



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
AUSTIN NOLEN,	:	
Requester	:	
	:	
v.	:	Docket No.: AP 2016-1187
	:	
PHILADELPHIA DISTRICT	:	
ATTORNEY’S OFFICE,	:	
Respondent	:	

INTRODUCTION

Austin Nolen (“Requester”) submitted a request (“Request”) to the Philadelphia District Attorney’s Office (“Office”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking the Office’s handbook regarding specific policies and procedures. The Office denied the Request, claiming that the requested records do not exist. 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 in part**, and the Office is required to take further action as directed.

FACTUAL BACKGROUND

On June 21, 2016, the Request was filed, seeking “[t]he Office’s handbook of policies and procedures, including procedures ‘to guide the exercise of prosecutorial discretion, and standard operating procedures for the [O]ffice.’ See A.B.A. Criminal Justice Standards for the

Prosecution Function (4th ed.), Standard 3-2.4(a) and (c).” On June 22, 2016, the Office denied the Request, asserting that the requested records do not exist.

On July 13, 2016, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Office to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On July 21, 2016, the Requester sought an indefinite extension of the deadline for the parties to submit evidence in this matter and for the OOR to issue its Final Determination, as the parties were attempting to resolve the matter on their own. The OOR granted the Requester’s request on July 22, 2016. On August 31, 2016, the Requester informed the OOR that the parties were unable to resolve the matter and submitted a position statement, arguing that the Office possesses records that are responsive to the Request. On September 1, 2016, the OOR notified the parties that the appeal would proceed and established the necessary deadlines.

On September 12, 2016, the Office submitted a position statement, identifying one record, a “training manual for new prosecutors” (“Manual”), but arguing that the Manual is not responsive to the Request. The Office also asserts that the Manual is privileged under the attorney-work product doctrine, 65 P.S. § 67.102, and reflects the Office’s internal, predecisional deliberations, 65 P.S. § 67.708(b)(10). The Office further argues that the Manual is exempt from disclosure because it would threaten personal security and public safety, 65 P.S. §§ 67.708(b)(1)-(2), and includes confidential proprietary information, 65 P.S. § 67.708(b)(11). Lastly, the Office asserts that the Manual is exempt from disclosure because it relates to criminal and noncriminal investigations, 65 P.S. §§ 67.708(b)(16)-(17).¹ In support of its position, the Office

¹ The Office is permitted to assert these new reasons on appeal to the OOR. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

also submitted the sworn statement of BJ Graham-Rubin, Esq., the Office's Open Records Officer.

On September 19, 2016, the Requester submitted a supplemental position statement in support of his argument, stating that the Manual is responsive to the Request and asking that the OOR remand the matter to the Office "for an initial determination of specific redactions" of the Manual. On September 26, 2016, the Office submitted a supplemental position statement in furtherance of its argument that the Manual is exempt from disclosure. In response to a request for clarification from the OOR, the Office submitted a second sworn statement from Open Records Officer Graham-Rubin on October 7, 2016.

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." 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.*; *Giurintano v. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). The law also states that an 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. *Id.* Here, neither of the parties requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate the matter.

The Office is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in 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 clearly 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). Similarly, the burden of proof in claiming a privilege from disclosure is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011); *Pa. Dep’t of Transp. v. Drack*, 42 A.3d 355, 364 (Pa. Commw. Ct. 2012) (“[T]he RTKL places an evidentiary burden upon agencies seeking to deny access to records even when a privilege is involved”); *In re: Subpoena No. 22*, 709 A.2d 385 (Pa. Super. Ct. 1998). 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 Manual is responsive to the Request

The Office first asserts that the Manual is not responsive to the Request, which seeks the Office's "handbook of policies and procedures, including procedures 'to guide the exercise of prosecutorial discretion, and standard operating procedures for the [O]ffice.'" The Office acknowledges, however, that the Manual contains materials "to train newly minted Assistant District Attorneys regarding how to prosecute cases...." While an agency may interpret the meaning of a request for records, 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. 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, supra*). Here, the Request seeks policies and procedures relating to prosecutorial discretion. As a result, the Office's interpretation of the Request is too restrictive, and a reasonable interpretation of the Request would include manuals that the Office uses to train new prosecutors regarding how to prosecute cases.²

2. The Office provided responsive records during the appeal

During the course of the appeal, the Office provided the Requester with the Manual's table of contents. As such, the appeal as to the Manual's table of contents is dismissed as moot.

3. The Office has demonstrated that portions of the Manual are exempt from disclosure under the attorney-work product doctrine

The Office claims that the Manual is exempt from disclosure under the attorney-work product doctrine. The RTKL excludes records subject to privilege from its definition of "public records." *See* 65 P.S. § 67.102. The RTKL defines "privilege" as "[t]he attorney-work product

² During the appeal, the Office also identified policies relating to "conditions of employment" at the Office. The Requester confirmed, however, that he is not seeking these policies.

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-work product doctrine 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 Pennsylvania Supreme Court has explained that the attorney-work product doctrine “manifests a particular concern with matters arising in anticipation of litigation.” *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011) (citing *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001) and stating that “[t]he ‘work product rule’ is closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation”); *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”).

In the instant matter, the Office argues that the contents of the Manual are exempt from disclosure under the attorney-work product doctrine. Specifically, Bryan Hughes, Esq., the Office’s Assistant District Attorney, states under the penalty of perjury that the Manual constitutes the Office’s “playbook of the chief law enforcement agency of Philadelphia.” Attorney Hughes further asserts that the Manual contains the Office’s “strategies in presenting cases, its interpretation of extant case law, [and] the manner in which it assesses defendants for participation in various programs, etc.” In support of its position, the Office also relies on the sworn declaration of Open Records Officer BJ Graham-Rubin, who states, in relevant part, as follows:

7. ... [T]he [M]anual consists of instruction regarding prosecution strategy, substantial research, interpretation of case law, and opinions and theories based on the experience of veteran prosecutors. Indeed, an order compelling the ... Office to produce its ... [M]anual would severely undermine the adversarial process fundamental to the criminal justice system, which the attorney work product doctrine is designed to protect.

Open Records Officer Graham-Rubin further attests, however, that the Manual contains factual information and that certain portions of the Manual were made available to individuals outside of the Office. Specifically, Open Records Officer Graham-Rubin states as follows:

16. ... [The Manual] does contain what I believe would qualify as “factual information,” insofar as it includes (1) a map of prosecutorial zones, (2) a diagram of the Office’s organizational structure, (3) A Written Guilty Plea Colloquy, and (4) reproduced copies of various provisions of Pennsylvania law.
17. ... [T]wo sections of the Manual (*i.e.* a PowerPoint presentation on the Office’s Zone Prosecution model and information regarding its Pretrial Diversion Programs) were previously made available to those in attendance at Continuing Legal Education lectures held by the Office.

Under the RTKL, a statement made under the 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). Based upon the evidence provided, the Office has established that portions of the Manual consist of mental impressions, opinions and theories of the Office’s attorneys, which are exempt from disclosure under the attorney-work product doctrine. *See Pa. Burton v. Pa. Dept. of Corr.*, OOR Dkt. AP 2015-0523, 2015 PA O.O.R.D. LEXIS 533 (holding that because the Department’s manual contains the mental impressions, analysis and conclusions of the Department’s counsel, it is exempt from disclosure under the attorney-work product doctrine). The factual contents of the Manual, however, are not exempt from disclosure under the attorney-work product doctrine. Likewise, the Office has waived the privilege with regard to the two sections of the Manual that

were previously disclosed to the public at lectures held by the Office. *See Peiffer v. Pennridge Sch. Dist.*, OOR Dkt. AP 2016-0031, 2016 PA O.O.R.D. LEXIS 1225 (holding that the factual content of e-mails, as well as the content previously released, is not exempt from disclosure under the attorney-work product doctrine).

The Requester asserts that the Manual is subject to public disclosure in its entirety because the Manual does not relate to the litigation of a specific case. Notwithstanding the foregoing, however, “[m]aterials do not need to be prepared in anticipation of litigation for the work-product privilege to attach.” *Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 417 (Pa. Commw. Ct. 2014).

4. The Office has not established that the Manual involves internal, predecisional deliberations

The Office also claims that it withheld the Manual because it reflects the Office’s internal, predecisional deliberations.³ *See* 65 P.S. § 67.708(b)(10)(i)(A). Section 708(b)(10)(i)(A) of the RTKL exempts from public disclosure a record that reflects:

[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, ... 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). In order for this exemption to apply, three elements must be satisfied: (1) “[t]he 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

³ On appeal, the Office purports to invoke the deliberative process privilege; however, because “[t]he predecisional deliberative exception set forth in Section 708(b)(10)(i) codifies the deliberative process privilege,” there is no need to separately address the deliberative process privilege. *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commw. Ct. 2013). All references to Section 708(b)(10) in this final order should be read to include the deliberative process privilege.

character, *i.e.*, pertaining to proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011); *Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *Sansoni v. Pa. Hous. Fin. Auth.*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375.

In support of its argument, Open Records Officer Graham-Rubin attests as follows:

8. Furthermore, my review of the [M]anual and research of relevant case law revealed that the entire content of the [M]anual was not subject to disclosure under the RTKL pursuant to the predecisional deliberative process privilege set forth in 65 P.S. § 67.708(b)(10)(i)(A). This privilege, which applies to encourage the free and frank exchange of ideas and opinions of government personnel regarding a course of action not yet taken, certainly applies to the strategic plan of the ... Office concerning training its new prosecutors regarding their actions in future criminal cases.

Under the RTKL, an affidavit may serve as sufficient evidentiary support. *See Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d at 909. However, conclusory statements that records are exempt from disclosure are not sufficient to meet an agency's burden of proof. *See Scolforo*, 65 A.3d at 1103 (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). Because the Office's affidavit is conclusory in nature, the Office has not demonstrated that the Manual is exempt from disclosure under Section 708(b)(10) of the RTKL.

5. The Office has not established that the Manual is otherwise exempt from disclosure under the RTKL

The Office next argues that the Manual is exempt from disclosure because it would threaten personal security and public safety, 65 P.S. §§ 67.708(b)(1)-(2), and includes confidential proprietary information, 65 P.S. § 67.708(b)(11). Lastly, the Office asserts that the Manual is not subject to disclosure because it relates to criminal and noncriminal investigations,

65 P.S. §§ 67.708(b)(16)-(17). In support of its argument, Open Records Officer Graham-Rubin provides the following:

9. Finally, my review of the [M]anual and research of the case law revealed that portions of the [M]anual were exempt from disclosure under the RTKL pursuant to various other provisions, such as 65 P.S. § 67.708(b)(1)(ii) ... § 708(b)(2) ... § 67.708(b)(11) ... § 67.708(b)(16) ... and § 67.708(b)(17)....

The Office only provides a conclusory statement and fails to provide a sufficient factual basis for the OOR to conclude that the Manual is exempt from disclosure under Sections 708(b)(1), 708(b)(2), 708(b)(11), 708(b)(16) or 708(b)(17) of the RTKL. As such, the Office has not met its burden with respect to these RTKL exemptions. *See* 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part, denied in part and dismissed as moot in part**, and the Office is required to provide the Requester with the factual content of the Manual, as well as the two sections of the Manual previously disclosed to the public, 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 Philadelphia 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. 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>.

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

FINAL DETERMINATION ISSUED AND MAILED: October 31, 2016

/s/ Magdalene C. Zeppos

APPEALS OFFICER
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Sent to: Austin Nolen (via e-mail only);
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