



**FINAL DETERMINATION**

**IN THE MATTER OF**

**ANTHONY BRICHTA &  
NORRIS MCLAUGHLIN P.A.  
Requester**

**v.**

**PENNSYLVANIA LIQUOR CONTROL  
BOARD,  
Respondent**

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**Docket No.: AP 2023-0605**

**FACTUAL BACKGROUND**

On February 1, 2023, Anthony Brichta, Esq., an attorney for Norris McLaughlin P.A. (collectively “Requester”), submitted a request (“Request”) to the Pennsylvania Liquor Control Board (“Board”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

Copies of any and all Recommendations, Opinions, or Recommended Opinions(s) from any Hearing Examiner with respect to the renewal of the following licenses for the licensing period effective May 1, 2022:

1. Big Woody’s Liberty, Inc. (R-16158; LID 46562)
2. Big Woody’s South Fourth, LLC (R-11835; LID 68073)
3. Big Woody’s Emmaus, LLC (R-12609; LID 83333)
4. Big Woody’s Forks, Inc. (R-19242; LID 56309)
5. Big Woody’s Hanover, LLC (R-1486; LID 68084)

On March 10, 2023, following a thirty-day extension, 65 P.S. § 67.902(b), the Board denied the Request, arguing that the responsive records are exempt as internal, predecisional deliberations until after the Board has issued a final ruling. 65 P.S. § 67.708(b)(10).

On March 17, 2023, the Requester appealed to the Office of Open Records (“OOR”), arguing that the hearing examiner’s report does not qualify for exemption under Section 708(b)(10). The OOR invited the parties to supplement the record and directed the Board to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On March 30, 2023, the Board submitted a position statement reiterating its argument that the responsive records are exempt under Section 708(b)(10) of the RTKL and arguing that the hearing examiners are contracted employees of the Board, that their recommendations are not binding prior to the vote of the Board, and that the Board is acting in a quasi-judicial capacity and is entitled to withhold such records prior to a determination in the case pending before it.

### **LEGAL ANALYSIS**

The Board 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. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Board 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)).

## **1. The identity of the Requester is irrelevant to this determination**

The Requester notes on appeal that he represents the owners of Big Woody's, and the Board argues that the appeal represents his client's attempt to pierce the Board's deliberations to obtain a strategic advantage in their case. However, a requester's identity or motivation for making a request is not relevant to determining whether a record is accessible to the public under the RTKL. *Padgett v. Pa. State Police*, 73 A.3d 644, 647 (Pa. Commw. Ct. 2013). Under the RTKL, whether the document is accessible is based only on "whether a document is a public record, and if so, whether it falls within an exemption that allows that it not be disclosed. The status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b) [of the RTKL]." *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli v. Pa. State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker*). Accordingly, the fact that the responsive records may involve the Requester's client's pending appeal before the Board is irrelevant to this Final Determination.

## **2. The records constitute internal, predecisional deliberations**

The Request seeks "Recommendations, Opinions, or Recommended Opinions(s)" of any Hearing Examiner related to the license renewals of five "Big Woody's" locations. The Requester explains on appeal that his client sought a license renewal for these locations, but in its January 23, 2023 meeting, the Board voted to hold off on issuing a decision while the Board sought a "Conditional License Agreement" from his client. The Requester states that his client participated in public hearings before a hearing examiner who then sent a recommended decision to the Board's three-member voting body, but that his client has never received a copy of this decision.<sup>1</sup>

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<sup>1</sup> As noted above, the Requester's identity and the identity of his client is immaterial to the OOR's legal consideration; these facts are recited only to explain the context of the appeal.

The Board argues that the recommended decision constitutes an internal, predecisional and deliberative record because it memorializes the recommendation provided to the Board by its hearing examiner, prior to the Board's vote on whether to issue a license renewal and is therefore, exempt under Section 708(b)(10)(i)(A) of the RTKL. 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). 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. Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan*, 103 A.3d at 382-83. 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)).

On appeal, the Board explains that the agency is comprised of a three-member board, charged with regulating the sale of alcoholic beverages in Pennsylvania and in determining whether liquor licenses should be issued to applicants wishing to sell alcoholic beverages. 47 P.S. § 4-404. The Board must also determine whether a liquor license should be renewed at the expiration of a licensing period. 47 P.S. § 4-470. During this process, an application for renewal is submitted to the Bureau of Licensing, who can raise an objection to a renewal for specified

reasons. *Id.* When an objection is raised by the Bureau of Licensing, an administrative hearing is held. 47 P.S. § 4-464.

The hearing is conducted by “a hearing examiner designated by the board,” who hears the Bureau of Licensing’s reasons for objections, and the applicant may cross-examine the witnesses. *Id.* Finally, the hearing examiner sends a recommendation to the Board’s three-member board, who vote to either grant or deny the application. *Id.* In the event of a denial, the Board is required to file “at least a brief statement in the form of an opinion of the reasons for the ruling or order and furnish a copy thereof to the applicant.” *Id.*

The Requester’s first objection to this exemption is that a hearing examiner is not an employee of the Board, but more akin to a contractor whose communications cannot be considered “internal” to the agency. *Chester Water Auth. v. Pa. Dep’t of Community and Econ. Dev.*, 249 A.3d 1106 (1112-13 (Pa. 2021) (“Private consultants providing services as independent contractors do not qualify as agencies, members, employees or officials who may engage in protected internal communications.”) The Board argues that the hearing examiners “serve at the direction of [the three-member board], and are essentially contracted employees of [the Board].” Board’s Position Statement pg. 5. The Board submitted both a copy of the contract it has with the hearing examiners, which provides that “[i]n performing its obligations under the Contract, the Contractor will act as an independent contractor and not as an employee or agent of the Commonwealth.” Exhibit 6, pg 4. However, the contract also sets forth the hearing examiner’s duties, such as “[c]onduct[ing] hearings in accordance with the [Board’s] prescribed procedures and hearing schedule”, “[a]dminister[ing] oaths and affirmations” and to “[r]eport to and consult with the [Board’s] Office of Chief Counsel on the legal issues involved in each hearing.” Exhibit 6, pg 1.

In *Chester Water Authority*, the Supreme Court considered a RTKL request seeking communications between a Commonwealth agency, the Department of Community and Economic Development (“DCED”), and a private contractor and subcontractors, who were hired to provide professional legal and financial services to the City of Chester, which had been designated as a distressed municipality under the Financially Distressed Municipalities Act or “Act 47.” The Court ultimately 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.” *Id.* at 1114. Relying on the plain language of Section 708(b)(10)(i)(A), the Court noted that “[p]rivate consultants providing services as independent contractors do not qualify as agencies, members, employees or officials who may engage in protected internal communications.” *Id.* at 1113.

However, the OOR has recently distinguished the facts of *Chester Water Authority* in cases involving agency officials who are not employees but are nevertheless appointed and have their conduct and duties regulated pursuant to statute. *Kervick v. Buckingham Twp.*, OOR Dkt. AP 2023-0192, 2023 PA O.O.R.D. LEXIS 671 (contemplating a township solicitor whose appointment is governed by the Second Class Township Code.) Unlike the financial services consultants hired by DCED in the former case, such officials are integrated with the agency they provide services to by the terms of a statute. Here, the Liquor Code expressly dictates the use and contracting of hearing examiners, who proceed to serve the Board in a quasi-judicial role with their conduct regulated both by the Liquor Code and by the terms of Pennsylvania’s robust common law regarding agency proceedings. *See* 47 P.S. § 2-212(a)-(b). Furthermore, these hearing examiners are chosen from a complement appointed by the governor and established as an autonomous office. *See* 47 P.S. § 2-212(h). Therefore, the OOR must conclude that they are either

contractors made internal to the Board by the operation of the Liquor Code or, at least, members of a government agency with whom communications may be “internal” under Section 708(b)(10) of the RTKL.

Next, the Requester objects that the records are not “deliberative” because they are not the suggestions of a Board employee for further discussion by the Board, but rather the factual findings and recommendations of the hearing officer, taken from hearings to which both the Board and the Requester were parties. The Requester emphasizes that the recommendations contain arguments presented against the Requester’s client by the Board itself, and that the Board does not then contact the hearing officer for further discussion, but simply refers to the recommended decision as part of its own decision process.

This argument improperly commingles the Board’s various functions. Per the Liquor Code, the Board contains both a prosecutorial and quasi-judicial function, which must be kept separate per the Pennsylvania Supreme Court’s holding in *Lyness v. Commonwealth*. 605 A.2d 1204 (Pa. 1992). The three-member board sits here in an adjudicative function and makes its decision based upon the facts, arguments and legal recommendation communicated to it from the hearing examiner. The Bureau of Licensing, which objected to the client’s application and argued against renewal, is the prosecutorial arm of the agency. Per *Lyness*, the arguments made by the Bureau of Licensing may be considered by the Board in its quasi-judicial role, but the regulations and procedures of the agency are intended to ensure that those arguments were not themselves directed by the Board. *Id.* In this context, it becomes clear that the recommended decision is, in fact, the context and legal record of events that the Board has been presented and will consider in that quasi-judicial role, along with the appointed quasi-judicial officer’s recommendation on how to proceed, given the law and the facts. Therefore, the OOR concludes that a recommended

decision constitutes, in its entirety, a recommendation to the Board and the Board's consideration of that recommendation constitutes deliberation. Contrary to the Requester's position, there is no requirement in the law that a "deliberation" involve a back-and-forth between every internal party - a single suggestion that is considered by another internal party may suffice.

Next, the Requester objects that the records are not predecisional because the Board only needs to "consider" them and is free to reject every fact and recommendation and decide whatever it likes. The Requester cites to *Pa. Liquor Control Bd. v. Burns*, where the Board attempted to withhold the number of liquor licenses in each county under Section 708(b)(10). 229 A.3d 51 (Pa. Commw. Ct. 2019). The Board argued, in that case, that knowledge of the numbers underlying the licenses for auction could inform "future license auctions" and would give away its "strategy" regarding the selection of licenses. *Id.* The Commonwealth Court rejected these arguments, noting that raw data could not provide insight "into any policymaking, rulemaking, or other deliberative processes" and that the data at issue was insufficient to show any parties what the Board's entire context for future decisions might be. *Id.*

This appeal differs from *Burns* in several important ways. First, it is obviously preceding a specific decision; the decision of the Board to renew the client's licenses or not. Further, the recommended decision of the hearing examiner contains recommendation for how to make those decisions, rather than purely factual information incidentally related to future choices. Given the requested documents' straightforward relationship with an upcoming quasi-judicial determination mandated by statute, it is difficult to think of examples of documents more predecisional than these.

Next, the Requester objects that the Board has already confirmed that these documents *will be* public because it intends to publish them once the decision of the Board is voted on at public



meeting. Although it is true that records exempt under Section 708(b)(10) remain exempt even after the decision to which they are “pre-decisional” has been taken, nothing in the RTKL prevents an agency from releasing records that might otherwise be exempt, even as a matter of course. *See* 65 P.S. § 67.506(c). However, the OOR is without authority to compel an agency to release exempt records. *Pa. Dep’t of Pub. Welf. v. Froelich*, 29 A.3d 863 (Pa. Commw. Ct. 2011).

Finally, the Requester argues that the Board is not entitled to invoke Section 708(b)(10) because it failed to identify the records being withheld with sufficient particularity. *See, e.g., Ryan v. Pa. Dep’t of Health*, OOR Dkt. AP 2020-1460, 2020 PA O.O.R.D. LEXIS 2669. It is true that an agency’s response must identify the responsive records at issue with enough granularity to permit a requester and OOR to understand what is being withheld and upon what grounds. *See* 65 P.S. § 67.903. Here, however, the Requester himself notes on appeal that he has sought only one kind of document - official recommendations from the hearing examiners to the Board in each of the identified cases. The OOR is satisfied that the Request identified the responsive records with enough specificity to eliminate any confusion over the nature of the documents at issue on appeal.

Therefore, because the records at issue are internal, predecisional and deliberative, they are exempt from disclosure under Section 708(b)(10) of the RTKL, and the Board was entitled to withhold them in response to the Request.

## CONCLUSION

For the foregoing reasons, the Requester’s appeal is **denied**, and the Board 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 according to court rules 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>2</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: April 17, 2023**

*/s/ Jordan C. Davis*

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Jordan C. Davis, Esq.  
Appeals Officer

Sent via  
Electronic Portal to: Anthony Brichta, Esq.;  
Jason Worley, Esq.

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