



**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>ED MAHON AND SPOTLIGHT PA,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No: AP 2024-0644</b>
	:	
<b>WESTMORELAND COUNTY,</b>	:	
<b>Respondent</b>	:	

**FACTUAL BACKGROUND**

On January 23, 2024, Ed Mahon, a reporter with Spotlight PA (collectively “Requester”) submitted a request (“Request”) to Westmoreland County (“County”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

1. Any audio or video recordings of the...County Board of Commissioners meeting on Nov. 2, 2023.
2. The memorandum of understanding described in this agenda item for that same meeting: “The Memorandum of Understanding between the County and District Attorney’s Office concerning the District Attorney[’]s Opioid Funds. Final approval is subject to acceptable MOU terms.”

On February 29, 2024, following a thirty-day extension, 65 P.S. § 67.902(b), the County denied the Request, asserting that no responsive records exist in its possession, custody or control. Specifically concerning the requested memorandum of understanding (“MOU”), the County asserts that it has not entered into a MOU with the County’s District Attorney’s Office (“Office”).

On March 6, 2024, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On March 18, 2024, the County submitted a position statement, reiterating its grounds for denial and noting that the Requester made a similar request to the Office, appealed as *Mahon and Spotlight PA v. Westmoreland Cnty. District Attorney’s Office*, OOR Dkt. AP 2024-0541, 2024 PA O.O.R.D. LEXIS 762.<sup>1</sup> Additionally, the County argues that the purported MOU is exempt under the internal, predecisional exemption pursuant to Section 708(b)(10) of the RTKL. 65 P.S. § 67.708(b)(10). In support of the County’s position, the County submitted the affidavits of Stephanie Paha (“Paha Affidavit”), Open Records Officer (“AORO”) for the County, and Ted Kopas (“Kopas Affidavit”), Secretary of the Board of Commissioners for the County.

On March 22, 2024, the Requester submitted a supplemental position statement, reiterating his argument that because the subject MOU was presented as an agenda item at a public meeting for discussion, the MOU cannot constitute internal deliberation.

On March 26, 2024, the Requester submitted correspondence drawing attention to the OOR’s decision in *Mahon*. 2024 PA O.O.R.D. LEXIS 762.

On March 28, 2024, the County submitted an additional position statement, reiterating its argument that the MOU at issue does not exist, as final acceptable terms had not been reached, and that the draft MOU is exempt under Section 708(b)(10) of the RTKL. In support of its position, the County submitted the supplemental affidavit of Ted Kopas (“Supplemental Kopas Affidavit”).

---

<sup>1</sup> The County incorporates the argument set forth in the Office’s position statement opposing Requester’s appeal, attached to the submission as “Exhibit 1,” as if set forth at length herein.

On April 9, 2024, the OOR sought additional clarification and evidence from the County concerning the November 2, 2023 meeting where the purported MOU was discussed, and if records were presented at the meeting.

That same day, the Requester submitted correspondence concerning the OOR's request for additional clarification and evidence.

On April 11, 2024, the Requester submitted additional correspondence, reiterating his argument that the County has not demonstrated that the purported MOU is exempt.

On April 12, 2024, in response to the OOR, the County submitted the affidavit of Melissa Guiddy, Esq. ("Guiddy Affidavit"), solicitor for the County.

That same day, in response to the County's submission, the Requester submitted an additional position statement.

### **LEGAL ANALYSIS**

The County 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 County 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)). Likewise, "[t]he burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request." *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

**1. The Request cannot be expanded on appeal, but the County’s interpretation of the Request was unreasonably narrow**

In the Requester’s appeal filing, the Requester submitted the same position statement that was originally provided in the appeal of a similar request filed by the Requester, *Mahon and Spotlight PA v. Westmoreland Cnty. District Attorney’s Office*, OOR Dkt. AP 2024-0541, 2024 PA O.O.R.D. LEXIS 762. In *Mahon*, the Requester argued that the request “additionally...sought any other such memorandums of understanding between the [Office] and the county commissioners for a specific time period.” However, the Request at issue in this appeal does not specify that any additional versions of the MOU are also being requested, solely focusing on the MOU that was the subject of the specified November 2, 2023 meeting.

The OOR has repeatedly held that a requester may not modify, explain or expand a request on appeal. *See Pa. State Police v. Office of Open Records*, 995 A.2d 515, 516 (Pa. Commw. Ct. 2010); *Michak v. Pa. Dep’t of Pub. Welfare*, 56 A.3d 925 (Pa. Commw. Ct. 2012) (holding that “where a request[e]r requests a specific type of record...the request[e]r may not, on appeal argue that an agency must instead disclose a different record in response to the request”). Accordingly, the OOR’s review on appeal is confined to the Request as written here, and any modification or expansion of the Request on appeal will not be considered.

However, the County also argues that because no executed MOU exists, no responsive records exist. In response, the Requester argues that the MOU that was the subject of the specified agenda at the November 2, 2023 meeting clearly exists, executed or not, and should be subject to access.

An agency may interpret the meaning of a request for records, but that interpretation must be reasonable. *See Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513; *Signature Info. Solutions, Inc. v. City of Warren*, OOR Dkt. AP 2012-0433, 2012 PA

O.O.R.D. LEXIS 557. The RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at \*16 (Pa. Commw. Ct. 2012) (citing *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff'd* 75 A.3d 453 (Pa. 2013)).

Here, the Request facially seeks the MOU that was described in the specified agenda item at the November 2, 2023 meeting, and a natural read of the Request does not limit the record to a final executed version. Therefore, insofar as the County interpreted the Request as being limited only to an executed MOU, such interpretation was not reasonable.

**2. The County has demonstrated that certain records do not exist in its possession, custody or control**

On appeal, the County asserts that it does not have any responsive audio or video recordings of the specified meeting in its possession, custody or control. Additionally, the County further asserts that an executed MOU does not exist in its possession, custody or control. In support of the County's position concerning audio and video recordings, the Paha Affidavit states, in part:

1. I serve as the [AORO] for the County...and I am responsible for responding to [RTKL] requests filed with the County.

...

4. As the [AORO] for the County, I am familiar with the records in the possession of the County.

5. I conducted a thorough examination of files and records in the possession, custody and control of the County for records possibly responsive to the [R]equest[] underlying this appeal.

6. No audio or video recordings of the November 2, 2023 meeting exist when it is not the County's practice to record or video tape its public meetings.

In support of the County's position concerning the nonexistence of an executed MOU, the Kopas Affidavit states, in part:

1. I serve as the Secretary of the Board of Commissioners of [the County].
- ...
3. I am familiar with the November 2, 2023 Board of Commissioners' meeting agenda.
4. As set forth in the agenda, final approval of the [MOU] between the County and [the Office] concerning the District Attorney[']s Opioid Funds was subject to acceptable MOU terms.
- ...
6. The MOU was never finalized because neither the Commissioners nor the DA reached a final agreement as to acceptable MOU terms.
7. A final MOU containing acceptable terms between the County and the [Office] does not exist, is not ready for execution and will not be executed at this time, making the document deliberative and predecisional in nature.

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 County has acted in bad faith or that responsive records, do, in fact, exist, “the averments in the [affidavit] 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 *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. The RTKL does not define the term “good faith effort.” However, the Commonwealth Court has concluded that:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession...When records are not in an agency’s physical possession, an open records officer has a duty to contact

agents within its control, including third-party contractors...After obtaining potentially responsive records, an agency has the duty to review the record and assess their public nature under... the RTKL.

*Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020).

In *Pa. Dep't of Health v. Mahon*, the Commonwealth Court discussed the evidence required to establish the absence of records, quoting its previous decision in *Hodges v. Pa. Dep't of Health*, which held that an agency “may satisfy its burden of proof...with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record.” *Mahon*, 283 A.3d 929, 936 (Pa. Commw. Ct. 2022) (quoting *Hodges*, A.3d 1190, 1192 (Pa. Commw. Ct. 2011)); *see also Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a “more likely than not” inquiry).

Here, Ms. Paha first affirms that as the AORO, she is familiar with the records of the County, and conducted a search of the County’s files for responsive audio and video recordings. Paha Affidavit ¶¶ 4-5. Ms. Paha further explains that the responsive records do not exist because it is not the County’s practice to record or video tape public meetings. Paha Affidavit ¶ 6.

Additionally, Mr. Kopas, who serves as Secretary of the Board of Commissioners for the County has affirmed that an executed MOU does not exist, as the County and the Office have not reached acceptable MOU terms to finalize the MOU. Kopas Affidavit ¶¶ 6-7. Accordingly, the County has provided sufficient evidence that certain records do not exist in the County’s possession, custody or control.

**3. The County has not demonstrated that the draft MOU is exempt under Section 708(b)(10)**

On appeal, the County asserts that the draft MOU is not subject to public access because the record reflects its internal, predecisional deliberations with the Office prior to the final execution of the MOU. 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). For purposes of this exemption, records that are exchanged with another agency are considered “internal” to the agency. *See Off. of the Governor v. Davis*, 122 A.3d 1185 (Pa. Commw. Ct. 2015); *see also West Chester Univ. of Pa. v. Schackner*, 124 A.3d 382, 398 (Pa. Commw. Ct. 2015) (“Records satisfy the ‘internal’ element when they are maintained internal to one agency or among governmental agencies”).

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. 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 be exempt from disclosure, 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).

In support of the County's position, the Kopas Affidavit states, in part:

1. I serve as the Secretary of the Board of Commissioners of [the County].
- ...
3. I am familiar with the November 2, 2023 Board of Commissioners' meeting agenda.
4. As set forth in the agenda, final approval of the [MOU] between the County and [the Office] concerning the District Attorney[']s Opioid Funds was subject to acceptable MOU terms.
5. The Commissioners and [the Office] needed to determine if acceptable terms could be reached within the parameters of Exhibit "E" to the Opioid Settlement Agreements as administered by the Pennsylvania Opioid Misuse and Addiction Abatement Trust.
6. The MOU was never finalized because neither the Commissioners nor the DA reached a final agreement as to acceptable MOU terms.
7. A final MOU containing acceptable terms between the County and the [Office] does not exist, is not ready for execution and will not be executed at this time, making the document deliberative and predecisional in nature.

Additionally, the Supplemental Kopas Affidavit states, in part:

3. The contents of the purported MOU were not part of a final decision, but instead part of a discussion regarding the possible items that were being considered for the final MOU.
4. At all times, the MOU was still in progress.
5. This never came to be when acceptable terms could not be reached within the parameters of Exhibit "E" to the Opioid Settlement Agreements as administered by the Pennsylvania Opioid Misuse and Addiction Abatement Trust.

First, the County has demonstrated that the draft MOU is predecisional, as acceptable terms have not been reached, and the MOU has not been executed. Kopas Affidavit ¶ 7. The draft MOU was a record created internally between the County and the Office, two local agencies, and is a record that was not physically presented at the public meeting. Guiddy Affidavit ¶ 4. Finally, the County has demonstrated that the MOU record reflects its deliberative process, as the Board of Commissioners were trying to decide if acceptable terms for the MOU could be reached based on the parameters of another document, a specific exhibit to the Opioid Settlement Agreements, and therefore is deliberative in nature. Kopas Affidavit ¶ 5.

However, notwithstanding the above, Section 708(b)(10)(ii) of the RTKL provides that: “[a] record that is not otherwise exempt from access under [the RTKL] and which is presented to a quorum for deliberation in accordance with 65 Pa. C.S. Ch. 7 [relating to open meetings] shall be a public record.” 65 P.S. § 67.708(b)(10)(ii). For a record of an agency otherwise exempt as an internal, predecisional deliberation to be subject to public disclosure, two requirements must be met: 1) it must be presented to a quorum of the County Board of Commissioners; and 2) it must be presented for the Board of Commissioners’ deliberation. *See, e.g., Bidlingmaier v. Jenkintown Borough*, OOR Dkt. AP 2021-2605, 2022 PA O.O.R.D. LEXIS 144. Section 708(b)(10)(ii) may apply to a record submitted to the full quorum even if the record is not presented at a public meeting. *Esposito v. Pennridge Sch. Dist.*, OOR Dkt. AP 2019-1521, 2019 PA O.O.R.D. LEXIS 1532. Instead, the OOR has found that any record presented to a quorum for the purpose of making a decision is subject to production. *Longo v. Phoenixville Area Sch. Dist.*, OOR Dkt. AP 2020-0504, 2020 PA O.O.R.D. LEXIS 1361.

Here, the County has submitted a true and correct copy of the Board of Commissioners’ November 2, 2023 meeting agenda. Paha Affidavit, Exhibit 1. As previously stated, the MOU was

not physically presented at the meeting. Guiddy Affidavit ¶ 4. However, the County's evidence and argument affirm that the MOU was a topic of discussion at a public meeting held under the Sunshine Act to the Board of Commissioners, and the County demonstrated that "[t]he Commissioners and [the Office] needed to determine if acceptable terms could be reached within the parameters of Exhibit "E" to the Opioid Settlement Agreements as administered by the Pennsylvania Opioid Misuse and Addiction Abatement Trust." Kopas Affidavit ¶ 5. Additionally, the County affirms that "[t]he contents of the purported MOU were not part of a final decision, but instead part of a *discussion* regarding the possible items that were being *considered* for the final MOU." (Emphasis added). Supplemental Kopas Affidavit ¶ 3.

The OOR has previously held that the exception to the exemption at Section 708(b)(10) becomes operative when the record, intended for deliberation, is received and considered by the quorum, and not merely when deliberation at a public meeting actually occurs. *Longo*, 2020 PA O.O.R.D. LEXIS 1361 (the fact that deliberative emails were not presented at a public meeting was immaterial, and the agency bore the burden of showing that Section 708(b)(10)(ii) does not apply). Here, the record shows that the purported MOU, while not finalized, was in possession of the County Board of Commissioners without external review with the intention that the Board of Commissioners consider the MOU at the public meeting and determine if acceptable terms could be reached. Accordingly, the MOU is subject to public access under Section 708(b)(10)(ii) of the RTKL. *See, e.g., Raich v. Ligonier Valley School Dist.*, OOR Dkt. AP 2011-1165, 2011 PA O.O.R.D. LEXIS 898 (finding MOU record presented for discussion at public meeting subject to disclosure under Section 708(b)(10)(ii) of the RTKL).

## CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the County is required to provide the purported MOU 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 Westmoreland 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> All documents or communications following the issuance of this Final Determination shall be sent to [oor-postfd@pa.gov](mailto:oor-postfd@pa.gov). This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: April 19, 2024**

*/s/ Tope L. Quadri*

---

TOPE L. QUADRI  
APPEALS OFFICER

Sent via portal to:     Ed Mahon  
                                 Stephanie Paha, AORO  
                                 Melissa A. Guiddy, Esq.

---

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