

pennsylvania
OFFICE OF OPEN RECORDS
FINAL DETERMINATION

IN THE MATTER OF

**NATHAN STRUNK,
Requester**

v.

**PENNSYLVANIA OFFICE OF THE
GOVERNOR,
Respondent**

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Docket No: AP 2026-1631

FACTUAL BACKGROUND

On February 25, 2026, Nathan Strunk (“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:

Records sufficient to show the role, knowledge, decision-making, and oversight of [the Office] regarding coordination, cooperation, or interaction with U.S. Immigration and Customs Enforcement (ICE), the Department of Homeland Security (DHS), Customs and Border Protection (CBP), or any federal personnel or contractors acting on their behalf, from January 1, 2025 to present. This [R]equest seeks policy-level, administrative, contractual, and coordination records. It does not seek criminal investigative files, arrest-level case records, intelligence reports, or records identifying specific private individuals. This [R]equest is not intended to interfere with active law enforcement operations, but rather to obtain records reflecting agency policy, oversight, and administrative coordination. Records requested:

1. Policy memoranda, briefing materials, executive summaries, recommendations, or legal analyses concerning cooperation or coordination with ICE, DHS, or CBP[.]
2. Communications with Commonwealth agencies (including PSP, DOC, PennDOT, Office of Administration, PA Office of Homeland Security, or the Turnpike Commission) regarding immigration enforcement or federal operational requests[.]
3. Internal discussions regarding whether to adopt, limit, delay, modify, or reject restrictions on cooperation with federal immigration enforcement[.]
4. Communications responding to public criticism, advocacy letters, legislative inquiries, or demonstrations regarding immigration enforcement cooperation[.]
5. Records reflecting informal, discretionary, or non-contractual coordination with federal agencies[.]
6. Records documenting requests or proposals from federal agencies that were declined, modified, or limited[.]
7. Records discussing transportation-based enforcement, roadside activity, staging locations, or custody transfers occurring outside correctional facilities[.]
8. Communications conducted via electronic messaging platforms, including but not limited to Signal, WhatsApp, SMS/iMessage, Teams chat, Slack, or similar applications, where used for official business[.]
9. Policies governing the retention, preservation, or deletion of such communications[.]
10. Records retention schedules applicable to responsive records[.]

On April 3, 2026, following a thirty-day extension, 65 P.S. § 67.902(b), the Office granted the Request in part, providing a responsive record. The Office also denied the Request in part, asserting that it properly withheld or redacted records of information, that if disclosed, would threaten public safety and law enforcement activities, would reveal personal identification information, and reflect internal, predecisional deliberations. 65 P.S. § 67.708 (b)(2); 65 P.S. § 67.708 (b)(6); 65 P.S. § 67.708 (b)(10).

On April 22, 2026, the Requester appealed to the Office of Open Records (“OOR”), challenging the Office’s denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Office to notify the OOR if any third parties have a direct interest in the appeal. 65 P.S. § 67.1101(c).

On April 27, 2026, the Requester submitted a supplemental position statement, clarifying that he does not challenge personal identification information redacted pursuant to Section 708(b)(6) of the RTKL. However, the Requester argues that the Office has failed to demonstrate that it conducted a sufficient search as to gather all responsive records, that the exemptions applied are truly applicable, and that records cannot be redacted as opposed to being fully withheld.

On May 20, 2026, the Office produced an additional 11 pages of responsive records to the Requester. On May 27, 2026, the Office submitted its response to the appeal, reiterating its grounds for denial. Additionally, the Office asserts that certain records are exempt from access pursuant to the attorney-client privilege and/or attorney work-product. The Office also submitted an exemption log detailing 241 pages of records that were withheld from access, identified as Exhibit “A” of its appeal submission. In support of its position, the Office submitted the attestation of Marc Eisenstein (“Eisenstein Attestation”), Open Records Officer (“AORO”) for the Office.¹ The Eisenstein Attestation affirms that the descriptions provided in the exemption log are true and accurate. Further, the Office also provided the titles and positions of the names of personnel across various agencies as mentioned in the exemption log as senders and recipients, compiled in Exhibit “C” of its appeal submission. Finally, upon further consideration, the Office also provided an additional 12 pages of responsive records as Exhibit “B” of its appeal submission.

¹ The Eisenstein Attestation is made subject to penalties under 18 Pa. C.S. § 4904, relating to unsworn falsifications to authorities.

That same day, the Requester submitted an additional position statement, first acknowledging that the issue is no longer whether additional responsive records exist, but rather if the Office has sufficiently demonstrated that records are exempt. The Requester argues that the Office's use of broad descriptive language in its exemption log fails to prove that the exemptions have been properly applied to the withheld records, or that certain records cannot be redacted of exempt information and be otherwise produced. The Requester again reiterates that the Request does not seek tactical law-enforcement details, active investigative information, or privileged legal strategy.

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)).

1. The appeal is dismissed as moot in part

On May 20, 2026, and May 27, 2026, as set forth above, the Office provided additional records to the Requester. Accordingly, the appeal is dismissed as moot in part as to these records. *See Chester Water Auth. v. Pa. Dep’t of Cmty. & Econ. Dev.*, 249 A.3d 1106, 1114 (Pa. 2021)

(finding that a matter was settled by provision of records and, thus, “the controversy has been mooted”).

2. The Office has demonstrated that certain records were properly withheld under Section 708(b)(10) of the RTKL

The Office asserts that most of the records at issue were properly withheld because they reflect internal, predecisional deliberations. 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”). However, communications with outside consultants and independent contractors are not “internal,” and are therefore, not subject to the exemption. *See Chester Water Auth. v. Pa. Dep’t of Community and Econ. Dev.*, 249 A.3d 1106, 1112-13 (Pa. 2021).

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). 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).

In support of the Office’s position, the Eisenstein Attestation states, in part:

7. With respect to materials denoted in the privilege log as containing internal, predecisional deliberations, the Office withheld records that include collaboration and consideration of matters within the executive branch of Commonwealth government. Such records reveal the thoughts and impressions of agency officials with respect to pending matters discussed between agency officials and employees within the [Office] or between the [Office] and other agencies. In such communications officials discussed plans, risks and benefits of various approaches and courses of action prior to implementing such actions, including strategies for addressing legal concerns or responding to inquiries. Such communications were not disclosed beyond the agencies.

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 Office has acted in bad faith, “the averments in the [attestation] 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)).

A review of the Office's attestation and exemption log support that there are records that are internal because they were only exchanged between and involved employees of the Office and other Commonwealth government agencies and representatives. A review of the exemption log and descriptions of the records provided further support that those records were withheld because the records reflect discussions, reviews, edits, and commentary that considered how to implement courses of action which had not yet occurred concerning the consideration of proposed Commonwealth and federal law enforcement and public safety policies/methods and tactics; how to respond to inquiries from the General Assembly, the federal government, and press/media; and draft policy memos as further described in the exemption log. Accordingly, based upon the evidence provided, the Office has demonstrated, by a preponderance of the evidence, that certain records are exempt and may be withheld pursuant to Section 708(b)(10) of the RTKL.² *See Campbell v. Pa. Interscholastic Athletic Ass'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (the preponderance of the evidence standard, which is the lowest evidentiary standard, is tantamount to a "more likely than not" inquiry).

3. The Office has demonstrated that certain records were properly withheld under Section 708(b)(2) of the RTKL

The Office asserts that certain records were properly withheld because release would be reasonably likely to threaten law enforcement activities and public safety pursuant to Section 708(b)(2) of the RTKL. Section 708(b)(2) of the RTKL exempts from disclosure "[a] record maintained by an agency in connection with ... law enforcement or other public safety activity

² Because the OOR finds that certain records are exempt from access under Section 708(b)(10) of the RTKL, the OOR need not reach the Office's alternative grounds for denying access to these records. *See Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity....” 65 P.S. § 67.708(b)(2). In order to establish this exemption, an agency must show: (1) the record at issue relates to a law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *California Borough v. Rothey*, 185 A.3d 456 (Pa. Commw. Ct. 2018). To determine the adequacy of an affidavit, the Commonwealth Court considered whether it (1) includes detailed information describing the nature of the records sought; (2) connects the nature of the various records to the reasonable likelihood that disclosing them would threaten public safety in the manner described; (3) shows that such disclosure would impair the agency’s ability to perform the public safety functions. *Allegheny Cnty. Dist. Attorney’s Office v. Wereschagin*, 257 A.3d 1280, 1298 (Commw. Ct. 2021).

In support of the Office’s position, the Eisenstein Attestation states, in part:

10. The Office withheld records maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity.
11. With respect to materials identified in the log as records maintained in connection with a public safety activity, such materials include discussion of law enforcement and public safety tactics, sources and practices that, if revealed publicly, would allow individuals to evade these law enforcement and public safety measures and unlawfully act to threaten the safety of individuals, infrastructure and systems.

The OOR also considers the descriptions as provided in the exemption log. For example, the Office withheld records described as a “[m]emorandum from federal military authorities provided and retained by state counterparts pursuant to federal public safety or preparedness

activities. Federal information control limits release to law enforcement, and limits release of some information for operation security or to members of exec branch or armed services.” The memorandum, provided by federal military authorities, clearly pertains to public safety and preparedness activities as described by the Office, which fits squarely into the exemption of Section 708(b)(2). Moreover, the evidence provided by the Office affirms that “such materials include discussion of law enforcement and public safety tactics, sources and practices that, if revealed publicly, would allow individuals to evade these law enforcement and public safety measures and unlawfully act to threaten the safety of individuals, infrastructure and systems.” Despite the Requester’s arguments that the Office must be obligated to provide portions of the responsive memo, nothing in the totality of the evidence suggests that the memo can otherwise be parsed out and provided. Accordingly, the Office has demonstrated, by a preponderance of the evidence, that certain records are exempt and may be withheld pursuant to Section 708(b)(2) of the RTKL.³

However, after review of the Office’s evidence and exemption log, there are records that the OOR cannot conclude are exempt under Section 708(b)(2) of the RTKL. For instance, the Office asserts that records identified as REL0000143253, REL0000167054, and REL0000169944 are emails that “forward” the memo to certain parties. However, the Office has not provided any evidence to explain how an email simply forwarding the memo is exempt under Section 708(b)(2). Accordingly, absent any further argument or evidence to withhold these records, the OOR will order disclosure of records REL0000167054 and REL0000169944. However, the Office asserts

³ Because the OOR finds that certain records are exempt from access under Section 708(b)(2) of the RTKL, the OOR need not reach the Office’s alternative grounds for denying access to these records. *See Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

that record REL0000143253 is still exempt under another exemption, which will be further addressed in this Final Determination.

4. The Office has demonstrated that certain records are privileged

The Office asserts that certain records were properly withheld pursuant to the attorney-client privilege and/or the attorney work-product doctrine. The RTKL defines “privilege” as “[t]he attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth.” 65 P.S. § 67.102.

In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *See Bousamra v. Excelsa Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citations omitted). “[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege must prove waiver under the fourth prong.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2014) (citing *Id.*). An agency may not rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks Cnty.*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to withhold records”). The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice, where the

disclosure might not have occurred absent the privilege, and where the client's goal is to obtain legal advice. *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001).

The attorney work-product doctrine, on the other hand, prohibits disclosure "of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pa. R.C.P. 4003.3. "The purpose of the work-product doctrine is to protect the mental impressions and processes of an attorney acting on behalf of a client, regardless of whether the work product was prepared in anticipation of litigation." *Bousamra*, 210 A.3d at 976; *see also Heavens v. Pa. Dep't of Env'tl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) ("[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked"). While the attorney-client privilege is waived by voluntary disclosure, *Bousamra*, 210 A.3d at 978, the work-product doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id.* at 979.

In support of the Office's position, the Eisenstein Attestation states, in part:

8. With respect to materials denoted in the privilege log as containing attorney-client or attorney work product privileged material, records reveal requests for or the provision of legal advice between client and counsel, and denote the legal issues or problems posed to or by counsel. As to each of the privileged communications, the communications were between attorney and client, or conveyed the thoughts and mental impression of counsel, and included no strangers to such communications. Neither the Office, agencies nor counsel has disclosed such communications beyond the Office or affiliated agencies, nor have any parties waived such privileges.

The Office's exemption log supports that there are records that are privileged because the communications or documents were only exchanged between employees of the Office and the Office of General Counsel, who are attorneys who offer legal representation to certain

Commonwealth agencies, including the Office. A review of the exemption logs and descriptions of the records provided further support that the records reflect counsel's thoughts, opinions, mental impressions, work edits, and legal advice on various issues such as the implementation of agency policies, Commonwealth law enforcement and public safety policies, draft memos, legal strategies on how to approach a pending federal investigation, and other issues as described in the exemption log. Further, nothing in the record suggests that the exchanges as detailed in the evidence are for the purpose of committing a crime or tort. Finally, the Office affirms that the withheld records have not been shared beyond the Office, no privileges have been waived, and the Requester has not proven waiver of attorney-client privilege. Accordingly, the OOR concludes that certain records are privileged pursuant to the attorney-client privilege and the attorney-work product doctrine.⁴

However, there is a record that after review, the OOR cannot conclude is privileged under the attorney-client privilege and/or the attorney work-product doctrine. As previously mentioned, record REL0000143253 is an email that simply forwards the underlying memo. Other than the exemption log implying that counsel had been copied on this particular email, the Office has not provided any evidence to explain how this record would be privileged, as there is no evidence to support that the email exchanges legal advice, or reflects counsel's mental impressions or work product. Accordingly, absent any further argument or evidence to withhold this record, the OOR will order disclosure of record REL0000143253.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part, and dismissed as moot in part**, and the Office is required to provide previously withheld records

⁴ Because certain records are privileged, the OOR need not reach the Office's alternative grounds for denying access. See *Jamison v. Norristown Bor. Police Dept.*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

REL0000167054, REL0000169944, and REL0000143253 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 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.⁵ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: July 7, 2026

/s/ Tope L. Quadri

TOPE L. QUADRI
APPEALS OFFICER

Sent via portal to: Nathan Strunk
Marc Eisenstein, AORO

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