

notes that he is “only attempting to look at the paperwork itself not someone[’]s judgement of the paper work.” 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 January 4, 2023, the Department submitted a position statement, reiterating its arguments and also noting that the employment application of an individual who is not hired by the agency is exempt, *see* 65 P.S. § 67.708(b)(7)(vi). In support, the Department provided a statement made under the penalty of unsworn falsification to authorities by Lisa M. Ludwig, District Human Resources Officer, Engineering District 2-0.

LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. 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 factfinder ... 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)).

1. The Requester’s employment application is exempt

The RTKL exempts “[t]he employment application of an individual who is not hired by the agency.” 65 P.S. § 67.708(b)(7)(vi). Although the RTKL does not define “employment application,” the OOR has found that material submitted by the applicant for consideration by the hiring agency falls under Section 708(b)(7)(iv), while extraneous material either not provided by

the applicant or not intended to be used in the hiring decision, does not. *Compare O'Brien v. City of Pittsburgh*, OOR Dkt. AP 2019-1694, 2019 PA O.O.R.D. LEXIS 1407 (finding that the results of a psychological evaluation were exempt); *with Ceasar v. North Huntingdon Twp. Police Dep't*, OOR Dkt. AP 2015-0503, 2015 PA O.O.R.D. LEXIS 522 (finding that the sign-in sheet at the front desk does not qualify for exemption); *see also Frable v. Pleasant Valley Sch. Dist.*, OOR Dkt. AP 2016-0683, 2016 PA O.O.R.D. LEXIS 876 (holding that clearances and letters expressing interest were exempt).

The Ludwig attestation affirms that the Requester's employment application was denied and that he has never been an employee of the Department. Ludwig Attestation at ¶¶ 5, 14-16. Further, the Ludwig attestation provides that the road test and background screening are part of the application. *Id.* at ¶ 17. Under the RTKL, an affidavit or statement made under 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. Off. 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, "the averments in the [attestation] should be accepted as true." *McGowan v. Pa. Dep't of Env't Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

As evidence establishes that the Requester was not hired by the Department and has never been a Department employee, his employment application is facially exempt. Further, just like the results of the psychological evaluation in *O'Brien*, the results of the road test and background screening fall under this exemption. Accordingly, the Department has met its burden of proving that the Requester's employment application, including the results of the road test and background screening, are exempt from disclosure under the RTKL. *See* 65 P.S. § 67.708(a)(1).

2. Materials associated with the application are internal, predecisional and deliberative

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

The 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 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. *Id.* 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)).

Here, the Ludwig attestation provides:

6. The employment application is weighed against the standards applicable to hiring criteria and requires professional judgment, or more precisely the rendering of professional recommendations and opinions.
7. When an application is received, it is reviewed; notes and other comments are articulated.
8. The notes and comments kept regarding his employment interview are internal to the Department, meaning that they have been shared with no person other than Department employees involved in the hiring decision-making process, and part of the predecisional deliberations with regard to the hiring decision.
- ...
17. The interview notes and comments ... contain the scoring criteria for the hiring decision, and are kept confidential and not shared with the applicant.
18. The scoring criteria for hiring changes based on the position that is open and the questions and criteria are not published or made available to the public in advance of an interview, which is vital to ensuring that we are able to evaluate candidates based on their skills and the answers they provide to spontaneous questions.

The Ludwig attestation establishes that the notes, comments, interview questions, and scoring criteria are maintained internally within the Department, reflect the Department’s decision-making process and precede the Department’s decision not to hire the Requester. As referenced *supra*, a statement made under the penalty of perjury constitutes sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. Accordingly, the Department has met its burden of proving that the materials associated with the application are exempt from disclosure under the RTKL. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **denied**, and the Department is not required to take any further action. 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.² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: February 17, 2023

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

Delivered via portal to: Terry Jordan, Adam Shanabrook, Victoria P. Edwards, Esq. and Jeffrey M. Spotts, Esq.

² See *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).