



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

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| IN THE MATTER OF | : | |
| | : | |
| ALLAN BLUTSTEIN AND AMERICA | : | |
| RISING, | : | |
| Requester | : | |
| | : | Docket No: AP 2023-0481 |
| v. | : | |
| | : | |
| PENNSYLVANIA OFFICE OF THE | : | |
| GOVERNOR, | : | |
| Respondent | : | |

FACTUAL BACKGROUND

On January 27, 2023, Allan Blutstein, on behalf of America Rising, (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania Office of the Governor (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the “Governor’s work calendar from the date of his inauguration through the date a search for responsive records is commenced.”

On March 6, 2023, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Office partially denied the Request, by referring the Requester to the Governor’s official online calendar¹ and arguing that some records are protected by the attorney-client

¹ See <https://www.governor.pa.gov/schedule/>.

privilege and executive privileges, reflect internal predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A), and consist of personal notes and working papers, 65 P.S. § 67.708(b)(12).

On March 6, 2023, the Requester appealed to the Office of Open Records (“OOR”), challenging the partial denial and stating grounds for disclosure.² 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. 65 P.S. § 67.1101(c).

On March 21, 2023, the Requester submitted a statement in support of the appeal, arguing that it is unlikely that the information contained in the Governor’s unpublished calendar would be wholly exempt. In the statement, the Requester also asked, “what type of work calendars are maintained [by the Governor’s Office] in addition to the Governor’s ‘schedule’ posted online and whether the unpublished calendars would be entirely exempt from a RTKL request.” The Requester asserts that entries reflecting activities such as weekly staff meetings or preparation for public interviews would likely not be fully exempt. The Requester cites the OOR Final Determination in *Kane v. Delaware Cnty. Dist. Atty’s Office*, OOR Dkt. AP 2021-2649, to assert that the factors relied upon in *Kane* to determine the application of Section 708(b)(12) of the RTKL should be considered here.

On March 27, 2023, the Office submitted a position statement reiterating its grounds for denial. The Office also argues that disclosure of the Governor’s personal calendar would disclose operations and locations of the security detail and such information is exempt under the RTKL security exemptions in Sections 708(b)(1)-(3), 65 P.S. §§ 67.708(b)(1) – (3). The Office further argues that calendar contains personal identification information, 65 P.S. § 67.708(b)(6)(i)(A), and

² The Requester granted the OOR additional time 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).”).

conference call identification numbers and PIN numbers that, if disclosed, would jeopardize technology security, 65 P.S. § 67.708(b)(4). Finally, the Office argues that the Governor’s personal calendar contains exempt personal medical appointments, 65 P.S. § 67.708(b)(5), and the identities of individuals who are under the age of 18, 65 P.S. § 67.708(b)(30). In support of its position, the Office submitted the sworn affirmation made subject to the penalty of perjury from Marc Eisenstein, the Office’s Open Records Officer.

On May 12, 2023, the Office submitted a supplemental Eisenstein affirmation in response to the OOR’s request for clarification regarding the individuals on the First Lady’s staff that have access to the Governor’s calendar.

LEGAL ANALYSIS

The Office 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 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 Office argues that the Governor’s personal work calendar is not a public record under the RTKL because it is not an official record of his schedule or activities, has no official purpose and it is not widely available to individuals other than the First Lady and four members of the Governor’s scheduling and operations staff. The Office argues that because of the nature of the

withheld personal calendar, it is exempt from disclosure under Section 708(b)(12) of the RTKL, 65 P.S. §708(b)(12), as “personal notes and working papers.” The Office relies on *City of Phila. v. Phila. Inquirer*, 52 A.3d 456, 461 (Pa. Commw. Ct. 2012), and *Glunk v. Pa. Dep’t of State*, 102 A.3d 605 (Pa. Commw. Ct. 2014), to support its position that the Governor’s personal calendar is exempt under Section 708(b)(12) of the RTKL.

Section 708(b)(12) exempts from disclosure “[n]otes and working papers prepared by or for a public official of 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). The records must be for the specific employee’s own personal use and not distributed outside of their office, *Glunk v. Pa. Dep’t of State*, 102 A.2d 605 (Pa. Commw. Ct. 2014) and must be used to carry out the employee’s official duties. *Pa. Dep’t of Labor & Indus. v. Tabor*, 2016 Pa. Commw. Unpub. LEXIS 251 (Pa. Commw. Ct. 2016). The Commonwealth Court has previously found that an official’s appointment calendar is exempt from disclosure under Section 708(b)(12), reasoning:

The purpose of the calendars as set forth by the affidavits personal to the Mayor and City Council Members are used for scheduling their daily activities and fall within the ‘notes and working papers’ exception. Under [Section 708(b)(12)], a public official is not the only person required to prepare or see the calendar because the exception specifically includes within the definition of working papers ‘papers prepared by or for the public official.’ ‘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 Philadelphia v. The Philadelphia Inquirer, 52 A.3d 456, 461 (Pa. Commw. Ct. 2012); see also *Glunk*, 102 A.3d at 614-15 (finding entries on an agency employee’s work calendar to be exempt under Section 708(b)(12) of the RTKL).

The Office presents the Eisenstein affirmation in support of its argument. The Eisenstein affirmation states, as follows:

- 3) In response to the request, I reviewed the records, operations and programs of the Office and consulted with members of the Governor's staff, specifically including the Governor's scheduling staff, who have custody or control over responsive records....
- 4) As a result of such review and consultation, I am fully informed of the use and purpose of the Governor's calendar.
- 5) The Governor's personal work calendar is not an official record of his schedule and activities. The calendar has no official purpose and is not available for access by anyone outside of the Governor's office.
- 6) The calendar contains information regarding the Governor's personal and work-related appointments, meetings, events and activities.
- 7) The sole purpose of the calendar is to assist the Governor and his immediate assistants in conveniently keeping track of the Governor's personal schedule and to determine his availability for scheduling purposes.
- 8) Only the Governor, the First Lady, and four members of the Governor's scheduling and operations staff are permitted to access and create appointments on the Governor's calendar.
- 9) No one outside of the Governor's and First Lady's immediate staff, including their security detail, may even view the Governor's daily calendar.
- 10) The Governor's calendar is used exclusively to assist the Governor in carrying out his personal public responsibilities.
- 11) The purpose of the Governor's calendar is solely personal – that is, its purpose is to keep track of his daily activities and availability.
- 12) The Governor's calendar does not set forth a daily agenda. Instead, the Governor's daily public agenda is published by the Governor's Press Office.
- 13) A retrospective of the Governor's public agenda is available at <https://www.governor.pa.gov/schedule/>.
- 14) The Governor's daily public agenda, for the time period requested, were provided to requester in response to this request....

The Eisenstein supplemental affirmation states regarding the OOR's request for clarification that "[t]he First Lady's immediate staff who have calendar access include only the First Lady's Chief of Staff and the Director of First Lady Engagement" and that "[t]he Office of the First Lady is an administrative function within the Office of the Governor and is not a separate agency." Eisenstein Affirmation, ¶¶ 10-11. Under the RTKL, a sworn 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).

The Office relies on *City of Philadelphia* and *Glunk* to assert that, when applying Section 708(b)(12), the courts have distinguished between an official's "daily agenda" and personal "appointment calendars." The *City of Philadelphia* court stated, citing to *Bureau of National Affairs, Inc. v. United States Dep't of Justice*, 742 A.2d 1484 (D.C. Cir. 1984), "[t]hat [*Bureau of National Affairs*] distinguished daily agendas, which were created for the express purpose of facilitating daily activities of a division, which were circulated to all staff for business purposes, from appointment calendars retained solely for the convenience of individual officials and did not have general distribution." 52 A.3d at 461-62. The Office asserts that the Governor's personal calendar falls squarely within this analysis and is fully exempt under Section 708(b)(12) of the RTKL.

The OOR has previously recognized that higher level officials with vast responsibilities may require extensive schedule coordination beyond that of the average individual who tracks and coordinates their own personal and work-related obligations. For example, the OOR found that the calendars of the District Superintendent, the District's School Medical Officer and the District's Chief of Schools for the School District of Philadelphia, based on the evidence presented,

“contain a mix of personal and work-related appointments and access to the calendars is limited; and that, ultimately, the calendars do not have an official purpose” and, as such, were exempt under Section 708(b)(12). *Lo v. Phila. Sch. Dist.*, OOR Dkt. AP 2022-2283, 2022 PA O.O.R.D. LEXIS 2502, *2-3 (citing *Philadelphia Inquirer*, 52 A.3d at 461-62). In *Lo*, the evidence consisted sworn averments from the school district officials stating, “[m]y calendar is not an official record of my schedule. As stated above, the purpose of my daily calendar is solely personal-- to keep track of my schedule of daily activities. *Access to my daily calendar is limited to myself and to members of my personal staff. No one outside ... my Office has access to my daily calendar.*” *Id.* at 2 (emphasis added); *see also Heimler v. Adams Cnty.*, OOR Dkt. AP 2021-2045, 2021 PA O.O.R.D. LEXIS 2458 (finding that the personal electronic Outlook calendars maintained by each County Commissioner were accessible only to office staff, including the County’s Chief Clerk, were exempt under Section 708(b)(12); *Nerl v. Phila. Sch. Dist.*, OOR Dkt. AP 2019-2620, 2020 PA O.O.R.D. LEXIS 1234 (finding that the school district’s President of the Board of Education’s calendar was personal and that access was limited to the President and the Board’s executive staff making it exempt under Section 708(b)(12)).

As in this matter, because of the vast number of and wide variety of obligations placed on the Governor, it is necessary that more than just the Governor alone have access to his personal schedule for proper coordination of his schedule. Here, the Office’s evidence demonstrates that the withheld calendar contains a mix of the Governor’s personal and work-related appointments and access to the calendars is limited to the First Lady and specific personal scheduling staff members such as, four members of the Governor’s scheduling and operations staff and two specific members of the First Lady’s staff. Further, the evidence establishes that that purpose of the calendar is to enable the Governor’s staff to track the Governor’s personal activities and

availability for the purpose of carrying out their official scheduling duties and that, ultimately, the personal calendar does not have an official purpose. The Requester questions the “paucity of events listed on the Governor’s public schedule” and asserts that it is reasonable to assume the Governor is “carrying out many work-related duties and that most of those activities are scheduled in advance and documented in a calendar-like format.” However, we note that the Request only encompasses the Governor’s first ten days in office, as the inauguration took place on January 17, 2023,³ and the Request was filed on January 27, 2023. Further, the Requester’s statements do not discredit the evidence establishing that the personal calendar, as compared to the calendar published on the Governor’s website as the official calendar, is exempt under Section 708(b)(12). *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (noting, that in the absence of evidence showing bad faith, averments in affidavits “should be accepted as true”) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

The Requester also argues that the “Governor’s unpublished work calendars undoubtedly contain at least *some* exempt information. To the extent that the calendars include entries for non-sensitive activities such as weekly staff meetings or preparations for public interviews, however, that information would be much less likely to be *wholly* exempt in the undersigned’s view.”⁴ (Emphasis in original). As set forth above, the Requester has not provided evidence that questions the validity or veracity of the Office’s evidence. *Id.* Based on the evidence provided, the Office has met its burden of proving that the requested calendar is an exempt notes and working papers under the RTKL and exempt in its entirety. 65 P.S. § 67.708(b)(12); *see also Lo, supra; Shoemaker*

³ See <https://www.governor.pa.gov/schedule/?eventName=swearing&submit=&startDate=2023-01-10&endDate=2023-01-31> (last accessed May 5, 2023).

⁴ The Requester also notes that Governor Shapiro’s predecessor published ordinary work-related activities on the public calendar such as, “what time he ate lunch.” While it is within an agency’s discretion to release otherwise exempt records, 65 P.S. § 67.506(c) (stating that “[a]n agency may exercise its discretion to make any otherwise exempt record accessible for inspection and copying...”), the OOR does not have the authority to order an agency to exercise such discretion.

and PublicSource v. Allegheny Cnty., OOR Dkt. AP 2018-1352, 2018 PA O.O.R.D. LEXIS 1094 (concluding that the calendars kept by two county officials were personal notes and working paper with no official use).⁵

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 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. 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: May 22, 2023

/s/ Kelly C. Isenberg

SENIOR APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent via E-File Portal to: Allan Blutstein; Thomas Howell, Esq.; Marc Eisenstein

⁵ Because we have determined that the withheld record is fully exempt under Section 708(b)(12), we do not need to reach the other grounds for exemption asserted by the Office such as, the internal predecisional deliberations exemption, 65 P.S. § 67.708(b)(10)(i)(A), public safety and personal security exemptions, 65 P.S. §§ 67.708(b)(1)-(3), computer and technology security exemptions, 65 P.S. § 67.708(b)(4), individually identifiable medical information exemption, 65 P.S. § 67.708(b)(5), personal identification information exemption, 65 P.S. § 67.708(b)(6)(i)(A), the disclosure of identification information of minors exemption, 65 P.S. § 67.708(b)(30), and the attorney-client privilege.

⁶ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).