IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Harrisburg Area Community College, Petitioner	:	
	:	No. 2110 C.D. 2009
v.	:	Argued: June 23, 2010
Office of Open Records, Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge**
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** May 17, 2011

Petitioner Harrisburg Area Community College (HACC) petitions for review of a final determination of the Pennsylvania Office of Open Records (Open Records), which granted an appeal filed by Justin McShane (Requester). Requester submitted a request (request) for information under the Pennsylvania Right-to-Know Law (RTKL)[1] to HACC. Requester sought "[a]ny and all course material and/or books, videos, manuals pertaining to DUI training" HACC provides under the authority of the Municipal Police Officers Education and Training Act (Act 120).[2] HACC provided some of the requested "course

[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-.3104.

[2] 53 Pa. C.S. §§ 2161-2171. Act 120, *inter alia*, created the Municipal Police Officer Education and Training Commission (Training Commission). The Training Commission serves

materials,"[3] but denied the bulk of the request. Requester appealed HACC's denial to Open Records, which concluded that the RTKL required HACC to provide Requester with the remainder of the "course materials" he sought, i.e, books, videos, or manuals that are used for the DUI Training Course. HACC appealed that order to this Court, and we now vacate Open Records' order and remand the matter to Open Records.

The facts and procedural history of this matter can be summarized as follows. HACC conducts a training course for Pennsylvania municipal police officers under the authority of Act 120. On or about June 30, 2009, Requester submitted to HACC, on a HACC-created RTKL form, a request for "[a]ny and all course material and/or books, videos, manuals pertaining to DUI training through Act 120 training including but not limited to Standardized Field Sobriety Testing." (Reproduced Record (R.R.) at 1a.)

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a number of functions, chief among which include the responsibility to develop a curriculum for the training and education of municipal police officers and the power to certify educational institutions to carry out the Training Commission's educational directives. According to HACC, the materials Requester seeks are comprised in the Training Commission's "Basic Police Officer Training Curriculum Section VI—DUI Enforcement/Occupant Safety" (DUI Training Course).

[3] The material HACC provided consists primarily of 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 stated in its response that this material is available from "public sources," and presumably declined to release other course materials that are not publicly available. HACC's response, however, does not indicate the form in which the undisclosed course materials exists. Further, because HACC did not produce the materials, and the appeals officer did not seek in camera review or conduct a hearing, the record is unclear as to the form of the remaining materials for which Requester seeks access. We assume, however, that the information is likely in the form of documents such as manuals, books, videos, and other "course materials," as indicated in the request.

HACC's RTKL records officer, Patrick Early (records officer), responded to Requester by letter dated July 31, 2009. (R.R. at 2a.) The records officer indicated that HACC, in reliance upon Section 708(b)(2) of the RTKL (the so-called "public safety" exemption),[4] was withholding certain of the information Requester had requested. (*Id.*) The records officer provided "course material which is available from public sources and which is used in the course," *id.*, as described in footnote 2 above. The records officer also included in his reply an affidavit of State Police Major John Gallaher, who is the Executive Director of the Training Commission. (R.R. at 2a-9a.) The records officer stated that the Training Commission was "the owner of the curriculum you requested." (*Id*. at 2a.) The affidavit included an attachment describing the Training Commission's "Policy." (R.R. at 9a.)

By letter dated August 11, 2009, Requester appealed HACC's denial to Open Records. (R.R. at 10a-13a.) In his appeal, Requester asserted that the records officer erred because "no reasonable basis in fact [exists] for [HACC]'s

[4] 65 P.S. § 67.708(b)(2). This section provides an exemption as follows:

> (b) Exceptions.—. . . [T]he following are exempt from access by a requester under this act:
>
> . . .
>
> (2) 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.

allegation that disclosure of officer training procedures relating to DUI training would jeopardize . . . the public." (R.R. at 11a.)[5]

On September 11, 2009, HACC filed a response to Requester's appeal with Open Records. (R.R. at 14a-16a.) In its response, HACC acknowledged that the information Requester sought constituted records under the RTKL, but that (1) the information related to a public safety activity and (2) release of the information would likely jeopardize "public protection activity," which is part of the public safety exception in Section 708(b)(2) of the RTKL.

In his response to HACC's position, Requester submitted a letter to Open Records on September 15, 2009, in which he suggested that HACC does not maintain the records in connection with a law enforcement or public safety activity. Requester asserted also that he believed that HACC denied access to the information based upon his status as a criminal defense attorney. Requester noted that HACC suggested that he could obtain the information through discovery and the use of subpoenas, but that such an approach conflicts with the object of the RTKL to permit everyday citizens the power to access such information. Further, Requester observed that he was unable to articulate his request more accurately because he does not yet have access to the information he seeks.

An Open Records appeals officer (appeals officer) issued a final determination on September 30, 2009, based solely on the content of the request, HACC's response to the request (including the affidavit and attachment to the affidavit), and the letters both parties submitted to the appeals officer, without

[5] We note that the certified record in this case does not contain a copy of the initial communication from Open Records (or the appeals officer) to the parties. In other appeals from Open Records, such as *Office of Budget v. Office of Open Records*, 11 A.3d 618 (Pa. Cmwlth. 2010), the certified record contained a copy of that communication.

conducting a hearing. (Open Records' final determination attached to Petitioner's brief as Exhibit "A".) The appeals officer, citing the affidavit of Major Gallaher, summarized the purpose of the Training Commission and its connection to HACC, noting that Act 120 vests the Training Commission with various powers and duties, including conducting mandatory municipal police training and revoking municipal police officers' certifications when a police officer fails to comply with the Training Commission's in-service training requirements. Pertinent to this case, however, is the Training Commission's certification of HACC to provide police officers with the training and educational requirements the Training Commission requires. The appeals officer cited Major Gallaher's affidavit, in which he stated that (1) Act 120's "extensive requirements and prohibitions" necessitated the protection of "the Commission's police officer training curricular and certification protocols" in order to fulfill the Commission's statutory mandate, and (2) revelation of that information would jeopardize the Training Commission's public protection activity. (*Id*. at 2-3.)

The appeals officer agreed that because HACC used the requested information as part of its training program for law enforcement officers, the information constituted records maintained by an agency in connection with law enforcement and public safety, the first element of the public safety exception of the RTKL. The appeals officer, however, concluded that although HACC asserted that the release of the information would impair law enforcement efforts to investigate and prosecute potential DUI suspects, Major Gallaher's affidavit did not explain, through the use of facts or examples, how the release of the sought-after information would aid or enable DUI offenders to avoid apprehension or ultimate prosecution and conviction. Thus, the appeals officer concluded that

HACC failed to satisfy its burden to demonstrate that the information fell within the exception contained in Section 708(b)(2) of the RTKL.

HACC petitioned this Court for review of Open Records' final determination,[6] raising the following issues: (1) whether Open Records erred in concluding that the records Requester seeks are not exempt under Section 708(b)(2) of the RTKL; (2) whether Open Records erred in concluding that Section 708(b)(2) requires an agency to prove immediate or imminent threats to public safety or public protection activity will result from release of the subject information; and (3) whether Open Records erred by failing to conduct an evidentiary hearing and/or in camera review before rendering factual findings and legal conclusions regarding HACC's asserted basis for denying Requester's request.[7]

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[6] "The scope of review for a question of law under the [RTKL] is plenary." *Stein v. Plymouth Twp.*, 994 A.2d 1179, 1181 n.4 (Pa. Cmwlth. 2010). In *Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Cmwlth. 2010) (en banc), *appeal granted*, ___ Pa. ___, 15 A.3d 427 (2011), we concluded that our standard of review under the RTKL is as follows: "A reviewing court, in its appellate jurisdiction, independently reviews [Open Records'] orders and may substitute its own findings of fact for that of the agency." *Id.* at 818. Further, "a court reviewing an appeal from a [decision of an Open Records] hearing officer is entitled to the broadest scope of review." *Id.* at 820. Under this broad standard we review "the record on appeal," which includes: the request for public records, the agency's response, the appeal, the hearing transcript, and the final written determination of the appeals officer. *Id*. at 820-21. Additionally, this Court may review other material, including party stipulations and also may conduct an *in camera* review of the documents at issue. *Id*. at 820-23. Finally, we may supplement the record by conducting a hearing or direct such supplementation by remanding the matter to Open Records. *Id*. at 823 n.11.

[7] In response to HACC's petition for review to this Court, Open Records filed a brief as Respondent, and Requester filed a brief as an Intervenor. We point out here that, after HACC petitioned for review, but before this Court heard argument on this case, we issued our decision in *East Stroudsburg University Foundation v. Office of Open Records*, 995 A.2d 496 (Pa. Cmwlth. 2010), *appeal denied*, ___ Pa. ___, ___ A.3d ___ (No. 439 MAL 2010, March 16, 2011), in which we concluded that Open Records has no standing to participate in appeals to this Court from its own final determinations. Thereafter, Open Records filed a notice of

1. The Right-To-Know-Law

Section 102 of the RTKL[8] defines the term "Commonwealth entity" to include community colleges. Because the parties do not dispute HACC's identity as a community college, we consider HACC a Commonwealth entity for the purposes of this appeal. As indicated above, neither Requester nor HACC disagree that the curriculum-related records Requester seeks are "records," as that term is defined in Section 102 of the RTKL. Under Section 701 of the RTKL,[9] however, a Commonwealth agency need only release records that are "public records," as that term is defined in Section 102 of the RTKL. As indicated above, all "records" of a Commonwealth entity are "public records" under Section 102 of the RTKL if they fall within one the following categories of "records:" (1) a record that "is not exempt under Section 708" of the RTKL; (2) a record that "is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree"; or (3) a record that "is not protected by a privilege." Section 102 of the RTKL.

The RTKL contains a presumption that "records" in the possession of a Commonwealth agency are "public records," and a Commonwealth agency seeking to preclude a requester's access to records bears the burden of proving, by a preponderance of the evidence, that a record is exempt from public access. Sections 305(a)[10] and 708 of the RTKL. Consequently, in this case, where

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non-participation. Additionally, the Training Commission petitioned to this Court to intervene, and this Court granted that petition.

[8] 65 P.S. § 67.102.

[9] 65 P.S. § 67.701.

[10] 65 P.S. § 67.305(a).

HACC's sole basis for denying access to the records Requester sought was the exception set forth in Section 708(b)(2) of the RTKL, HACC bore the burden to prove by a preponderance of the evidence that HACC "maintained" the records "in connection with a . . . law enforcement or other public safety activity," and that, if HACC disclosed the records, that release "would be reasonably likely to jeopardize or threaten" either "public safety . . . or public protection activity." Section 708(b)(2) of the RTKL.

In considering whether a record falls within an exception to the RTKL, this Court has observed that because "the [RTKL] is remedial legislation 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, the exemptions from disclosure must be narrowly construed." *Bowling*, 990 A.2d at 824.

This Court has had some opportunity to consider RTKL requests for which an agency denied access under Section 708(b)(2) of the RTKL. For example, in *Bowling*, we concluded that information revealing the location of certain items the Pennsylvania Emergency Management Agency had purchased (such as bungee cords) could not "endanger[] the public safety or preparedness." *Id*. at 825. The Court, however, reasoned that "knowledge of the location of some goods and services may pose a threat to the public safety . . . and protection activity." *Id.* As an example, the Court opined that "[k]nowledge of the location of [computer] servers has the potential to endanger an information storage system . . . and knowledge of the location of biochemical testing equipment could implicate a taskforce's ability to effectively respond to a chemical threat." *Id*. The Court concluded that "PEMA must provide Requester with the names of the

recipients of the goods and services purchased with Homeland Security funds" at least for those items that were not "reasonably likely to endanger public safety." *Id*. Ultimately, the Court remanded the matter to Open Records, with the direction to PEMA "to refine its redactions consistent with our discussion." *Id.*

In a decision of this Court requiring our review of an inmate's request for access to the sex offender policy of the Pennsylvania Board of Probation and Parole (PBPP), Open Records had affirmed the PBPP open records officer's redaction of sections of that record relating to polygraphs and supervision strategies, concluding that release would threaten public safety. *Woods v. Office of Open Records*, 998 A.2d 665 (Pa. Cmwlth. 2010). In his appeal to this Court, the inmate abandoned his request for the sections relating to polygraphs, and the sole issue before the Court was whether PBPP had sustained its burden to prove that the supervision strategies section was exempt from disclosure under Section 708(b)(2) of the RTKL.

In that case, the appeals officer had requested PBPP to submit information to aid her in her understanding of the information at issue. PBPP responded by detailing the headers of each subsection of the supervision strategies record. PBPP also submitted an affidavit of its deputy executive director, who identified the purpose of the policy as being "to advise [PBPP] employees on procedures and practices that may be used to supervise a sex offender on parole" and "to explain to [PBPP] staff specialized aspects concerning the supervision of sex offenders." *Id.* at 667. The director also described the roles of parole officers as providing services to protect the public's safety, connecting offenders with services that might help with their reintegration into society, and undertaking "a

range of strategies and interventions geared to the varying risks presented by the offenders." *Id*. at 668.

The director provided specific details outlining the reasons why the PBPP withheld the information, including that revealing the information to a sex offender (the inmate requester, for example) would enable a sex offender to know how parole agents monitor a "sex offender's deviant cycle," identify high risk situations for sex offenders, and use "Residential Assessment factors that could indicate that the sex offender is re-offending," and, thus, a parolee might be able to manipulate the assessment tools. *Id.* Further, the director noted that a sex offender who knows a parole agent's strategies would be reasonably likely to "exploit the limitations of the parole agent's review" and make offenders aware of the capabilities of the PBPP's management procedures and policies. *Id*. Releasing the information, the director stated, would jeopardize the PBPP's public protection activity because a sex offender could use the information "to circumvent existing parole supervision . . . and therefore, would necessarily threaten public safety to the community at large." *Id*.

In considering whether the records were exempt, the Court reasoned as follows:

> [In] exercising an independent review of this matter as we are permitted to do under *Bowling*, it appears from the evidence submitted that the "Supervision Strategies" section is just what the title implies, a strategic guide for [PBPP] employees to employ when monitoring and supervising sex offender parolees. Provision of such to those who are the subject of supervision *or* to any member of the public would impair the effectiveness of that supervision, and thus threaten public safety. Therefore, we conclude that [Open Records] did not err in determining that the [PBPP] proved by a preponderance of the evidence that

> disclosure of the redacted "Supervision Strategies" section "would be reasonably likely to jeopardize or threaten public safety . . . or public protection activity."

Id. at 670 (citation omitted). In summary then, this Court deemed significant to the exemption issue the determination that the strategies aid PBPP staff in supervising potential recidivist sex offenders—a public safety matter, and that release of the record *would impair* the function of those supervising such potential sex offenders. The Court concluded that, consequently, disclosure of the record would be likely to jeopardize either public safety or PBPP's public protection activity.

Thus, we do have guidance for reviewing an Open Records' final determination relating to records that an agency asserts are "maintained in connection with . . . law enforcement or . . . public safety," and, in which, we have determined that release of which would *impair* the performance of the agency's function, and such *impairment* would likely "jeopardize or threaten public safety . . . or public protection activity." Section 708(b)(2) of the RTKL.

In considering whether HACC satisfied its burden to demonstrate that release of the records at issue here would be reasonably likely to jeopardize or threaten public safety or public protection, we first note that, as in *Woods*, and as clearly suggested by Section 708(b)(2) of the RTKL itself, the agency's burden does not include a requirement that the release of a record would *definitely* threaten or jeopardize public safety or protection. The Court in *Woods* accepted evidence indicating that a *possible* consequence of releasing the information would be the *impairment* of the agency's ability to perform its function of monitoring individuals who, based upon their past conduct, might engage in similar criminal activity, and *preventing* them from engaging in future similar conduct that is unquestionably harmful to the public. Thus, when an the agency proffers evidence

of even the potential impairment of a function that is aimed at preventing public harm and securing the public's safety, this Court has concluded that the agency satisfied its burden to demonstrate that a record is not subject to disclosure under Section 708(b)(2) of the RTKL.

In this case, then, we need to consider whether the affidavit of Major Gallaher, like the affidavit of the director of PBPP in *Woods*, was sufficient to demonstrate that the release of records HACC asserts reflect DUI training and practice methods (or strategies) would: (1) impair police officers in the performance of their responsibilities to ensure the safety of the travelling and pedestrian public from potential injuries that might occur by virtue of a driver operating a vehicle while under the influence of alcohol or other substances, and, thereby, (2) threaten or jeopardize public safety or protection. The 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. Similarly, in this case, we must consider whether Major Gallaher's affidavit: (1) includes detailed information regarding the nature of the curriculum; (2) connects the nature of the curriculum to the potential use of those records by individuals who may drive on Pennsylvania roads while under the influence of alcohol; and (3) indicates that such individuals' use of the records would impair police officers' ability to perform their public safety functions relating to intoxicated drivers who might be impaired, including detection and prosecution of those drivers.

We conclude that Major Gallaher's affidavit is insufficient to demonstrate that the requested records fall within the exception contained in Section 708(b)(2) of the RTKL. Major Gallaher described the purpose of the

Training Commission in developing and supervising providers of the police training program. Major Gallaher also stated that the "Commission holds its certified schools and instructors responsible for . . . maintaining examination confidentiality and security, enforcing the anti-cheating policy, and restricting the dissemination of Commission-authorized training source materials to certified school staff members, instructors and officer-trainees." (Affidavit, ¶ 11; R.R. at 5a-6a.) In making that averment, Major Gallaher referred to three provisions of the Pennsylvania Code and a "Policy Statement" developed by Major Gallaher's predecessor. Of those four references, only two may be relevant to our discussion.[11] One provision, 37 Pa. Code § 203.52(c)(8), provides that "[t]he certified school, and the course instructors, will be held responsible by the Commission for proper administration of in-service training courses, including maintenance of proper examination security." Another regulation to which Major Gallaher referred, 37 Pa. Code § 203.54, provides in relevant part as follows:

> **§ 203.54. Commission cheating policy.**
>
> (a) The contents of all examinations are confidential. An individual may not cheat or tamper in any manner with an official examination either conducted or sponsored by the Commission by obtaining, furnishing, accepting, or attempting to obtain, furnish or accept answers or questions to examinations, or portions thereof. Individuals may not copy, photograph or otherwise remove examination contents . . . Unauthorized possession of a test, examination or quiz shall constitute cheating.

[11] As will be discussed below, these regulations pertain to cheating and test secrecy. Requester's request, however, does not indicate clearly whether he is interested in test materials, because he only asks for course material and/or books, videos, and manuals relating to DUI training under Act 120.

Although these provisions do appear to constitute presumptively valid and reasonable expressions of the Commission's intent to retain secrecy regarding the content of its examinations, tests, and quizzes, Major Gallaher does not describe how release of examination content in violation of these regulations has the potential to impair the Commission's function and jeopardize or threaten public safety or protection. Further, the provisions do not address or suggest why the other material Requester seeks is subject to the exception of Section 708(b)(2) of the RTKL. Even with regard to the examinations, Major Gallaher does not articulate the connection between the policy decision to keep examinations confidential and the potential harm to the Commission's function and its public protection activities.[12]

The only other statement of Major Gallaher in his affidavit that addresses the exception states that "[b]ased upon my professional experience and judgment, a disclosure of the Commission's DUI curriculum in response to this RTKL request would be reasonably likely to jeopardize or threaten the Commission's statutorily-mandated public protection activity." (Affidavit, ¶ 15; R.R. at 6a.) This statement, however, in contrast to the affidavit in *Woods* is purely conclusory, and insufficient to satisfy HACC's burden under Section 708(b)(2) of the RTKL. The averment does nothing more than assert that release of the records would jeopardize the Commission's public protection activity without describing in detail how such a result might happen by virtue of the release.

[12] We note here that neither HACC nor the Commission has asserted that the examinations do not constitute "public records" by virtue of the definition of that term in Section 102 of the RTKL, which excludes records that are "not exempt from being disclosed under any other . . . State law or regulation."

In summary, we conclude that the evidence HACC offered to the appeals officer is insufficient to satisfy HACC's burden of proof under Section 708(b)(2) of the RTKL. Consequently, we need to consider HACC's argument that the Court should either conduct a hearing for the acceptance of additional evidence or remand the matter to Open Records to perform that function and revisit the issue after supplementing the record.[13] Based upon the reasons expressed below, we conclude that we are unable to conduct effective appellate review of this potentially significant issue, and we will remand the matter to Open Records.

Ordinarily, a court should not grant a party's request for a remand when the purpose behind such a request is simply to permit the party to strengthen its proofs on a particular issue. In zoning matters, for example, an appellant must assert that new evidence exists that was not available at an initial evidentiary hearing. *See Kennsington S. Neighborhood Advisory Council v. Zoning Bd. of Adjustment of City of Phila.*, 471 A.2d 1317 (Pa. Cmwlth. 1984). This Court has also noted that when a trial court has a complete record before it, it may not remand a matter to a local agency simply to provide an opportunity to prove what the party should have proved during the first hearing opportunity. *Sparacino v. Zoning Hearing Bd. of Adjustment, City of Phila.*, 728 A.2d 445, 448, n.4 (Pa. Cmwlth. 1999). On the other hand, this Court has, on occasion, concluded that it could not engage in effective appellate review as a result of an insufficient record

[13] Before discussing our rationale for remanding this matter, we will briefly address Requester's argument that under Section 1102(a)(2) of the RTKL, 65 P.S. § 67.1102(a)(2), a party may not appeal an appeals officer's decision not to conduct a hearing. This provision only provides that a party may not seek immediate review of an appeals officer's discretionary decision not to conduct a hearing. This provision does not impair the right of a party *on appeal* from a RTKL decision to raise the question of whether the record on appeal is adequate for appellate review or whether this Court may remand for Open Records to conduct a hearing, when we believe such a remand is appropriate.

and deemed a remand necessary, even when a party has already had an opportunity to develop an evidentiary record. *Allegheny Cnty. Dep't of Admin. Svcs. v. A Second Chance, Inc.*, 13 A.3d 1025 (Pa. Cmwlth. 2011) (vacating trial court's determination and remanding for further hearing where record in Right to Know Law case inadequate for appellate review); *see also Bingnear v. Workers' Comp. Appeal Bd. (City of Chester)*, 960 A.2d 890 (Pa. Cmwlth. 2009) (vacating and remanding where evidentiary record inadequate for judicial review of issues raised below).

The matter now before us arrived here in a distinct procedural posture and arose from a freshly minted law that the Courts have only recently had an opportunity to examine. In this case, Requester filed his appeal with Open Records and then Open Records assigned the appeal to the appeals officer. The appeals officer sent a letter dated September 2, 2009, to counsel for HACC requesting information relating to HACC's position under Section 708(b)(2) of the RTKL.[14] The letter stated that "[a]ny response should be supported by sufficient factual background and a detailed legal analysis." *Id*. Further, the letter notified HACC that the appeals officer would render a final determination based only on information HACC submitted on or before a certain date. *Id*. Thus, the letter was silent as to the possibility that the appeals officer had the authority to conduct a hearing.

[14] Neither the certified record nor the Reproduced Record include this letter. The letter is included in the Training Commission's Reproduced Record at 36c. In other Open Records appeals to this Court, the records often included the initial communications from Open Records to the parties, indicating that they could request a hearing, but the record in this case includes no copy or original communication where Open Records may have informed the parties that they could request a hearing. Rather, the record in this case suggests that the only information the appeals officer was interested in was memoranda including factual information and legal argument.

In this case, where, at least based upon the information in the certified record, Open Records apparently did not indicate to HACC that its appeals officer had the *power* to conduct a hearing, we cannot discern whether HACC had notice that it could have requested a hearing during which it might have offered testimony that could have fleshed out the nature of the training program and the potential explicit harms that might flow from release of the records. Further, in such circumstances as this, where an agency may have a genuine concern and reasonable belief that its records are exempted for reasons relating to public safety, an undeveloped response, such as HACC's preliminary response in this case, may suggest reasons why an appeals officer should exercise his discretion and proceed to conduct a hearing. We believe that, in this case, the appeals officer would have benefited from at least conducting in camera review of the subject records. By failing to do so, we lack a sufficient record with which to conduct meaningful or effective appellate review of the potentially significant question of whether HACC's claims relating to the protection of the public and public safety interests are meritorious.

Given the fact that the courts are still in the process of discerning the meaning of many procedural and substantive provisions of the RTKL, this case presents an opportunity to impress upon Open Records that, while it may have a firm notion of how it believes the RTKL should operate, practitioners representing agencies and requesters are still operating in the dark in some respects, working diligently in this new terrain and trying to decipher the sometimes cryptic direction and intricacies of the RTKL. In this light and particularly given the fact that the "public safety" exemption is at issue, we believe that Open Records has a responsibility to develop a fuller record using the means granted to it in the RTKL,

such as conducting a hearing or examining the subject records in camera, and then reconsider whether the requested records are exempt under Section 708(b)(2) of the RTKL.

Based upon the foregoing discussion, we will vacate Open Records' final determination and remand the matter with instructions that Open Records conduct a hearing on this matter and then determine whether the "public safety" exemption contained in Section 708(b)(2) of the RTKL is applicable to the records requested by Requester.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.	:	
Office of Open Records, Respondent	:	

O R D E R

AND NOW, this 17th day of May, 2011, the order of Open Records is vacated, and the matter is remanded to Open Records for further proceeding consistent with this Court's opinion, including a hearing to more fully develop the record as to the "public safety" exemption contained in Section 708(b)(2) of the Right to Know Law, 65 P.S. § 67.708(b).

Jurisdiction relinquished.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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OPINION NOT REPORTED

CONCURRING OPINION
BY JUDGE McCULLOUGH FILED: May 17, 2011

I concur in the result only. While I agree that the decision of the Office of Open Records (OOR) should be vacated and this matter remanded to OOR for a hearing or an *in camera* review of the records, there is no need to predicate this Court's decision to do so on the notion that the RTKL is "a freshly minted law." Rather, the decision to vacate and remand is, and should simply be because the OOR abused its discretion in failing to conduct a hearing in this case.

I disagree that the age of a statute is relevant to determining whether to grant a remand on the grounds that the record is insufficient for purposes of appellate

review. On the contrary, the OOR failed to conduct a hearing when in this case, it is obvious that it should have done so.

Section 1101(b)(3) of the RTKL states that a hearing *may be conducted.* Thus, it is within the discretion of the OOR appeals officer to make such determination. Here, HACC demonstrated the existence of a material question regarding the public safety exemption that could only be resolved by a hearing or *in camera* review.

Specifically, HACC conducts a DUI training course for Pennsylvania municipal police officers under the authority of Act 120, and there was a sworn affidavit submitted by the executive director of the Municipal Police Officer Education and Training Commission, a Major of the Pennsylvania State Police (with over 28 years of experience) asserting that disclosure of the materials would be a threat to public safety because it, "…would be reasonably likely to jeopardize or threaten the Commission's statutorily mandated public protection activity." (R.R. at 5a.) HACC contends in its brief that release of the requested records would jeopardize public safety by revealing vulnerabilities in DUI law enforcement training resulting in the avoidance of criminal liability by those who willingly place themselves and others at risk by driving while intoxicated. Under these circumstances, I would hold that OOR should have exercised its discretion to conduct a hearing or examine the records *in camera*. Clearly, in establishing the RTKL's "public safety" exemption, the legislature recognized the significance of these types of concerns.

Further, I am also troubled that the Majority's opinion appears to impose new procedures or requirements concerning the content of the OOR appeals officers' letters or notices. The Majority quotes from the appeals officer's September 2, 2009,

letter to counsel for HACC requesting information related to HACC's position on appeal and focuses on the absence of information in this letter concerning the appeals officer's authority to conduct a hearing, but does not cite to any part of the RTKL requiring OOR to include such additional information. The Majority states that "we cannot discern whether HACC had notice that it could have requested a hearing." Majority op. at 17. There is no need for this given the *statute itself* provides ample notice of the appeals officer's power to conduct a hearing. Notably, section 1101 ("Filing of appeal") states in relevant part that:

> (3) Prior to issuing a final determination, a hearing **may be conducted**. The determination by the appeals officer shall be a final order. The appeals officer shall provide a written explanation of the reason for the decision to the requester and the agency.

65 P.S. §67.1101(b)(3) (emphasis added). It is not for this Court to impose new procedures or requirements concerning the content of OOR appeals officers' letters or notices. That is a matter for the General Assembly to consider.

In accordance with the above, I would vacate OOR's final determination and remand the matter for a hearing or *in camera* review of the records to assess whether the disclosure of these records would implicate the "public safety" exemption in Section 708(b)(2) of the RTKL.

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PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Harrisburg Area Community College,	:	
Petitioner	:	
	:	No. 2110 C.D. 2009
v.	:	Argued: June 23, 2010
	:	
Office of Open Records,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: May 17, 2011

I agree with the majority that Major Gallaher's affidavit was insufficient to demonstrate that the requested records fall within the public safety exception found in Section 708(b)(2) of the Right-to-Know Law (RTKL).[1] However, I disagree with the majority's decision to remand the matter to the Office of Open Records for a hearing, so I respectfully dissent.

[1] Act of February 14, 2008, P.L. 6, 65 P.S. §67.708(b)(2).

As the majority acknowledges, absent an inability for an appellate court to engage in meaningful judicial review or the existence of new evidence not available at the time of the original hearing, a court should not grant a party's request for a remand once a party has already had the opportunity to develop an evidentiary record. *See, e.g., Bingnear v. Workers' Compensation Appeal Board (City of Chester),* 960 A.2d 890 (Pa. Cmwlth. 2009); *Sparacino v. Zoning Hearing Board of Adjustment, City of Philadelphia*, 728 A.2d 445 (Pa. Cmwlth. 1999); *Kensington S. Neighborhood Advisory Council v. Zoning Board of Adjustment of City of Philadelphia*, 471 A.2d 1317 (Pa. Cmwlth. 1984).

Here, Harrisburg Area Community College had the opportunity to present whatever evidence it wanted to demonstrate that the requested records fell within the public safety exception to the RTKL. It chose to do so via Major Gallaher's affidavit, which was not sufficient. It is not entitled to a second bite at the apple to supplement the record when it could have included additional information originally, either through more detailed information in the affidavit or through other means. In addition, in no way can disclosure of course material related to DUI training possibly be a public safety hazard if released, so any hearing on remand would be futile and in no way would it meaningfully supplement the record, even if such supplementation were proper.

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DAN PELLEGRINI, JUDGE