

[1] York County's initial notice to U.S. Immigration and Customs Enforcement that the contract would end in 120 days.

[2] The County's notice to ICE that it was ending contract negotiations.

[3] Copies of all correspondence, such as letters and memos, from ICE to the County in 2021.

[4] Documents that memorialize the federal standards that ICE wanted York County Prison to implement as a condition of a new contract, which the county commissioners described as being non-negotiable.

After invoking an extension of time to respond to the Request, 65 P.S. § 67.902(b), the County, on August 26, 2021, partially denied the Request, withholding certain correspondence and asserting that such records reflected internal predecisional deliberations, 65 P.S. § 67.708(b)(10)(i)(A). According to the County, "the communications requested and denied [regarded] negotiations and deliberations among the Prison Board of Inspectors members and ICE representatives, directly related to the County's continuation or non-continuation of the ICGA Contract."

On August 31, 2021, the Requester appealed to the OOR, challenging the County's denial of access to the requested correspondence and stating grounds for disclosure. The Requester contends that the internal predecisional deliberation exemption cannot apply to the records at issue because the County's communications with ICE are not internal to the County. ICE, the Requester contends, is not an agency aiding the County in its decision-making process, but instead, is an opposing party in a contractual relationship with the County. The OOR invited both parties to supplement the record and directed the County to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).¹

On September 3, 2021, the County sought a thirty-day extension to file its evidentiary submission in this appeal. Based upon a subsequent exchange of emails between the parties and

¹ During the course of the appeal, the County requested additional time to reach out to ICE. Thus, presumably, ICE was given notice of the instant appeal.

the OOR, and due to the statutorily imposed time constraints to issue a decision in this matter, the OOR extended the due date for the parties' submissions for one additional week, until September 20, 2021.

On September 20, 2021 the County submitted a position statement reiterating its grounds for denial. The County indicates that it withheld 27 emails on the basis that those emails reflected internal, pre-decisional deliberations. After further review, however, the County indicated that 5 of those communications can be released, subject to redaction of certain contact information. Those 5 redacted emails were attached to the County's submission. The Requester subsequently confirmed that she did not contest those redactions. In support of its position that the remaining withheld emails are exempt under Section 708(b)(10) of the RTKL, the County provided an exemption log and an attestation from its Open Records Officer and Solicitor, Michelle Pokrifka.²

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

² Counsel for the County submitted a completed Request to Participate form as part of the County's response to this appeal. However, neither the parties to an appeal nor their counsel are required to complete that form. Rather, the Request to Participate form is intended for use by persons, other than the parties or their counsel, that may have a direct interest in the records at issue. See 65 P.S. § 67.1101(c); 65 P.S. §§ 67.707(a) and (b).

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 County is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local 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)).

1. The appeal is moot as to the records provided.

During the course of this appeal, the County produced certain emails that were responsive to the Request. Although there are some redactions to those emails, the Requester indicated that

she is not contesting them. Accordingly, the appeal as to the records provided is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, *6 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. Section 708(b)(10)(i)(A) of the RTKL does not apply to the records withheld.

The County claims that the 22 emails withheld are exempt under Section 708(b)(10)(i)(A) of the RTKL, which exempts from public disclosure a record that reflects “[t]he internal, predecisional deliberations of an agency....”. In order for this exemption to apply, three elements must be satisfied: 1) “The records must . . . be ‘internal’ to a governmental agency,” *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 379 (Pa. Commw. Ct. 2013); 2) the deliberations reflected must be predecisional, *i.e.*, before a decision on an action; and 3) the contents must be deliberative in character, *i.e.*, pertaining to proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011). To establish that records are deliberative, an agency must show that the information relates to the deliberation of a particular decision. *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 378-88 (Pa. Commw. Ct. 2014).

In support of its position that Section 708(b)(10)(i)(A) applies, Attorney Pokrifka attests as follows in her attestation:

5. Each of the responsive records withheld are described in the preceding exemption log.

6. The attached exemption log has been reviewed and approved by me as the Open Records Office and the Solicitor for the [County].

7. I have reviewed each of the records withheld and the description of record type, record date, the subject matter, authors of the record, and the recipients of the records as described in the preceding exemption log are true and correct.

8. After review of the withheld e-mails, five (5) e-mails have now been redacted and provided to requester and are believed to be responsive to the initial request.

9. As to the remaining communications as listed in the exemption log, pursuant to Section 708(b)(10)(i)(A), a record reflecting the “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” may be withheld. 65 P.S. § 67.708(b)(10)(i)(A).

10. To the best of my information and belief, the e-mails outlined in the Exemption Log were by and between only those individuals that were directly involved in the negotiations and ongoing deliberations necessary to assist the Prison Board of Inspectors in making a decision regarding the continuance of the ICE contract with the York County Prison.

11. After a review of all of the communications, all were directly related to the issues critical to the pre-decisional deliberations between agencies, the [County] through the Prison and authorized DHS-ICE (Department of Human Services-Immigration and Customs Enforcement), Contracting officials and no outside or third [-]party individuals or entities unrelated to the contract were included in such communications.

The Exemption Log provided by the County identified the subject matter of the emails as, among other things, “[n]egotiations and specific issues with ICE contract continuation,” “...discussion regarding finalization of any agreements,” “offered modifications to ICE contract,” “legal issues related to contract termination notice,” “discussion regarding notice to terminate,” “discussion of exit plan negotiations” and “ongoing contract negotiations with specific and detailed reference to provisions in the agreement being negotiated.”

The Requester argues that the emails are not subject to exemption under Section 708(b)(10) because they are not internal to the County. Records satisfy the “internal” element when they are maintained internal to one agency or among governmental agencies. *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 658 (Pa. Commw. Ct. 2016). Recently, the Pennsylvania Supreme Court discussed the “internal” element of Section 708(b)(10) in its decision in *Chester Water Auth. v. Pa. Dep’t of Cmty. & Econ. Dev.*, 249 A.3d 1106 (Pa. 2021). *Chester* dealt with a RTKL request seeking

communications between a Commonwealth agency, the Department of Community and Economic Development (“DCED”) and a private contractor and subcontractors, who were hired to provide professional legal and financial services to the City of Chester which had been designated as a distressed municipality under the Financially Distressed Municipalities Act or “Act 47.”³ The Court ultimately held that, “Section 708(b)(10)(i)(A) does not serve to insulate communications exchanged between a Commonwealth agency and a private consultant from the [RTKL’s] general requirement for openness.” *Id.* at 1114. While the facts of *Chester* and the instant case are distinguishable, the same rationale of *Chester* applies here. The Court in *Chester* looked to the RTKL’s statutory language and determined that the third-party contractor or its subcontractors in that matter were not agencies, members, employees or officials as set forth Section 708(b)(10). *Id.* at 1112.

Similarly, here, ICE is not an “agency” as that term is defined in the RTKL. *See* 65 P.S. § 67.102. The language of Section 708(b)(10) only protects deliberations between an agency “and members, employees, or officials of *another agency*.” 65 P.S. § 67.708(b)(10)(i)(A). The term agency under the RTKL is defined as a “Commonwealth agency or a local agency, judicial agency or a legislative agency.” 65 P.S. § 67.102. ICE is none of those. “The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa.C.S. § 1921(a). Further, the best indication of the General Assembly’s intent is the plain language of the statute. *Martin v. Cmwltth., Dep’t of Transp., Bureau of Driver Licensing*, 905 A.2d 438, 443 (2006). Accordingly, the records sought are not “internal” under Section 708(b)(10) of the RTKL and, therefore, are not exempt from disclosure.

³ Act of July 10, 1987, P.L. 246, No. 47 (as amended 53 P.S. §§11701.101-11701.712).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part**, and **dismissed as moot in part**, and the County is required to provide all remaining responsive records 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 York County Court of Common Pleas. 65 P.S. § 67.1302(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.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 30, 2021

/s/ Angela Edris

APPEALS OFFICER
ANGELA EDRIS, ESQ.

Sent via email to: Teresa Boeckel/YDR;
Michelle Pokrifka, Esq., AORO/Solicitor

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).