



FINAL DETERMINATION

IN THE MATTER OF	:
	:
JAMES HARRIS,	:
Requester	:
	:
v.	: Docket No: AP 2026-3319
	:
PENNSYLVANIA OFFICE OF	:
THE GOVERNOR,	:
Respondent	:

FACTUAL BACKGROUND

On July 6, 2026, James Harris (“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.*, stating:

“Please be advised that this is a new, highly narrowed, and evidence-based request. It is not duplicative of my previous request (OOR Docket AP 2025-1294). This request is based on newly acquired evidence—specifically, a recorded voicemail dated April 2, 2025, from a Department of Environmental Protection (DEP) Regional Director confirming that the DEP Secretary and Sam Robinson briefed Governor Shapiro on the Homer City Redevelopment "modeling protocols" at exactly 2:00 PM on that date. Because this request is tied to a specifically documented briefing, blanket claims of "predecisional" privilege cannot be applied to conceal the factual materials presented.

Requested Records: The April 2, 2025 Briefing Materials: Any and all briefing documents, memos, “modeling protocols,” or presentation materials prepared by the DEP (or AECOM) that were provided to Sam Robinson, Governor Josh

Shapiro, or executive staff for the 2:00 PM briefing on April 2, 2025, regarding the Homer City Generating Station redevelopment.

Calendar Entries: The official, unredacted calendar entries for Governor Josh Shapiro and Sam Robinson for the date of April 2, 2025, specifically reflecting the 2:00 PM Homer City briefing or any meeting with the DEP Secretary.

Developer Communications: Any direct correspondence (emails, letters, memos) between the Governor's executive staff (including Sam Robinson) and Robin Gorman or Homer City Redevelopment LLC regarding the fast-tracked approvals for the Homer City site, from January 1, 2025, to May 1, 2025.”

On August 12, 2026, following a thirty-day extension, 65 P.S. §67.902(b), the Request was denied. The Office stated that it identified thirteen (13)¹ pages of responsive records, that if disclosed, would reveal the internal, predecisional deliberations of officials or employees, 65 P.S. § 67.708(b)(10), and notes 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. 65 P.S. § 67.708(b)(12).

On August 12, 2026, the Requester filed an appeal with 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 Office to notify the OOR if any third parties have a direct interest in this appeal. 65 P.S. § 67.1101(c).

On August 25, 2026, the Office submitted its response to the appeal, reiterating its reasons for denial. In support of its position for denial, the Office submitted the affirmation of Marc Eisenstein, (“Eisenstein Affirmation”), the Office’s Agency Opens Records Officer (“AORO”), made subject to the penalties of perjury. The Office also submitted a privilege log attached as Exhibit “A” and the titles and agencies for the senders and recipients listed in the privilege log as Exhibit “B.”

¹ The Eisenstein Affirmation clarifies that fourteen (14) pages of records were withheld.

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 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. Argic. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). Here, the Requester sought an *in camera* review of the records, but this request is denied, as the OOR has sufficient evidence to render a decision.

1. A portion of the Request seeks records that do not exist in the possession, custody or control of the Office

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 identified record[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

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 all potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff’d*, 243 A.3d 19 (Pa. 2020). An agency must show, through detailed evidence submitted in good faith from

individuals with knowledge of the agency's records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep't of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

In support of its position that records responsive to the portion of the Request seeking developer communications do not exist in the possession, custody or control of the Office, the Eisenstein Affirmation states that upon receipt of the Request, Mr. Eisenstein reviewed the operations and programs of the Office and consulted with the individuals who would have custody or control over any possible responsive records. Eisenstein Affirmation, ¶3. Specifically, Mr. Eisenstein commissioned and conducted a search for the requested records by inquiring with Information Technology staff who would have access to potentially responsive records, as well as by searching the email accounts of individuals whose email accounts are within the possession, custody and control of the Office. *Id.* at ¶4. Mr. Eisenstein attests that with respect to the portion of the Request seeking correspondence between the Governor's executive staff and Robin Gorman or Homer City Redevelopment LLC, regarding fast-tracked approvals for the Homer City site from January 1, 2025, to May 1, 2025, based upon a good faith search, no responsive records exist in the possession, custody or control of the Office. *Id.* at ¶6. Therefore, based upon a preponderance of the evidence, the Office has proven that these Requested records do not exist in the possession, custody or control of the Office.

2. Records were properly withheld under Section 708(b)(10) of the RTKL

The Office asserts it properly withheld fourteen (14) pages of documents as detailed in the privilege log in Exhibit "A" 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 or 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).

The Eisenstein Affirmation states that “the Office withheld records that include collaboration on and consideration of matters within the executive branch of Commonwealth government.” Eisenstein Affirmation, ¶9. Such records reveal the thoughts and impressions of agency officials with respect to pending matters discussed between agency officials and employees within the Governor’s Office or between the Governor’s Office and other agencies. Such communications were not disclosed beyond the agencies.” Eisenstein Affirmation, ¶9.

A review of the Eisenstein Affirmation and the privilege log submitted by the Office supports that the withheld communications are internal because they were exchanged only between and involved employees of the Office, the Department of Environmental Protection, and the Department of Community and Economic Development, all of which are governmental agencies. The Eisenstein Affirmation affirms that these communications have not been shared outside of these agencies. Eisenstein Affirmation, ¶¶9, 10. The Office’s privilege log contains a description of the records and provides further support that these communications were withheld because the records reflect communications, thoughts, and analyses that considered possible courses of action on policy matters, topics relating to prospective review and analysis of permit processes, permitting and funding. As these are internal to the agency, reflect prospective courses of action

and are deliberative, the Office has demonstrated that the withheld communications are exempt and may be withheld pursuant to Section 708(b)(10) of the RTKL.²

3. The requested calendar entries are exempt under Section 708(b)(12) of the RTKL

The Request sought “[t]he official, unredacted calendar entries for Governor Josh Shapiro and Sam Robinson for the date of April 2, 2025, specifically reflecting the 2:00 PM Homer City briefing or any meeting with the DEP Secretary.”

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). This exemption protects “notes and working papers created by a . . . public official or employee regarding agency-related business, but not for an official function.” *Escalera v. Adams Cnty.*, OOR Dkt. AP 2011-0184, 2011 PA O.O.R.D. LEXIS 176. The record 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.3d 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. Ct. Unpub. LEXIS 251 (Pa. Commw. Ct. 2016).

² The Requester makes an argument that because of a recorded voicemail dated April 2, 2025, from a Department of Environmental Protection Regional Director confirming that the DEP Secretary and Sam Robinson briefed Governor Shapiro on the Homer City Redevelopment “modeling protocols” at exactly 2:00 p.m. on April 2, 2025, the briefing materials would not be predecisional in nature because the Department of Environmental Protection finalized and accepted these protocols on March 17, 2025. The Requester therefore characterizes this as “post decisional crisis management.” However, the Requester provides no evidence to support this argument, just assertions of belief. There is no actual evidence attached to the appeal. For example, the Requester includes a “Key Evidence/Source Exhibit” on page 2 of his submission brief. He states that as Exhibit TTT, April 2, 2025, there is a DEP Regional Director Voicemail. However, there is no Exhibit TTT included in the submissions. The Requester also identifies as “PEMA Bradley Affidavit” in O.O.R. AP Dkt. 2026-2597, yet this is not included in his submissions either. The Requester additionally submits a statement of prior mischaracterization and formal demand for in-camera judicial review along with a reproduced portion of an exemption log from a prior RTKL case involving the Office, yet this is reproduced by the Requester and the actual exemption log mentioned in the submissions is not attached.

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. Cmwlth. 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, supra*. (finding entries on an agency employee's work calendar to be exempt under Section 708(b)(12) of the RTKL).

In support of its argument that the calendars are exempt from disclosure, the Eisenstein Affirmation states that Mr. Eisenstein is fully informed of the use and purpose of both Governor Shapiro's and Mr. Robin's calendars. Eisenstein Affirmation, ¶11. He states "[t]he personal work calendars are not an official record of their schedules and activities . . . [they] do not have an official purpose and are not available for access by anyone outside of the Governor's office." *Id.* at ¶12. Furthermore, he affirms the calendars contain the following: information regarding "personal and work-related appointments, meetings, events, and activities" and their "sole purpose . . . is to assist conveniently keeping track of personal schedules and to determine availability for scheduling purposes." *Id.* at ¶¶13, 14.

Here, the evidence substantiates that the responsive calendar entries are part of the personal calendars of the Governor and Mr. Robinson and that such calendars are used solely for the personal use of the Governor and Mr. Robinson to carry out their official duties. Accordingly, the

Office met its burden to demonstrate that the calendar entries are exempt from public access. 65 P.S. §67.708(b)(12).

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 or petition for review 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 65 P.S. § 67.1303, but 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.³ 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 website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 6, 2026

/s/ Meryl M. Peterman

MERYL M. PETERMAN, ESQ.
APPEALS OFFICER

Sent via OOR E-file appeal portal to:

James Harris
Marc Eisenstein, AORO

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