

OOB Holds that Borough's Use of Taser Policy is Partially Exempt

Articles, Right to Know Law Blog July 24, 2019

Last week, we discussed how the OOR concluded that, for the most part, Taser discharge reports are public records. This week, we'll examine whether policies related to Tasers are public records. In *Ciavaglia v. Newtown Borough*, AP 2019-0866, the Requester sought, among other items, the Borough Police Department's ("Department") Taser use policies. The Borough partially denied the Request, arguing that the disclosure of the policies would threaten personal security and public safety and were, therefore, exempt under Section 708(b)(1) and (2) of the RTKL.

On appeal, the Borough identified the responsive Taser Handling and Deployment Policy ("Policy") and provided portions of the Policy that were administrative in nature. Regarding the remainder of the Policy, the Borough argued that disclosure of the information would threaten personal security and public safety. Section 708(b)(1) exempts from public disclosure "[a] record the disclosure of which ... would be reasonably likely to result in substantial and demonstrable risk of physical harm to or the personal security of an individual." 65 P.S. § 67.708(b)(1)(ii). To establish this exemption applies, an agency must show: (1) a "reasonable likelihood" of (2) "substantial and demonstrable risk" to a person's security. *Delaware County v. Schaefer*, 45 A.3d 1149, 1156 (Pa. Commw. 2012).

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). To withhold records under Section 708(b)(2) of the RTKL, the Borough 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. 2013). In order to show a reasonable likelihood, "[a]n agency must offer more than speculation or conjecture to establish the security-related exceptions under the [RTKL]." *California Borough v. Rothery*, 185 A.3d 456, 468 (Pa. Commw. 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. 2019) (emphasis in original) (quoting *Carey*, 61 A.3d at 373).

The Policy in question contained the following sections:

- An Information section consisting largely of definitions, but also defining the types of weapons used, their "Deployment", and conventional tactics;
- A Procedure section describing who may use Tasers, what Tasers may be used, how Tasers may be used, the manner in which they are carried, defective Taser procedures, safety requirements and Taser deployment and documentation;
- A Deployment section describing procedures, circumstances and appropriate uses of Tasers in the law enforcement context;
- A Documentation section instructing how the use of a Taser in the line of duty is to be documented and evidence assembled by narrative, photographs and sequestering of the Taser;
- A Taser Control Manager's Responsibilities section;
- An Appendix "A" with the Taser certification course outline;
- An Appendix "B" "Policy Memorandum"; and
- An Appendix "C" a blank "Taser Use Report."

In an affidavit, the Department's Chief averred that public disclosure of: 1) Department tactics including weapons, munitions, preparation, training; 2) limits on and the authorization of the use of physical force and deadly force; and 3) the disclosure of weapons training and evidence gathering policies and procedures would threaten public safety and the ability of the Department to protect the public.

Based on this affidavit, the OOR concluded that the Borough properly redacted the following portions of the Policy:

- Information: all sections;
- Procedure: sections pertaining to how Tasers may be used, the manner in which Tasers are carried, and Taser deployment and documentation; and
- Deployment: all sections.

This decision was consistent with prior OOR determinations regarding "use of force" policies. See *Benzing v. Churchill Borough*, AP 2018-1518 (permitting the redaction of procedures for the use of firearms, situational tactics, including officer movement and response procedures, and the types of weaponry available to and used by police officers pursuant to Section 708(b)(2) of the RTKL); *Sees v. Northumberland Borough*, AP 2018-0729 (permitting the redaction of tactical information from a use of force policy under Section 708(b)(2) of the RTKL).

However, the OOR concluded that the Borough could not redacted the following sections:

- Procedure: portions pertaining to who may use Tasers, what Tasers may be used, defective Taser procedures, and safety requirements;
- Documentation: all sections;
- Taser Control Manager's Responsibilities: all sections; and
- Appendices A and B.

The OOR did not permit redaction of these sections because, according to the OOR, the Borough did not adequately explain how this information, which is comprised of technical material regarding Tasers, the general qualifications of the user and the proper documentation of an incident after a Taser was used, would be reasonably likely to threaten personal security or public safety.

This case is important because local agencies frequently receive requests for their police department's policies and manuals. Open Records Officers familiar with the OOR's analysis in the *Ciavaglia* case will be able to, with the assistance of their solicitor, make an informed decision as to what the ORR will consider public and what it will consider private prior to responding to such a request.

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.