



Department of Homeland Security (including Immigration and Customs Enforcement) between December 6, 2015 and April 20, 2016 relating to:

- a. The renewal, nonrenewal, revocation, or expiration of the license of the Berks County Residential Center [“BCRC”]; or
- b. The continued operation or closure of the [BCRC] after the February 2016 expiration of its former operating license.

On May 27, 2016, the County partially denied the Request, withholding e-mails the County asserts are exempt from disclosure because they reflect the internal, predecisional deliberations of the County. *See* 65 P.S. § 67.708(b)(10)(i)(A).

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

On June 21, 2016, the County submitted a position statement along with an exemption log and the sworn attestation of Maryjo Gibson, Open Records Officer for the County, who attests that the withheld records are recommendations and deliberations of the County. On August 10, 2016, following the Requester’s agreement to an extension of time to issue the Final Determination in this matter, the OOR directed the County to submit the withheld records for *in camera* review. On August 19, 2016, the County submitted the records, along with an exemption log, and the OOR performed an *in camera* review.

On September 9, 2016, at the request of the OOR, the County submitted the supplemental sworn attestation of Diane Edwards, Executive Director of the BCRC, who attests that the BCRC is contracted with the federal government pursuant to the Intergovernmental Service Agreement to provide a program that houses illegal immigrants in the custody of the Department of Homeland Security Immigration and Customs Enforcement (“ICE”).

## 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 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, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The County 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). 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)).

The County withheld responsive e-mails, arguing that they reflect the County’s internal, predecisional deliberations. Section 708(b)(10)(i)(A) of the RTKL exempts from 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). To withhold a record under Section 708(b)(10)(i)(A), an agency must show: 1) the deliberations reflected are internal to the agency, including representatives; 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 a proposed action. *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. Auth.*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *Kyle v. Pa. Dep’t of Cmty. & Econ. Dev.*,

OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310. Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 385-386 (Pa. Commw. Ct. 2014).

The OOR conducted an *in camera* review of the records claimed to be exempt under Section 708(b)(10). The withheld e-mails are exchanges between representatives of the County and ICE. Ms. Edwards attests that “[t]he ... BCRC is contracted with the [f]ederal [g]overnment pursuant to the Intergovernmental Service Agreement ... to provide a program to illegal immigrants under the custody of ... ICE.” Under the RTKL, an attestation made under the penalty of perjury may serve as sufficient evidentiary support to sustain an agency’s burden of proof. *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 competent evidence that the County acted in bad faith, “the averments in [the attestation] 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 *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the County has established that it contracts with ICE to run the BCRC and that the withheld e-mails are between officials of the County and ICE. Communications with a contractor to perform services for an agency are internal to the agency under Section 708(b)(10)(i)(A). *See Frey v. Del. Valley Reg. Planning Comm.*, OOR Dkt. AP 2011-1175, 2011 PA. O.O.R.D. LEXIS 974. Therefore, because the Request specifically seeks e-mails between officials of the County and ICE, the e-mails are internal to the County. *See Kaplin*, 19 A.3d at 1216.

In addition to being internal to the agency, the County must also establish that the withheld records are predecisional and deliberative in nature. In order for a record to be deliberative in character, it must make recommendations or express opinions on legal or policy matters and not be purely factual in nature. Furthermore, 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. In *McGowan v. Pa. Dep’t of Env’tl. Prot.*, an agency’s affidavit specifically detailed the manner in which the withheld documents related to that agency’s contemplation of a future course of agency action. 103 A.3d 374 (Pa. Commw. Ct. 2014). Here, the County has submitted evidence demonstrating that the withheld records are predecisional and deliberative in nature. In particular, Ms. Gibson attests the following:

11. The [r]ecords withheld and identified in the attached privilege log set forth the [County’s] internal discussions, recommendations and deliberations regarding a contemplated action concerning the [a]gency’s facility and its operation of same pursuant to the License Agreement with the federal government in light of the actions of DHS with regard to the license of BCRC.

12. Further, the records withheld set forth BCRC and ICE’s discussions, recommendations and deliberations regarding the further management and operation of the Residential Center pending DHS’s purported revocation of the license including applicability of federal and state statutes regarding same[.]

Based on the evidence provided, as well as the OOR’s *in camera* review, the County has demonstrated that the following e-mails are internal to the County (between County officials and ICE officials), pertain to a proposed action (operation of the BCRC in light of actions regarding its license), and reflect deliberations (discussions and recommendations for the management and operation of the BCRC pending revocation of its license): Bates no. 001 (e-mail dated 1/4/2016 at 2:44:13 P.M. only), Bates nos. 005 – 006 (e-mail dated 1/4/2016 at 2:44:13 P.M. only), Bates nos. 007 - 008. Therefore, the County has met its burden of proving that the foregoing records

are exempt from disclosure. *See* 65 P.S. § 67.708(a)(1). The balance of the withheld records are purely factual in nature and are required to be disclosed.

### CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part** and **denied in part**, and the County is required to provide all responsive records, with the exception of Bates no. 001 (e-mail dated 1/4/2016 at 2:44:13 P.M. only), Bates nos. 005 – 006 (e-mail dated 1/4/2016 at 2:44:13 P.M. only), and Bates nos. 007 – 008, within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing of this Final Determination, any party may appeal to the Berks 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 according to court rules 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.<sup>1</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: September 12, 2016**

/s/ Kathleen A. Higgins

APPEALS OFFICER  
KATHLEEN A. HIGGINS, ESQ.

Sent to: Caitlin Barry (via e-mail only);  
Maryjo Gibson (via e-mail only)

---

<sup>1</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).