



FINAL DETERMINATION

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|--|---|--------------------------------|
| IN THE MATTER OF | : | |
| | : | |
| PENNSYLVANIA HEALTH AND | : | |
| WELLNESS, INC. | : | |
| Requester | : | |
| | : | Docket No: AP 2020-1398 |
| v. | : | |
| | : | |
| PENNSYLVANIA DEPARTMENT OF | : | |
| HUMAN RESOURCES, | : | |
| Respondent | : | |
| | : | |
| and | : | |
| | : | |
| AMERIHEALTH CARITAS HEALTH | : | |
| PLAN, VISITA HEALTH PLAN, INC., | : | |
| KEYSTONE FAMILY HEALTH PLAN, | : | |
| GEISINGER HEALTH PLAN, UPMC FOR | : | |
| YOU, INC., HEALTH PARTINERS PLAN, | : | |
| INC., GATEWAY HEALTH PLAN, INC. | : | |
| Direct Interest Participants | : | |

INTRODUCTION

Pennsylvania Health and Wellness, Inc. (“PHW”), through its counsel, Joshua Voss, Esq., (collectively “Requester”) submitted a request (“Request”) to the Pennsylvania Department of Human Resources (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records related to Department’s Request For Applications (“RFA”) 07-19. The Department partially denied the Request, arguing, among other things, that the records reflect internal, predecisional deliberations, consist of information pertaining to agency bids and

proposals, and that the records are privileged. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted in part, denied in part, and dismissed as moot**, and the Department is required to take additional action as directed.

FACTUAL BACKGROUND

On July 14, 2020, the Request was filed, seeking¹:

2. All documents, regardless of physical form, relating to RFA No. 07-19, including any:

- a. memoranda pertaining to the selection of MCOs² and/or the award of contracts;
- b. list(s) of criteria used with the weight assigned to each criteria;
- c. scores of each application considered along with a summary of scores;
- d. correspondence, memoranda, notes and/or records justifying the selection of MCOs and/or the award of contracts;
- e. individual and team scoring sheets and notes and/or working papers used to tabulate the summary scores;
- f. any scoring criteria or scoring sheets which reflect how the available points for each score are determined and applied;
- g. instructions, protocols or requirements provided to team members on how to score the submissions;
- h. notes or minutes of team members from team member meetings where team scores were determined;
- i. notes, memoranda and recordings (including voice, video and/or audio recordings) of oral presentations made by, to, for or on behalf of any bidder or pertaining in any way to RFA No. 07-19 and/or the contract(s) awarded pursuant thereto;

¹ On September 3, 2020, the Requester withdrew the appeal as to Request Item 1.

² Managed Care Organizations.

j. notes, memoranda and recordings (including voice, video and/or audio recordings) of any/all questions, inquiries or requests made to any bidder;

k. documents or items that contain, set forth, request, analyze, reference or cite any research and information that the [Department] considered or may have considered in awarding contract(s) pursuant to RFA No. 07-19;

l. documents or items that state, list, or reference any person(s) that [the Department] consulted or may have consulted or relied upon in any way in its review of responses to RFA No. 07-19 (including without limitation consultation for reference checks), and the information or input of each such person(s) consulted or relied upon;

m. other documents, records, correspondence, e-mail, notes or memoranda relating to the evaluation and/or scoring of the responses to RFA No. 07-19.

3. All records, including any and all criteria, bid tabulations, individual scoring sheets and notes of members of the evaluation committee evaluating RFA No. 07-19 applications, including but not limited to the technical scores submittals, records or evaluation sheets, regardless of physical form, prepared or produced by or on behalf of [the Department], Bureau of Financial Operations [(“BFO”)], Division of Procurement and Contract Management; [Department] Office of Long-Term Living; the Department of Aging; the Bureau of Diversity, Inclusion & Small Business Opportunities (“BDISBO”), and/or any evaluation committee(s);

4. All records and correspondence, regardless of physical form, received or produced by or on behalf of [the Department] and/or any evaluation committee(s) regarding RFA No. 07-19;³

5. All records, regardless of physical form, that indicates the name of each individual responsible for evaluating RFA No. 07-19, including any evaluation committee(s) for RFA No. 07-19, how the individuals in the evaluation committee(s) were grouped, the name of each in the group and what sections each evaluated;

6. All records, regardless of physical form, related to the results of any evaluation committee’s report to the Issuing Office regarding RFA No. 07-19;

7. All records, regardless of physical form, related to the scores of all bidders, individually or combined, in connection with the final technical scores and any

³ In an August 13, 2020 email, attached to the appeal, the Requester replied to the Department’s request for clarification regarding the time frame for the records sought in Item 4 of the Request, by stating “January 1, 2019.”

other relevant scores including the bidders' overall scores regarding RFA No. 07-19;

8. All memoranda including without limitation any selection memoranda, regardless of physical form, received or produced by or on behalf of the [Department] and/or any evaluation committee(s) regarding RFA No. 07-19;

9. All recordings, regardless of physical form, received or produced by or on behalf of [the Department] or any evaluation committee(s) regarding RFA No. 07-19;

10. All records, regardless of physical form, related to the post-selection notification and evaluation processes, including any readiness review conducted by [the Department] regarding RFA No. 07-19;

11. All records related to all versions and proposed versions, regardless of physical form, of RFA No. 07-19, all correspondence, regardless of physical form, received or produced by or on behalf of [the Department] related to RFA No. 07-19, and all reports, memoranda, notes, charts or similar documents, regardless of physical form, related to RFA No. 07-19;

12. All records related to all versions, proposed versions, or contemplated versions, regardless of physical form, of RFA No. 07-19 that included any scoring for not-for-profit or local MCOs, all correspondence, regardless of physical form, received or produced by or on behalf of [the Department] related to RFA No. 07-19 that included any scoring for not-for-profit or local MCOs, and all reports, memoranda, notes, charts or similar documents, regardless of physical form, related to RFA No. 07-19 that included any scoring for not-for-profit or local MCOs;

13. All records related to all versions, proposed versions, or contemplated versions, regardless of physical form, of RFA No. 07-19 that included any scoring relating to small diverse business ("SDB") participation, all correspondence, regardless of physical form, received or produced by or on behalf of [the Department] related to RFA No. 07-19 that included any scoring relating to SDB participation, and all reports, memoranda, notes, charts or similar documents, regardless of physical form, related to RFA No. 07-19 that include any scoring for SDB participation;

14. All records and correspondence, regardless of physical form, relating to any [Department] evaluation, assessment, feedback, or review, positive or negative, of [PHW's] Community HealthChoices program from January 1, 2018 to the present;

15. All correspondence, or notes, memoranda, or presentations relating to such correspondence, regardless of physical form, between any [Department] personnel and any employee, representative, or agent of any managed care organization that responded to RFA No. 07-19 during the time period of October 15, 2019 to the present;

16. From June 1, 2019 to July 31, 2019, emails to, from, or copying [Department] employee Kevin Hancock regarding [PHW], Inc. or Justin Davis; and

17. From January 1, 2020 to the present, emails to, from, or copying any employee of [the Department] and any employee or agent of any of (i) Gateway Health Plan, Inc., (ii) Geisinger Health Plan, (iii) Health Partners Plans, Inc., (iv) United HealthCare of Pennsylvania, Inc., (v) UPMC For You, Inc., (vi) UPMC Health Plan, or (vii) Vista Health Plan, Inc. regarding [RFA] # 07-19.⁴

On July 14, 2020, the Department invoked a thirty-day extension to respond to the Request. 65 P.S. § 67.902(b). On August 13, 2020, the Requester agreed to grant the Department an additional extension of time to respond. On August 14, 2020, the Department partially denied the Request, arguing that certain records contain personal identification information, 65 P.S. § 67.708(b)(6)(i)(A); are records of the Department's proposal evaluation committee, 65 P.S. § 67.708(b)(26); reflect the Department's internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A); are notes and working papers of Department employees or officials, 65 P.S. § 67.708(b)(12); and, are protected by the attorney client privilege and attorney work product doctrine. Regarding Item 16 of the Request, the Department argued that, in addition to personal identification information, the records contain exempt medical information, 65 P.S. § 67.708(b)(5), are records are a recipient of social services, 65 P.S. § 67.708(b)(28), and are records that relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17)(vi)(A). The Department also argued that certain records do not exist within its possession, custody or control and portions of the Request are insufficiently specific, 65 P.S. § 67.703.

On August 17, 2020, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.⁵ The OOR invited both parties to supplement the record and directed the

⁴ By email dated September 18, 2020, the Requester withdrew his appeal as to Item 1 of the Request.

⁵ The OOR's Final Determination deadline was extended until April 20, 2021, for the purpose of conducting an *in camera* review.

Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).⁶

On August 28, 2020, UPMC For You, Inc. (“UPMCFY”) submitted a request to participate in the appeal, which the OOR granted. On September 9, 2020, UPMCFY submitted a position statement arguing the requested records are exempt under 65 P.S. § 67.708(b)(26), 65 P.S. § 67.708(b)(10)(i)(A) and 65 P.S. § 67.708(b)(11), and that the requested proposals contain confidential proprietary information and trade secrets. UPMCFY relies on *UnitedHealthcare of Pennsylvania, Inc. v. Pa. Dep’t of Human Svcs.*, 187 A.3d 1046 (Pa. Commw. Ct. 2018) (“*UnitedHealthcare*”) in support of its position. In support of its position, UPMCFY submitted an affidavit made under penalty of perjury from John Lovelace, President of UPMCFY.

On September 2, 2020, Geisinger Health Plan (“GHP”) submitted a request to participate in this appeal pursuant to 65 P.S. § 67.1101(c), which the OOR granted. On September 9, 2020, GHP submitted a position statement arguing that the requested records are exempt under 65 P.S. § 67.708(b)(26). GHP also relies on *UnitedHealthcare* in support of its position. GHP also agreed with the Department’s position that certain records reflect internal, predecisional deliberations and contain personal identification information. In support of its position, GHP submitted the affidavit of David Weader, Esq., Associate Chief Legal Officer and Regulatory Affairs Officer.

On September 3, 2020, the Requester withdrew the appeal as to Request Item 1, which sought “[a]ll bids or applications submitted by the offerors in response to RFA No. 07-19, including all appendices, attachments, parts or sub-parts, or revisions.” The Requester further advised that it is no longer seeking “Appendix E” information, which is a reference to the portion

⁶ Because of issues impacting the delivery of records for which the Department granted access due to the COVID-19 pandemic and the limited ability to physically enter Commonwealth buildings at that time, the parties mutually agreed to a final document production date of September 4, 2020, and a record closing date of September 9, 2020. The OOR granted the extension based on the parties’ agreement.

of the applications filed in response to RFA No. 07-19, wherein the applying parties describe their trade secrets and/or confidential proprietary information.

On September 3, 2020, Vista Health Plan and its affiliate subcontractors AmeriHealth Caritas Health Plan and Keystone Family Health Plan (collectively “AmeriHealth Caritas”) submitted a request to participate in the appeal, which the OOR granted. On September 11, 2020, AmeriHealth submitted a position statement, arguing that the requested records are exempt under 65 P.S. § 67.708(b)(26), 65 P.S. § 67.708(b)(11), and asserting its support of the Department’s position on appeal. In its position statement, AmeriHealth Caritas clarified that its submission did not include evidence in support of the Section 708(b)(11) exemption. The evidence was not included because AmeriHealth relied on the Requester’s September 3, 2020 email in which Item 1 of the Request was withdrawn and the Requester stated that Appendix E, along with any trade secrets or confidential proprietary information, is no longer sought..

On September 9, 2020, Health Partners Plan, Inc. (“Health Partners”) also submitted a request to participate in the appeal, which the OOR granted. Health Partners claimed that the requested records are exempt under 65 P.S. § 67.708(b)(26), 65 P.S. § 67.708(b)(11), 65 P.S. § 67.708(b)(10)(i)(A), 65 P.S. § 65.708(b)(6), 65 P.S. § 67.708(b)(1). Health Partners also relies on *UnitedHealthcare of Pennsylvania, Inc. v. Pa. Dep’t of Human Svcs.*, 187 A.3d 1046 (Pa. Commw. Ct. 2018) to support the cited exemptions.. In support of its position, Health Partners provided the sworn declaration of Kearline Jones, Vice President of Health Partners.

On September 9, 2020, UnitedHealth Care of Pennsylvania (“United”) submitted a request to participate in the appeal, but, based on the Requester’s withdrawal of Request Item 1 and Appendix E information it indicated that, as of that date, it was only seeking to monitor the

proceedings. The request to participate was not granted and United did not make a submission for the record.

On September 11, 2020, the Requester submitted a position statement asserting that the Department had not carried its burden of proof with competent evidence to demonstrate the asserted exemptions and redactions or that certain records do not exist. The Requester also argued that Item 15 of the Request is sufficiently specific and that the Department's refusal to provide responsive public records "unfairly inhibits [the Requester] in its protests of the RFA awards." The Requester further asserted that the Department's failure to provide access to records is a pattern of conduct that conceals basic information about the RFA process from the public. The Requester requested that the OOR seek an exemption log from the Department and order *in camera* review of all withheld records.

On September 14, 2020, the Requester submitted a supplemental position statement asserting that the Department improperly redacted the scores from the Recommendation Memoranda provided in response to Item 2.a. The Requester disputed that the redactions can legally be made under Sections 708(b)(10)(i)(A) and 708(b)(26), and also asserted that the Department released the same record in connection with a prior procurement process without such redactions.

On September 11 and 15, 2020,⁷ the Department submitted a position statement, document logs and other evidence reiterating its grounds for denial. In support of its position, the Department

⁷ The Department submitted its position statement on September 11, 2020, but requested an extension until September 14, 2020, to submit one additional affidavit and the Department's document logs. Due to difficulties in obtaining a signature for the affidavit related to teleworking during the COVID-19 pandemic emergency, as well as computer difficulties encountered when compiling the document logs, the Department completed its submission on September 15, 2020. Although the submissions were one day late, to fully develop the record in this matter, all of the Department's submissions were considered. 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").

submitted the attestations made under penalty of perjury from Andrea Bankes, the Department's Open Records Officer; Karen Kern, an Issuing Officer for the Department's Office of Administration ("OA"), Bureau of Procurement and Management ("BPM"); Laurie Rock, the Department's Director for the Bureau of Managed Care Operations ("BMCO") in the Office of Medical Assistance Programs ("OMAP"); Sallie Rodgers, the Department's Deputy Chief Counsel; and Scott Matlock, Human Services Policy Research Evaluation Consultant for the Department's OMAP, BMCO.

On September 18, 2020, Gateway Health Plan, Inc. ("Gateway") submitted correspondence requesting to participate and to monitor the appeal proceedings because Gateway's confidential and proprietary information is potentially at issue, 65 P.S. § 67.708(b)(11). Gateway asserts that it received actual knowledge of the appeal on September 9, 2020, and, therefore, the request to participate was submitted to the OOR within 15 days. That same day, the Requester objected to Gateway's request, asserting that all third parties were provided notice by the Department on August 28, 2020, that he has withdrawn his request for any confidential proprietary information or trade secrets of any applicant, and that because Gateway failed to include a submission in support of its request with the September 18, 2020 correspondence, any submission is untimely. On September 28, 2020, in response to the OOR's request for clarification, the Department submitted copies of the August 28, 2020 emails transmitted to all of the applicants notifying the parties of the pendency of this appeal. The emails included one sent to Brian Dobbins, Senior Vice President of Medicare and Medicaid Markets of Gateway.⁸ On October 2, 2020, Gateway filed

⁸ <https://www.gatewayhealthplan.com/about-gateway-health/news/gateway-health-adds-healthcare-industry-veterans-to-executive-leadership-team-ceo-cain-a-hayes-makes-his-first-key-appointments-to-lead-the-organization-in-its-mission-to-address-social-determinants-of-health#:~:text=Brian%20Dobbins%2C%20Senior%20Vice%20President%2C%20Markets&text=Prior%20to%20Evolution%20Health%2C%20he,and%20Medicare%20lines%20of%20business> (last accessed March 26, 2021).

an untimely submission arguing that its confidential and propriety information is protected under the RTKL and in the alternative, seeking a protective order under the Rules of Civil Procedure. Because the submission was both untimely and does not relate to the issues underlying this appeal as the appeal was withdrawn with respect to confidential proprietary information, it is not included as part of the record. *See* 65 P.S. § 67.1102(a)(2) (stating that “[t]he appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute”).

On October 6, 2020, the OOR ordered *in camera* review of the records for which the Department was claiming the attorney-client privilege and attorney work-product doctrine. On October 20, 2020, the OOR received a disc containing several thousand records for *in camera* review from the Department.

With the *in camera* records, the Department submitted a supplemental position statement and the second attestations of Karen Kern and Andrea Bankes, incorporating by reference the contents of their original attestations. The Department also submitted enhanced privilege logs addressing the records provided for review. In addition, in response to the OOR’s directive, the Department’s supplemental submission also addressed the applicability of *Payne v. Pa. Dep’t of Health*, 240 A.3d 221 (Pa. Commw. Ct. 2020). The Department argues that this matter is distinguishable from *Payne*, in that the Department’s evidence demonstrates that the scores and scoring records are kept confidential and reflect internal, predecisional deliberations.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is

“designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing; however, an *in camera* review was ordered.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011).

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 identity of the Requester and reason for the Request are irrelevant

The Requester argues that the Department’s refusal to release the requested records unfairly inhibits its ability to proceed under a related bid protest. However, under the RTKL, whether the document is accessible is based only on “whether a document is a public record, and if so, whether it falls within an exemption that allows that it not be disclosed. The status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b) [of the RTKL].” *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014); *see also* 65 P.S. § 67.102; 65 P.S. § 67.305; *Cafoncelli v. Pa. State Police*, 2017 Pa. Commw. Unpub. LEXIS 405 (Pa. Commw. Ct. 2017) (citing *Hunsicker*). Furthermore, a determination of whether the Requester is entitled to access to certain records through administrative processes set forth in the Procurement Code is beyond the purview of OOR. *See* 65 P.S. § 67.306 (“Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree”); *see also UnitedHealthcare*, 187 A.3d at 1046, n.4. Accordingly, the Requester’s identity or the reason for making a request is irrelevant to this Final Determination.

2. The Department properly redacted personal identification information

The Department states that it redacted personal telephone numbers and personal email addresses from records responsive to Items 2.m, 3, 4, 7, 11, 14, 16, and 17. The Department explains that only *personal* telephone numbers, as opposed to the general numbers for the Department's Secretary's Office or the Department Legal Office, were redacted. The Department also explains that it only redacted *personal* email addresses, as distinguished from an individual's email address used to send or receive messages related to a person's employment or business. Ms. Bankes attests that the Department "withheld personal email addresses and personal telephone numbers from the documents responsive to paragraphs 2.m, 3, 4, 7, 11, 14, 16, and 17" pursuant to 65 P.S. § 67.708(b)(6). In addition, Ms. Kern attests that "the documents responsive to paragraphs 2.m, 3, 4, 7, and 17 contained personal email addresses, cell phone numbers, and personal telephone numbers."

Section 708(b)(6) of the RTKL exempts from disclosure certain personal identification information, including "a record containing all or part of a person's Social Security number; driver's license number; personal financial information; home, cellular or *personal telephone numbers*; *personal e-mail addresses*; employee number or other confidential personal identification number." 65 P.S. § 67.708(b)(6)(i)(A). As personal email addresses and personal telephone numbers are expressly exempt from disclosure pursuant to the RTKL, this information may also be redacted from responsive form. *See, e.g. Linton v. Butler Cnty.*, OOR Dkt. AP 2020-2645, 2021 PA O.O.R.D. LEXIS 2645 (finding that personal telephone numbers and personal email addresses may be redacted from a County Communications Council membership list); *Hoyer v. Warren Cnty.*, OOR Dkt. AP 2020-1728, 2020 PA O.O.R.D. LEXIS 2861 (finding that personal telephone numbers may be redacted from a resume that is not fully exempt under the RTKL). Accordingly, the redactions identified on the Department's log for these reasons were proper.

3. Item 15 of the Request is sufficiently specific

The Department argues that Item 15 of the Request lacks the specificity necessary to ascertain what records are being sought. More specifically, the Department argues that Item 15 lacks a subject matter and scope, in that it fails to identify a transaction or activity of the Department or a discrete group of documents by type or recipient. Section 703 of the RTKL states that “[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” 65 P.S. §67.703. When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as 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*, 990 A.2d 813). In determining whether a particular request is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep’t of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). Specifically, the OOR examines to what extent the request sets forth (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. *Pa. Dep’t of Educ.*, 119 A.3d at 1124-25. Finally, “[t]he fact that a request is burdensome does not deem it overbroad, although it may be considered as a factor in such a determination.” *Pa. Dep’t of Env’tl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012) (*en banc*).

First, “[t]he subject matter of the request must identify the ‘transaction or activity’ of the agency for which the record is sought.” *Id.* at 1125. In *Carey*, the Commonwealth Court found a request for unspecified records (“all documents/communications”) related to a specific agency project (“the transfer of Pennsylvania inmates to Michigan”) that included a limiting timeframe to

be sufficiently specific “to apprise [the agency] of the records sought.” 61 A.3d 367. Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *See Pa. Dep’t of Educ.*, 119 A.3d at 1125. “The timeframe of the request should identify a finite period of time for which records are sought.” *Id.* at 1126. This factor is the most fluid and is dependent upon the request’s subject matter and scope. *Id.* Failure to identify a finite timeframe will not automatically render a sufficiently specific request overbroad; likewise, a short timeframe will not transform an overly broad request into a specific one. *Id.*

Ms. Bankes attests with regard to Item 15, the following:

- 1) [Item 15] lacked a subject matter and does not identify a discrete group of documents by type or recipient.
- 2) [Item 15] encompassed every employee with the Department and also any individual from multiple parties.
- 3) [The Requester] did not provide a way for me to establish where his request [in Item 15] should be directed to search for responsive records.
- 4) The Applicants that responded to RFA 07-19 engage with the Department regarding various programs across multiple program offices.

The Requester argues that Item 15 sufficiently sets forth a subject matter, scope and timeframe, such that the Department is able to conduct a search and identify responsive records. More specifically, the Requester asserts that the transaction or activity of the Department is its issuance of RFA No. 07-19 and the scope is clear from the face of Item 15, because the Department knows which MCOs responded to RFA No. 07-19. Finally, the Requester asserts that the timeframe is finite in that RFA No. 07-19 was issued on October 15, 2019 and the Request was submitted on July 6, 2020.

Here, Item 15 clearly identifies a timeframe, the time period of October 15, 2019 through the date of the Request. While somewhat general, Item 15 clearly relates to the subject matter of

“RFA No. 07-19.” Regarding the scope of Item 15, it seeks “... correspondence, or notes, or memoranda, or presentations relating to” those records “between any DHS personnel and any employee, representative, or agency” of the MCOs which responded to RFA No. 07-19. Although such a search may result in a large number of documents, this is not a conclusive factor in determining whether Item 15 is insufficiently specific. *Legere*, 50 A.3d at 265. Further, while Item 15 uses the phrase “any and all,” RFA No. 07-19 is a well-known subject and agency activity to the Department and, therefore, it is reasonable to infer that the Department would be able to identify the relevant custodians of the responsive records and identify correspondence, notes and memoranda that pertain to such a major project. *See Benzing v. City of Pittsburgh*, OOR Dkt. AP 2018-0188, 2018 PA O.O.R.D. LEXIS 383 (holding that a request containing keywords that related to a well-known agency computer program was sufficiently specific under the RTKL where the request identified a timeframe and senders and recipients).

In *Carey*, the Commonwealth Court found a request for unspecified records (“all documents/communications”) related to a specific agency project (“the transfer of Pennsylvania inmates to Michigan”) that included a limiting timeframe was sufficiently specific “to apprise [the agency] of the records sought.” 61 A.3d 367. Similar to *Carey*, Item 15 is limited to the Departmental personnel involved in RFA No. 07-19, and the MCOs that applied, for a relatively short timeframe. While the search may result in a large amount of records and burden may be a factor in determining that a request is insufficiently specific, the fact that a request is burdensome does not, in and of itself, deem it overbroad. *See Legere, supra* (“The fact that a request is burdensome does not deem it overbroad”); *see also Ruggiero v. Lackawanna Cnty.*, OOR Dkt. AP 2014-0043, 2014 PA O.O.R.D. LEXIS 157 (“[A] request involving the detailed review of voluminous documents does not relieve the agency of its requirements to presume the records are

open and available and respond in accordance with the RTKL.”). On balance, Item 15 is sufficiently specific.

4. The Department has proven that the records requested in Items 2.a, 2.b, 2.c, 2.d, 2.e, 2.f, 2.g, 2.h, 2.j, 2.l, 2.m, 3, 4, 5, 7, and 8 of the Request are exempt from disclosure pursuant to 65 P.S. § 67.708(b)(26)

The Department argues that portions of the requested records are proposal documents and records of a proposal evaluation committee, and are, therefore, exempt from disclosure under based on Section 708(b)(26) of the RTKL. More specifically, the Department denied access to the proposal information responsive to Items 2.a, 2.d, 2.m, 3, 4, 7, 8 and 17 because no agreements or contracts have been awarded in response to RFA 07-19. The Department also denied access to documents of the agency proposal evaluation committee sought in Items 2.a, 2.b, 2.c, 2.d, 2.e, 2.f, 2.g, 2.h, 2.j, 2.l, 2.m, 3, 4, 5, 7, and 8.

Section 708(b)(26) of the RTKL exempts from disclosure:

A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder’s or offeror’s economic capability; or the identity of members, notes and other records of an agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

65 P.S. § 67.708(b)(26).

Section 708(b)(26) shields from public disclosure evaluation committee scoring information. *See, e.g., Kelman*, OOR Dkt. AP 2011-0222, 2011 PA O.O.R.D. LEXIS 188; *Radwanski*, OOR Dkt. AP 2010-0238, 2010 PA O.O.R.D. LEXIS 279. Section 708(b)(26) also shields from public disclosure any “other records” used by an evaluation committee during the course of evaluations of competitively bid proposals. *See McKeeson Health Solutions v. Pa. Dep’t of Pub. Welf.*, OOR Dkt. AP 2009-1104, 2010 PA O.O.R.D. LEXIS 10.

In support of the Department's position, Ms. Kern attests, in relevant part, as follows:

2. My duties includes serving as the Issuing Officer for procurements assigned to the Complex Procurements Unit, such as [RFA 07-19] HealthChoices Physical Health Services....

4. The subject RTKL request pertains to a procurement conducted by the Department.

5. The Department published RFA 07-19 on October 15, 2019.

6. To date the procurement process that was commenced by RFA 07-19 has not resulted in the award of any agreements.

7. As stated in RFA 07-19 its purpose was to procure the services of Managed Care Organizations to provide HealthChoices Physical Health Services to Medical Assistance beneficiaries for each HealthChoices zone in the Commonwealth.

8. Section 513 of the Commonwealth Procurement Code pertains to "[c]ompetitive sealed proposals." 62 Pa.C.S. § 513.

9. The Department received applications from eight applicants for the Northeast, Southeast, Southwest and Lehigh/Capital Zones and seven applicants for the Northwest Zone in response to RFA 07-19, including an application from the requester's client.

10. Each application was required to contain a Technical Submittal, a Small Diverse Business Participation Submittal [(“SDBP”)] and a Contractor Partnership Program [(“CPP”)] Submittal. The Department did not require a cost submission for RFA 07-19, as federal regulations require that the Department provide actuarially sound rates for managed care services.

11. When issuing this RFA, similar to the requirements for a Request for Proposal (“RFP”), the Department established “evaluation factors” to be applied in evaluating the competing applications, as well as “[t]he relative importance of the evaluation factors be fixed prior to opening the proposals.” See 62 Pa.C.S. § 513(e).

12. After issuing RFA 07-19, and as in prior procurements with competitive sealed proposals, the Department established an evaluation committee.

13. One function of an Evaluation Committee is to analyze and evaluate each applicant's technical submittal in accordance with the predetermined evaluation criteria. Based on this evaluation, the Evaluation Committee for each technical submittal will arrive at a numeric score for each rated criteria.

14. Each member of an Evaluation Committee is provided with instructions and guidance on the process of the evaluation and scoring the technical submittals of the applications.

15. These instructions were not developed by the Evaluation Committee but [were] used during the deliberative process.

16. An Evaluation Committee does not decide which applicant(s) is selected for negotiations. Rather, the function of the Evaluation Committee is to evaluate and score the technical submittals of applications. Once the Evaluation Committee's evaluation is complete, it provides the resulting scores to the issuing office.

17. For RFA 07-19, the Department combined the technical scores and the Domestic Workforce bonus points for each Zone and made a recommendation as to the selection for negotiations to the Department's Procurement Officer. The Procurement Officer has the discretion to recommend to the Agency Head (or his designee) that he or she accepts or rejects the recommendation.

18. In the context of RFA 07-19, the Procurement Officer set forth her recommendation in the document referred to in Requester's appeal as the Recommendation for Selection memorandum.

19. As it pertains to RFA 07-19, applicants were chosen for negotiations through the evaluation process. As the term accurately indicates, "negotiations" are bilateral negotiations which includes negotiating items that may or may not result in agreement on mutually agreeable terms.

20. The negotiations between the Department and the selected applicants have not yet commenced.

21. The Department has only selected applicants to enter into negotiations.

22. The Department sent letters notifying applicants of their selection to enter into negotiations and notified the other applicants of their non-selection for negotiations.

23. [PHW] was not selected for agreement negotiations in the Northeast, Southeast, Southwest or Lehigh/Capital Zones per the selection letter issued on July 1, 2020....

25. Mr. Voss' RTKL request asks for records pertaining to RFA 07-19 including records containing proposal information and evaluation committee records....

26. As stated above, the procurement process commenced by RFA 07-19 has not yet resulted in the award of agreements.

27. I responded to and interpreted Mr. Voss' requests in paragraphs 2.a, 2.d, 2.m, 3, 4, 7, 8 and 17 to encompass records that include portions of the Applicant's applications to fulfill the Department's needs explained in RFA 07-19....

28. I responded to and interpreted Mr. Voss' requests in paragraphs 2.a, 2.b, 2.c, 2.d, 2.e, 2.f, 2.g, 2.h, 2.j, 2.l, 2.m, 3, 4, 5, 7, and 8 to encompass deliberative documents of the Evaluation Committee including the scoring and evaluation sheets, evaluator workbooks, instructions, training materials, notes and Evaluation Committee names in regards to RFA 07-19....

30. Since agreements have not been awarded, my understanding of section 708(b)(26) of the RTKL is that, as of this date, none of the applications which contain the Applicant's applications that were submitted in response to RFA 07-19 are "public records." Therefore, none of the documents or information that are part of the applications are "public records."

31. Before reviewing the technical submittals for RFA 07-19, as explained above each member of the Evaluation Committee was provided with instructions and guidance regarding the conduct of their work in evaluating the technical submittals. As such, the instructions are internal guidance for the Evaluation Committee members. Such guidance is not shared outside the Evaluation Committee and the Evaluation Committee members are advised that the Evaluation Committee materials are confidential.

32. The Evaluation Committee materials and member names are to remain confidential in order to shield the internal procurement process against external threats to its integrity for the evaluators to freely express their opinions.

33. The scoring members of the Evaluation Committee were from the Department's [OMAP], [OLTL], Office of Mental Health & Substance Abuse Services and the Secretary's Office.

34. Each member of the Evaluation Committee was given a scoring matrix for purposes of the evaluation of the technical submittals.

35. Before meeting as a group, each Evaluation Committee member separately reviewed and preliminarily scored each technical submittal.

36. Once the members of the Evaluation Committee had completed the task of individually scoring each technical submittal, the Evaluation Committee met as a group, discussed the technical submittals and the initial scores. Members were permitted but not required to adjust their initial scores.

37. After the completion of the technical evaluation, the Evaluation Committee provided the final scoring of the technical submittals to the Issuing Officer. The Issuing Officer completed the scoring by adding the Domestic Workforce bonus

points to the final technical scores and then made a written recommendation to the Department's Procurement Officer.

38. The document created by the Issuing Officer to make this recommendation is the Recommendation for Selection Memorandum RFA 07-19 ("Recommendation Memorandum").

39. The Recommendation Memorandum contains the total score of each application and other application information for all applicants.

40. Although the Recommendation Memorandum contains the total scores of the applications, it is not developed by the Evaluation Committee for use to score and evaluate the technical submittals.

41. The Department provided a redacted copy of the Recommendation Memorandum because it summarizes the RFA process, memorializes the results of the Evaluation Committee's work as well as sets forth the adopted recommendation.

42. The Department redacted the total scores of all the applicants pursuant to 65 P.S. § 67.708(b)(26) and 65 P.S. § 67.708(b)(10)(A).

43. In addition, the Department redacted the SDB commitment of the applicants pursuant to 65 P.S. § 67.708(b)(26) because this is proposal information taken from the Applicants' submissions.

44. As stated above, no agreement has yet been awarded. Therefore, my understanding is that section 708(b)(26) of the RTKL exempts the content of the proposals presented in the applications from the definition of "public record."

45. The scores of the technical submittals are other records that reflect the analysis and comments of the Evaluation Committee and are exempt under 65 P.S. § 708(b)(26).

46. The scores were set forth in the Recommendation Memorandum prior to the date that the memorandum was submitted for consideration and reflect the Evaluation Committee's analysis of the submitted applications....

49. In addition, some of the documents responsive to the paragraphs in the request contained application information. As stated above, my understanding of section 708(b)(26) of the RTKL is that, as of [the date of the affidavit], none of the applications that were submitted in response to RFA 07-19 are 'public records.' Therefore, none of the documents that are part of the applications are 'public records.'

Items 2.a, 2.b, 2.c, 2.d, 2.e, 2.f, 2.g, 2.h, 2.j, 2.l, 2.m, 3, 4, 5, 7, and 8 seek documents that would be included as part of the applicants' submissions, documents that would include scoring, evaluation and tabulation sheets and workbooks, notes and draft memoranda and other materials used by the Evaluation Committee in evaluating the technical submittals made in response to RFA 0719. Section 708(b)(26) expressly exempts "[a] proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of a contract or ... the rejection of all bids...." Further, as asserted by several of the direct interest participants, the proposals contain the "... financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability...." See 65 P.S. § 67.708(b)(26); see also *UnitedHealthcare*, 187 A.3d 1046; *Global Tel*Link Corp. v. Wright*, 147 A.3d 978 (Pa. Commw. Ct. 2016) (financial information submitted to demonstrate a bidder's economic capability to perform the services is exempt from disclosure); *Kelman v. Pa. Dep't of Gen. Servs.*, OOR Dkt. AP 2011-0222, 2011 PA O.O.R.D. LEXIS 188; *Radwanski v. West Chester Univ. of Pa.*, OOR Dkt. AP 2010-0238, 2010 PA O.O.R.D. LEXIS 279. Based on the attestation of Ms. Kern, the Department has proven that the contract associated with RFP 07-19 has not been awarded.

The Department asserts that it interprets Items 2.a, 2.b, 2.c, 2.d, 2.e, 2.f, 2.g, 2.h, 2.j, 2.l, 2.m, 3, 4, 5, 7, and 8 as seeking documents that would be included as part of the applicants' submissions and documents that would include the scoring and evaluation sheets, used by the Evaluation Committee in evaluating the technical submittals of applicants' applications submitted in response to RFA 07-19. 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*, 990 A.2d at 824). Based on the language of the Request, the Department made a reasonable interpretation of what records were being sought.

Here, the Department attests that records responsive to Items 2.a, 2.b, 2.c, 2.d, 2.e, 2.f, 2.g, 2.h, 2.j, 2.l, 2.m, 3, 4, 5, 7, and 8 of the Request constitute records of the evaluation committee's scoring of proposals received in response to the RFA or are records that were used by the evaluation committee during the course of its evaluation of such proposals, as well as portions of the Applicant's applications to fulfill the Department's needs explained in RFA 07-19. A review of the logs provided shows that records that were redacted include emails seeking clarification from applicants on their proposals, emails with answers to clarifications and clarification documents, emails regarding corporate references, and the selection memos for each zone. Records that were withheld include the applications themselves and documents used or created by the evaluation committee which identify a committee member, evaluator score sheets, evaluator workbooks, evaluation committee instructions/scoring guide, master score sheets, scoring with SDB commitment, scoring templates, RFP confidentiality statements, Final Documents for Submission to Procurement with messaging, amended Personnel Documents for RFA Number 07-19 and evaluation committee training PowerPoint presentations. Further, as asserted by several of the direct interest participants, the proposals contain the financial information furnished to demonstrate a bidder's economic capabilities. The Department further attests that the contract associated with the RFA has not been awarded because negotiations with the selected offeror have not been completed. The Commonwealth Court has concluded that "the General Assembly

intended the phrase ‘award of the contract’ for purposes of Section 708(b)(26) to mean the execution of the contract.” *UnitedHealthcare*, 187 A.3d at 1058; *see also UnitedHealthcare of America v. Pa. Dep’t of Human Servs.*, OOR Dkt. AP 2020-1501, 2020 PA O.O.R.D. LEXIS 2874. Additionally, the Requester has initiated a bid protest under the Procurement Code. Accordingly, the Department has met its burden of proving that the records sought in 2.a, 2.b, 2.c, 2.d, 2.e, 2.f, 2.g, 2.h, 2.j, 2.l, 2.m, 3, 4, 5, 7, and 8 of the Request are exempt from public disclosure under Section 708(b)(26) of the RTKL.⁹

However, in its October 20, 2020, supplemental submission, the Department stated that it exercised its discretion to provide an unredacted copy of the Recommendation Memorandum for all zones, which provided the final technical scores, Domestic Workforce bonus points and the total scores to the applicants. Ms. Kern attests that the Requester received a copy of the unredacted Recommendation Memorandum, but that the “Department has not given out any individual evaluator scores nor any document it considers to be scoring or evaluation documents.” Accordingly, the appeal is moot as to the Recommendation Memorandum.

5. The Department has proven that portions of Items 4, 11, 14 and 16 reflect internal predecisional deliberations

The Department redacted and withheld records responsive to Items 4, 11, 14, and 16 of the Request, arguing the records encompass records reflecting deliberative material, but are not also records of the Evaluation Committee. More specifically, the Department asserts that records responsive to Items 4 and 11 “include internal correspondence regarding the planning, drafting and organizing of RFA 07-19.” The Department further

⁹ The Department also argues that Items 2.h, 2.j, and 3 contain personal notes of agency employees that are exempt under Section 708(b)(12) of the RTKL; however, because we have determined that the records responsive to Items 2.h, 2.j, and 3, were properly withheld under Section (b)(26), the OOR need not reach the Department’s alternative grounds for denying access. *See Jamison v. Norristown Bor. Police Dep’t*, OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927.

asserts that records responsive to Items 14 and 16 include “internal correspondence of [OTLT] staff having discussions prior to a decision” or “issuance of the final evaluation or assessment.”

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 Department presents the attestations of Ms. Kern, Mr. Matlock and Ms. Vovakes in support of its position. Ms. Kern attests, in pertinent part, the following:

51. As the Issuing Officer for this procurement, I was also involved in the planning, drafting and organizing of RFA 07-19.

52. I responded to and interpreted ... [Items] 4 and 11 to encompass documents and communications pertaining to the planning, drafting and organizing of RFA 047-19....

54. Some of these documents and communications contain my discussion with internal, Department staff prior to the issuance of the RFA about the contents or drafting of RFA 07-19.

55. Some of these documents and communications contain drafts and discussions that contain deliberations in preparation for specific actions, such as announcing addendums and announcing selections.

Mr. Matlock attests that he works for OMAP within the Bureau of Managed Care Operations. Mr. Matlock further attests, as follows:

[2.] My duties include the following: I was involved in the planning, drafting, revision, and assembly of RFA 07-19. I also provided administrative support during the procurement process....

3. I responded to and interpreted ... [Items] 4 and 11 to encompass documents and communications pertaining to the planning, drafting and organizing of RFA 07-19....

[4.] These paragraphs encompass correspondence and records of OMAP.

[5.] I and other staff provided responsive records to the RTKL office.

[6.] Some of these documents and communications contain my discussions with internal, Department staff prior to the issuance of the RFA about the contents or drafting of RFA 07-19.

[7.] Some of these documents and communications contain drafts and discussions that contain deliberations in preparation for specific actions, such as adding and announcing addendums.

[8.] Therefore, it is my understanding that the RTKL's predecisional deliberation exemption protects these documents and communications from disclosure, 65 P.S. § 67.708(b)(10)(i).

Ms. Vovakes is employed as the Chief of Staff within the Department's OLTL and she attests that "her duties include the following: plans and directs all administrative activities for OLTL and is involved in engaging and supporting OLTL policy, operations, finance, and quality activities with the object to prioritize critical issues and required information to support executive decision-making." Regarding Items 14 and 16 of the Request, Ms. Vovakes attests that records sought "encompass correspondence and records within OLTL." Ms. Vovakes further attests, as follows:

7. Myself and my staff provided responsive records to the RTKL office.

8. Before providing the responsive documents to the RTKL office, I reviewed the contents of the documents.

9. Some of the responsive records contain discussions with internal, Departmental OLTL staff prior to the issuance of the final evaluation or assessment.

10. In addition, some of the records contain internal discussions about possible Department actions and occur before the decision on a final course of action.

11. These documents and communications are between internal Departmental staff, occurring before a specific action, deliberative about that action....

13. Therefore, it is my understanding that the RTKL's predecisional deliberation exemption protects these documents and communications from disclosure. 65 P.S. § 67.708(b)(10)(i)(A).

Based on the attestations of Ms. Kern, Mr. Matlock and Ms. Vovakes, the Department has demonstrated that the responsive communications and documents were internal to the Department. In addition, some records consist communications between a Department of General Services employees and Department employees; however, they are still considered internal for purposes of Section 708(b)(10)(i)(A). *See 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, the Department 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). In *McGowan*, an agency's affidavit specifically detailed the manner in which the withheld documents related to that agency's contemplation of a future course of agency action. 103 A.3d 374. 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).

Here, the Department has submitted evidence in support of its position that the withheld records are predecisional and deliberative in nature. The attestations of Ms. Kern, Mr. Matlock and Ms. Vovakes demonstrate that the redacted and withheld communications and documents consist of documents and communications related to planning, drafting, organizing and revising RFA 07-19, prior to the issuance of the RFA or prior to the issuance of final evaluation or assessment. Specifically, the predecisional deliberations include “adding and announcing addendums,” “the issuance of the RFA about the contents or drafting of RFA 07-19,” and “announcing selections” for negotiations. Further, a review of the Department’s log reveals that the responsive records that the Department claims reflect internal predecisional deliberations include predecisional discussions, communications and draft documents related to reviewing and/or revising the RFA language, addenda, SDB and VBP language and SDB summary sheets, RFA appendices, and the recommendation of selection memoranda. The records also include predecisional and deliberative discussions among Department personnel, DGS personnel and the Evaluation Committee, regarding applicant questions, preproposal conference materials and talking points, legal edits to draft RFA documents, addenda and exhibits, evaluator questions, and clarification letters to be sent to applicants. Finally, the records include the predecisional review and evaluation of the RFA applications, agreements, and status reports on the RFA process. Based on a review of the Department’s evidence, in conjunction with the exemption and privilege logs, the Department has demonstrated that it properly withheld and redacted records responsive to Items 4, 11, 14 and 16, under Section 708(b)(10)(i)(A) of the RTKL.¹⁰

¹⁰ Regarding the application of *Payne*, because we have already concluded that the Department’s evidence is sufficient to prove that the Evaluation Committee scores and scoring sheets are protected by Section 708(b)(26), and because

6. The Department has proven that portions of the records responsive to Item 16 are exempt from disclosure

The Department partially denied Item 16, which seeks “emails to, from, or copying [Department] employee Kevin Hancock regarding [PHW] or Justin Davis” from June 1, 2019 to July 31, 2019, asserting that the records contain personal identification information, 65 P.S. § 67.708(b)(6)(i)(A), reflect internal, predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A), contain individually identifiable medical information, 65 P.S. § 67.708(b)(5), would identify the recipient of social services, 65 P.S. § 67.708(b)(28), and that the records relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17)(i). On appeal, the Department also asserts that the records would identify an individual requesting assistance or constituent services, 65 P.S. § 67.708(b)(29). The Department argues that the responsive records include a complaint sent to the Department from the General Assembly that was sent in by a member of the public; emails that contain discussion on handling the complaint; and documents that identify recipients and discuss medical information.

The Department presents Ms. Vovakes’ attestation in support of its position. As stated above, Ms. Vovakes attests that the records responsive to Item 16 encompass records within the OLTL and that she and her staff reviewed the contents of the records prior to providing them to the Department’s RTKL office. Ms. Vovakes also attests that the records contain discussions internal to the OLTL staff prior to the issuance of a final evaluation or assessment, contain discussions about a course of action before deciding on a course of action and contain deliberations about the course of action. Specifically, regarding Item 16, Ms. Vovakes attests, “several records

the issue before the Court in *Payne* was whether the affidavit submitted by the Department sufficiently demonstrated that medical marijuana permit scoring notes and materials reflected internal, predecisional deliberations under Section 708(b)(10)(i)(A), *Payne* is not applicable to the instant matter.

responsive to [Item] 16 contain information on a complaint received from the General Assembly that was sent in by a member of the public.”

Through Ms. Vovakes’ attestation, the Department identifies the records responsive to Item 16 as consisting of correspondence and other records maintained by the OLTL in which internal, predecisional deliberations took place. Regarding records that are exempt under Section 708(b)(10)(i)(A), this issue has been addressed and disposed of above. In addition, for the portions of the records for which the redaction of personal identification information was made pursuant to Section 708(b)(6)(i)(A), this issue has also been addressed and disposed of above.

The Department also asserts the records “contain information on a complaint received from the General Assembly that was sent in by a member of the public” and argues that such information is exempt under Section 708(b)(29) of the RTKL. Section 708(b)(29) of the RTKL exempts from disclosure:

[c]orrespondence between a person and a member of the General Assembly and records accompanying the correspondence which would identify a person that requests assistance or constituent services. This paragraph shall not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbying disclosure).

65 P.S. § 67.708(b)(29).

In the Department’s exemption log, the subject of the withheld record is, “[Complainant] Examples – PA Health and Wellness” and the “explanation” is “[c]omplaint from GA and course of action in handling. Examples include social service recipient information.” Regarding this record, the Department relies on Ms. Vovakes’ attestation, which along with the exemption log, establishes that the Department received a complaint that was received by a member of the General Assembly and sent on to the Department. A reasonable inference is that the complaint was sent to the member of the General Assembly for the purpose of obtaining assistance or constituent

services. Further, the express language also exempts the records “accompanying” the correspondence, which, in this instance, would include the complaint and the name of the complainant. Accordingly, the complaint, complainant’s name and the records accompanying the complaint forwarded by a member of the General Assembly to the Department are the types of exempt records contemplated by Section 708(b)(29). *See, e.g., Van Sickle v. London Grove Twp.*, OOR Dkt. AP 2013-0623, 2013 PA O.O.R.D. LEXIS 294 (finding that emails exchanged between an individual and members of the General Assembly in the possession of the Township are exempt under Section 708(b)(29) of the RTKL).

However, regarding the remaining grounds for denial, the Department’s evidence is insufficient. Regarding Section 708(b)(5), of the RTKL exempts from disclosure:

[a] record of an individual’s medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers’ compensation and unemployment compensation; or related information that would disclose individually identifiable health information.

65 P.S. § 67.708(b)(5). Regarding Section 708(b)(28), the RTKL exempts from disclosure “[a] record or information:”

(i) identifying an individual who applies for or receives social services; or

(ii) relating to the following:

(A) the type of social services received by an individual;

(B) an individual’s application to receive social services, including a record or information related to an agency decision to grant, deny, reduce or restrict benefits, including a quasi-judicial decision of the agency and the identity of a caregiver or others who provide services to the individual; or

(C) eligibility to receive social services, including the individual's income, assets, physical or mental health, age, disability, family circumstances or record of abuse.

65 P.S. §§ 67.708(b)(28)(i)-(ii). The RTKL defines “social services” as including “medical, mental and other health care services,” “vocational services and training, occupational training,” and “services for individuals with disabilities.” 65 P.S. § 67.102.

As previously stated, the Department relies on Ms. Vovakes’ affidavit to support withholding records responsive to Item 16; however, the evidence does not detail any of the necessary elements of these additional exemptions, such as whether the medical information is individually identifiable or how an individual could be identified as a person who is receiving social services. Conclusory affidavits “are not sufficient to justify the exemption of public records” under the RTKL. *Scolforo*, 65 A.3d at 1103; *see also Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 659 (Pa. Commw. Ct. 2016) (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*). Under the RTKL, exemptions must be narrowly construed. *Pa. State Police v. Grove*, 161 A.3d 877, 992 (Pa. 2017) (“Consistent with the RTKL’s goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed”) (citing *Office of Governor v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015)). Because the Department has not provided sufficient competent evidence to demonstrate that the records responsive to Item 16 contain information that is exempt under Sections 708(b)(5) and 708(b)(28), the portions of the records for which the Department claimed these bases for exemption may not be withheld. *See Ciavaglia and The Bucks County Courier Times v. Bucks Cnty.*, OOR Dkt. AP 2020-0770, 2020 PA O.O.R.D. LEXIS 1665 (evidence was insufficient to demonstrate that data containing the number of deaths at a nursing home would reveal individually identifiable health information); *Snover v. Northampton Cnty.*,

OOR Dkt. AP 2021-0080, 2021 PA O.O.R.D. LEXIS 379 (finding that a conclusory affidavit was insufficient to demonstrate that video footage of individuals entering the Human Services building to vote would reveal identity of an individual entering the building to obtain social services); *c.f. DeFrancisco v. Northampton Cnty.*, OOR Dkt. AP 2020-0987, 2020 PA O.O.R.D. LEXIS 2506 (affidavit demonstrated that a record contained the type and extent of services provided to an individual under a waiver for Medicaid services and services for health and psychological conditions).

Finally, regarding the Department's claim that the records relate to a noncriminal investigation and, more specifically that under Section 708(b)(17)(i) of the RTKL, the complaint submitted to the agency is exempt from disclosure, we have already determined that the complaint submitted to the Department is exempt under Section 708(b)(29).

Accordingly, the Department has proven that the complaint forwarded by a member of the General Assembly, the complainant's name and records accompanying the complaint are exempt from disclosure under Section 708(b)(29); other records reflect internal, predecisional deliberations under Section 708(b)(10)(i)(A); and portions of the records contain personal identification information under Section 708(b)(6); however, the Department's conclusory evidence fails to support the withholding of any other information outside of these records. *See* 65 P.S. § 67.708(a).

7. The Department has proven that certain records are protected by the attorney-client and attorney work-product doctrine

The Department asserts that portions of the records responsive to Items 4 and 11 of the Request that are not otherwise exempt encompass communications between Department counsel and Department staff and, therefore, the material is protected by the attorney-client privilege and

the attorney work-product doctrine. In support of its claim of privilege, the Department relies on the attestation of Sallie Rodgers, Esq., the Department's Deputy Chief Counsel.

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 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 Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). "[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 County*, 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-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 v. Excela Health*, 210 A.3d 967, 976 (Pa. 2019) (internal citations omitted); *see also Heavens v. Pa. Dep’t of Env’t 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).

Attorney Rodgers attest, the following:

1. I am an attorney and work for the Office of General Counsel (“OGC”), within the Department Kenneth Serafin and Lara Antonuk are attorneys and work for OGC, within the Department. Doris Leisch is an attorney and currently works for the Governor’s OGC and formerly worked for the Department. Mary Fox is an attorney and works for OGC, within the Department of General Services (“DGS”).
2. I became involved with advising Department staff pertaining to RFA 07-19. At various times, Kenneth Serafin, Lara Antonuk, Doris Leisch and Mary Fox have been involved with advising Department staff pertaining to RFA 07-19....

Specifically, regarding Items 4, and 11, Attorney Rodgers further attests:

4. I interpreted these two [Items] to include attorney-client correspondence and attorney written work which is protected from disclosure pursuant to the attorney-client privilege and attorney work-product doctrine....

5. My email correspondence and work products are encompassed by this request. Email correspondence and work products by Kenneth Serafin, Lara Antonuk, Doris Leisch and Mary Fox are also encompassed by this [R]equest.

6. The Department and DGS are administrative agencies under the jurisdiction of the Governor of Pennsylvania and, consequently, are part of the government of the Commonwealth of Pennsylvania.

7. The position of General Counsel to the Governor of Pennsylvania exists pursuant to the Commonwealth Attorneys Act. In addition to providing legal advice and services to the Governor, the General Counsel oversees the OGC.

8. Pursuant to the Commonwealth Attorneys Act, the OGC provides legal advice and services to all administrative agencies falling within the Governor's jurisdiction, including the Department and DGS.

9. In addition to the General Counsel, other attorneys within OGC's central office ... provide the Department and other Commonwealth agencies and legal services and advice.

10. OGC has assigned 30+ of its attorneys to work in the Department's offices, for the purpose of providing legal services and confidential legal advice to the Department staff.

11. Because the Department and DGS are administrative agencies, the attorneys who represent administrative agencies do so by providing legal services and confidential legal advice to the Department staff.

12. The Department staff routinely interact with the Department and OGC attorneys as well as attorneys for DGS in procurement matters. The mutual understanding of the Department staff and the attorneys is the legal advice provided by the attorneys to the staff is confidential and subject to the attorney client privilege.

13. There are records encompassed by this [R]equest that were sent by Department staff to a Department, OGC or DGS attorney, and those sent by Department, OGC or DGS attorney and [I] can say without a doubt that:

a. None of the messages was sent for the purpose of committing a crime.

b. None of the messages was sent for the purpose of committing a tort.

c. The messages contain requests from Department staff to Department, OGC or DGS counsel to obtain legal advice and from Department, OGC or DGS counsel to Department staff providing

legal advice about the procurement process, drafting of the RFA and scoring pertaining to RFA 07-15.

14. None of the records to or from a Department, OGC or DGS attorney set forth a waiver of the attorney-client privilege.

15. Records responsive to [Items 4 and 11] also contain attorney work-product.

16. The records were authored by an attorney in the course of his or her professional duties, sent to another attorney or Department staff, and contain the written work, the mental impressions, theories, and strategies of an attorney.

In further support of the Department's position, Ms. Kern attests, in relevant part, the following:

51. As the Issuing Officer for this procurement, I was also involved in the planning, drafting and organizing of RFA 07-19.

52. I responded to and interpreted [Request Items] 4 and 11 to encompass documents and communications pertaining to the planning, drafting and organizing of RFA 07-19....

53. Some of these documents and communications contain my discussions with the Department's legal counsel requesting and receiving advices.

The OOR conducted an *in camera* of the records withheld and redacted as privileged. Based upon the *in camera* review, the descriptions in the privilege logs and Attorney Rodgers' attestation, the Department has demonstrated that most of the withheld and redacted records for which the Department claims privileged are protected by the attorney-client privilege. The records consist of communications between the Department and its attorneys regarding legal advice sought or rendered or discussions between Department attorneys and DGS attorneys, rendering opinions of law on various aspects of RFA 07-19, as well as comments relating to revisions or necessary actions, in which the privilege has not been waived by either party.

However, some records are not protected in that they are not to or from an attorney for the purpose of securing legal advice or, on their face, the contents consist of routine scheduling and

transmittal correspondence or are comprised of factual information that is not protected by privilege. *Pa. Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1124 (Pa. Commw. Ct. 2015) (citing *Commonwealth v. Vartan*, 733 A.2d 1258 (Pa. 1999)); see also *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (privilege extends only to communications and not to fact). Furthermore, some records are not protected by the attorney-client privilege because, even though an attorney is a sender or recipient, the information is purely factual in nature and not related to securing legal advice, *i.e.* transmittal emails forwarding documents for review or, in one instance, a bid protest that had been filed by an applicant that, in some instances, includes the language “attached for your review.” Also, one withheld email included communications with parties outside of the agency specifically, the Pennsylvania Health Law Project. Another withheld record included the RFA posting on DGS’s Pennsylvania E-Alerts System and communications merely forwarding that status to the Department’s Secretary. Based upon the OOR’s *in camera* review, the Department has not demonstrated that the records identified below are protected by the attorney-client privilege. In addition, while the Department also asserts that these record reflect internal, predecisional deliberations and, therefore, the records are exempt under Section 708(b)(10)(i)(A), based on the *in camera* review of the records, the factual information contained in what are essentially transmittal emails is not deliberative. See *Kaplin*, 19 A.3d at 1214; *McGowan*, 103 A.3d at 378-88. The records for which the Department has not demonstrated privilege are to be provided to the Requester and consist of the following Bates document numbers:

- 00000000196
- 00000000316
- 00000000340
- 00000000350
- 00000000516
- 00000000562
- 00000000934
- 00000000958

- 00000001165
- 00000001337
- 00000001423
- 00000001518
- 00000001605.

The Department also withheld certain records described as “DHS-Serafin-Status Report,” asserting that they contain attorney work product.¹¹ The reports are authored by the Department’s Chief Counsel and submitted to the Governor’s OGC. A review of these records show that the reports consist of a discussion of current and potential litigation, pending and future requests for proposals or applications, as well as updates on the ongoing issues and status of each matter including, legal issues. Based on a review of the records, the material in the status reports contain mental impressions, theories and/or strategies of an attorney that were sent in the course of professional duties. As such, the Department has demonstrated that the Status Reports are protected by the attorney work-product doctrine. *See 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 OGC are protected by 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 OGC and the Governor discussing developing legal issues, policy matters, the legislative agenda and issues pending before executive agencies are protected by the attorney work-product doctrine). In addition, some records consist of communications that contain deliberations between Department employees and Department counsel that contain legal theories and strategies, as well as communications in which Department employees relay Department counsel’s legal directives in

¹¹ The Department’s claim of the attorney work-product doctrine applies to the responsive portion of the record, as much of the information in the status report is unrelated to the instant Request.

regarding to issues related to RFA 07-19, relay counsel's responses to program office's charge of questions and answers, and relay attorney comments on how certain issues related to the RFA should be addressed. Again, based on a review of the records, the communications and are protected by the attorney work-product doctrine in that they contain mental impressions, theories and/or strategies of an attorney that were provided in the course of his or her professional duties.

8. The Department has proven that records responsive to Items 2.i, 2.k, 6, 9, 10, 12 and 13 of the Request do not exist

The Department argues that following a good faith reasonable search for records, it has determined that responsive to Items 2.i, 2.k, 6, 9, 10, 12 and 13 of the Request do not exist within its possession, custody or control. In support of the Department's position, Ms. Kern attests, with respect to Items 2.i, 2.k, 6, 9, the following:

57. For [Items] 2.i, 2.k, 6, 9, if any responsive documents existed, I would be in possession of those records as the Issuing Officer....

58. I conducted a reasonable search for any records responsive to these requests and no records exist.

a. For [Item] 2.i, I searched for any notes, memoranda and recordings of oral presentations made by, to, for or on behalf of any bidder or pertaining in any way to RFA 07-19.

b. For [Item] 2.k, I searched for any documents that contain, set forth, request, analyze, reference or cite any research and information that the Department considered or may have considered in awarding contracts pursuant to RFA 07-19.

c. For [Item] 6, I search for any records related to the results of any evaluation committee's report to the Issuing Office regarding RFA 07-19.

d. For [Item] 9, I searched for any recordings received or produced by or on behalf of the Department or any evaluation committee regarding RFA 07-19.

Ms. Rock attests that in her position as the Director for the Bureau of Managed Care Operations. within the Department's OMAP, Bureau of Managed Care Operations, her duties include the following:

...[O]versight of the Physical Health Managed Care Organizations that entails assessing compliance with the HealthChoices Agreement requirements and interacting with stakeholder organizations for feedback on the program.

Ms. Rock attests, with regard to Items 10, 12 and 13 of the Request, that "if any responsive documents existed, my office would be in possession of those records. Ms. Rock further attests that:

- a. For [Item] 10, I had my office search for any recordings relating to the post-selection notification and evaluation process including any readiness review records.
- b. For [Item] 12, I had my office search for any records related RFA 07-19 pertaining to the scoring for not-for-profit or local MCOs.
- c. For [Item] 13, I had my office search for any related to RFA 07-19 pertaining to the scoring for the small diverse business participation.

The Requester argues that the Department has not met its burden of proving that no records exist that are responsive to Items 2.i, 2.k, 6, 9, 10, 12 and 13. The Requester further argues that, regarding Item 2.i, information filed in a bid protest by another MCO, UnitedHealthcare of Pennsylvania, Inc., that also bid on RFA 07-19, alleges that a meeting took place between itself and the Department to discuss RFA 07-19. The Requester asserts that, as a bidder, "oral presentations to United are included within the scope of [Item] 2.i," and, therefore it is incredulous that no responsive records exist for Item 2.i.

In Ms. Bankes' supplemental attestation, she attests that, "[t]he Department's [OMAP] and Bureau of Procurement and Contract Management informed [her] that they did not possess responsive records to [Item] 2.i." Ms. Bankes further attests that "Karen Kern with the

Department's Bureau of Procurement and Contract Management informed me that oral presentations were not conducted for RFA 07-19."

Ms. Kern further attests, as follows:

59. For [Items] 2.i, 2.k, 6, and 9, if any responsive records existed, I would be in possession of those record as the Issuing Officer....

60. I conducted a reasonable search of our records for any records responsive to these [Items] and no records exist.

a. For [Item] 2.i, I searched for any notes, memoranda and recordings of oral presentations made by, to, for or on behalf of any bidder or pertaining in any way to RFA 07-19.

i. The phrase "oral presentations" is used in the procurement process.

ii. Language regarding oral presentations was included in RFA 07-19.

iii. The following language was included in REF 07-19:

1. I-15. Oral Presentations and Negotiations. An Applicant may be required to make an oral presentation of its application to the Department to demonstrate an Applicant's capabilities and ability to provide the services required in the RFA. The Department will initiate requests for oral presentations; which may include a request that key personnel be present.... The Department may request a presentation or conduct negotiations at any stage of the evaluation and selection processes prior to grant agreement award. (Emphasis in original).

iv. I interpreted [Item] 2.i to ask for oral presentations pertaining to REF 07-19, as that phrase is used in the procurement process, given the context of the rest of the [R]equest.

v. As the Issuing Officer, I would have been the individual from the Department to initiate requests for oral presentations.

vi. The Department did not request oral presentations nor were any oral presentations given for RFA 07-19.

vii. The meeting mentioned in United's protest was not an oral presentation pertaining to RFA 07-19.

b. For [Item] 2.k, I searched for any documents that contain, set forth, request, analyze, reference or cite any research and information that the Department considered or may considered in awarding contracts pursuant to RFA 07-19.

c. For [Item] 6, I searched for any records related to the results of any evaluation committee's report to the Issuing Office regarding RFA 07-19.

d. For paragraph 9, I searched for any recording received or produced by or on behalf of the Department or any evaluation committee regarding RFA 07-19.

As set forth above, under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry* 20 A.3d at 520-21; *Moore*, 992 A.2d at 909.

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 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.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2013) (internal citations omitted); *see also Rowles v. Rice Twp.*, OOR Dkt. AP 2014-0729, 2014 PA O.O.R.D. LEXIS 602 (citing *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 857 F.Supp.2d 129, 138-39 (D.D.C. 2012)). Additionally, the Commonwealth Court has held that an open records officer's inquiry of agency members may constitute a "good faith effort" to locate records, stating that open records officers have:

a duty to inquire of [agency personnel] as to whether he or she was in the possession, custody or control of any of the ... requested emails that could be deemed public and, if so, whether the emails were, in fact, public and subject to disclosure or exemption from access by [r]equest[e]r.

Mollick v. Twp. of Worcester, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011); *see also In re Silberstein*, 11 A.3d 629, 634 (Pa. Commw. Ct. 2011) (holding that it is "the open-records officer's duty and responsibility" to both send an inquiry to agency personnel concerning a request and to determine whether to deny access).

Ms. Bankes attests that, upon receipt of the Request, she contacted the Department's OMAP and the Bureau of Procurement and Contract Management. Ms. Kern attests that she is the Department's Issuing Officer in connection with RFA 07-19, and that if any records responsive to Items 2.i, 2.k, 6, 9, 10, 12 and 13 existed, they would be in the possession of the Issuing Officer. Regarding the Requester's assertion that oral presentation records responsive must exist because an MCO alleged in a bid protest that it participated in a meeting with the Department related to its application, Ms. Kern explained that she interpreted Item 2.i as meaning oral presentations as used in the Department's procurement process and as explained in the terms of RFA 07-19. Ms. Kern's attestation demonstrates that, when read within the context of the Request as a whole, the Department's interpretation of Item 2.i was reasonable. Furthermore, Ms. Kerns and Ms. Bankes' attestations detail the steps of the search for records responsive to Items 2.i, 2.k, 6, 9, 10, 12 and

13, and that the search was conducted with the Department offices, officials and bureaus most likely to possess the records. *See Hays v. Pa. State Police*, OOR Dkt. AP 2015-0193, 2015 PA O.O.R.D. LEXIS 294. The Requester has not presented competent evidence to refute the Department's positions and, in the absence of any evidence that the Department has acted in bad faith or that the records exist, "the averments in [the attestations] should be accepted as true." *McGowan*, 103 A.3d at 382-83 (citing *Scolforo*, 65 A.3d at 1103). Based on a review of the evidence presented, the Department has met its burden of proving that no records responsive to Items 2.i, 2.k, 6, 9, 10, 12 and 13, exist within its possession, custody or control. *Hodges*, 29 A.3d at 1192; 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part, and dismissed as moot**, and the Department is required to provide all responsive records in accordance with this Final Determination 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.¹² This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: April 19, 2021

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

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

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