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2026 through the date of this [R]equest between Josh Shapiro, Governor, Sam Robinson, Deputy Chief of Staff and/or Dana Fritz, Chief of Staff, and any of the below listed individuals or entities:

- a. Mark Ellis;
- b. [T]he American Economic Liberties Project (“AELP”) and any representative, agent, or employee acting on its behalf;
- c. MarketClear Utility Policy Research (“MarketClear”) and any representative, agent or employee acting on its behalf; and
- d. Pennsylvania Public Utility Commission [(“PUC”)] Commissioners.

2. Please provide written and electronic communications regarding the Utility Reform Proposal, the Competitive Market-Based Process, or the Acceptance of the Market Rate of Return from January 1, 2026 through the date of this [R]equest between Josh Shapiro, Governor, Sam Robinson, Deputy Chief of Staff and Dana Fritz, Chief of Staff, and the below listed individuals or entities:

- a. Office of General Counsel personnel responsible for energy affordability or utility matters, including Mark Szybist, Special Counsel for Energy Affordability.

3. All calendars, calendar records or entries, meeting invites, visitor logs, agendas, or notes related to any meeting, call, videoconference, or event involving or discussing the Utility Reform Proposal, the Competitive Market-Based Process, or the Acceptance of the Market Rate of Return from January 1, 2026 through the date of this [R]equest between Josh Shapiro, Governor, Sam Robinson, Deputy Chief of Staff and/or Dana Fritz, Chief of Staff, and any of the below listed individuals or entities:

- a. Mark Ellis;
- b. the AELP and any representative, agent or employee acting on its behalf;
- c. MarketClear and any representative, agent or employee acting on its behalf; [and]
- d. [PUC] Commissioners.

4. All calendars, calendar records or entries, meeting invites, visitor logs, agendas, or notes related to any meeting, call, videoconference, or event involving or discussing the Utility Reform Proposal, the Competitive Market-Based Process, or the Acceptance of the Market Rate of Return from January 1, 2026 through the date of this [R]equest between Josh Shapiro, Governor, Sam Robinson, Deputy Chief of Staff and/or Dana Fritz, Chief of Staff, and the below listed individual or entity:

- a. Office of General Counsel personnel responsible for energy affordability or utility matters, including Mark Szybist, Special Counsel for Energy Affordability.

5. All records (written and electronic) in the possession, custody or control of Josh Shapiro, Governor, Sam Robinson, Deputy Chief of Staff and/or Dana Fritz, Chief of Staff discussing, analyzing, referencing, attaching, forwarding, or citing materials concerning the Utility Reform Proposal, the Competitive Market-Based Process, or the Acceptance of the Market Rate of Return from January 1, 2026 through April 29, 2026.

6. All records that identify all non-public individuals or organizations that were asked to help prepare or consulted with on the Utility Reform Proposal, the Competitive Market Based Process, or the Acceptance of the Market Rate of Return from January 1, 2026 through April 29, 2026.

7. All records identifying the origin or source of the Competitive Market-Based Process or the Acceptance of the Market Rate of Return from January 1, 2026 through April 29, 2026.

On August 10, 2026, following a thirty-day extension during which to respond, 65 P.S. § 67.902(b), the Office partially granted the Request and provided responsive records containing redacted information. Specifically, the Office asserts the redactions consist of exempt personal identification information, 65 P.S. § 67.708(b)(6), exempt internal, predecisional deliberative information, 65 P.S. § 67.708(b)(10), and information protected by the attorney-client privilege and attorney work product doctrine, 65 P.S. §§ 67.102 (definition of privilege), 67.305(a)(2), 67.506(c)(2).¹

On August 24, 2026, the Requester filed an appeal with the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.² Specifically, the Requester asserts that the Office did not meet its burden of proof regarding the redactions claimed to be

¹ The Office’s final response does not indicate that responsive records were withheld; however, the Eisenstein Attestation clarifies that the redactions contained within the responsive records were made pursuant to Section 708(b)(6) and 39 pages of responsive records were withheld as privileged and internal, predecisional deliberative materials. Eisenstein Attestation ¶¶ 6, 7.

² The Requester did not object to the OOR’s request for a three-week extension with which 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).”); *see also* OOR’s correspondence, dated August 27, 2026.

internal, predecisional deliberations or privileged material.³ 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 September 4, 2026, the Requester submitted a position statement, reiterating the arguments made at the time of the appeal. Additionally, the Requester asserts that the Office failed to perform a good faith search for responsive records, as PUC released records to the Requester that were not disclosed by the Office. The Requester further claims that the attorney-client privilege has been waived as there are non-agency third parties included on emails. Lastly, the Requester seeks *in camera* review of the redacted and withheld responsive records and an exemption log outlining all redacted and withheld materials.

On September 4, 2026, the Office submitted an attestation made under the penalty of perjury, 18 Pa.C.S. § 4902, authored by Marc Eisenstein (“Eisenstein Attestation”), the Office’s Agency Open Records Office (“AORO”). The Office reiterated its grounds for redacting and withholding responsive records. Additionally, the Office provided 2 pages of records with the Eisenstein Attestation that the Office no longer claims are exempt,⁴ a privilege log (“Log”)⁵ and a directory of senders and recipients (“Directory”) for the individuals listed within the Log.⁶

On September 18, 2026, at the request of the OOR, the Office submitted a second attestation made under the penalty of perjury, 18 Pa.C.S. § 4902, authored by Marc Eisenstein (“Eisenstein Second Attestation”), and provided a redacted email⁷ previously withheld in full.⁸

³ As the Requester does not challenge the redactions made by the Office pursuant to Section 708(b)(6), said redactions will not be further discussed herein.

⁴ See Eisenstein Attestation, Exhibit B.

⁵ The contents of the Log are affirmed to be accurate. See Eisenstein Attestation ¶ 12, Exhibit A.

⁶ See Eisenstein Attestation, Exhibit C.

⁷ Control Number REL0000067303. See Log; see also Eisenstein Second Attestation ¶ 7, Exhibit A.

⁸ The OOR afforded the parties evidentiary submission extensions through September 18, 2026. See 65 P.S. § 67.1102(b)(3) (“In the absence of a regulation, policy or procedure governing appeals under this chapter, the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute”).

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)). 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).

While the Requester sought an *in camera* review of the redacted and withheld records, the OOR has sufficient information and evidence before it to adjudicate the matter. Therefore, the request for *in camera* review is denied.

1. The appeal as it relates to the records provided during the appeal is moot

During the pendency of the appeal, the Office provided the Requester with 3 additional pages of responsive records that are no longer claimed to be exempt. *See* Eisenstein Attestation, Exhibit B; *see also* Eisenstein Second Attestation ¶ 7.⁹ As such, the appeal as to the records provided to the Requester during the pendency of the appeal is dismissed as moot. *See Chester*

⁹ Under the RTKL, a sworn affidavit or statement 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). In the absence of any evidence that the Office has acted in bad faith, “the averments in [the attestations] 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 *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

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 it appropriately withheld some records responsive to the Request that reflect internal, predecisional deliberative materials

Section 708(b)(10)(i)(A) of the RTKL exempts from disclosure records reflecting:

[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, legislative proposal, legislative amendment, contemplated or proposed policy 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).

The Office argues that it withheld records that contain internal, predecisional deliberative information. In support of the Office’s assertion the records were properly withheld pursuant to Section 708(b)(10)(i)(A), the Eisenstein Attestation indicates, in relevant part, the following:

8. With respect to materials denoted in the privilege log as containing internal, predecisional deliberations, the Office withheld records that include collaboration on and consideration of matters within the executive branch of Commonwealth government. Such records reveal the thoughts and impressions of [Office] officials with respect to pending matters discussed between agency officials and employees within the Office of General Counsel or between the Office of General Counsel and other agencies. Such communications were not disclosed beyond the agencies. As referenced in the [Log], in each of the identified communications, [Office] officials and employees circulated the exempt documents and therein considered policy and substantive programmatic options, sought and provided comments on such options, and considered the desirability of various approaches to such policy and programmatic options.

Additionally, the Log describes these withheld records as:

Communications regarding draft letter circulated among Office of the Governor personnel for review, consideration, and comment concerning energy policy.

Draft letter circulated among Office of the Governor personnel for review, consideration, and comment concerning energy policy.

Communications regarding draft letter circulated among Office of the Governor and [PUC] officials for review, consideration, and comment concerning energy policy.

...

Communications circulated among Office of the Governor personnel for review, consideration, and comment concerning energy policy and a meeting request.

Communications related to a press inquiry circulated among Office of the Governor and Department of Environmental Protection personnel for review, consideration, and comment. Record includes discussions of energy policy and positions on legislation.

See Log.

The withheld records were sent to, commented on or sent by entities within the Office, the Pennsylvania Department of Environmental Protection, the Governor's Office of General Counsel, PUC and the Pennsylvania Department of Community and Economic Development. *See* Directory; *see also* Log. Thus, the Directory and Log demonstrate that the withheld records are internal to the Office.

The Office must also establish that the withheld records are predecisional and deliberative in nature. Furthermore, an agency must "submit evidence of specific facts showing how the information relates to a deliberation of a particular decision." *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 379 (Pa. Commw. Ct. 2013). 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 prove that a record is exempt under this section, 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).

Recently, in *Shepherd v. Pennsylvania Office of the Governor*, in discussing *McGowan v. Pennsylvania Department of Environmental Protection*, 103 A.3d 274 (Pa. Commw. Ct. 2014), the Commonwealth Court found the following:

McGowan guides that not every internal agency communication involving a decision to be made or a question to be answered is subject to the predecisional deliberative exemption. Rather, it is apparent that the exemption protects those communications which reflect that an agency is deliberating, as in *McGowan*, a particular determination, ruling or policy. *See Office of General Counsel v. Bumsted*, 247 A.3d 71, 84 (Pa. Cmwlth. 2021) (only information that constitutes confidential deliberations of law or policymaking reflecting opinions, recommendations or advice is protected as deliberative). This ‘big picture’ approach avoids an overbroad interpretation of the deliberative process exemption, which could conceivably lead to the exemption of virtually any discussion or dialogue that occurs within an agency. Moreover, it furthers the RTK Law’s directive that exemptions from disclosure must be narrowly construed.

2025 Pa. Commw. Unpub. LEXIS 277, 14 (June 5, 2025). As a result, the Commonwealth Court conducted an *in camera* review of the records identified as exempt under Section 708(b)(10)(i)(A) and found that while the records contained discussion of various administrative and agency minutiae, none of the discussions rose to the level of a predecisional deliberation regarding a significant decision of the agency.

As noted in the Eisenstein Attestation, the records contain internal, predecisional deliberative discussions concerning collaboration and consideration of matters within the executive branch of the Commonwealth government. Eisenstein Attestation ¶ 8. Further, the Eisenstein Attestation indicates the withheld records contain discussions of policy and substantive

programmatic options and sought and provided comments on options related thereto. *Id.* Additionally, the Log reveals specifically that the records concern energy policy, a draft letter concerning energy policy and communications related to a press inquiry related to energy policy and legislation. *See* Log. The Eisenstein Second Attestation further indicates that the responsive material within the records does not contain any severable factual information, as it is intrinsically intertwined with the officials' thoughts and considerations. Eisenstein Second Attestation ¶ 9.

Thus, the Log and Eisenstein Attestations support that the above records were appropriately withheld, as the records contain the internal, predecisional deliberations of the Office regarding policymaking, official decisions and responses regarding said policymaking—not merely administrative decisions. Thus, the Office has properly withheld these responsive records under Section 708(b)(10)(i)(A) of the RTKL.¹⁰

3. The Office has demonstrated that the remaining withheld records are privileged

The RTKL excludes records subject to a privilege from the definition of “public record.” *See* 65 P.S. § 67.102. The RTKL defines “privilege” as “[t]he attorney-work-product doctrine, the 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.” *Id.* 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). In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder

¹⁰ The Requester asserts that the records, if exempt, should be released in redacted format; however, “where a record falls within an exemption under Section 708(b), it is not a public record as defined by the RTKL and an agency is not required to redact the record...” *Pa. State Police v. Office of Open Records*, 5 A.3d 473, 481 (Pa. Commw. Ct. 2010). As the records identified by the Office are internal, predecisional deliberative records and the content therein cannot be severed from the records, the Office does not need to redact the responsive records.

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, 976 (Pa. 2019). “[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.*).

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 976 (internal citations omitted); *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 (internal citation omitted), the work-product doctrine is not primarily concerned with confidentiality, as it is designed to provide protection against adversarial parties. *Id.* at 979 (internal citations and quotation omitted).

The Office asserts that the remaining withheld responsive records encompass communications between legal counsel and the Office that contain privileged communications or the thoughts and mental impressions of counsel.

The Eisenstein Attestation indicates, in relevant part, the following:

9. 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.

Additionally, the Log further describes the records as seeking and providing legal strategy regarding energy policy, legislation and the review of a letter regarding energy policy. *See* Log.

Based upon the review of the descriptions contained in the Log and the attestation, the Office has demonstrated that the withheld records are privileged. The records consist of communications between Office and its counsel regarding the provision or seeking of legal advice related to energy policy and legislation.

As the Requester has not submitted evidence in support of the waiver of the privilege regarding the remaining withheld records, and as such, the OOR need not further address waiver of the privilege. *See Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 420 (the burden of proving waiver is on the party seeking disclosure); *see also Connell v. Pa. Dep't of Human Resources*, OOR Dkt. AP 2015-2894, 2016 PA O.O.R.D. LEXIS 85 (finding that department status reports created by counsel and sent to the Office of General Counsel are protected by the attorney-client privilege and/or the attorney work product doctrine); *see also McKenna and InsideClimate News v. Pa. Off. of Gov.*, OOR Dkt. AP 2019-0407, 2019 PA O.O.R.D. LEXIS 1400 (finding that daily

briefing emails between the Office of General Counsel and the Governor discussing developing legal issues, policy matters, the legislative agenda and issues pending before executive agencies are protected by the attorney-client privilege and/or the attorney-work product doctrine).

4. The Office demonstrated it performed a good faith search for responsive records

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. 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 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).

Here, the Request seeks communications, calendars and meeting information for and between specified individuals related to utilities. In support of the Office’s assertion that a good faith search was performed in response to the Request, the Eisenstein Attestation details its search for responsive records, which included a search within the Office’s records through Information Technology staff who searched the Office’s electronic records systems and email accounts of the

individuals named in the Request. Eisenstein Attestation ¶ 4. Additionally, based on the Requester's position statement, the Office performed a second, expanded search and provided additional responsive records. Eisenstein Second Attestation ¶¶ 5-7. The Office also explained that based upon the Request language, the pages located on pages 105 and 106 of the Requester's position statement would not be responsive to the Request. *Id.* While the Requester argues that the search is not complete, the Office has demonstrated that a good faith search was performed and that it does not possess additional records responsive to the Request other than the records provided and withheld. There has been no sufficient evidence provided that otherwise contradicts the statements offered by the Office in the attestations submitted. *See Pa. Dep't of Health v. Mahon*, 283 A.3d 929 (Pa. Commw. Ct. 2022). Therefore, based on the evidence provided, the Office has met its burden of proof that additional responsive records do not exist in the Office's possession, custody or control.¹¹ *Hodges*, 29 A.3d at 1192.

CONCLUSION

For the foregoing reasons, the appeal is **denied in part** and **dismissed as moot in part**, 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; 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.¹² 65 P.S. § 67.1303. All documents or communications following the issuance of this Final Determination shall be sent to

¹¹ The OOR makes no determination as to whether records *should* exist, as our inquiry is limited to only whether or not records are "in existence and in possession of the ... agency at the time of the right-to-know request." *Moore*, 992 A.2d at 909; *see also* 65 P.S. § 67.705.

¹² *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

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

FINAL DETERMINATION ISSUED AND MAILED: October 13, 2026

/s/ Bandy L. Jarosz

BANDY L. JAROSZ, ESQ.
APPEALS OFFICER

Sent to: Joshua Bonn, Esq. (via portal only)
Marc Eisenstein (via portal only)