth. 2013) (citing *Adams v. Pennsylvania State Police*, 51 A.3d 322 (Pa. Cmwlth. 2012)).

In applying the *Carey* framework and the principles of the cases underlying it, it is clear that the Burig Affidavit is sufficient to meet the preponderance standard. Major Burig’s Affidavit is detailed and explains why each section of AR 6-9 was redacted. Addressing each section, Major Burig described the information contained in the section using the section’s title, and where appropriate, how that section is used when PSP conducts investigations using open sources. Furthermore, for each section of AR 6-9 that is redacted, Major Burig provided an explanation of how PSP’s ability to conduct investigations using open sources may be compromised should that redacted section of AR 6-9 be made public.

Additionally, in his Affidavit, Major Burig explained that his opinions about the effects of disclosure of AR 6-9 are based on his 22 years of experience as a PSP Trooper, which include his experience as the current Director of the Bureau of Criminal Investigation, and his experience in conducting criminal investigations, criminal investigation assessments, and analytical intelligence. Finally, after detailing why each redacted section should not be disclosed, Major Burig attested that “[t]he procedures, policies and information that have been redacted is uniform to all investigations using open source methods that are conducted by PSP personnel.” He further stated that “[t]here is [a] reasonable likelihood that if any of the redacted information were to be disclosed it would threaten the public protection activity of PSP conducting criminal investigations...using open source methods.”

Finally, it is notable that ACLU’s arguments amount to a thinly veiled attack on the credibility or veracity of the affidavit. Such attacks withstand scrutiny because it is well-established that “[a]bsent evidence of bad faith, the veracity of an agency’s submissions explaining reasons for nondisclosure should not be questioned.” *California University of Pennsylvania v. Schackner*, 168 A.3d 413, 418 (Pa. Cmwlth. 2017) (*quoting Scolforo*); *see also, McGowan v. Pennsylvania Dept. of Environmental Protection*, 103 A.3d 374, 382-383 (Pa. Cmwlth. 2014) (stating that when “no evidence has been presented to show that the [agency] acted in bad faith, the averments in the [agency’s] affidavits should be accepted as true”);

Office of Governor v. Donahue, 98 A.3d 1223, 1239 (Pa. 2014) (“We presume that Commonwealth agencies will act in good faith in discharging their statutory duties under the RTKL”).

As demonstrated above, the *Carey* framework is well reasoned and well-established, and in this case, was properly applied by the Commonwealth Court in its *de novo* review. Therefore, this Honorable Court should affirm the decision of the Commonwealth Court.

B. The Commonwealth Court has *de novo* review in RTKL appeals; therefore, the court was not required to conduct an *in camera* review of AR 6-9 simply because the OOR appeals officer did.

In 2013, this Court issued its decision in *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013). *Bowling* is a groundbreaking opinion in RTKL jurisprudence, as it establishes how Chapter 13 courts are to handle RTKL appeals. In *Bowling*, this Court held that “under the RTKL Chapter 13 courts are the ultimate finders of fact and that they are to conduct full *de novo* reviews of appeals from decisions made by RTKL appeal officers... .” *Id.* at 477. Additionally, this Court held that a Chapter 13 Court’s “scope of review is broad or plenary when it hears appeals from determinations made by appeals officers under the RTKL.” *Id.*

Like the many other appeals that have come before the Commonwealth Court, that court conducted a *de novo* review of PSP’s appeal from the OOR’s Final Determination. The Commonwealth Court, as articulated in *Bowling*, is the ultimate

finder of fact in Commonwealth agency appeals. In this particular case, the court found it unnecessary to conduct an *in camera* review to make its decision.

The ACLU's argument, in Part B of its brief, that the Commonwealth Court "erred in limiting its own review" of the appeals officer's Final Determination is erroneous. This argument by the ACLU derives from the Commonwealth Court's decision not to conduct an *in camera* review of AR 6-9, but instead consider Major Burig's Affidavit as sufficient evidence demonstrating that the redacted portions of AR 6-9 are exempt from disclosure. The ACLU argues that the Commonwealth Court improperly limited its scope of review in this case and asserts that "[n]othing in *Bowling* or the statute itself suggests that the Commonwealth Court has the authority to contract the record by deciding which parts of the record it wants to review and which it does not." Appellant Br. at 21. Such assertion is in error.³

This Court has recognized that standard of review and scope of review may be confused. *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 728 (Pa. 2012). Thus, this Court in *Bowling* carefully analyzed and distinguished each concept, while also making clear that they "are not concepts that are considered in isolation from one another." *Bowling*, at 475. Here, however, the ACLU seeks to have this Court consider the Commonwealth Court's scope of review in isolation

³ On page 21 of its brief, the ACLU attempts to define "plenary" or "broad" review by quoting *Bowling*. PSP notes, however, that this quote is being applied out of context, as the quote represents what a party conceded at oral argument, not the Court's own position. *Bowling*, at 476.

and invites this Court to issue a rule that the Commonwealth Court *must* take the same procedural steps that the OOR appeals officer took upon his initial review of the case. Such assertion improperly confines the appellate court's review, and limits, rather than expands, the court's authority.

In *Bowling*, the Court stated that “[a] *de novo* standard of review permits the court to determine the case anew, including matters pertaining to testimony and other evidence.” *Bowling*, at 466 n. 14. Indeed, *de novo* or plenary review empowers the Court to hear the case as if from its inception, and thereby decide whether the lower court should have taken, or as here, should not have taken, certain actions. To hold otherwise would require *de novo* reviewing courts to rely upon even that evidence which should not or need not have been considered below. Here, the Commonwealth Court correctly held that Major Burig's affidavit obviated any need to conduct an *in camera* review. ACLU cites no authority that would require the court to nevertheless disregard the affidavit and conduct such review. Because the Commonwealth Court correctly determined that no *in camera* review was required, its Opinion and Order should be affirmed.⁴

⁴Moreover, the decision to conduct or not conduct such a review is a procedural decision, *Office of Open Records v. Center Township*, 95 A.3d 354, 370 (Pa. Cmwlth. 2014), and the ACLU has not cited any authority establishing that the Commonwealth Court, in its *de novo* review, must follow the same procedural steps as the OOR appeals officer.

II. AN *IN CAMERA* REVIEW OF AR 6-9 WAS UNWARRANTED BECAUSE UNDER THE PUBLIC SAFETY EXCEPTION, OPINION EVIDENCE REGARDING THE EFFECT OF DISCLOSURE WAS DISPOSITIVE OF THE ISSUE OF WHETHER PSP HAD MET ITS BURDEN OF PROOF.

The Commonwealth Court's legal analysis ended with its finding that Major Burig's Affidavit was sufficient to sustain PSP's burden, and considering that its standard of review is *de novo*, the court was not required to conduct an *in camera* review of AR 6-9.⁵ The court provided its rationale as to why conducting an *in camera* review in this case was not necessary, and that rationale should be affirmed by this Court.

In its opinion, the Commonwealth Court found that:

...Major Burig's Affidavit was detailed and not conclusory in that it: (i) described the nature of the records sought; (ii) connected the nature of the AR 6-9 to the reasonable likelihood that disclosure would threaten public safety and impair PSP's public safety function; and (iii) noted that disclosure would allow certain individuals to more easily conceal their criminal activities and evade police scrutiny.

ACLU, slip op. at 12. The court concluded that it was not necessary to review the unredacted record *in camera*, stating:

...we find it unnecessary to review the unredacted document under the

⁵ The ACLU's first Question Involved describes the Commonwealth Court's reasons for not conducting an *in camera* as the court's "holding." However, the Commonwealth Court's holding was that Major Burig's Affidavit was legally sufficient to sustain PSP's burden. *ACLU*, slip op. at 12. The court's discussion regarding *in camera* review on page 11-12 of the slip opinion is dicta. *Valley Township v. City of Coatesville*, 894 A.2d 885, 889 (Pa. Cmwlth. 2006) ("Judicial dictum is an opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision. Dicta has no precedential value." (internal quotation marks omitted)).

circumstances here. In addition to such review being unnecessary given the detailed nature of Major Burig's Affidavit, in general, where this Court has reviewed an unredacted document *in camera*, those situations usually have involved exemption claimed under the attorney-client privilege or the predecisional deliberative process.

ACLU, slip op. at 13.

The approach taken by the Commonwealth Court, reviewing the Affidavit to determine whether or not it was sufficient, is judicially sound. *UnitedHealthcare of Pennsylvania, Inc., v. Department of Human Services*, 187 A.3d 1046, 1060 (Pa. Cmwlth. 2018) (court holding "[b]ecause DHS sufficiently explained the basis for nondisclosure through affidavits, neither an exemption log nor *in camera* review of the withheld documents was necessary").

As stated above, when the OOR does not hold a hearing, testimonial affidavits are the primary evidence upon which facts are established and legal conclusions are drawn in RTKL cases. *Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Cmwlth. 2013). The Commonwealth Court correctly framed the issue for review, when the public safety exception is claimed, as "the actual words on the page are not at issue; rather, the issue is whether disclosure of the words would be reasonably likely to threaten public safety or public safety activity" *ACLU*, slip op. at 13 (internal quotations omitted). Given that this is the issue to be determined, conducting an *in camera* review is incongruous with the role of the finder of fact

under the RTKL.⁶

While the RTKL certainly allows for the finder of fact to conduct an *in camera* review of withheld records, caselaw and the RTKL demonstrate that *in camera* review is reserved for circumstances where there is something to be factually determined. *Office of Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Cmwlth. 2015) (in holding that e-mails reviewed *in camera* were sufficient evidence to sustain the agency's burden, the court stated "an affidavit may be unnecessary when an exemption is clear from the face of the record"); *see also Office of Open Records v. Center Township*, 95 A.3d 354, 371 (under the RTKL, the OOR has "the authority to conduct *in camera* review of documents to ascertain whether they constitute privileged material"); *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473, 479 (Pa. Cmwlth. 2010); *McGowan v. Dept. of Environmental Protection*, 103 A.3d 374 (Pa. Cmwlth. 2014).

Under the second prong of the public safety exception, the role of the finder of fact is to determine whether the agency has presented sufficient opinion evidence to make the legal conclusion that disclosure "would be **reasonably likely** to threaten public safety or a public protection activity." 65 P.S. 67.708(b)(2). In these cases,

⁶ An affiant is presumed to be telling the truth unless there is evidence of bad faith. *California University of Pennsylvania v. Schackner*, 168 A.3d 413, 418 (Pa. Cmwlth. 2017) (*quoting Scolforo*) ("[a]bsent evidence of bad faith, the veracity of an agency's submissions explaining reasons for nondisclosure should not be questioned").

affiants, such as Major Burig, are ostensibly presented as experts to provide their opinions on the effect of disclosure. *Adams v. Pennsylvania State Police*, 51 A.3d 322 (Pa. Cmwlth. 2012) (conclusions regarding effect of disclosure were not speculation or conjecture because the conclusions were based on the affiant's training and experience). Because it is the effect of disclosure that determines if a record is exempt under the public safety exception, only expert opinion evidence can satisfy a Commonwealth agency's burden of proof.

By imposing a "reasonably likely" standard that an agency must meet for the public safety exception to apply to a record, the exception, by its very terms, calls for prediction of what the results may be, should the record be disclosed. *Carey*, 610A.3d at 375 ("we look to the likelihood that disclosure would cause the alleged harm, requiring more than speculation").

"Generally, when a matter involves some technical knowledge, skill, training or experience not common to the ordinary layman, an expert witness who is qualified by training and experience can be used as a competent witness. The purpose is to assist the triers of the fact involving the special skills, study and experience in which the ordinary layman is not equipped." *Hays Creek Country Club, Inc. v Central Penn Quarry Stripping & Const. Co*, 181 A.2d. 301, 308 (Pa. 1962). Here, the purpose of Major Burig's Affidavit was to assist the OOR appeals officer and, on appeal, the Commonwealth Court, in understanding whether public safety would be

jeopardized if the information that was redacted from AR 6-9 were disclosed. The appeals officer and the Commonwealth Court, considering the applicable standards, were free to accept or reject Major Burig's opinions on the subject.⁷ However, at that point, the inquiry should end, and a determination should be made that either PSP has met its burden on the issue, or it has not. If the finder of fact finds that the affidavit is conclusory on its face, there is no need to ever conduct an *in camera* review.⁸

Moreover, it is important to recognize that this case arises under the RTKL, and therefore the *in camera* review must be conducted within the bounds of the RTKL. For this reason, the cases to which the ACLU cites, such as *Commonwealth ex rel. District Attorney of Blair County, In re Buchanan*, 880 A.2d 568 (Pa. 2005), are inapplicable here. In *Buchanan*, this Court stated the following in its remand directive to the trial court:

Upon remand, the trial court should determine whether the Commonwealth can establish that the release of the report in this case in fact poses a threat of substantially hindering or jeopardizing the ongoing investigation. In this consideration, the trial court may, pursuant to its broad discretionary authority conduct an *in camera*

⁷ Moreover, the ACLU was free to submit an affidavit from its own expert on these matters. It chose not to do so. While this expert may not have been able to provide testimony specific to the redacted information in AR 6-9, the expert could have testified regarding these types of policies generally and opined on whether disclosure would jeopardize public safety.

⁸ Interestingly, the OOR appeals officer did not make a finding regarding whether Major Burig's Affidavit was conclusory or that the Affidavit did not meet the standards outlined in *Carey*. The appeals officer disregarded the evidence (Burig Affidavit) and made his own judgment on the likelihood of harm that could occur to public safety should a record be released.

review of the autopsy report, and consider additional evidence if proffered.

Id. at 577-578.

However, key to this Court’s remand directive was its recognition of the trial court’s “broad discretionary authority.” In contrast, “...discretionary decision-making under the RTKL [only arises] where a determination must be made regarding conflicting evidence pertaining to whether a document falls under one of the statutory exceptions.” *Bowling*, at 467. Here, there was no conflicting evidence, as Major Burig’s Affidavit was the only evidence of record that addressed the “reasonably likely” prong of the public safety exception. Thus, so long as the Affidavit was sufficient under the framework outlined in *Carey*, the records are exempt from disclosure.

As demonstrated above, The ACLU’s argument that in *camera* review should be utilized as a check on the agency is not supported by the RTKL or RTKL jurisprudence.⁹

⁹ In its brief, the ACLU argues “....*in camera* review is the only way for a reviewer to know whether the affiant has described the document accurately.”

CONCLUSION

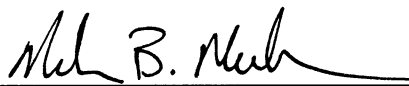
WHEREFORE, for the foregoing reasons, Appellee, the Pennsylvania State Police, respectfully requests that this Honorable Court affirm the decision of the Commonwealth Court.

Respectfully submitted:

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