



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION UPON REMAND

<b>IN THE MATTER OF</b>	:	
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<b>JUSTIN MCSHANE,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2009-0718</b>
	:	
<b>HARRISBURG AREA COMMUNITY</b>	:	
<b>COLLEGE,</b>	:	
<b>Respondent</b>	:	
	:	
<b>and</b>	:	
	:	
<b>PENNSYLVANIA STATE POLICE,</b>	:	
<b>Intervener</b>	:	

### INTRODUCTION

Justin McShane, Esq. (“Requester”) submitted a request (“Request”) to the Harrisburg Area Community College (“HACC”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking access to course materials and curriculum relating to municipal police officer training for the enforcement of driving under the influence (“DUI”) laws. HACC partially denied the Request, arguing that the release of certain records would threaten public safety. The Requester appealed to the Office of Open Records (“OOR”). The OOR granted access to the withheld records and HACC subsequently appealed the OOR’s Final Determination to the Commonwealth Court. The Pennsylvania State Police (“PSP”) intervened in the proceedings before the Commonwealth Court. The Commonwealth Court vacated the OOR’s

Final Determination and remanded the matter to the OOR for further proceedings. For the reasons set forth in this Final Determination Upon Remand, and following a hearing, the appeal is **granted** and HACC and PSP are required to take further action as directed.

### **FACTUAL BACKGROUND**

On June 30, 2009 the Request was filed, seeking access to course materials and curriculum relating to municipal police officer training for DUI law enforcement training. Pertinent to this appeal, the Request was made to HACC, an agency that conducts training courses for Pennsylvania municipal police officers under the supervision of the Municipal Police Officers Education and Training Commission (“Training Commission”). The Training Commission, established through 53 Pa. C.S. §§ 2161-2171 (“Act 120”), is administered by PSP and is responsible for the development of training and certification programs for municipal police officers throughout the Commonwealth.

On July 31, 2009, after extending the period to respond pursuant to 65 P.S. § 67.902(b), HACC provided certain course material to the Requester, including “National Highway Traffic Safety Administration information relating to traffic fatalities caused by alcohol-impaired drivers, Pennsylvania DUI Association Ignition Interlock Guide and other information, and additional information regarding ignition interlock systems apparently issued by the Pennsylvania Department of Transportation.” *HACC v. Office of Open Records*, 2110 C.D. 2009, 2011 Pa. Commw. Unpub. LEXIS 378 at \*2-\*3 n.3 (Pa. Commw. Ct. May 17, 2011). HACC denied access to the remaining records responsive to the Request, including a portion of the Training Commission’s lesson plan entitled *Basic Police Officer Training Curriculum Section VI-Motor Vehicle Law Enforcement and Accident Investigation, Subsection B-DUI*

*Enforcement/Occupant Safety* (“Lesson Plan”),<sup>1</sup> arguing that release of these records would threaten public safety. 65 P.S. 67.708(b)(2). Gallaher Aff. ¶¶ 14-15.

On August 18, 2009, the Requester appealed to the OOR. *McShane v. HACC*, OOR Dkt. AP 2009-0718, 2009 PA O.O.R.D. LEXIS 624. The Requester did not challenge HACC’s response to the extent he was provided “course material which is available from public sources and which is used in the course.” To determine whether the remaining records were properly withheld under the public safety exemption, the OOR applied a two part test: (1) whether the record is maintained by the agency in connection with its law enforcement or other public safety activity; and (2) whether there is a reasonable likelihood that the disclosure of the information would threaten public safety. *Id.* at \*7. While the OOR concluded that the requested information was maintained by HACC in connection with law enforcement and public safety, the OOR determined that the evidence submitted by HACC was not sufficient to establish, through facts or examples, that the release of the information would impair law enforcement efforts to investigate DUI suspects. *Id.* at \*8-\*10. Specifically, HACC relied on conclusory statements to demonstrate that the release of the requested information would allow DUI offenders to evade detection, apprehension, ultimate prosecution and conviction. *Id.* at \*8-\*10. On September 30, 2014, the OOR ordered that HACC provide access to the withheld records. *Id.* at \*11.

HACC filed an appeal of the OOR’s Final Determination to the Commonwealth Court. *See HACC*, 2011 Pa. Commw. Unpub. LEXIS 378 at \*1. During the course of the appeal, the Commonwealth Court granted the Training Commission intervener status. *Id.* at \*10-\*11 n.7. In

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<sup>1</sup> During the hearing conducted by the OOR, PSP purportedly submitted an unredacted portion of the Lesson Plan withheld in response to the 2009 Request. However, a review of the copy of the Lesson Plan provided includes a warning against the release of the Lesson Plan signed by the Training Commission’s Executive Director and dated April 8, 2010—a date after the Request was filed. In addition, the title of the Lesson Plan described in the Gallaher Affidavit, “DUI Enforcement/Occupant Safety,” differs from the title of the Lesson Plan provided during the hearing, “DUI Enforcement & Prosecution.” However, PSP and the Requester do not contest that the Lesson Plan described at the hearing is the record responsive to the Request and the OOR need not address whether responsive records were properly preserved during the course of this appeal.

an unreported opinion, the Commonwealth Court vacated the OOR's Final Determination and remanded the matter to the OOR to conduct an evidentiary hearing and determine whether the public safety exemption is applicable to the withheld records. *Id.* at \*27. The Requester petitioned the Pennsylvania Supreme Court to review the Commonwealth Court's decision, but the petition was denied. *HACC v. Office of Open Records*, No. 445 MAL 2011, 81 A.3d 79 (Pa. 2013) (denying the Requester's "Petition for Allowance of Appeal").

Upon remand of the record from the Commonwealth Court, the OOR appointed a hearing officer and held an evidentiary hearing on April 29, 2014.<sup>2</sup> The Requester and PSP presented evidence at the hearing.

During the hearing, PSP identified seven records as responsive to the Request ("Responsive Record List"). The contents of the Responsive Record List is summarized below:

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<sup>2</sup> Prior to the hearing, the Requester filed a Motion in Limine to Exclude Irrelevant Witnesses ("Motion"), seeking to exclude the testimony of Dr. Beverly Young, Director of the Training Commission's Administration and Certification Section, and Mr. Rudy Grubesky, Director of the Training Commission's Police Training and Curriculum Development Section. Following PSP's reply, the hearing officer denied the Motion, noting that "the OOR has the ability to ignore testimony that is not germane to the issues before it." *See* 65 P.S. § 1102(a)(2) (stating that "[t]he 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"). While Mr. Grubesky testified, Dr. Young did not appear as a witness during the hearing.

	<b>Title of Record</b>	<b>Description of Record</b>
1	2004 DUI Checklist	1-page sheet containing summary of graded per se intoxication offenses, grading and sentences
2	Recruit Curriculum-Section VI.B Motor Vehicle Law Enforcement	Background Information on alcohol; general legal rules for pulling over vehicles; statutes applicable to DUI law; types of field sobriety tests and chemical tests used to test subjects
3	Mandatory In-service Training (“MIST”) Lesson Plans 2004-05	Legal updates—summary of case law on Vehicle Code violations
4	MIST Lesson Plans 2005-09	Legal updates—summary of case law on Vehicle Code violations
5	MIST Workbooks	10 fill-in-the-blank workbooks used to test knowledge for various crimes code violations
6	Recruit Curriculum-Section VI.B Motor Vehicle Law Enforcement (“Withheld Lesson Plan”)	Procedure for encountering and processing DUI suspect; developing foundational and substantive testimony; techniques on how to record observations
7	National Highway Traffic Safety Administration (“NHTSA”) DWI Detection and Field Sobriety Testing (“FST”) Participant Manual, 2006 Ed.	NHTSA Stats on DUI violations and vehicle accidents; Legal and social deterrent measures; effects of alcohol on body; legal updates

PSP Ex. 1.

During the hearing, PSP raised no exemptions and provided no evidence to withhold Responsive Record List Items 1-5 and 7. In addition, during the hearing, PSP provided the Requester with a portion of the Lesson Plan described in Responsive Record List Item 2. Thus, PSP focused the evidence presented on the withheld portion of Lesson Plan, specifically the redacted portion of pages 6 and pages 7 to 13 (“Withheld Lesson Plan”), identified as Responsive Record List Item 6.

In their case in chief, PSP presented the testimony of Lieutenant Stephen Kiessling, Assistant Director of the Municipal Police Officers Education and Training Commission; Rudy Grubesky,<sup>3</sup> the Director of Curriculum for MPOETC; and Timothy Ebersole, a PSP Police Training Specialist. The Requester presented the testimony of Anthony Palacios, a law

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<sup>3</sup> The Notes of Testimony contain a typographical error and incorrectly refer to Mr. Grubesky as Mr. Grubesay.

enforcement consultant for criminal attorneys and civil attorneys specializing in the area of DUI detection.

Following the hearing, both the Requester and PSP filed briefs in support of their positions. In his brief, the Requester also requested that the OOR conduct an *in camera* review of the Withheld Lesson Plan. In a reply brief, PSP proposed an alternative resolution to the appeal and provided the Requester with a redacted copy of the withheld portion of the Withheld Lesson Plan revealing section headings, but redacting the remaining text. However, the Requester declined to accept PSP's suggested alternative resolution.

On November 6, 2014, the Requester filed a request to reopen the record in light of the Requester's acquisition of the entire Lesson Plan from PSP, including the Withheld Lesson Plan that was the subject of the hearing. The Requester explains that he obtained the Lesson Plan from PSP in response to a subpoena in *Commonwealth v. Glenn Miller*, No. 203-CR-2014, pending in the Dauphin County Court of Common Pleas. Based on a comparison between the actual contents of the Lesson Plan and the testimony presented by PSP, the Requester claims that the PSP witnesses perjured themselves when describing the contents of the Withheld Lesson Plan.

On November 10, 2014, PSP and HACC responded collectively to the Requester's motion, arguing that accepting additional evidence into this matter is improper and requesting that the appeal be dismissed as moot because PSP provided the Requester with a copy of the Withheld Lesson Plan. In addition, PSP counters the claims that its witnesses perjured themselves with testimony related to the contents of the Withheld Lesson Plan, as the testimony "is not an exhaustive narrative of the topics that are referenced within, or which logically flow from, the topics contained in the lesson plan."

On November 26, 2014, the OOR reopened the record to admit the letter petition filed by the Requester and the reply filed by PSP and HACC. The OOR denied the Requester's request to present additional evidence through a rehearing.

### LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “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. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, based on the Commonwealth Court's instruction, the OOR ordered a hearing. Following an evidentiary hearing, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

HACC is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial

order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(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(a). 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

**1. The appeal as to the Lesson Plan falls within an exception to the mootness doctrine**

During the course of the proceedings on remand, PSP provided the Requester with the Lesson Plan. Thus, the PSP argues, the appeal is moot. In *Philadelphia Public School Notebook v. School District of Philadelphia*, the Commonwealth Court examined the mootness doctrine, stating:

Mootness problems arise in cases involving litigants who clearly had one or more justiciable matters at the outset of the litigation, but events or changes in the facts or the law occur which allegedly deprive the litigant of the necessary stake in the outcome after the suit is underway. *Chruby v. Department of Corrections*, 4 A.3d 764, 771 (Pa. Cmwlth. 2010). “Although we generally will not decide moot cases, exceptions are made when (1) the conduct complained of is capable of repetition yet evading review, or (2) involves questions important to the public interest, or (3) will cause one party to suffer some detriment without the Court's decision.” *Cytemp Specialty Steel Division, Cyclops Corp. v. Pennsylvania*



*Public Utility Commission*, 128 Pa. Commw. 349, 563 A.2d 593, 596 (Pa. Cmwlth. 1989).

... The first exception to mootness--that the conduct complained of is capable of repetition yet likely to evade judicial review--involves two elements: (1) that the duration of the challenged action is too short to be fully litigated prior to its cessation or expiration; and (2) that there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Commonwealth v. Buehl*, 316 Pa. Super. 215, 462 A.2d 1316, 1319 (Pa. Super. 1983).

49 A.3d at 447, 448-49.

In the instant matter, an exception to the mootness doctrine applies to the Lesson Plan. The first element from *Cytemp* is not met because the conduct complained of was subject to the administrative and judicial appeal process prior to the record being provided, and although the matter was pending on remand to the OOR for additional fact finding when the records were provided, the Requester had sufficient time to challenge the denial of access. The third element is also not met because neither party will suffer detriment without the OOR's action as the Requester received the records at issue in a separate proceeding and PSP and HACC are free to raise grounds for denial of these records in response to future requests, subject to the administrative review process.

However, it is in the public interest to determine whether the Lesson Plan is subject to public interest under the RTKL. The OOR notes that the public nature of the Lesson Plan has not been addressed in the criminal prosecution where the Requester obtained the Lesson Plan through a subpoena as the court did not answer issue of whether the Lesson Plan is a public record subject to access under the RTKL. An order granting access through discovery does not make the records expressly publicly available through a RTKL request. *See, e.g., D'Alfonso, supra*, (holding that the "avenue for enforcement of any discovery order is with the court that issued any such order, not the OOR"). Therefore, although the Lesson Plan was provided to the

Requester, an exception to the mootness doctrine applies in this instance, and the OOR will reach the merits regarding this record.

**2. PSP and HACC have waived the claim that the Lesson Plan is subject to the personal security exemption**

On appeal, PSP and HACC argue that the release of the Lesson Plan poses a risk to the personal security of individuals and that the Lesson Plan is therefore exempt from disclosure under 65 P.S. § 67.708(b)(1)(ii). However, in its initial denial, HACC raised 65 P.S. § 67.708(b)(2) as the sole legal basis for withholding responsive records. On appeal before the OOR and the Commonwealth Court, HACC, and later PSP, maintained that the requested records were subject to this exemption. The Commonwealth Court remanded this matter to the OOR to further develop the record regarding the public safety exemption. *HACC*, 2011 Pa. Commw. Unpub. LEXIS 378 at \*27. As the purpose of the remand was to address whether the withheld records are subject to the public safety exemption, HACC and PSP are not permitted to raise additional grounds for denial on remand. *Levy v. Senate of Pennsylvania*, 94 A.3d 436, 442 (Pa. Commw. Ct. 2014) (noting that “[w]here a case is remanded for a specific and limited purpose, ‘issues not encompassed within the remand order’ may not be decided on remand” and that “[a] remand does not permit a litigant a ‘proverbial second bite at the apple’”). Therefore, HACC and PSP have waived any argument that the Lesson Plan is also exempt under 65 P.S. § 67.708(b)(1)(ii).

**3. The Lesson Plan is not subject to public safety exemption**

PSP and HACC argue that responsive records are exempt from public access under Section 708(b)(2) of the RTKL, which exempts from disclosure “[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 the appropriate Federal or State military authority.” 65 P.S. § 67.708(b)(2). In order to establish this exemption, an agency 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. Dep't of Corrections*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). Additionally, speculation and conclusory statements in an affidavit do not show a reasonable likelihood of a threat to security. *Id.*; *Lutz v. City of Philadelphia*, 6 A.3d 669 (Pa. Commw. Ct. 2010).

In this case, the Requester obtained and submitted a copy of the withheld record following the conclusion of the OOR's hearing in this matter. Thus, the Requester's request for the OOR to conduct an *in camera* review in this matter is denied as it is not necessary.

In weighing testimony presented by the parties during the course of the hearing, the OOR, as a fact-finder, “is free to believe all, part or none of the evidence presented.”<sup>4</sup> *See Commonwealth v. Hoffman*, 938 A.2d 1157, 1160 (Pa. Commw. Ct. 2007). During the hearing, PSP presented the testimony of Lieutenant Kiessler and Mr. Grubsky, who acknowledged that they had only a general understanding of the Lesson Plan and had not read the record. As a result, the OOR does not find the testimony of Lieutenant Kiessler and Mr. Grubsky credible

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<sup>4</sup> PSP argues that the OOR should show deference to the testimony of senior law enforcement officials when public safety concerns are raised. When evaluating the testimony of any witnesses or affiants, the OOR considers the requisite experience of an individual related to the subject matter to whether the evidence presented is credible. *See Knauss v. Unionville-Chadds Ford School District*, OOR Dkt. AP 2009-0332, 2009 PA O.O.R.D. LEXIS 238. In the context of correctional facilities, the OOR has held that “a correctional facility need not demonstrate specific prior examples of physical harm to personal security to meet the agency's burden of proof under 65 P.S. § 708(b)(1)(ii).” *Mele v. Monroe County*, OOR Dkt. AP 2011-1230, 2011 PA O.O.R.D. LEXIS 1358. Even so, the individual affiant or witness must have actual knowledge of the matter for which evidence is submitted. In this case, despite Mr. Kiessler and Mr. Grubsky's wealth of experience within PSP and the activities of the Training Commission, their lack of knowledge as to the content of the Lesson Plan supports a finding that their testimony lacks credibility with respect to the public safety risk posed by its release. In addition, in this case, the OOR could compare the actual contents of the Lesson Plan to the testimony of Mr. Ebersole to determine what weight his testimony should be given.

with respect to the specific contents of the Lesson Plan and the applicability of the public safety exemption to the Lesson Plan.

PSP presented the testimony of one witness with actual knowledge of the actual contents of the Lesson Plan—Mr. Ebersole. Mr. Ebersole testified that the Lesson Plan discusses issues concerning officer safety, including how to safely handle a traffic stop; interact with a suspect; search, handcuff, transport, and deal with suspects during the actual stop and process them for arrest. N.T. 87. Mr. Ebersole also indicated that the information presents specific details regarding the conduct of the police officers in certain situations, including how the police officer should position his body at the time of arrest. N.T. 98-99. Mr. Ebersole explained that, if tactical information is released, the release would threaten the safety of the officer because suspects could determine methods to defeat police tactics. N.T. 87-88. According to Mr. Ebersole, should suspects learn to defeat officer methodologies, officer safety would be jeopardized. N.T. 88.

However, a review of the portions of the Lesson Plan related to the arrest of suspects (Sections II, IV and V) reveals that the Lesson Plan consists of a teaching outline that provides the legal requirements for stopping a motorist suspected of DUI and general information about field sobriety tests and testing procedures, as well as chemical testing available for police to collect evidence related to a suspected DUI. These parts of the Lesson Plan describe the introduced concepts in general terms and provide no information addressing officer strategies for safely handling a traffic stop or interacting with a DUI suspect, or searching, handcuffing, transporting, and dealing with a DUI suspect during the actual stop and processing them for arrest. As a result, the release of Sections II (Stopping the Suspected Motorist), IV and V of the Lesson Plan would not jeopardize public safety and cannot be withheld pursuant to Section

708(b)(2) of the RTKL. *Cf. Laigle v. City of Lebanon*, OOR Dkt. AP 2010-0232, 2010 PA O.O.R.D. LEXIS 323 (holding that an agency may redact specifics on police tactics and employment of less lethal force, information such as specific target areas, weapons retention techniques, techniques for failures or misfires and officer safety strategies designed to reduce risk to officers and suspects).

PSP and HACC claim that portions of the Lesson Plan that address officer testimony during the trial of individuals charged with DUI (Sections VI to XV) are not subject to public access. The Requester countered HACC and PSP's argument that revealing the portions of the Lesson Plan providing information related to a police officer's testimony during a DUI trial through the testimony of Mr. Palacios, who testified that that he observed guilty verdicts where the courtroom testimony presentation training was available to defense counsel. N.T. 117-118. Mr. Palacios also acknowledged that he has seen a not guilty verdict where a police officer was cross examined by defense counsel using training materials set forth in NHTSA, although he was speculating as to the reason for the not guilty verdict. N.T. 123-124. A review of the portions of the Lesson Plan related to the arrest of suspects (Sections VI to XV) reveals that the Lesson Plan consists of a basic outline of issues to address by testifying officers in order to be fully prepared for providing testimony in a DUI case. These parts of the Lesson Plan describe the basic information police officers should assemble in order to be prepared for trial, including certificates of accuracy for equipment used to test a DUI suspect, foundational information about the arresting officer, observations of the suspect on the day of the incident, and the tests performed on the suspect. The Lesson Plan does not reveal specific strategies police officers should employ to maximize their credibility with a judge or jury, including maintaining eye contact with the jury. As a result, Sections VI to XV of the Lesson Plan do not contain

information the release of which is reasonably likely to jeopardize public safety and cannot be withheld pursuant to Section 708(b)(2) of the RTKL.

Finally, Sections I (Introduction), II (Background Information on Alcohol) and III (Laws Applicable to DUI) provide general background information on the objectives for the lesson, general information about the effect of alcohol and the dangers that DUI poses to the public, and citations to relevant statutes applicable in DUI cases. The information presented in these sections does not reveal law enforcement methodologies or strategies and, instead, provides basic information about DUI and DUI laws. As a result, Sections I (Introduction), II (Background Information on Alcohol) and III (Laws Applicable to DUI) of the Lesson Plan do not contain information the release of which is reasonably likely to jeopardize public safety and cannot be withheld pursuant to Section 708(b)(2) of the RTKL.

PSP also claims that the release of the Lesson Plan will interfere with overall law enforcement preparation due to the financial costs of rewriting exams should a cheating scandal occur and providing an unfair advantage to officers who might receive the lesson plan prior to attending the training. However, while PSP claims that it incurred significant cost rewriting the exam in response to a prior cheating scandal, PSP presented no evidence regarding whether the cheating scandal involved the release of a lesson plan, the contents of which are presented to training participants, or a copy of the exam itself. N.T. 39-43. In addition, PSP presents no evidence regarding how the cost incurred to revise an exam or access to the Lesson Plan prior to attending the academy “would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity.” *See* 65 P.S. § 67.708(b)(2).

**4. PSP and HACC have not proven that Items 1, 3-5 and 7 have been provided to the Requester**

At the hearing, PSP did not contest the release of Responsive Record List Items 1, 3-5 and 7 and in subsequent submissions claims to have provided the Requester with those Items. Under the RTKL, an affidavit may serve as sufficient evidentiary support for a factual statement. *See Sherry, supra; Moore, supra.* However, an unsworn position statement is not competent evidence to meet an agency's burden of proof that it provided all responsive records to a requester. *See Housing Authority 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); *City of Philadelphia v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) ("Because the letter written by City's counsel is a legal brief, it cannot be ... evidence at all"). PSP and HACC submitted no evidence demonstrating that Responsive Record List Items 1, 3-5 and 7 were actually provided to the Requester. Consequently, while PSP and HACC do not contest the release of the records, PSP and HACC have not proven that they actually provided the responsive records to the Requester.

**5. The OOR lacks authority to impose criminal or civil penalties**

The Requester also seeks sanctions against PSP witnesses for purported false testimony during the hearing in this matter. However, the OOR lacks jurisdiction under the RTKL to consider claims of perjury as it is a criminal matter beyond the scope of the OOR's authority. *See* 18 Pa.C.S. §§ 4902 (relating to perjury), 4903 (relating to false swearing in official matters); *see also* 71 P.S. § 732-205(b) (relating to the Attorney General and district attorney's authority to prosecute criminal matters, including prosecutions involving state officials or employees). Further, under the RTKL, only a court of record, not the OOR, may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith. *See* 65 P.S. §§ 1304

(relating to court costs and attorney fees), 1305 (relating to civil penalties). As a result, the OOR lacks jurisdiction under the RTKL to impose any criminal or civil penalties.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and HACC is required to provide Responsive Record List Items 1, 3-5 and 7 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 Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: March 4, 2015**



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APPEALS OFFICER  
BENJAMIN A. LORAH, ESQ.

Sent to: Justin McShane, Esq. (via e-mail only);  
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