



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

:

**DAVID ROTENSTEIN,
Requester**

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:

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v.

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Docket No: AP 2022-2272

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**PENNSYLVANIA HISTORICAL AND
MUSEUM COMMISSION,
Respondent**

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FACTUAL BACKGROUND

On September 12, 2022, David Rotenstein (“Requester”) filed a request (“Request”) with the Pennsylvania Historical and Museum Commission (“Commission”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

All records (application form, supporting documentation, correspondence, and agency files) related to the request for a historical marker for the Central Amusement Park baseball stadium, Pittsburgh, Allegheny County [] submitted in 2011 by Dr. McDonald Williams.

On September 19, 2022, the Commission provided a letter that was sent to Dr. Williams, but denied access to other records, arguing that they contain internal, predecisional deliberations, *see* 65 P.S. § 67.708(b)(10)(i)(A), and that some records either never existed or no longer exist.

On September 26, 2022, in response to the Requester’s questions, the Commission explained that its record retention schedule dictates that historical marker nominations that were not approved were retained for three years and then transferred to the State Records Center for an

additional seven years prior to disposal. The hardcopy nomination was retained for three years and then disposed of in 2015.

On September 28, 2022, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging only the denial of internal, predecisional and deliberative material, and stating grounds for disclosure.¹ Specifically, the Requester argues that the deliberations are the only known surviving record of the application, contain important information, and are more than a decade old. The OOR invited both parties to supplement the record and directed the Commission to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On October 6, 2022, the Commission submitted a position statement, arguing that the Requester has provided no significant need or reason to overcome the predecisional exemption.

LEGAL ANALYSIS

The Commission argues that records reflect its internal, predecisional deliberations. Section 708(b)(10)(i)(A) of the RTKL exempts from public disclosure a record that reflects:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, ... including predecisional deliberations relating to a budget recommendation, ... 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). In order for this exemption to apply, three elements must be satisfied: 1) “[t]he records must ... be ‘internal’ to a governmental agency”; 2) the deliberations reflected must be predecisional, *i.e.*, before a decision on an action; and 3) the contents must be

¹ Section 507 of the RTKL provides that “[n]othing in this act shall be construed to modify, rescind or supersede any record retention policy or disposition schedule of an agency established pursuant to law, regulation, policy or other directive.” 65 P.S. § 67.507. Regardless, the Requester does not challenge the Commission’s assertion that responsive records were destroyed pursuant to the Commission’s record disposition schedule. As a result, the Requester has waived any objections to this assertion. *See Pa. Dep’t of Corr. v. Off. of Open Records*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

deliberative in character, *i.e.*, pertaining to proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

To be deliberative in nature, a record must make recommendations or express opinions on legal or policy matters and cannot be purely factual in nature. *Kaplin*, 19 A.3d at 1214. 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). In addition, to prove that a record is exempt under this section, an agency must explain how the information withheld reflects or shows the deliberative process in which an agency engages during its decision-making. *See Twp. of Worcester v. Off. of Open Records*, 129 A.3d 44, 61 (Pa. Commw. Ct. 2016).

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, 382-83 (Pa. Commw. Ct. 2014). However, factual material can still qualify as deliberative information if its “disclosure would so expose the deliberative process within an agency that it must be deemed excepted”; or in other words, when disclosure of the factual material “would be tantamount to the publication of the [agency’s] evaluation and analysis.” *Id.* at 387-88 (citing *Trentadue v. Integrity Commc’n*, 501 F.3d 1215, 1228-29 (10th Cir. 2007)).

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)).

Here, the Commission does not describe the records; it only states that “some records” were withheld because they contain internal, predecisional deliberations. *See Scolforo v. Off. of the Governor*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) (“Affidavits that are conclusory or merely parrot the exemption do not suffice”); *W. Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) (“The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions”) (internal citation omitted).

Furthermore, the Commission provides no supporting evidence.² A sworn affidavit or statement 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. Off. of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). However, an “unsworn position statement does not constitute evidence. Position statements are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from

² The Commission suggests that the burden is on the Requester to provide a reason for disclosure that overcomes the internal, predecisional and deliberative exemption. While this was the paradigm under Pennsylvania’s former Right-to-Know Act, 65 P.S. §§ 66.1-66.9, under the current RTKL, which provides significantly broader access to records, a record in the possession of an agency is presumed to be public, and the burden of proving otherwise lies with the agency. *See generally Bowling v. Off. of Open Records*, 621 Pa. 133 (Pa. 2013); 65 P.S. § 67.305(a).

the *evidentiary* record.” *Off. of the Governor v. Davis*, 122 A.3d 1185, 1193-94 (Pa. Commw. 2015) (*en banc*) (emphasis in original). Accordingly, the Commission has failed to meet its burden of proving that the records are internal, predecisional and deliberative. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted**, and the Commission is required to produce all records that exist 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 28, 2022

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent via email to: David Rotenstein and Cindy Bendroth

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