



**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>SID HAWACH,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2023-0308</b>
	:	
<b>NORTHAMPTON COUNTY DISTRICT</b>	:	
<b>ATTORNEY'S OFFICE,</b>	:	
<b>Respondent</b>	:	

**FACTUAL BACKGROUND**

On January 6, 2023, Sid Hawach ("Requester") submitted a request ("Request") to the Northampton County District Attorney's Office ("Office") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking, in relevant part:

Records of vacation time and personal time, hours, and days requested, granted, approved, and recorded for the first assistant district attorney, Richard Huntington Pepper, from January 1, 2020 through December 31, 2022.

On January 17, 2023, the Office invoked a thirty-day extension to respond. See 65 P.S. § 67.902(b). On February 6, 2023, the Office granted access to certain records, but partially denied the Request, asserting that the only record maintained by the Office showing vacation and personal time was a set of calendar books with handwritten notes that are exempt under Section 708(b)(12) of the RTKL. 65 P.S. § 67.708(b)(12). Official payroll records are maintained by the Northampton County payroll department.

On February 13, 2022, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial of the handwritten calendar notes specifically. The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On February 23, 2023, the Office submitted the verified statements of Bridget Murphy, the Office’s Open Records Officer, and Tina Queen, the Office Manager, who attest that the Office does not keep a regular record of leave and vacation usage, but that such records are kept by the Northampton County payroll department. Ms. Queen also attests that the only record in the Office’s keeping that might be responsive are handwritten calendar books where she notes leave requests prior to passing them on to the payroll department.

### **LEGAL ANALYSIS**

The Office 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 Office 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)).

The sole issue on appeal is whether the Office must produce pages from the Office Manager’s handwritten notebook that include notes regarding First Assistant District Attorney Pepper’s use of time off. The Office admits that pages from the notebook are responsive to the

Request, but argues that the notebook is exempt under Section 708(b)(12) of the RTKL. 65 P.S. § 67.708(b)(12).

Section 708(b)(12) of the RTKL exempts from disclosure “[n]otes and working papers prepared by or for a public official or agency employee used solely for that official’s or employee’s own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.” 65 P.S. § 67.708(b)(12). “‘Personal’ within this definition does not mean that it has to involve a public official’s personal affairs—a message slip that his wife called—because those types of documents are not covered by the RTKL, *Easton Area School District v. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012); it covers those documents necessary for that official that are ‘personal’ to that official in carrying out his public responsibilities.” *City of Phila. v. Phila. Inquirer*, 52 A.3d 456, 461 (Pa. Commw. Ct. 2012). Therefore, a record will only fall within the scope of the exemption when it relates to an official’s public responsibilities but is personal to that employee. *Smith ex rel. Smith Butz, LLC. v. Pa. Dep’t of Env’tl. Prot.*, 161 A.3d 1049, 1067 (Pa. Commw. Ct. 2017).

In support of the exemption, the Office submitted the verified statement of Attorney Murphy, who attests:

3. That search for the above [R]equest at once revealed that official records of ADA vacation and personal time taken (including that of First Assistant District Attorney Richard Pepper) are reported directly to Payroll by the [Office’s] Office Manager, and thus those official records are in the possession of Northampton County Payroll rather than the [Office], as the [Office] does not supervise the Payroll Department.

4. However, as AORO I continued in my search for any potentially responsive records.

[...]

6. With permission, I retrieved a collection of handwritten records from the possession of [the Office’s manager] and reviewed them for any entries even possibly relating to requests for vacation and personal time, hours, and days

requested, granted, and approved for the First Assistant District Attorney, Richard Huntington Pepper.

7. After a search of several hours, several potentially responsive handwritten notes (including literally anything that might be interpreted as containing the name “Rich” “Pepper” or “Richard”) in the calendar books kept by the [Office’s manager] were located and identified, and photocopies were made with extensive clearly non-responsive entries being redacted. It was readily apparent that the pages that contained handwritten entries possibly relating to the above [R]equest also contained, on the same pages, information that is both unrelated to the above request and unrelated information exempt under the RTK law.

8. This extraneous information, which includes information clearly wholly unrelated to First Assistant District Attorney Richard Pepper or indeed any of the above requests, includes information exempt under 65 P.S. 67.708(b)(5), exempt under 65 P.S.67.708(b)(1)(ii), and exempt under other law.

9. As my search for potential responsive documents continued, so did my search for relevant case law regarding proper processing of the above [R]equest.

10. Upon further examination of OOR cases interpreting RTK law against the context of the nature of these paper calendar books and the information provided by the [Office Manager] with relation to use of her paper calendar books, it became increasingly clear that even those potentially responsive handwritten notes in the calendar books kept by the [Office Manager] fell under the “working papers” exception of the RTK law:

[...]

Although the OOR originally interpreted this exemption as only protecting records that were “purely personal in use,” the OOR, in 2022, revised its interpretation because documents that are “purely personal” would not document a “transaction or activity of an agency,” and accordingly, would not be considered records. [...] As a result, the OOR clarified that this exemption “served to protect notes and working papers created by a public official or employee regarding agency-related business, but not for an ‘official’ function.” [] As these office manager calendar records are necessary for the employee to carry out their duties, but not be distributed outside of the individual’s office, they qualify under the “working papers” exception....

Additionally, the Office submitted the verified statement of Office Manager Queen, who attests that:

1. I serve as the Office Manager [for the Office] and my responsibilities include payroll, assigning files, attendance, office supplies, billing, manage ADAs and clerical staff on a day to day basis.
2. As part of these duties, I report official records of ADA vacation and personal time directly to Payroll by the Tuesday of each second week.
3. (With regard to that duty, the term ADA here specifically includes Assistant District Attorneys, Deputy District Attorneys, Chief Deputy District Attorneys, and the First Assistant District Attorney Richard Pepper).
4. Payroll therefore keeps the official records of ADA vacation and personal time; I do not print out and retain copies of those official entries once submitted.
5. However, I do have handwritten-only notes relating to this task kept in my physical paper calendar books for the years 2020, 2021, and 2022 kept by myself, in my own office.
6. These handwritten-only notes are necessary in order for me to accurately carry out my duties of reporting ADA vacation and personal time (I often make checkmarks in the books to remind myself I have completed a duty), but these handwritten notes are not the complete and final typed official records; those are directly reported to Payroll by myself and maintained by Payroll.
7. The RTK officer asked permission to retrieve my physical paper calendar books for the years 2020, 2021, and 2021 [sic] while conducting a RTK[L] search, and I gave her permission to retrieve them; however, my physical paper calendar books are otherwise kept in my office and are not distributed throughout the [O]ffice.
8. In addition, I do not make or allow for copies of the content of the physical paper calendar books I maintain [...]
9. The handwritten entries in my physical paper calendar books contain much information unrelated to ADA vacation and personal time, unrelated to the above [R]equest, and furthermore[,] the vast majority of the entries do not concern First Assistant Richard Pepper whatsoever.

Under the RTKL, a verification 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 competent evidence that the Office acted in bad faith, “the averments in [the verifications] 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)). Furthermore, an agency's verification showing that a good faith search for records was conducted is sufficient to prove that additional responsive records do not exist. *See Pa. Dep't of Health v. Mahon*, 2022 Pa. Commw. LEXIS 136 (Pa. Commw. Ct. 2022).

The notebooks sought in this appeal are records of the Office because they are kept and maintained by the Office Manager to assist her in her duties. The Office's verifications make it clear that the notes are kept exclusively for the convenience of the Office Manager in keeping track of her duties for the day and are not circulated to other employees or relied upon by the Office for an official purpose otherwise. *City of Phila.*, 52 A.3d at 461-62 (noting that there is a difference between "daily agendas, ... created for the express purpose of facilitating daily activities of a division, which [are] circulated to all staff for business purposes, [and] appointment calendars retained solely for the convenience of individual officials [that do not] have general distribution"); *see also Glunk v. Pa. Dep't of State*, 102 A.3d 605, 615 (Pa. Commw. Ct. 2014), *appeal denied*, 117 A.3d 299 (Pa. 2015) (holding that the evidence demonstrated that entries on a work calendar were exempt notes and working papers). Although the notebooks may contain more detailed notes than the average personal calendar, they are kept for the same express purpose. Therefore, because the annotated calendars are kept by the Office Manager for her own personal use in performing her duties and are not used or distributed by the Office in other ways, they fit under the rubric established by the Commonwealth Court for personal calendars under Section 708(b)(12) of the RTKL. *Id.*

On appeal, the Requester objects to this description of the records, arguing that the responsive calendars are not analogous to the *Phila. Inquirer* appeal because that case involved a work calendar and notes being kept by an official for that official's personal use, whereas this

calendar belongs to the Office Manager and is kept as part of her administrative duties. *See, e.g., Nase v. Pa. Public Utility C'mmn.*, OOR Dkt. AP 2019-2652, 2022 PA O.O.R.D. LEXIS 1048 (“This exemption is not intended to shield an employee’s regular work product from disclosure, but rather, to shield their notes about their work, daily task lists the employee creates, and other similar items from disclosure as they are personal to that employee’s way of doing their job.”) However, this argument merely demonstrates that the records are not notes created to help First Assistant District Attorney Pepper in the fulfillment of his duties. Instead, the notes about First Assistant District Attorney Pepper’s leave were created only to help the Office Manager remember to make her official reports to the Northampton County Payroll Department, not as part of an office-wide scheduling database. Nothing in Section 708(b)(12) states that exempt notes must not concern other employees, and personal calendars often do.

An unusual factor raised by this case is that the Office argues that the notebook is the only record it maintains of leave usage. Because the Office relies on Northampton County for certain administrative services, the official records of leave are communicated to the Northampton County Payroll Department and recorded there. If the handwritten notebooks are the only existing record of leave use available to the Office, it follows that they do serve an official purpose, whether intentionally conceived as such or not. It is undoubtedly part of an agency’s duties to keep track of the hours worked and time off taken by employees, and it would be impossible to argue that the agency’s only repository of such information is not kept “for an official purpose.”

However, the evidence shows that official records of leave exist in the possession of the Northampton County Payroll Department. While the County is a separate agency from the Office, the employee records it maintains belong to the Office. In prior appeals, County offices and District Attorneys Offices have interchangeably received and fulfilled requests for payroll records

relating to that District Attorney's Office. *See, e.g., Monaghan v. Lycoming Cnty.*, OOR Dkt. AP 2020-0657, 2020 PA O.O.R.D. LEXIS 2104 (seeking payroll records of the DA's Office from the County government); *Donaghy v. Bucks County DA's Office*, OOR Dkt. AP 2013-0357, 2013 PA O.O.R.D. LEXIS 175 (where the County entered as a Direct Interest Participant in order to submit evidence regarding payroll). Therefore, because an official register of leave use exists and is accessible, the OOR cannot find that the handwritten calendar notes serve as the Office's only record of personnel time, and the calendars are exempt from disclosure under Section 708(b)(12) of the RTKL.<sup>1</sup>

### CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Office 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 Northampton 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>2</sup> This Final Determination shall be placed on the OOR website at: <https://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: March 15, 2023**

/s/ Jordan Davis

Jordan C. Davis, Esq.  
Senior Appeals Officer

Sent via email only to: Sid Hawach; Bridget Murphy, Esq.

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<sup>1</sup> In response to the Request, the Office notified the Requester that the responsive leave information was available through the County. Because the Requester's appeal explicitly challenges only the exemption of the calendars, the OOR will not consider the question of whether this procedure was proper or if the Office had a duty to ask the County to provide it with responsive documents.

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