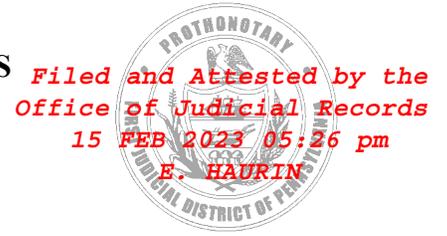


IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY



CITY OF PHILADELPHIA	:	
POLICE DEPARTMENT	:	
	:	
	:	
Appellant,	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COURT
v.	:	TRIAL DIVISION
	:	
SAMANTHA MELAMED	:	No. 211002394
	:	
Appellee.	:	

BRIEF OF APPELLEE

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MATTER BEFORE THE COURT

The matter before the Court is an appeal from a Final Determination of the Office of Open Records (“OOR”). Appellee Samantha Melamed requests that this Court affirm the OOR’s decision requiring the Philadelphia Police Department to provide withheld time response log information, including “nature of the call” information, under Pennsylvania’s Right to Know Law.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns a request submitted by journalist Samantha Melamed (“Appellee”) to the Philadelphia Police Department (“PPD” or “Appellant”) pursuant to the Pennsylvania Right to Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking “[t]he time response log, computer-aided dispatch report,¹ and any other documents generated in connection with any 911 call on June 7 at or around 6:58 p.m. requesting assistance at 523 Burnham Rd., Philadelphia PA 19119.” Record at OOR_015.²

Appellee urges this Court to affirm the OOR’s finding that PPD must release withheld time response log information contained within the CAD Report, including “nature of the call” information, responsive to her request. “Nature of the call” is not defined in the RTKL or in the Emergency Communications Services statute. 35 Pa. C.S. § 5301. However, 35 Pa. C.S. § 5399 clarifies that only “identifying information” must be shielded from release pursuant to a RTKL request for 911 call information. Identifying information includes the name, telephone number and home address of the individual calling 911. *See* 35 Pa. C.S. § 5399(c). Thus, any other 911

¹ Computer-aided dispatch reports are also known as “CAD Reports.”

² For the Court’s convenience, Appellee’s Counsel has added Bates-stamps (OOR_001 through 062) to the OOR certified record filed by the OOR on March 10, 2022 with the Philadelphia County Clerk of Judicial Records. The OOR record did not have page numbers; no other changes have been made to the document. The Bates-stamped OOR certified record has been filed concurrently with this brief as Appendix 1.

call information that describes the “nature of the call”—such as which government agency responded (fire department, EMS, police, SWAT, search and rescue, water rescue, animal control, etc.) and the manner in which they responded (vehicle, rate of speed, milage³, siren activation)—is not exempt. *County of York v. Pa. Office of Open Records*, 13 A.3d 594, 602 (Pa. Commw. Ct. 2011) (holding time response logs must be disclosed for the public to ascertain the efficiency and adequacy of emergency response times); *Walker v. Lancaster Cnty. Dist. Att’y’s Office*, OOR Dkt. AP 2021-0448, 2021 PA O.O.R.D. LEXIS 712 (Apr. 30, 2021).

Relying on the language of the RTKL and applicable precedent, the OOR correctly determined that “the portions of the CAD Report[] reflecting the time of the request for service, address or cross-street information, and when/if emergency responders responded to and arrived at the scene are subject to public access.” Record at OOR_060. And, the OOR correctly determined that these same policy interests—enabling the public to scrutinize emergency response time efficiency—require disclosure of “nature of the call” information. Record at OOR_061; *see Walker*, 2021 PA O.O.R.D. LEXIS 712, at *16–17 (holding that “time response log” information subject to disclosure under *County of York* includes “nature of the call” information). In so ruling, the OOR confirmed that the purpose of disclosing time response log information, including “nature of the call” information, “is to provide citizens with oversight of the government’s actions and enable the public to evaluate the efficiency of an entity’s response time to reported emergencies.” *Id.* at *14–15. The public has a right to know, for instance, whether police, fire and other emergency response agencies respond to requests for assistance in

³ Appellee adopts the spelling of “milage” used in the OOR’s Final Determination, but notes that “mileage” is an alternative spelling that has been used in these proceedings, and in this brief, in particular, to reflect the spelling used by PPD in its Motion to Supplement the Record.

a timely, consistent manner.⁴ The OOR therefore correctly determined that any such information in the CAD Report responsive to Appellee’s records request must be provided, including “odometer readings, milage information, information regarding delays encountered by the vehicle and the type of incident for which the dispatch was made.” Record at OOR_061. The OOR permitted PPD to redact only the information “directly related to the contents and basis of the 911 call and radio conversations with emergency responders which is unrelated to time response evaluation.” *Id.*

PPD seeks reversal of the OOR’s Final Determination, arguing in turn that the records: “(i) do not exist; (ii) are exempt from disclosure under Section 708(b)(18) of the RTKL . . . ; and (iii) are exempt from disclosure under Pennsylvania Right to Know Law Section 708(b)(16) as records of a criminal investigation.” PPD Opening Br. 7.

For the reasons articulated herein, Appellee respectfully urges this Court to reject these arguments. The record below at the OOR allowed both parties ample opportunity to develop legal arguments and factual assertions, and PPD did not previously claim the non-existence of records responsive to Ms. Melamed’s request. PPD has therefore waived the argument that responsive records do not exist. *Levy v. Senate of Pa.*, 94 A.3d 436, 441–42 (Pa. Commw. Ct. 2014) (“[A]n agency must raise all its challenges before the fact-finder closes the record. . . . In the ordinary course of RTKL proceedings, this will occur at the appeals officer stage, and a reviewing court will defer to the findings of the appeals officer.”). Even if this Court were to consider this late-stage argument, PPD has failed to demonstrate by a preponderance of the

⁴ See, e.g., Jordan Levy, *City audit: Understaffing and slower 911 response times for communities of color are major problems for Philly police*, BillyPenn (Oct. 18, 2022), <https://billypenn.com/2022/10/18/philadelphia-police-audit-understaffing-911-response-controller/>; Max Marin et al., *Philadelphia police response times have gotten 4 minutes longer, about 20% worse*, Phila. Inquirer (Feb. 15, 2022), <https://www.inquirer.com/news/philadelphia-police-911-calls-response-time-20220215.html>; William Bender, *Called 911, waited 53 minutes: ‘Not a cop, not a paramedic’*, Phila. Inquirer (June 30, 2017), <https://www.inquirer.com/philly/news/firefighter-philadelphia-response-911-police-20170630.html>.

evidence that responsive records do not exist, as required under the RTKL. 65 P.S. § 67.708.

PPD has improperly withheld public records, despite the inapplicability of any exemption. If any information in the responsive records is subject to an exemption, the records should nonetheless be disclosed in redacted form. 65 P.S. § 67.706.

This Court should therefore adopt the legal conclusions and factual findings of the OOR and affirm its Final Determination.

STATEMENT OF THE QUESTION

1. Should the OOR's Final Determination be affirmed insofar as it requires PPD to disclose withheld time response log information (including "nature of the call" information), including any withheld meter information regarding the responding vehicle, the basic type of incident response which was called for by dispatch, and any travel or delay information contained within the CAD Report?

Suggested answer: Yes.

2. Did PPD waive the argument that records responsive to Ms. Melamed's request do not exist when it failed to raise this argument before the OOR?

Suggested answer: Yes.

FACTUAL BACKGROUND

On July 14, 2021, Ms. Melamed submitted a RTKL request to PPD seeking "the time response log, computer-aided dispatch report, and any other documents generated in connection with any 911 call on June 7 at or around 6:58 p.m. requesting assistance at 523 Burnham Rd., Philadelphia PA 19119." Record at OOR_015. On July 22, 2021, PPD granted the request in part, providing Ms. Melamed with an almost entirely redacted CAD Report consisting of two

pages.⁵ See Record at OOR_013. It is not clear from the two pages provided or PPD's accompanying letter whether the pages provided comprise the full CAD Report, or only part. Record at OOR_011–012. The only portions of the pages not obscured reveal only the time and location of the 911 call and the arrival time of unidentified emergency service responders. Record at OOR_017–018. Specifically, the only three visible lines of text on the first page provide:

DISPATCHED:	06/07/2021	19:04:18	BY	B06 (1429)	/274393
ONSCENE:	06/07/2021	19:06:26	BY	B06 (1429)	/274393
LOCN:	523 BURNHAM RD, PHL				

Record at OOR_017. The second page reveals only the following three visible lines in an otherwise redacted page:

DISPATCHED:	06/07/2021	19:39:29	BY	B06 (1429)	/274393
ONSCENE:	06/07/2021	19:39:29	BY	B06 (1429)	/274393
LOCN:	523 BURNHAM RD, PHL				

Record at OOR_018.

In its response to Ms. Melamed's RTKL request, PPD asserted that it was withholding portions of the CAD Report pursuant to the criminal and noncriminal investigation exemptions under 65 P.S. § 67.708(b)(16) and 65 P.S. § 67.708(b)(17), respectively. Record at OOR_011. PPD also invoked Section 708(b)(18), which exempts from disclosure records pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings. Record at OOR_011; 65 P.S. § 67.708(b)(18). PPD's denial also

⁵ According to the U.S. Department of Homeland Security, "all CAD systems serve the same function: providing a coordinated system in which dispatchers can assign and track law enforcement resources to specific calls for service. CAD systems are critical because they are often the very first point of storage and transmittal of key information collected during law enforcement interactions with members of the public." U.S. Dep't of Homeland Sec., *Best Practices: Leveraging Computer-Aided Dispatch to Enhance Suspicious Activity Reporting 2* (Aug. 2022), <https://www.dhs.gov/publication/best-practices-cad-rms-guide>.

referenced the Criminal History Record Information Act (“CHRIA”), 18 Pa. C.S. §§ 9101 *et seq.*, which exempts from disclosure records containing criminal history record information and/or investigative information. Record at OOR_011. Pursuant to CHRIA, such information is not publicly accessible under the RTKL. *Id.* Therefore, according to PPD, to the extent Ms. Melamed’s request sought such records, CHRIA compelled a denial of the request. *Id.*

In response to PPD’s partial denial of her request, Ms. Melamed appealed to the OOR to challenge the applicability of PPD’s claimed exemptions and seek further evidentiary support from PPD.⁶ *Id.* In her appeal letter, Ms. Melamed noted that “[a]ll information [in the CAD Report] about how the call was logged and processed and what information was shared to responders was redacted – for reasons that appear to have nothing to do with the information requested.” Record at OOR_010. Again, it is not clear whether the pages provided to Ms. Melamed comprise the full CAD Report or only part. PPD argued to the OOR that the requested information was exempt from disclosure citing, *inter alia*, the criminal investigation and emergency dispatch exemptions to the RTKL, as well as CHRIA, and submitted the September 9, 2021 Affidavit of Lieutenant Barry Jacobs (“Jacobs Affidavit I”), PPD’s Open Records Officer, in support. Record at OOR_045–046. Although PPD had claimed both criminal and noncriminal investigation exemptions in its initial denial of Ms. Melamed’s request, it abandoned its noncriminal investigation argument before the OOR. Record at OOR_042–043. PPD also raised a new argument: that responsive records were exempt from disclosure under Section 708(b)(5), which exempts records of an individual’s medical history or related information that

⁶ Ms. Melamed requested that PPD provide a redaction log and that the OOR conduct an *in-camera* review of the redacted portions of the CAD Report. Record at OOR_010. The OOR appeals officer did not act upon either of Ms. Melamed’s requests, nor were her requests addressed in the OOR’s Final Determination.

would disclose individually identifiable health information. Record at OOR_041–042; 65 P.S. § 67.708(b)(5).

After reviewing the positions and submissions of both parties, the OOR issued its Final Determination on October 1, 2021. The OOR noted that the “portions of the CAD Report[] reflecting the time of the request for service, address or cross-street information, and when/if emergency responders responded to and arrived at the scene are subject to public access and were properly provided in response to the Request.” Record at OOR_060 (citing *County of York*, 13 A.3d at 602). The OOR further determined, contrary to the arguments advanced by PPD, that Section 708(b)(18) does not exclude “nature of the call” information, which, like other time response log information, is “entirely relevant to the public’s ability to understand an emergency responder’s response time and evaluate the government’s emergency response efficiency.” Record at OOR_060–061 (quoting *Walker*, 2021 PA O.O.R.D. LEXIS 712, at *15). As such, the OOR directed PPD to provide any withheld time response log information, including the aforementioned “nature of the call” information—specifically, “withheld meter information regarding the responding vehicle, the basic type of incident response which was called for by dispatch, and any travel or delay information contained within the CAD Report which would help the Requester ascertain how effectively the emergency response was conducted.” Record at OOR_061.⁷ OOR permitted PPD “to redact information directly related to the contents and basis of the 911 call and radio conversations with emergency responders which is unrelated to time response evaluation.” *Id.* The OOR did not address PPD’s Section 708(b)(16) argument that the

⁷ Although Ms. Melamed did not explicitly request odometer readings, milage information, or information regarding delays encountered by the vehicle, the OOR correctly interpreted her request expansively to include such information within “time response log” information. See *Gingrich v. Pa. Game Comm’n*, No. 1254 C.D.2011, 2012 WL 5286229, at *6 (Pa. Commw. Ct. Jan. 12, 2012) (holding that “[t]he RTKL must be construed to maximize access to government records,” and “Requester is not required to identify the records by name . . . [n]or is Requester required to specify a type of record”).

responsive record contained exempt information related to a criminal investigation, noting not only that it lacked jurisdiction,⁸ but also that it was inapposite, as “the OOR [did] not direct[] the Department to release any investigative information.” Record at OOR_061 n.3. The OOR also did not address PPD’s Section 708(b)(5) argument.

PPD appealed on October 29, 2021, seeking a reversal of the OOR’s decision as to withheld time response log information. On June 15, 2022, the parties jointly moved to stay this appeal until November 16, 2022, the end of Pennsylvania’s 2022 Legislative Session, to allow time for the Legislature to consider a bill that would have explicitly defined “time response logs” in the RTKL, a dispositive issue in this case. *See* Joint Mot. to Stay Briefing Schedule at 3–4, (filed June 15, 2022). The motion was granted on July 18, 2022. However, the Legislature ultimately failed to pass the bill, HB 2524, into law and the parties submitted a status update to the Court asking it to lift the stay. *See* Status Update to the Court (filed Nov. 17, 2022). In turn, this Court issued a Scheduling Order on December 2, 2022.

On January 11, 2023, PPD filed with this Court its opening brief, as well as a Motion to Supplement the Record, seeking to include in the Record a supplemental affidavit by Lt. Barry Jacobs (“Jacobs Affidavit II”). This Court granted that motion on February 2, 2023.

ARGUMENT

At issue in this case is whether PPD may withhold time response log information, including “nature of the call” information, in response to Appellee’s RTKL request. Relying on *County of York*, the OOR determined—rejecting the very same arguments that PPD makes here—that PPD is required to provide any such information contained within the CAD Report.

⁸ The OOR does not have jurisdiction to review denials of RTKL requests implicating criminal investigations. Instead, these appeals are referred to the district attorney’s office for each county. *See* 65 P.S. § 67.503(d)(2).

PPD's continued withholding of this information in its entirety is improper as a matter of law for the following reasons. *First*, the CAD Report is a public record subject to the RTKL. *Second*, PPD has waived the argument that responsive records do not exist. *Finally*, to the extent any exemption applies—and none do—PPD must release the responsive records with limited redactions.

I. Records in the possession of a government agency are presumed “public” under the RTKL, and exemptions are to be narrowly construed.

The RTKL defines a “record” as “[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. Such records in the possession of a Commonwealth or local agency are presumed to be “public” and shall be publicly accessible upon request. 65 P.S. § 67.305(a); 65 P.S. § 67.701(a). If the agency claims that a requested record does not exist or is exempt under the RTKL and therefore not subject to disclosure, the agency must prove this by a preponderance of the evidence. 65 P.S. § 67.708(a). Moreover, in light of the RTKL’s remedial purpose, exemptions are to be “narrowly construed.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010).

There is no question that the CAD Report in this case documents the activity of an agency—namely, the speed with which emergency responders arrived at a particular location within the city, and what type of call they were responding to. For the reasons set forth *infra*, given the presumptively public nature of the CAD Report, PPD’s continued withholding of responsive information that comprises the CAD Report is improper because the agency has not met its burden of proving that records containing the information at issue do not exist or are exempt from disclosure.

II. PPD has waived the argument that responsive records do not exist.

a. PPD has failed to preserve the argument on appeal that records responsive to Ms. Melamed's request do not exist.

PPD has never previously claimed—neither in its initial denial of Ms. Melamed's RTKL request, Record at OOR_011–012, nor in its arguments to the OOR, Record at OOR_039–043—that records responsive to Ms. Melamed's request do not exist. It attempts to raise this argument for the first time before this Court. PPD Opening Br. 8. However, “it is the parties' burden to submit sufficient evidence to establish material facts” at the OOR level. *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017). Courts are not required to accept new evidence on appeal, particularly, as here, “when the parties and participants had a full opportunity to submit evidence to the fact-finder.” *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 129 (Pa. Commw. Ct. 2019). Indeed, “an agency must raise all its challenges before the fact-finder closes the record,” and “[i]n the ordinary course of RTKL proceedings, this will occur at the appeals officer stage, and a reviewing court will defer to the findings of the appeals officer.” *Levy*, 94 A.3d at 441–42. As a result, because this argument was not raised before the OOR, this defense to disclosure has been waived by PPD.

b. Even if the Court chooses to consider this new argument, PPD's affidavits are insufficient to prove that responsive records do not exist.

When a Commonwealth agency denies custody of responsive records, the agency bears the burden to show by a preponderance of evidence that the records do not exist. *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011) (citing 65 P.S. § 67.708). The agency may provide affidavits to detail the search it conducted for responsive documents, *Collazo v. Pa. Gaming Control Bd.*, No. 581 C.D. 2019, 2019 WL 6834701, at *5 (Pa. Commw. Ct. Dec. 16, 2019) (applying *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa.

Commw. Ct. 2013) to affidavits asserting responsive documents do not exist); *Hodges*, 29 A.3d at 1192, but such testimonial affidavits must be relevant and credible in order to provide sufficient evidence under the RTKL.⁹ *Heavens v. Pa. Dep't of Env't Prot.*, 65 A.3d 1069, 1073–74 (Pa. Commw. Ct. 2013). In addition, “[t]he affidavit must be detailed, nonconclusory, and submitted in good faith; an affidavit which merely tracks the language of the exception it presupposes is insufficient to demonstrate that the responsive records are exempt from disclosure.” *Pa. State Police v. Muller*, 124 A.3d 761, 765 (Pa. Commw. Ct. 2015) (citing *Scolforo*, 65 A.3d at 1103–04); *see also Collazo*, 2019 WL 6834701, at *5.

In *Scolforo*, a case examining affidavits in the exemption context, the court concluded that an affidavit from the Office of the Governor failed to demonstrate that a RTKL exemption applied to a request for calendar entries. 65 A.3d at 1103–04. The Office’s affidavit was insufficient because it contained no specifics, merely tracked the language of the exception it argued applied and was conclusory. *Id.* at 1104. By contrast, in *Collazo*, the government agency provided “detailed, particularized explanations” for why the responsive records did not exist—including, for instance, the agency’s relevant record-keeping policies and practices, which the court found to be sufficient to meet the agency’s burden of proof. *Collazo*, 2019 WL 6834701, at *3, *5. Here, PPD has not satisfied the evidentiary standards enunciated in *Scolforo*.

PPD argues that CAD Report records showing “odometer readings, milage information, and information regarding delays encountered by the vehicle,” which the OOR determined are responsive to Appellee’s request, do not exist, PPD Opening Br. 8–9, but the agency has not met

⁹ Contrary to PPD’s position in this appeal, *see* PPD Opening Br. 8, the mere existence of an affidavit does not unequivocally establish its evidentiary sufficiency. *See ACLU of Pa. v. Pa. State Police*, 232 A.3d 654, 669 (Pa. 2020) (finding that “the proposition that OOR appeals officers and courts lack competency to assess the adequacy and probity of an agency affiant’s characterization of the record or the credibility of its effects assessment is untenable”). Indeed, “[e]ven when an affiant’s veracity and good faith are wholly unquestioned, the sufficiency of its attestation may be discredited.” *Cent. Dauphin Sch. Dist. v. Hawkins*, 286 A.3d 726, 742 (Pa. 2022) (citing *ACLU of Pa.*, 232 A.3d at 669).

its burden of establishing that is the case. The Jacobs Affidavit II, which attests to the non-existence of responsive records, contains in relevant part only *a single sentence*: “I have reviewed the CAD Report responsive to Ms. Melamed’s Request and it contains no odometer readings, mileage information, or information regarding delays encountered by the emergency response vehicle.” Mot. to Suppl. the Record, Ex. A. Conspicuously absent from the affiant’s statement are *any* details regarding how a search for responsive records was conducted, whether any third-party contractors were contacted, whether a search of key terms or records was made, or the nature of the Department’s record-keeping practices with respect to the requested information. Additionally, the affidavit does not describe whether or how, upon first receiving Ms. Melamed’s July 14, 2021 request, PPD searched for “any other documents generated in connection with any 911 call on June 7 at or around 6:58 p.m. requesting assistance at 523 Burnham Rd., Philadelphia PA 19119,” as requested by Ms. Melamed in conjunction with her request for the CAD Report. Record at OOR_015. Instead, PPD’s boilerplate statement amounts to “a generic determination or conclusory statement[]” that lacks the specificity required by law. *See Scolforo*, 65 A.3d at 1103.

Moreover, there was *no discussion at all* in Jacobs Affidavit I, submitted at the OOR level and therefore preserved as part of the OOR’s factual record, regarding the search methodology employed by Lt. Barry Jacobs to identify and locate records responsive to Appellee’s RTKL request. *See* Record at OOR_045–046. That is, even accepting the statements in Jacobs Affidavit I as part of the OOR’s factual findings, PPD still fails to meet its evidentiary burden. On their face, *neither* of the affidavits submitted by PPD sufficiently prove, by a preponderance of the evidence, that records showing “odometer readings, milage information,

information regarding delays encountered by the vehicle and the type of incident for which the dispatch was made,” do not exist. *See ACLU of Pa.*, 232 A.3d at 669.

Consequently, these affidavits are, on their own, insufficient as a matter of law to prove that responsive records do not exist. Even if the Court were to consider Jacobs Affidavit II—which it should not, *Levy*, 94 A.3d at 441—the affidavit does not meet the evidentiary standard set by the RTKL, and this Court should therefore find that PPD has failed to demonstrate that records responsive to Appellee’s request do not exist.

III. Neither of PPD’s claimed exemptions apply to the “nature of the call” information at issue.

a. “Nature of the call” information is publicly accessible under the RTKL.

The OOR determined that, to the extent the CAD Report contains “nature of the call” information, it must be provided. Record at OOR_061. Indeed, the OOR has consistently held that “nature of the call” information is subject to public access under the RTKL. *See, e.g., Walker v. Lancaster Cnty. Dist. Att’y’s Office*, OOR Dkt. AP 2021-0448; *Melamed v. Montgomery County*, OOR Dkt. AP 2022-1997; *Turner v. Montgomery County*, OOR Dkt. AP 2022-1967. This conclusion follows logically from the Commonwealth Court’s decision in *County of York* more than a decade ago, holding that time response logs are subject to public disclosure “to allow the citizenry ‘to scrutinize the actions of public officials,’” and evaluate the efficiency of emergency response times. *County of York*, 13 A.3d at 602 (quoting *Bowling*, 990 A.2d at 824).

Appellant argues that the “OOR provides no good reason why the nature of the call is related to the response time of emergency responders or why its disclosure is necessary for the scrutiny of emergency responders,” PPD Opening Br. 13, but the OOR has resolved that question in not one, but two, of its opinions—its Final Determination here and in *Walker*, 2021 PA

O.O.R.D. LEXIS 712. In both decisions, the OOR cogently explained that “nature of the call” information—*e.g.*, the basic type of incident response called for by dispatch—must be disclosed in order to fully effectuate the purpose of disclosing time response log information. That is, “[w]ithout knowing the ‘nature of a call’ received by an emergency dispatcher and then responded to, the public is unable to assess whether the corresponding response times related to those calls are reasonable.” Record at OOR_061 (quoting *Walker*, 2021 PA O.O.R.D. LEXIS 712, at *15). What further reasoning Appellant seeks is not clear.

Importantly, *County of York* sets a *minimum* content requirement for time response logs—not a maximum—and its holding is not limited to the production of location information. Indeed, the Commonwealth Court recognized that records showing time information alone, without additional context, can render time response logs meaningless. *County of York*, 13 A.3d at 602. The court thus confirmed that additional contextual data gathered by agencies, like location information, is a necessary component of time response logs: “Without the address or cross-street information, there would be no way of knowing exactly how far the emergency responders had to travel in response to any given call and, therefore, no way of determining whether or not those response times were deficient.” *Id.* Accordingly, if an agency gathers contextual information as part of its 911 response, it is public unless the agency can prove otherwise. “Nature of the call” information is exactly the kind of contextual information necessary to render time response logs meaningful indicators of emergency response time efficiency.

Appellant has therefore not persuasively demonstrated why this Court should depart from several, consistent holdings of the OOR with respect to “nature of the call” information—holdings which clearly track the legislative intent of the RTKL, discussed further *infra*. This

Court should affirm the OOR's finding that "nature of the call" information is publicly accessible under the RTKL and not subject to any exemption barring disclosure.

b. The exemptions cited by PPD are inapplicable to Appellee's request; to the extent any exemption applies, responsive records should be released in redacted form.

PPD asserts that both exemptions, under Sections 708(b)(16) and 708(b)(18), preclude disclosure in the instant case. To successfully withhold a public record under either of these exemptions, PPD must prove the exemption applies by a preponderance of the evidence. 65 P.S. § 67.708(a)(1); *Dep't of Health v. Office of Open Records*, 4 A.3d 803, 809 (Pa. Commw. Ct. 2010). Notably, in light of the RTKL's presumption of access and its remedial purpose, Section 706 provides that an "agency may not deny access to the record **if the information which is not subject to access is able to be redacted.**" *Hawkins*, 286 A.3d at 742 (emphasis in original) (quoting 65 P.S. § 67.706). In other words, if a requested record contains some information subject to exemptions, as PPD argues here, and the agency is able to redact such exempted information, the agency must provide the requested record with those redactions. In this case, however, neither exemption cited by PPD is applicable.

1. PPD has failed to establish that the criminal investigation exemption applies.

PPD maintains that "nature of the call" information is exempt under Section 708(b)(16), and applicable to Appellee's request, on grounds that the requested records pertain to a criminal investigation, PPD Opening Br. 13, but the OOR did not order PPD to release any investigative information. The "nature of the call" information OOR ordered PPD to release, including "odometer readings, milage information, information regarding delays encountered by the vehicle and the type of incident for which the dispatch was made," patently does not require disclosure of *any* aspect of PPD's criminal investigation. *See* PPD Opening Br. 14 (describing

information collected from witnesses, assessment of the offender, and danger level assessment). Indeed, the OOR did not direct PPD to release any investigative information. Record at OOR_061 n.3.

Appellant nevertheless maintains that “disclosing copies of the responsive CAD Report would reveal PPD’s criminal investigation into the potential criminal event at issue in the responsive CAD Report.” PPD Opening Br. 14. As noted *supra*, if there is, in fact, information in the CAD Report which relates to a criminal investigation, that information can and should be redacted, and the rest of the responsive record—including withheld meter information, the basic type of incident response, and any travel or delay information—should be disclosed, as ordered by the OOR. PPD has not sufficiently explained—much less proven by a preponderance of the evidence—why *this* information implicates a criminal investigation, thereby meriting the Section 708(b)(16) exemption. See Record at OOR_045–046 (Jacobs Affidavit I); Mot. to Suppl. the Record, Ex. A (Jacobs Affidavit II) (failing to explain specifically why the information ordered disclosed by the OOR meets the Section 708(b)(16) exemption).

2. PPD has failed to establish that the exemption for dispatch recordings applies.

PPD also argues Section 708(b)(18) of the RTKL exempts from disclosure “nature of the call” information responsive to Appellee’s request as it pertains “to audio recordings [and] telephone or radio transmissions received by emergency dispatch personnel,” PPD Opening Br. 11, an argument the OOR soundly rejected. Record at OOR_060–061 (“Section 708(b)(18) does not exclude the disclosure of nature of the call information.”). Appellant challenges the OOR’s decision to narrowly construe the reach of the dispatch recordings exception,¹⁰ PPD Opening Br.

¹⁰ Appellant asserts that *Sapp v. Philadelphia Fire Department*, OOR Dkt. AP 2021-1051, 2021 PA O.O.R.D. LEXIS 1678 (Sept. 13, 2021), a decision “requir[ing] disclosure of odometer readings and ‘information regarding delays encountered by the vehicle and the type of incident for which the dispatch was made,’” was vacated by this

12, but the OOR’s ruling is consistent with the General Assembly’s intention that the RTKL be remedial legislation and that its exemptions be “narrowly construed.” *Bowling*, 990 A.2d at 824. Importantly, the text of Section 708(b)(18) does not exempt from disclosure “nature of the call” information. 65 P.S. § 67.708(b)(18).

In any case, the OOR already determined that records pertaining to audio recordings, or telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings, in the requested records may be redacted. Record at OOR_061. This is consistent with the language of the RTKL. *See* 65 P.S. § 67.706. PPD has not adequately, let alone convincingly, explained why the information it *was* directed to release—meter information regarding the responding vehicle, the basic type of incident response called for by dispatch, and any travel or delay information contained in the CAD Report—could not be produced without implicating the exemption for dispatch recordings. Indeed, the information at issue here involves the basic, logistical operations of emergency responders. It was for that very reason that the OOR ordered it disclosed, so that members of the public could “ascertain how effectively the emergency response was conducted.” Record at OOR_061. As a result, the responsive CAD Report should be released, with limited redactions where necessary to the extent any record implicates information pertaining to audio recordings, or telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.

Furthermore, as a policy matter, the Pennsylvania Legislature’s stated intent was for Section 708(b)(18) to exempt the kind of information that would risk re-traumatizing victims if

Court on March 10, 2022. PPD Opening Br. 12 n.1. However, Appellant fails to mention that the basis for vacating the decision was that the OOR had improperly required the Philadelphia Fire Department Emergency Medical Services to provide a patient’s individually identifiable health information, in violation of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). This Court’s decision to vacate the OOR decision in *Sapp* is therefore easily distinguished from the instant case, as the OOR has not directed PPD to release any information in contravention of its requirements under HIPAA.

publicly disclosed, not information that would enable journalists to analyze and report on the efficiency of emergency response times. *See* Pa. Legis. J. (Feb. 6, 2008), at 371, <https://www.openrecords.pa.gov/Documents/RTKL/Legislative%20History.pdf> (“I know there is not one among us who wants to be responsible for the victim of domestic violence who fears picking up the phone and dialing 911 because of a flaw in this bill that may allow her tormentor to know who she is and where she is. None of us wants to be responsible for the hesitation that may cause her her life.”).

The information ordered released here—meter information, the basic type of incident response, and travel or delay information—plainly does not implicate these concerns; Ms. Melamed does not seek the names or identities of anyone involved in the incident, nor the transcripts of the 911 calls themselves. Moreover, because the RTKL is remedial legislation, the “exemptions from disclosure must be narrowly construed.” *Bowling*, 990 A.2d at 824. Reversing the OOR’s determination would therefore contradict the stated legislative intent of this statutory exemption and undermine the very purpose of the RTKL, which seeks “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.” *Id.*

For these reasons—as a matter of both law and policy—PPD has not proven by a preponderance of the evidence that either of these exemptions warrants withholding the information the OOR directed PPD to release.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Appellee respectfully requests that this Court deny the instant appeal and affirm the OOR’s decision below insofar as it orders PPD to provide withheld time response log information in the CAD Report, including nature of the call information. Appellee

respectfully urges this Court to reject PPD’s argument that responsive records do not exist, as that argument has been waived, or otherwise find that PPD has not introduced satisfactory evidence to meet its burden under the RTKL. In the alternative, if this Court does not order immediate release of the withheld time response log information, it should conduct an *in camera* review of the disputed records, or otherwise remand this matter to the OOR for an *in camera* review. *See Bowling*, 990 A.2d at 821–22 (holding that common pleas courts have authority to conduct *in camera* review of public records sought under the RTKL).

Dated: February 15, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2023, a true and correct copy of the foregoing Brief of Appellee in the above-captioned matter was filed by sending this paper to the Court's electronic filing system (EFS) website pursuant to Pa.R.C.P. 205.4(g) and Phila. Civil Rule *205.4(f), and by virtue of automatic electronic service by the Court to all parties, who have entered their appearance on the Court's electronic docket, and by email to:

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Date: February 15, 2023

Submitted by: Paula Knudsen Burke

Signature: *Paula Knudsen Burke*

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