



... [A]ny and all other memoranda, policy statements, and minutes of meetings, correspondence, and any other documents, generated by any person or organization, which pertain to [the Department's] decision to suspend work during the summer months [of] 2016 on the repair on the bridge across where Tobyhanna Creek flows into Pocono Lake in Tobyhanna Township.

On June 6, 2016, Department invoked a thirty-day extension to respond to the Request. *See* 65 P.S. § 67.902(b). On July 6, 2016, Department partially denied the Request, providing a copy of an e-mail along with a list of attachments, but denying access to other documents, stating they reflect the Department's internal, predecisional deliberations. 65 P.S. § 67.708(b)(10)(i)(A).

On July 12, 2016, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure. 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 25, 2016, the Department submitted a position statement, reiterating its grounds for denial. In support of this position statement, the Department submitted the affidavit of Kerry Cox, Project Manager for the Department. In his affidavit, Mr. Cox attests that the withheld communications discuss the Department's course of action working on a bridge project, and that such communications were internal, predecisional and deliberative.

On July 27, 2016, the OOR responded to Department's submission, seeking clarification as to the nature of the parties involved in the communications sought by the Requester, and how the records at issue could be internal to the Department. On July 28, 2016, Department responded to the OOR, offering its interpretation as to the scope of the Request and clarifying the number and nature of documents at issue. On August 3, 2016, the Requester responded to Department's submission, disputing its interpretation of the Request and offering additional argument. The same day, the Department submitted a second position statement, in which it

disclosed that it had contacted the Requester to clarify the issues on appeal and conducted an expanded search, identifying two more responsive records, one of which was disclosed to the Requester and another deemed exempt. In support of this position statement, the Department submitted two more affidavits, one of Christina Oswald, the RTKL Coordinator for District 5-0 and one of Kenneth Kutchinsky, the Right-of-Way Administrator for District 5-0. In her affidavit, Ms. Oswald attests that the Department possesses no records responsive to item 1 of the Request, except those which have been disclosed or identified. In his affidavit, Mr. Kutchinsky identifies two additional responsive records, a letter and a document in a contractor's database, the latter of which he attests is exempt under Section 708(b)(10) of the RTKL.

On August 4, 2016, the OOR asked the Requester for an extension of time in order to conduct a review of the records *in camera*. The same day, the Requester consented to a sixty-day extension of time and the OOR ordered the Department to produce the records for *in camera* review by August 17, 2016. The OOR subsequently conducted an *in camera* review of these records.

### **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 OOR conducted an *in camera* review of the withheld records; therefore, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth 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 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 Department’s interpretation of the Request is reasonable**

The Department argues that at issue in this case are a series of memoranda, e-mails and other documents that were withheld by the Department in response to the Request. These consist of the items submitted for the OOR’s *in camera* review, identified by Bates number, along with a letter deemed responsive to the Request after a consultation between the Department and Requester. The Requester disputes the Department’s interpretation of the Request, noting firstly that the Request seeks items (such as meeting minutes) that cannot be exempt under Section 708(b)(10), and also arguing that a list of permits and records that the Department attached to its response are likewise responsive. Meanwhile, the Department attests that the list of attachments provided in its response are unrelated to the Request because they do not relate to the decision to close the bridge.

While an agency may interpret the meaning of a request for records, that interpretation must be reasonable. *See Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513; *Signature Info Solutions, Inc. v. City of Warren*, OOR Dkt. AP 2012-0433, 2012 PA O.O.R.D. LEXIS 557. The Department attests that some of the records listed in its response consist of permits and memoranda that neither document communications with the Pocono Lake Preserve nor relate to the Department’s decision to suspend work on the bridge project. While these records generally relate to the bridge project, they are not correspondence between the

Department and the Pocono Lake Reserve or internal communications relating to the decision to stop work on the bridge. Therefore, the Department's interpretation of the Request is reasonable, and those records are not responsive.

## **2. Some records do not exist**

The Request seeks, in part, items such as "policy statements" and "meetings of minutes." In response, the Department argues that it does not possess such records. In support of this position, the Department submitted the affidavits of Christina Oswald and Kenneth Kutchinsky. These individuals attest that they performed a search and contacted relevant personnel and third-party contractors and, with the exception of the documents listed in this Final Determination, discovered no responsive records.

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 requested records do, in fact, exist, "the averments in [the affidavits] 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)). Based on the evidence provided, the Department has met its burden of proving that it does not possess additional responsive records.

## **3. Some records were provided**

On appeal, the Department provided the Requester with the copy of a letter deemed responsive to the Request after clarification. Therefore, this appeal is dismissed as moot as to that record.

#### **4. Certain records reflect the Department's internal, predecisional deliberations**

In response to the appeal, upon discussion with the Requester, the Department identified seven items that it asserts are internal, predecisional, deliberative records under Section 708(b)(10), and which are identified by Bates numbers 001 through 028. 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).

In support of its claim, the Department submitted several affidavits, which establish that the records withheld were all internal to the Department or to its contractors, that they were all created prior to the Department's decision to delay work on the bridge project and that all of the

records pertain to proposed actions to be taken on the project. In order to determine whether any of the withheld information was purely factual in nature, the OOR conducted an *in camera* review of the e-mails claimed to be exempt under Section 708(b)(10). See *Office of the Governor v. Davis*, 122 A.3d 1185, 1194 (Pa. Commw. Ct. 2015) (holding that an *in camera* review may serve as sufficient evidence). From that review, the OOR has determined that the following items are exempt in their entirety:

- Bates no. 001, which consists of impressions and opinions of an interview with a Public Works Director, and recommendations regarding routes.
- Bates no. 002-006, consisting of a Department contractor's project updates and recommendations regarding proposals and settlements.
- Bates no. 007-010, which is an e-mail dated 6/24/2015, consisting of a proposed schedule.
- Bates no. 011-026, containing the diagrams showing plans for traffic control under consideration by the Department.

These records are internal, predecisional and deliberative, and no purely factual information exists in any severable form therein. As such, these items are exempt from disclosure.

#### **5. Certain records are not exempt**

In addition to being internal to the agency and predecisional, the Department must also establish that the withheld records are 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. If a document

contains both exempt and purely factual information, the exempt information must be redacted if the factual information is otherwise severable. *Id.* at 835-836.

Upon review of the records, the record numbered as Bates no. 027, consisting of a summary regarding historic floods and high-water marks in the region, is entirely factual rather than deliberative in nature. While this summary relates to the Department's plans regarding the bridge project, all of the material contained within is purely factual in nature, and, therefore, is not exempt from disclosure.

The final item, which is numbered as Bates no. 028, consists of a memorandum discussing past high water events. This item consists of an initial paragraph and a series of bullet points. The initial paragraph, describing the contacts and methodology, is exempt under Section 708(b)(10), as is the third sentence of the fifth bullet point and the entirety of the sixth bullet point, which contain recommendations and opinions. The remainder of the bullet points are not exempt, as they consist only of descriptions of past flooding events. Because this item contains both exempt and non-exempt information, the item must be provided to the Requester in redacted form. *See Id.*

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part, denied in part, and dismissed as moot in part**, and the Department is required to provide the Requester with an unredacted copy of the item numbered Bates no. 027 and a redacted copy of Bates no. 028 within thirty days. 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 Commonwealth Court. 65 P.S. § 67.1301(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.<sup>1</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: October 14, 2016**

*/s/ Jordan Davis*

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