



### **FINAL DETERMINATION**

**IN THE MATTER OF**

**TODD SHEPHERD AND BROAD AND  
LIBERTY,  
Requester**

**v.**

**PENNSYLVANIA OFFICE OF THE  
GOVERNOR,  
Respondent**

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**Docket No: AP 2021-0219**

### **INTRODUCTION**

Todd Shepherd, on behalf of Broad and Liberty (collectively “Requester”), submitted a request (“Request”) to the Pennsylvania Office of the Governor (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking copies of phone logs, scheduling calendars and meeting logs. The Office partially denied the Request, arguing that records contain personal identification information. 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 For the reasons set forth in this Final Determination, the appeal is **granted in part, denied in part, withdrawn in part** and **dismissed as moot in part**, and the Office is required to take additional action as directed.

### **FACTUAL BACKGROUND**

On December 3, 2020, the Request was filed, seeking:

[A] copy of all phone logs for the cell phone and office phone for Gov. Tom Wolf, from the dates Feb. 1, 2020, to and including Dec. 2, 2020 (dates inclusive), and

for any other phone line that is established or maintained for his use during that period. I also request a copy of the log from the governor's personal cell phone for the same frame for any calls related to government business. I also request the governor's scheduling calendar for the same dates. Please note a thorough search for records for cell phone logs will also look for logs from any smartphone app that allows for calling, such as (but not limited to) Skype, WhatsApp, or Signal. I request a copy of all meeting logs and/or call logs from any virtual meeting app like (but not limited to) Zoom, Cisco Webex, GoToMeeting, Microsoft Teams, etc., for the same time frame, and/or for any account established for the governor with any such "virtual meeting" app during that time frame.

Following a thirty day extension, 65 P.S. § 67.902(b), on January 11, 2021, the Office partially denied the Request by providing redacted records, by directing the Requester to the Governor's website to access the Governor's calendar, and arguing that the records contain personal identification information, 65 P.S. § 67.708(b)(6)(i)(A). The Office also explained that it was still in the process of retrieving records for the Governor's personal cellphone and, if they are available, records would be provided as appropriate under the RTKL.

On February 1, 2021, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.<sup>1</sup> The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On February 10, 2021, the Requester submitted a position statement to supplement the appeal. The Requester argues that the Office's response was incomplete, that the Office's response was contradictory when compared to the records produced, and asserts that additional records must exist. The Requester also argues that the Office has not met its burden to support the bases asserted for the redactions.

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<sup>1</sup> The Requester granted the OOR an extension of time to issue a Final Determination until July 30, 2021. *See* 65 P.S. § 67.1101(b)(1).

On February 11, 2021, the Office submitted a position statement reiterating its grounds for denial. The Office also argues that no additional responsive records exist and that the questions posed in the Requester's position statement do not seek records. Additionally, the Office asserts that it properly redacted personal identification information and personal financial information, 65 P.S. § 67.708(b)(6)(i)(A), calendar entries that would identify law enforcement officials responsible for the Governor's security, and entries reflecting communications with counsel seeking legal advice. In support of its position, the Office submitted the affirmation made under penalty of perjury from Marc Eisenstein, the Office's Open Records Officer. The Office explained, as indicated in its final response, that it was still in the process of reviewing the Governor's personal cellphone records obtained from the service provider and such records would be provided to the Requester in accordance with the RTKL when the review was complete. In addition, the Office's submission attached 310 pages of records consisting of the Governor's scheduling calendar and requested that the record remain open until March 1, 2021, in order to complete its review of the Governor's cellphone records.

On March 1, 2021, the Office provided redacted copies of the Governor's cellphone records, asserting that the redactions consisted of entries that do not reflect a business, transaction or activity of the Commonwealth and personal identification information, 65 P.S. § 67.708(b)(6)(i)(A).

On April 15, 2021, in response to the OOR's directive, the Office submitted an Exemption Declaration in support of the redactions made to the records provided to the Requester. In addition to the bases for exemption set forth above, the Office also asserts that it properly redacted conference numbers, host codes, call in codes and PINs for web-conferences and audio visual

conferences such as “Zoom,” based on the RTKL computer security exemptions, 65 P.S. § 67.708(b)(3)-(4).

On June 21, 2021, in response to the OOR’s request for clarification, the Requester submitted a statement indicating what exemptions contained in the Office’s Exemption Declaration he is no longer challenging on appeal. In addition, on July 14, 2021, the Requester further clarified that he is no longer challenging redactions made to the records that reveal the identities of law enforcement officer or reflect legal advice from counsel.

On July 19, 2021, in response to the OOR’s further request for clarification, the Office submitted a position statement asserting that the Governor’s personal cellphone records are not records of the Office in that the bill is the name of the Governor and the Commonwealth does not pay for or reimburse the Governor for the fees. The Office further argues that to the extent that the records were released in redacted form, it has granted access to any entries that may reflect any relevance to an Office transaction, business or activity. In support of its position, the Office submitted the supplemental affidavit of Mr. Eisenstein.

### **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.

The Office 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). 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 Office provided records on appeal**

During the course of the appeal, the Office provided redacted personal cellphone records in response to the portion of the Request seeking, “a copy of the log from the governor’s personal cell phone for the same frame for any calls related to government business.” As to the portions of the cellphone records that are not redacted, the appeal is moot.

Further, in the Requester’s supplemental appeal statement, he asserts that the Office’s response to the portion of the Request seeking the “Governor’s scheduling calendar” was insufficient in that he was unable to access the link to the Governor’s website without being required to establish an online account with either Facebook, Google or Scribd.<sup>2</sup> The Requester asserts that the link provided is not a “publicly accessible electronic means” by which he could access the requested records. In the Office’s appeal submission, Mr. Eisenstein affirms:

The Office has provided an electronic version of the Governor’s ‘scheduling calendar,’ and Requester has not indicated that he unable to access that document. Nevertheless, as Requester now indicates that he may be unable or unwilling to access this electronic schedule, a true and correct copy of the Governor’s scheduling calendar is attached.

Under the RTKL, a statement made under made under the penalty of perjury may serve as sufficient evidentiary support to sustain an agency’s burden of proof. *See Sherry v. Radnor Twp.* Sch. Dist., 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the position statement, a different electronic link to the Governor’s calendar for the relevant timeframe was provided, <https://www.scribd.com/document/446052441/1-31-2020-2-6-2020-Gov-Wolf-Calendar>, and a

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<sup>2</sup> The Office referred the Requester to <https://www.governor.pa.gov/schedule/>.

hardcopy of the records was included with the submission. We have determined that the link accesses the Governor's calendar without the requirement of establishing an account on any other internet application. Accordingly, as to the portions of the calendar records that are unredacted, the appeal is moot.

## **2. Portions of the appeal have been withdrawn**

During the course of the appeal, the Requester narrowed the scope of his challenge on appeal with respect to the records identified as redacted or withheld on the Office's Exemption Record submitted on June 15, 2021, and in the Office's position statement. Based on the Requester's June 21, 2021, reply to the OOR's request for clarification, the Requester stated that he is no longer challenging the redactions made to the records identified in the following portions of the Exemption Record: Item 1.a; Items 2.a, 2.b, and 2.d; Items 3.b, 3.c, and 3.d. The redactions to these records include personal telephone numbers, conference call-in numbers, PIN numbers or host codes for telephone conference calls or virtual conference calls, the Governor's home billing address, account number, invoice number and personal telephone number contained in the personal cellphone records, as well as travel confirmation numbers. In addition, on July 14, 2021, the Requester stated that he is no longer challenging the Office's redactions of the records provided that would reveal the identities of law enforcement officer responsible for the Governor's security and entries that would reflect communications with counsel for the purpose of seeking legal advice. As such, the appeal as to these redactions has been withdrawn.

## **3. The Office has properly redacted the Governor's personal cell phone records**

In the Exemption Record, the Office explains regarding the Governor's personal cell phone Verizon billing records, the following:

2.c) Each entry that is redacted in full is a personal communication unrelated to Commonwealth business, such as a telephone call to Pennsylvania's first lady or

another relative(s) of the Governor, and as such does not document a business, transaction or activity of the Office of the Governor and is therefore neither a 'record' of an agency nor responsive to the [R]equest.

In a supplemental submission, the Office states that the personal cellphone bill is issued in Governor Wolf's name. The Office further asserts that the cellphone is not paid for by the Commonwealth and the Governor does not receive reimbursement for the service. Therefore, the Office argues that the records do not "document[] a transaction or activity of an agency" and that they were not "created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency." The Office further asserts that, in the interest of transparency, to the extent that any of the personal cellphone bill entries reflected business of the Office, such entries were disclosed. Finally, the Office argues that the remaining cellphone bill entries are purely personal and do not reflect agency business. In support of the Office's argument that the call entries are not records of the Office, Mr. Eisenstein affirms that he reviewed the supplemental position statement and that "such statement is true and correct to the best of his knowledge, information and belief."

Under the RTKL, a record is defined as "[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency." 65 P.S. § 67.102. As noted by the Office, the Commonwealth Court, in *In re Silberstein*, found that emails and documents on Commissioner Silberstein's personal computer do not fall within the definition of record, as any record personally and individually created by Commissioner Silberstein would not document the Township's transactions and activities. The Court held that:

In other words, unless the emails and other documents in Commissioner Silberstein's possession were produced with the authority of York Township, as a local agency, or were later ratified, adopted or confirmed by [the] Township, said



requested records cannot be deemed ‘public records’ within the meaning of the RTKL as the same are not ‘of the local agency.’

*In re Silberstein*, 11 A.3d 629, 633 (Pa. Commw. Ct. 2013). The Court also credited the trial court with noting that, “Commissioner Silberstein is not a governmental entity. He is an individual public official with no authority to act alone on behalf of the Township.” *Id.* at 634.

The Request expressly seeks, “a copy of the log from the governor’s *personal* cell phone ....” (Emphasis added). Based on a review of the records provided, the billing records are facially personal billing records of Governor Wolf. In addition, the majority of the call log entries are not fully redacted. Further, Mr. Eisenstein affirms to having overseen the retrieval and review of the records responsive to this Request and he also affirms that the factual averments in the supplemental position statement are true and correct. In the absence of any competent evidence that the Office acted in bad faith, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). The Requester argues that the Office’s evidence as to the personal nature of the call log entries that were redacted in full is conclusory; however, beyond this argument, the Requester does not submit evidence to dispute the Office’s log or Mr. Eisenstein’s sworn affirmations. Accordingly, the Office has demonstrated that the redaction of call log entries that are purely personal matters unrelated to any Office business is appropriate as they do not reflect a transaction or activity of the Office.

#### **4. The Office has not demonstrated that no additional responsive records exist**

The Office argues that it has provided all records of the Governor’s phone logs, meeting logs or call logs in its possession, custody or control. 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).

In support of the Office’s argument, Mr. Eisenstein affirms, the following:

4) In response to the [R]equest, I reviewed the operations and programs of the Office and, with respect to all requested records excepting the Governor’s personal cell phone records, I determined that the records referenced in the Office’s response consist of the entirety of the responsive records in the possession of the Office, and the Office does not possess, maintain or have custody or control over any additionally responsive records.

5) Specifically, I have consulted with individuals responsible for maintaining the Office's information technology infrastructure, who confirmed that the Office does not possess or have custody or control of any responsive 'phone logs' other than those records provided to the Requester....

13) ... [B]ased upon a good-faith search of the records of the Office of the Governor, I hereby swear and affirm, under penalty of perjury, that the Office of the Governor does not possess, maintain or have custody or control over any additional records responsive to the instant [R]equest ....<sup>3</sup>

14) I have reviewed the ... position statement of the Office of the Governor and affirm that the statements therein are true and correct to the best of my knowledge, information and belief.

Regarding the request for "all phone logs for the cell phone or office phone" for the Governor, in the final response, the Office stated, "the Governor's calendar ... serves as the record of scheduled calls in which the Governor participated..." and "[t]he attached [.pdf] is the Office's record of calls in which the Governor participated via the Office's electronic telephony and messaging/conference systems[.]" including his business cell phone and office phone. The Requester argues that the records are not complete because the .pdf log provided begins on March 17, 2020, when the Request timeframe is February 1, 2020 through December 1, 2020. The Requester also asserts that it is not clear whether the Office is relying on the calendar records to reflect the Governor's calls from February 1, 2020 – March 16, 2020, the dates that are not accounted for on the .pdf log, and that the calendar entries do not match the .pdf entries.<sup>4</sup>

A review of the .pdf document provided to the Requester shows that it, in fact, begins on March 17, 2020 and contains entries for each month through December 2, 2020. The Office

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<sup>3</sup> Mr. Eisenstein concluded his averment by stating, "beyond the Governor's personal cell phone records discussed above[.]" because those records had not yet been provided. However, as set forth in this Final Determination, the Office subsequently provided copies of the Governor's personal cellphone records.

<sup>4</sup> The Requester also asserts that the phone logs requested were for all of the Governor's calls, not just the Governor's scheduled calls. He asserts that the records should identify what calls the Governor participated in or did not participate in. However, neither the requester nor the OOR is permitted to alter a request on appeal. *See, e.g., McKelvey v. Office of Attorney Gen.*, 172 A.3d 122, 125 (Pa. Commw. Ct. 2017) ("Once a RTKL request is submitted, the requester may not expand or modify the request on appeal").

disputes the Requester's assertion that contradictions exist within the records by arguing that he "conflates the issue by asserting that the Governor's public schedule and personal calendar are 'call logs'." However, the Office's final response states, "the Governor's calendar ... serves as the record of scheduled calls in which the Governor participated...." While acknowledging that the Governor's scheduling calendar may not necessarily reflect the exact number of calls that take place in a given day, based on a review of the calendar, calls and "call time" entries were scheduled during the timeframe of February 1, 2020 – March 16, 2020, thereby implying that calls may have taken place. However, the Office's evidence fails to address this gap in the records or explain how the calendar entries are related or not related to the log entries, except to argue that the call logs and scheduling calendar are separate categories records in the Request. Accordingly, the Governor's evidence is conclusory as to the non-existence of calls entries memorialized in the "electronic telephony and messaging/conference systems[,]" from February 1, 2020 – March 16, 2020. Conclusory statements are not sufficient to demonstrate that the requested records do not exist. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) ("[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records") *see also Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) ("Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL") (citations omitted). Nevertheless, the OOR recognizes the Office cannot provide access to a record that does not exist. Furthermore, Section 705 of the RTKL provides that "[w]hen responding to a request for access, an agency shall not be required to create a record which

does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705.

Regarding the Governor’s scheduling calendar, the Requester asserts that additional records must exist because, when he searched for the Governor’s calendar in two different ways on the Office’s website, the number of calendar entries were different. The Office explains in its position statement affirmed by Mr. Eisenstein that the Requester is incorrectly attempting to assert that the “Governor’s public schedule (i.e. his public appearances and events)” should match his personal calendar. In the Exemption Record, the Office states, the following:

... [T]his document, as it is published on the Governor’s webpage, is the current version of the document, and was current as of the date of the [R]equest. That is, this record only exists in redacted form, and an ‘unredacted’ version does not exist in the possession, custody or control of the Office.

Based on a review of the calendar records provided by the Office, the more encompassing personal calendar was provided for the entire requested timeframe and Mr. Eisenstein affirms that no other calendar records exist.<sup>5</sup> The Requester has not presented evidence that additional calendar records do, in fact, exist. Accordingly, the Office has demonstrated that no additional scheduling calendar records exist.

Based on the evidence as a whole, except for the phone log entries from February 1, 2020 – March 16, 2020, the Office has demonstrated that no additional responsive records exist. *See Hodges*, 29 A.3d at 1192.

## CONCLUSION

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

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<sup>5</sup> The Requester also argues that the Office’s assertion that the Governor’s calendar records only exist in redacted form to be irregular. However, the point is moot because the Office provided a copy of the redacted calendar and, as set forth above, the Requester does not challenge any of the redactions made to the calendar.

call log records for the timeframe of February 1, 2020 through March 16, 2020 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.<sup>6</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: July 30, 2021**

*/s/ Kelly C. Isenberg*

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APPEALS OFFICER  
KELLY C. ISENBERG, ESQ.

Sent to: Todd Shepherd (via email only);  
Thomas Howell, Esq. (via email only);  
Marc Eisenstein (via email only)

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<sup>6</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).