



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:
	:
<b>MAYA K. VAN ROSSUM AND</b>	:
<b>DELAWARE RIVERKEEPER NETWORK,</b>	:
<b>Requester</b>	:
	:
<b>v.</b>	: <b>Docket No: AP 2022-1985</b>
	:
<b>CITY OF PHILADELPHIA WATER</b>	:
<b>DEPARTMENT,</b>	:
<b>Respondent</b>	:

### FACTUAL BACKGROUND

On July 29, 2022, Maya van Rossum and the Delaware Riverkeeper Network (collectively “Requester”) submitted a request (“Request”) to the City of Philadelphia Water Department (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

[A]ll records...regarding vessel strikes, hazards, collisions or near-collisions, or incidents of any kind regarding recreational uses of the Delaware River—including, but not limited to, kayaks, canoes, recreational boats, jet skis, swimmers, fishers, and waders—and maritime fishing traffic including, but not limited to, those from barges, tanker vessels, and container ships.

This request does not seek any preliminary or final drafts of the forthcoming Delaware River Safety Report. Instead, I seek specifically any data created, collected, transmitted, shared, and/or analyzed by [the Department] and any of the following entities to create the Delaware River Safety Report: the Maritime Exchange for the Delaware River and Bay, the Delaware River Port Authority, the Philadelphia Port Authority, the United States Coast Guard, the New Jersey State Police’s Marine Services Bureau, and relevant state agencies of Pennsylvania, New Jersey, and Delaware.

I specifically request any records responsive to this request from January 01, 2012, to the present date.

On August 8, 2022, the Department denied the Request, arguing that no responsive records exist.

On August 29, 2022, the Requesters appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.<sup>1</sup> 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. 65 P.S. § 67.1101(c).

On September 22, 2022, the Requesters re-submitted their argument in support of the appeal, arguing that the Department did not perform a good faith search for responsive records and failed to provide sufficient evidence to demonstrate the nonexistence of responsive records (“Submission I”). The Requesters sought *in camera* review if necessary.

On September 22, 2022, the Department submitted a position statement asserting that the appeal is untimely and arguing that records are exempt internal predecisional deliberations, 65 P.S. § 67.708(b)(10), and noncriminal investigative records, 65 P.S. § 67.708(b)(17). The Department also argues that it does not have permission to produce records provided by the United State Coast Guard (“USCG”). The Department also notified the OOR that it had notified the USCG of the appeal and sought a stay in this matter to permit the USCG to participate in the appeal. In support of its position, the Department submitted the attestation made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities, of Kelly Anderson, the Watershed Protection Program Manager for the Department (“Anderson Attestation I”).

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<sup>1</sup> The Requester granted the OOR a 30-day extension to issue a final determination. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

On September 22, 2022, the Requester submitted an automated email from the Department's Open Records Officer stating that she was out of the office and returning on August 1, 2022, and any RTK request will not be deemed received until read upon her return. As such, the Request was received no earlier than August 1, 2022, and the final response and appeal are timely. *See* 65 P.S. § 67.901; *see also* *Commonwealth v. Donahue*, 98 A.3d 1223 (Pa. Commw. Ct. 2014).

On October 7, 2022, the Requester sought permission to file a supplemental response. On October 11, 2022, the OOR agreed to permit a supplemental filing provided that the Department would be able to respond, and the Requester would agree to extend the final determination issuance date. *See* 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”); *see also* 65 P.S. § 67.1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

On October 13, 2022, the Requester filed their supplemental response (“Submission II”) and granted the necessary extensions.

On October 28, 2022, the Department filed a supplemental response and attestation from Kelly Anderson (“Anderson Attestation II”), regarding the USCG records at issue. Again, the Department sought a stay in order to permit the USCG to participate, noting that it had contacted the USCG. The RTKL permits a third party with a direct interest in the record subject to an appeal to participate on appeal. 65 P.S. § 67.1101(c). The RTKL states that:

- (1) A person other than the agency or requester with a direct interest in the record subject to an appeal under this section may, within 15 days following receipt of actual knowledge of the appeal but no later than the date the appeals officer issues an order, file a written request to provide information or to appear before the

appeals officer or to file information in support of the requester's or agency's position.

*Id.* The request for a stay is denied, as the USCG was notified as early as September 22, 2022 and has not filed a Request to Participate.

On October 28, 2022, the Requester filed a supplemental submission ("Submission III") in response to the Department's argument regarding the USCG records.

### LEGAL ANALYSIS

The Department is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Department is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 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)). While the Requester suggested *in camera* review of the withheld records, the OOR has the information and evidence before it to properly adjudicate the matter. Therefore, the request for *in camera* review is denied.

The Anderson Attestation I identifies three data sets in the possession of its contractor that are responsive to the Request.<sup>2</sup> Anderson Attestation I, ¶ 6. The three datasets at issue are (a) a

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<sup>2</sup> Under the RTKL, a sworn affidavit or statement made under the penalty of perjury 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 Authority has 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)).

spreadsheet collecting news reports of drowning incidents in the Delaware River, (b) boating accident analyses provided by the Pennsylvania Fish & Boat Commission (“Commission”) and (c) case and investigative reports provided by the USCG pursuant to 14 U.S.C. § 701. *Id.*

**1. The Department has not demonstrated that the requested records are internal, predecisional deliberations**

The Department asserts that all three datasets are exempt internal predecisional deliberations, 65 P.S. § 67.708(b)(10). Section 708(b)(10)(i)(A) 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, employees or officials of another agency, 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). 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).

The Requester argues that because the datasets have been distributed between the Department and a third-party consultant, they are no longer internal to the agency. The Anderson Attestation I acknowledges that “[t]he three data sets have been distributed exclusively among Department employees and the contractor....” Anderson I Attestation, ¶ 9.

In *Chester Water Auth. v. Pa. Dep’t of Cmty. & Econ. Dev.* the Pennsylvania Supreme Court held that “Section 708(b)(10)(i)(A) does not serve to insulate communications exchanged

between a Commonwealth agency and a private consultant from the [RTKL's] general requirement for openness.” 249 A.3d 1106, 1114 (Pa. 2021).

In *Shannon v. Pa. Dep't of Educ.*, the OOR found that, while communications from an agency's contractor were not internal, a report generated by the consultant for the agency's exclusive use that was not shared with anyone outside the agency qualified as internal. OOR Dkt. AP 2021-1351, 2021 PA O.O.R.D. 1797. The OOR noted that this is particularly the case when the records constitute “research, memos or other documents used in the predecisional deliberations.” *Id.* (quoting 65 P.S. § 67.708(b)(10)(i)(A)); *see also Wolfson v. Allegheny County*, OOR Dkt. AP 2021-2372, 2021 PA O.O.R.D. 2529 (finding that a master spreadsheet of proposals that was internally compiled but discussed with an outside accounting firm to ensure eligibility qualified as internal).

Furthermore, the “origination of records from outside an agency does not preclude application” of Section 708(b)(10)(i)(A). *Office of the Governor v. Davis*, 122 A.3d 1185, 1193 (Pa. Commw. Ct. 2015) (citing *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81 (Pa. Commw. Ct. 2013) (holding that records originating with Penn State University, which is not an agency under the RTKL, may become records of an agency when records are used in agency decision-making)).

Here, the datasets are not *communications* between the agency and a consultant as contemplated by the Supreme Court, but rather are materials that originated outside of the Department but are within its possession and are therefore internal.

Next, the datasets must be used for predecisional deliberations. 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 Envtl. 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). 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 Communication*, 501 F.3d 1215, 1228-29 (10th Cir. 2007)).

The Anderson Attestation I states:

9...The underlying study is still being drafted and final analyses regarding the safety of the Delaware River and related determinations on actions to improve safety of the river have not been completed.

10. Though the data sets may not be reproduced in the report, they are being maintained by the Department to assess river safety, inform future safety measures, and aid in the Department’s continued compliance with Clean Water Act obligations, of which the to-be-finalized report is a part.

In *Salvatore v. Newtown Borough*, OOR Dkt. AP 2021-0633, 2021 PA O.O.R.D. LEXIS 628, the OOR determined that a report commissioned by the Borough contained analyses, opinions and recommendation and was created for the purposes of evaluation and recommendation to the Borough. The OOR held that the report was an integral part of the deliberative process. Unlike *Salvatore*, the datasets at issue here were not commissioned by the Department and there is no evidence that the datasets themselves include any analysis, recommendations or opinions of the Department, rather, they are factual material underlying a yet to be published report. Similarly, in *McGowan*, the Commonwealth Court determined that a briefing memorandum summarizing

information could contain factual information severable from the internal, predecisional deliberations. 103 A.3d at 387. In this matter, there is no evidence of a summarization of information contained within the datasets, but rather the Department has identified only the datasets themselves at the responsive records. As such, the datasets are not deliberative and not subject to this exemption.

**2. The Department did not demonstrate that it performed a noncriminal investigation**

The Department asserts that the records provided by the Commission and USCG are noncriminal investigative records, 65 P.S. § 67.708(b)(17). Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation.” 65 P.S. § 67.708(b)(17). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep’t of Pub. Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

The Anderson Attestation I states:

7. The records provided by the Pennsylvania Fish & Boat Commission contain recapitulations of fatal boating incidents in the Delaware River and other bodies of water from 2000 to 2020, including the results of investigations into the contributing factors of the accidents and the victims’ causes of death.



8. The records provided by the Coast Guard consist of investigation summaries pertaining to casualty events in which debris and other factors in and around the Delaware River caused damage to vessels....

The OOR has generally held that an agency may not withhold records of another agency's investigation. *See Silver and the Pittsburgh Post-Gazette v. Plum Borough Sch. Dist.*, OOR Dkt. AP 2015-2737, 2016 PA O.O.R.D. LEXIS 60; *but see Murphy and PennLive et al. v. Office of the Governor*, OOR Dkt. AP 2017-2425, 2018 PA O.O.R.D. LEXIS 310 (noting that “records generated by the [Office of State Inspector General] as a result of noncriminal investigations commissioned by another Commonwealth agency are exempt from disclosure as to the [Office of State Inspector General] and the commissioning agency”) (citing *Diaz v. Pa. Dep’t of Cmty. & Econ. Dev.*, OOR Dkt. AP 2013-0089, 2013 PA O.O.R.D. LEXIS 150). Because the Department acknowledges that the records are the investigative records of other agencies and because there is no evidence that the Department commissioned or jointly participated in the investigations, it cannot claim the noncriminal investigative exemption over the records.<sup>3</sup>

**3. The Department has not proved that the records are exempt pursuant to USCG statutes**

Finally, the Department asserts that it is prohibited from distributing the USCG records without express permission, which it does not have. The Department explains that it originally requested the USCG records through a Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, request; however, the USCG provided the records pursuant to “the authority granted in 14 U.S.C. § 701 to cooperate with other government agencies upon an official request,” and not pursuant to FOIA. The records were provided with an accompanying memorandum stating that “[t]he 69 pages of responsive materials are being released to the Philadelphia Water Department for

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<sup>3</sup> While the Department notified the USCG, there is no evidence that the Department notified the Commission regarding the pendency of the appeal. *See* 65 P.S. § 67.1101(c).

purposes of public safety research. **You and your office are not authorized to distribute the attached materials any further without obtaining express permission by this office.**” See USCG Memo, ¶ 4 (emphasis in original).

While the RTKL yields to federal law, *see* 65 P.S. § 67.703 ([a] record in possession of a local agency is presumed public unless it is exempt under Section 708, protected by privilege, or exempt from disclosure under any other state or federal law or regulation), there is nothing in 14 U.S.C. §§ 701 *et seq.* that provides for confidentiality of records provided to other government agencies under this statute. Because there is no conflict with this statute and the USCG has not filed a Request to Participate and demonstrated that the records are investigative records under the USCG’s statute, the Department has not proven that the records are exempt from public disclosure under the RTKL. See 65 P.S. § 67.305; *Hamill and the Pittsburgh Post-Gazette v. Port Auth. of Allegheny Cnty.*, OOR Dkt. AP 2022-1201, 2022 PA O.O.R.D. LEXIS 1632.

### CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the Department is required to provide the three responsive datasets 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 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. 65 P.S. § 67.1303. 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>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: November 17, 2022**

*/s/ Erin Burlew*

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SENIOR APPEALS OFFICER  
ERIN BURLEW, ESQ.

Sent via email to: Kacy Manahan, Esq; Javier Soler, Esq.; Sheilah Louis, Kelly Anderson