



FINAL DETERMINATION

IN THE MATTER OF

MEGAN BROCK,
Requester

v.

PENNSYLVANIA OFFICE OF THE
GOVERNOR,
Respondent

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Docket No: AP 2021-2729

INTRODUCTION

Megan Brock (“Requester”) submitted two requests (individually, “Request”, collectively, “Requests”) to the Pennsylvania Office of the Governor (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking records containing specific search terms sent on the pa.gov domain between Meg Snead, Alison Jones, Dave Rubin, and/or Rachel Levine. The Office partially denied the Requests, arguing that the Requests were insufficiently specific in part, but providing some records with redactions. 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** and **denied in part**, and the Office is required to take further action as directed.

FACTUAL BACKGROUND

On October 7, 2021, the first Request was filed, seeking:

Copies of any/all electronic and US Mailed correspondence, records, and attachments to/from the Office of the Governor from June 10, 2021 to September

10, 2021 that were sent or received on the pa.gov domain from Mary Dougherty and/or Allison Jones and/or Tara Williams to/from Dr. Dave Rubin and/or Alison Beam.

For purposes of specificity and search the following terms apply communication records should include one or multiples of the following search terms:

1. Guidance; 2. School(s); 3. ACE-IT; 4. Mask(s); 5. Bucks; 6. Damsker; 7. CHOP; 8. Test; 9. Quarantine; 10. Covid; 11. Guidelines; 12. Health; 13. Face Covering (s); 14. Rubin

On the same day, the Second Request was filed seeking:

Copies of any/all electronic and US Mailed correspondence, records, and attachments to/from the Office of the Governor from May 1, 2020 to July 30, 2020 that were sent or received on the pa.gov domain from Meg Snead and/or Alison Jones to/from Dr. Dave Rubin and/or Rachel Levine.

For purposes of specificity and search the following terms apply communication records should include one or multiples of the following search terms:

1. Guidance; 2. School(s); 3. ACE-IT; 4. Mask(s); 5. Bucks; 6. Damsker; 7. CHOP; 8. Reopening; 9. Quarantine; 10. Covid; 11. Guidelines; 12. Health; 13. Face Covering (s); 14. Rubin

On October 15, 2021, the Office invoked a thirty-day extension during which to respond. 65 P.S. § 67.902(b).¹ On November 15, 2021, the Office partially denied the Requests, providing some records with redactions, as they would disclose internal, predecisional deliberations, 65 P.S. § 67.708(b)(10), contain personal identification information, 65 P.S. § 67.708(b)(6) and arguing that the Requests are insufficiently specific in part, 65 P.S. § 67.703.

On December 3, 2021, the Requester appealed to the OOR, challenging the denial of specific redactions, including the redaction of names of senders and recipients of email communications appearing on multiple identified pages, and stating grounds for disclosure. The

¹ October 11, 2021 was a federal holiday and not a business day.

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.² 65 P.S. § 67.1101(c).

On December 20, 2021, the Office submitted an exemption log and the attestation of Marc Eisenstein, the Office's Open Records Officer, supporting its grounds for denial.

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

² The Requester specifically challenges the redactions made to pages 1, 2, 5-8, 10-12, 14, 15, 18, 25, 28, 60, 153, 155-157, 167, 176-181, 184, 190, 191, 215, 220, 221, and challenges "the names of senders and/or recipients were redacted on pages 64, 68, 162-165, 175, 195, 199." Therefore, the OOR will only address the records at issue and will not address any other records in this Final Determination.

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 Office has provided records on appeal

During the appeal, the Office acknowledged that it erroneously made redactions to some records and provided the Requester with those records on appeal. Therefore, the appeal as it relates to page 60 of the contested records 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. The Office has established that a portion of the records are exempt internal, predecisional deliberative records

The Office argues that it has properly redacted responsive records because they reflect the Office’s internal, predecisional deliberations. 65 P.S. § 67.708(b)(10)(i)(A). Pursuant to Section 708(b)(10)(i)(A), a record reflecting the “internal, predecisional deliberations of an agency... or

predecisional deliberations between agency members, employees or officials ... including predecisional deliberations relating to a ... contemplated or proposed policy or course of action” are protected from disclosure. 65 P.S. § 67.708(b)(10)(i)(A). The OOR consistently holds that an agency must show three elements to substantiate this exception: (1) the deliberations reflected are “internal” to the agency; (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 proposed action/policy-making. *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. *Id.* at 378-88. The term “deliberation” is generally defined as “[t]he act of carefully considering issues and options before making a decision or taking some action ...” BLACK’S LAW DICTIONARY 492 (9th ed. 2009); *see also Heintzelman v. Pa. Dep’t of Cmty. & Econ. Dev.*, OOR Dkt. AP 2014-0061, 2014 PA O.O.R.D. LEXIS 254, *aff’d* No 512 C.D. 2014, 2014 Pa. Commw. Unpub. LEXIS 644 (Pa. Commw. Ct. 2014).

In support of the Office’s argument, it provided the affidavit of Mr. Eisenstein, who attests, in relevant part, as follows:

Both prior to responding to the [R]equest[s], and again upon receipt of the instant appeal, I reviewed the records collected in response to the [R]equest[s], and in particular those records referenced in [the Requester’s] appeal.

Upon review of the collected records and [the Requester’s] appeal, I prepared the attached exemption log, which accurately identifies all information redacted from the responsive records, and the reason for each redaction.

As to each item identified as “discussion of policies under consideration by Commonwealth official/employees:”

- a. The redacted portions of the records are communications between agency officials and employees;

- b. The redacted portions of the records are communications between those agency officials and employees in which they discuss and consider questions of policy and planning regarding how best to respond or recommend responses to ongoing challenges faced by government, schools, hospital systems and others, in light of developments in COVID-19 case levels, distribution, hospitalization and similar metrics. The redacted material contains mental impressions and recommendations and is more than “merely factual” information.
- c. The communications outlined above occurred before the officials’ or employees’ final decision on how policies, responses and recommendations would be developed.
- d. While the officials or employees relied upon other individuals’ reports, materials, knowledge and expertise when deliberating and considering the matters discussed in the records, the redacted portions of communications were not provided to individuals who are not agency officials or employees.

As to each item identified as “material used by Commonwealth officials in their internal predecisional deliberations:”

- a. The redacted portions of such records were authored by Dr. David Rubin of the Children’s Hospital of Philadelphia, and other physician or health care expert consultants and advisors for the purpose of assisting executive agencies’ in their development of policies and strategies to combat and contain COVID-19.
- b. The redacted portions of such records are research, recommendations and analyses of disease and public health practices and developments prepared by such consultants and experts and were used and considered by executive agencies as set forth in paragraph 9, above.
- c. The redacted portions of such records do not contain severable factual information, as any factual information is necessarily intertwined with the consultants’ and experts’ analysis and presentation of such information.
- d. Once submitted to agency officials and employees, the redacted portions of such records remained internal to the agencies, and was not further distributed to non-agency individuals.

...

The hyperlink contained on page 20 links to a draft document circulated only to executive agency officials and employees for the purpose of soliciting those

officials and employees thoughts in advance of making a final decision regarding policy recommendations and public announcements.

Under the RTKL, an attestation or statement made under penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any competent evidence that the Office acted in bad faith, “the averments in [the attestation] 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 first element required to prove that a record is exempt as an internal, predecisional deliberation is that the record is internal. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011). Based on a review of the exemption log provided and combined with the attestation of the Office, the records at issue were all internal and not shared with any outside parties. The final two elements are for the deliberations to be predecisional and the content of the records to be deliberative. *Id.* Here, the Office has provided context regarding the redacted records, and based on the attestation provided, the redactions identified as “Discussions of policies under consideration...” were predecisional and deliberative in nature.

However, there is a distinction between the two reasons for redactions made in this matter, “Discussions of policies under consideration...” and “Material redacted from this exchange were used by Commonwealth officials,” insofar as to whether or not the redactions are deliberative in nature.

The Office attests that the redactions made for the purposes of preventing disclosure of “Material redacted from this exchange” were “research, recommendations and analyses of disease and public health practices” that were created by individuals who have not been identified as

employees of the agency. However, the “origination of records from outside an agency does not preclude application” of Section 708(b)(10)(i)(A). *See Shannon v. Pa. Dep’t of Edu.*, OOR Dkt. AP 2021-1351, 2021 PA O.O.R.D. LEXIS 1797, *see Office of the Governor v. Davis*, 122 A.3d 1185, 1193 (Pa. Commw. Ct. 2015) (citing *Bagwell v. Pa. Dep’t of Educ.*, 76 A.3d 81 (Pa. Commw. Ct. 2013) (records originating with Penn State University, which is not an agency under the RTKL, may become records of an agency when records are used in agency decision-making), particularly where the records constitute “research, recommendations and analyses.” 65 P.S. § 67.708(b)(10)(i)(A).

Here, the Office has provided evidence in the form of an exemption log and attestation supporting its argument that the redactions to the responsive records were only to portions that documented internal communications between Office officials and employees where discussions of policy changes were taking place prior to any final decision. Additionally, the Office provided evidence that the materials used by the Commonwealth officials were created for the purpose of consulting with and advising on the policy responses to combat the COVID-19 pandemic. *But see Chester Water Auth. v. Pa. Dep’t of Cmty. and Econ. Dev.*, 249 A.3d 1106, 1114 (Pa. 2021). (Where communications were shared with a non-agency employee those communications were not deemed to be internal). The evidence in this matter establishes that the redacted records remained internal and were not disclosed to outside non-agency individuals at any time.

Accordingly, the Office has proven that the redactions made to records to pages 1, 2, 5, 6, 7, 8, 10, 11, 12, 14, 20, 28, 153, 155, 127, 167, 176, 177, 178, 179, 180, 184, 190, 191, 215, and 220, were proper as they are related to internal, predecisional deliberations and are exempt from disclosure. *See* 65 P.S. § 67.708(b)(10)(i)(A).

3. The Office has established that a portion of the records are exempt as personal identification information

The Office argues that the redactions of “names of senders and/or recipients,” as challenged by the Requester, are due to the redactions containing personal identification information. In support of its argument, the Office again relies on the attestation of Mr. Eisenstein, who attests as follows:

The “names of senders and/or recipients” that [R]equester mentions on pages 64, 68, 162, 163, 164, 165, 175, 195, and 199 consist wholly of individual, direct email addresses, personal to the addressees, which have not been held out to the public as a means to contact such individuals via unsolicited communications.

As stated above, an attestation is sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-521. 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 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). Accordingly, the redactions identified as “names of senders and/or recipients” on pages 64, 68, 162, 163, 164, 165, 175, 195, and 199 were proper.

4. The Office has established that disclosure of a link would jeopardize computer security

The Office argues that the redactions on page 16 were proper to prevent disclosure of a link that would provide access to a secure link that would allow an individual to modify data. In

support of this argument, Mr. Eisenstein attests, “[t]he material that appears on page [15] of the records provided to [the Requester] include a link to an editable Commonwealth database. Provision of the link to non-secure users could allow individuals to inappropriately access, alter, delete or otherwise modify data contained therein.”

Section 708(b)(3) of the RTKL permits agencies to withhold records “the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system,” including an agency’s electronic or computer systems. 65 P.S. § 67.708(b)(3)(i). Additionally, Section 708(b)(4) exempts from disclosure “[a] record regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer safety.” 65 P.S. § 67.708(b)(4). “In interpreting the ‘reasonably likely’ part of the test[s], as with all the security-related exceptions, we look to the likelihood that disclosure would cause the alleged harm, requiring more than speculation.” *Cal. Borough v. Rothery*, 185 A.3d 456, 468 (quoting *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013)); *see also Lutz v. City of Phila.*, 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (noting that “[m]ore than mere conjecture is needed”).

Here, the Office’s attestation establishes that the link would allow an individual unfettered access to a secure Commonwealth database and allow for modifications of the data within. Accordingly, the Office has properly withheld access to the redaction contained on page 20. *See Megurian v. Delaware Cnty.*, OOR Dkt. AP 2018-0443, 2018 PA O.O.R.D. LEXIS 704; *see also Givney v. Sch. Dist. of Phila.*, OOR Dkt. AP 2018-0077, 2018 PA O.O.R.D. LEXIS 372

5. The Office failed to establish that some records are exempt from public disclosure

The Office provided the OOR with an attestation and exemption log over the course of the appeal. Additionally, the OOR reached out multiple times to ask if any additional information by the Office was sought to be added to the record in this matter. The Office declined to provide any supplemental information until February 22, 2022, and this supplemental submission did not provide any additional information regarding redactions to pages not previously addressed.

Here, the Requester challenged the redactions on pages 18, 25, 156, 181, and 221, each of which were not addressed in the attestation nor were they addressed or listed in the exemption log provided. Therefore, because the Office has failed to provide evidence that the redactions were proper, the Office is to provide those pages to the Requester without redactions. 65 P.S. § 67.708(a)

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Office is required to provide unredacted copies of pages 18, 25, 156, 181, and 221, to the Requester 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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

FINAL DETERMINATION ISSUED AND MAILED: March 2, 2022

/s/ Ryan W. Liggitt

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Sent to: Megan Brock (via email only);
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