



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
DEREK MITCH AND <i>MUCKROCK NEWS</i>,	:
Requester	:
	:
v.	:
	:
	:
PHILADELPHIA POLICE	:
DEPARTMENT,	:
Respondent	:

Docket No: AP 2016-1175

INTRODUCTION

Derek Mitch and *MuckRock News* (“Requester”) submitted a request (“Request”) to the Philadelphia Police Department (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records relating to government vehicles carrying Google stickers. The Department partially denied the Request, arguing, among other reasons, that a withheld record reflects the internal, predecisional deliberations of the Department. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part**, and the Department is required to take further action as directed.

FACTUAL BACKGROUND

On May 17, 2016, the Request was filed, seeking:

1. All proposal and approval documentation for government vehicles carrying Google stickers or branding.

2. All e-mails sent, received or otherwise maintained by the Philadelphia Police Department relating to, concerning or about government vehicles carrying Google stickers or branding, from January 2012 to the date of this request.

On May 24, 2016, the Department invoked a thirty-day extension to respond to the Request.¹ *See* 65 P.S. § 67.902. On July 5, 2016, the Department partially denied the Request, claiming that no responsive records exist with respect to Item 1. The Department provided one record responsive to Item 2, and withheld another record, on the basis that it reflected the internal, predecisional deliberations of the Department. 65 P.S. § 67.708(b)(10)(i)(A).

On July 11, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On July 29, 2016, the Department submitted a position statement reiterating its grounds for denial.³ The Department claims that the Requester has waived his appeal with respect to Item 1, as he fails to state any grounds for appeal. *See* 65 P.S. § 67.1101. Additionally, the Department claims that it has no records that are responsive to Item 1 in its possession, custody or control. Regarding Item 2, the Department claims that the withheld e-mail chain is not a public record because it is exempt from disclosure as it reflects internal, predecisional deliberations between the Department and two other City agencies. 65 P.S. § 67.708(b)(10)(i)(A). In support of its position, the Department submitted the affidavit of

¹ On June 21, 2016 and June 29, 2016, the Requester granted the Department two additional extensions of time to respond to the Request. 65 P.S. § 67.902(b)(2).

² By OOR Order issued July 11, 2016, the Requester was required to file a complete copy of the Department's response. On July 19, 2016, the Requester complied with the OOR's Order.

³ The Department requested, and was granted, an extension of time to file its submission until July 29, 2016. *See* 65 P.S. § 67.1102(b)(3) (in ruling on procedural matters, the appeals officer shall rule on the bases of fairness, justice and the expeditious resolution of the dispute). The Requester granted a corresponding extension of seven (7) days to the OOR for the issuance of a Final Determination. *See* 65 P.S. § 67.1101(a)(1).

Lieutenant Edward Egenlauf, Open Records Officer for the City of Philadelphia Police Department.

On August 12, 2016, after securing an extension of time from the Requester to issue a final determination, 65 P.S. § 67.1101(b)(1), the OOR ordered the Department to provide unredacted copies of the withheld record for an *in camera* review. The Department provided the records on August 22, 2016, and the OOR conducted an *in camera* review of these records.

The Requester did not submit any evidence on appeal.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct.

2011). Here, the parties did not request a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Likewise, “[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. **The Requester’s challenge to Item 1 has not been waived.**

A proper RTKL appeal must include the following: a copy of the Request; the agency's response, if any; a statement addressing why the record is a public record; and a statement

addressing all grounds cited by the agency for denial of access. *See* OOR Interim Guidelines, Section III(B)(1); 65 P.S. § 67.1101(a). The Department claims that the Requester has waived any challenge to Item 1 of the response because the appeal only addresses the issue of the records withheld pursuant to Section 708(b)(10)(i)(A) of the RTKL.

In the appeal letter, the Requester recites all the reasons the Department presented for denial. He then goes on to assert that the “documents sought are public records under the Right-to-Know Act” as they are held by a local agency and claims that the Department has not sustained its burden of proving that the documents are exempt under Section 708 of the RTKL. The language employed by Requester is sufficient to satisfy Section 1101(a). *See Barnett v. Pa. Dep’t of Public Welfare*, 71 A.3d 399, 406 (Pa. Commw. Ct. 2013) (holding that a general statement that records are public and not subject to exemption is sufficient to meet the requirements of Section 1101(a)(1)).

2. **The Department has established that records responsive to Item 1 do not exist in the agency’s possession, custody or control.**

On July 29, 2016, the Department submitted a position statement and the affidavit of Lt. Edward Egenlauf, Open Records Officer for the Department. Lt. Egenlauf attests that a search was conducted and that based upon this search, he determined that the records sought under Item 1 of the Request do not exist in the Department’s possession, custody or control. The Requester did not submit any evidence to contradict the Department’s affidavit.

Under the RTKL, an affidavit may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith or that the records do, in fact, exist, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374,

382-83 (Pa. Commw. Ct. 2014) (citing *Scolforo*, 65 A.3d at 1103). Based on the evidence provided, the Department has met its burden of proof that it does not possess the proposal and approval documentation for government vehicles carrying Google stickers or branding.

3. **The Department has established that portions of the withheld e-mail chain are exempt from disclosure as internal, predecisional deliberations.**

The Department determined that two (2) e-mail chains are the only records responsive to Item 2. One e-mail chain was provided to the Requester, and the other was withheld based on the assertion that it is exempt under Section 708(b)(10)(i)(A) of the RTKL, because it reflects the internal, predecisional deliberations of the Department and two other local agencies: the Office of Fleet Management (“OMF”) and the Philadelphia Mayor’s Office.

Section 708(b)(10) exempts from public disclosure records reflecting:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). An agency must show three elements to establish this exemption: (1) the deliberations reflected are internal to the agency; (2) the deliberations reflected are predecisional, *i.e.*, before a decision on an action, and (3) the contents are deliberative in character, *i.e.*, pertaining to proposed action or policy-making. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011); *Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *Sansoni v. Pa. Hous. Fin. Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *Kyle v. Pa. Dep’t of Cmty. and Econ. Dev.*, OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310.

In the instant matter, Lt. Egenlauf attests that upon his search of the Department records, he found two (2) e-mail chains responsive to the Request. Both e-mail chains pertained to requests for information from a media requester, Dustin Slaughter, who sought “information as to whether [the Department] or OFM has any arrangements with Google for mapping/street view services.”⁴ Regarding the first element of the test, Lt. Egenlauf states that the e-mails sought by the Requester were transmitted between the Department, the OFM and the Mayor’s Office, all local agencies, 65 P.S. § 67.102, for the purpose of determining “how to process and respond to the Slaughter requests.” Lt. Egenlauf states that the e-mails were solely shared between the Department, OFM and the Mayor’s Office without the intent to be shared with another person or entity outside of the City. The Requester has not presented evidence to contradict Lt. Egenlauf’s affidavit.

Section 708(b)(10) also requires a record to be deliberative in character: it must make recommendations or express opinion on legal or policy matters and is not be purely factual in nature. *Kaplin*, 19 A.3d at 1214. In order to demonstrate that the withheld documents are deliberative in character, an agency must “submit evidence of specific facts showing how the information relates to a deliberation of a particular decision.” *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 397 (Pa. Commw. Ct. 2012).

In his affidavit, Lt. Egenlauf attests that the e-mail discussions are also deliberative and predecisional to any conclusion as to how to respond to the Slaughter Requests, in that no decision was reached regarding how to respond to them. According to Lt. Egenlauf, the discussions were for the purpose of deciding how to process and respond to the Slaughter Requests. Regarding the “predecisional” element, he attests that the three agencies considered options with regard to acting on the requests for information “without reaching an ultimate

⁴ The e-mails are referred to by the Department as the “Slaughter Requests.”

decision or conclusion....” Finally, Lt. Egenlauf affirms that there is no other information in the e-mails that does not constitute deliberations of how to process and respond to the Slaughter Requests.

In addition, the OOR conducted an *in camera* review of the records alleged to be subject to the internal, predecisional deliberation exemption found in Section 708(b)(10).⁵

Based upon the OOR’s *in camera* review of the records and the evidence presented, the Department has established that the following portions of the e-mail chains should be withheld as exempt under Section 708(b)(10) of the RTKL, as they represent internal, predecisional deliberations of the Department in consideration of how to respond to the Slaughter request:

- Bates No. 0001, e-mails dated 5/11/16 at 12:29 p.m. and 1:20 p.m.
- Bates No. 0004, e-mail dated 5/11/16 at 12:30 p.m. only

However, the remainder of the e-mails are not deliberative in nature. To establish that records are deliberative, an agency must show that the information relates to the deliberation of a particular decision. *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 378-88 (Pa. Commw. Ct. 2014). The term “deliberation” is generally defined as “[t]he act of carefully considering issues and options before making a decision or taking some action....” BLACK’S LAW DICTIONARY 492 (9th ed. 2009); *see also Heintzelman v. Pa. Dep’t of Cmty. & Econ. Dev.*, OOR Dkt. AP 2014-0061, 2014 PA O.O.R.D. LEXIS 254, *aff’d* No. 512 C.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 644 (Pa. Commw. Ct. 2014). While Lt. Egenlauf attests that there is no other information in the e-mails that is not deliberative in nature, a review of the records demonstrates that some non-deliberative and factual information is included, such as the mere

⁵ Section V(E)(13) of the OOR Procedural Guidelines provides that “[r]eferences to specific records submitted for in camera inspection, or the contents of such records, in the Final Determination will be ... by reference to generic descriptions or characterizations as set forth in the in camera inspection index.” As such, the OOR’s written analysis is constrained to generic descriptions of the withheld records.

transmission and/or forwarding of attachments to other personnel. Accordingly, the following records (or parts of records) are not deliberative and are subject to access:

- Bates No. 0001, e-mail dated 5/11/16 at 1:15 p.m. and 12:21 p.m. only.
- Bates No. 0002
- Bates No. 0003
- Bates No. 0004, e-mail dated 5/11/16 at 12:35 p.m. only.
- Bates No. 0005, e-mails dated 5/11/16 at 12:14 p.m. and 12:21 p.m. only.⁶

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the Department is required to provide the Requester with the responsive records, subject to the redaction of Bates No. 0001 (e-mails dated 5/11/16 at 12:29 p.m. and 1:20 p.m.) and Bates No. 0004 (e-mail dated 5/11/16 at 12:30 p.m. only). This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Philadelphia County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁷ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

⁶ The Department included in the *in camera* records additional records responsive to the Slaughter Requests and provided copies to the Requester (Bates No. 0006). However, the records were not considered in the disposition of this appeal as they are not responsive to the present Request.

⁷ See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: September 7, 2016

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Derek Mitch (via e-mail only);
Russell Crotts, Esq. (via e-mail only);
Lieutenant Edward Egenlauf (via e-mail only)