

Agencies Must Prove that the Release of Security Footage will Endanger Public Safety and the Physical Security of a Building (Sections 708(b)(2) and 708(b)(3))

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When responding to RTKL requests, Open Records Officers biggest concern is inadvertently disclosing information that could put people in danger. While such records are generally exempt from disclosure, it is the agency's burden to demonstrate that the record is exempt if there is an appeal. To meet this burden the agency generally gets one chance to submit an affidavit that meets the burden. The case *Grove v. Gregg Township*, AP 2019-0317 (April 5, 2019) is a good reminder that the failure to meet this burden will result in the OOR declaring a record to be public. In *Grove*, the Requester sought:

Security footage of [two individuals] entering and exiting office for beginning of shifts, ending of shifts, and lunch breaks – from the same two cameras that were previously granted. Preserve date & time stamp. 4/13/18-4/26/18, 6/22/18-07/05/18, 7/20/18-08/01/18.

The Township denied the request, arguing that the requested security footage would endanger public safety and the physical security of a building pursuant to Sections 708(b)(2) and 708(b)(3) of the RTKL.

Section 708(b)(2) exempts from disclosure records “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). 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. “Reasonably likely” has been interpreted as “requiring more than speculation.”

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.” 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).

The Township supported its denial with an attestation from its Open Records Officer which stated, among other things, that the location of the cameras was not obvious to passers-by, that the users of the building do not know the coverage of the cameras, and that disclosure of the recordings would require disclosure of footage from multiple cameras throughout the building and many periods of time throughout the day.

The OOR found that this affidavit was insufficient to demonstrate that the records were exempt under either Section 708(b)(2) or 708(b)(3) of the RTKL. In reaching this decision, the OOR relied on its determination in *Rome v. Exeter Borough*, AP 2016-0730, where it determined that surveillance video footage capturing individuals arriving at and departing from the borough office and parking lot was not exempt from disclosure under Sections 708(b)(2) and 708(b)(3) because the video cameras were presumably located in public areas and the borough did not submit evidence that it had taken steps to hide or disguise the location of the cameras. The OOR also relied on *Gregg Twp. v. Grove*, No. 1186 C.D. 2017, 2018 Pa. Commw. Unpub. LEXIS 343 (Pa. Commw. Ct. 2018), where the Commonwealth Court stated that the

Township's affidavit was insufficient because, while it established that cameras were installed for security of the building, it was silent as to what was depicted on the requested camera footage and how disclosure of the footage would jeopardize the building security and public safety.

Based on that precedent, the OOR determined that the Township's attestation did not adequately demonstrate how the disclosure of the requested surveillance footage would be reasonably likely to threaten public safety or the security of the building.

This case serves as a good reminder that in addition to raising proper exemptions, an agency must prove that such an exemption applies. In the event an agency's determination is appealed to the OOR, the agency should work closely with its solicitor to confirm that the affidavit meets the required burden of proof.

If you have any questions or comments, please do not hesitate to contact Chris Voltz or any of the other Municipal and School Attorneys at Tucker Arensberg, P.C.