INTRODUCTION

Mark Schwemler, Esq., on behalf of Aetna Better Health of Pennsylvania, Inc. (“Requester”), submitted a request (“Request”) to the Pennsylvania Department of Human Services (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 et seq., seeking records related to a Request for Proposals (“RFP”). The Department partially denied the Request, arguing, among other things, that some records are records of an agency proposal evaluation committee and other records reflect internal, predecisional deliberations.
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 Department is required to take further action as directed.

**FACTUAL BACKGROUND**

On February 3, 2017, the Request was filed, seeking:

1. All records reflecting or relating to the formulation or drafting of RFP 06-15 and RFP 06-15 (Reissued) and the evaluation criteria to be used in each RFP.

2. All offers submitted by offerors in response to RFP 06-15 and RFP 06-15 (Reissued).

3. All records, including email communications, reflecting or relating to the scoring decision for each offer submitted by offerors in response to RFP 06-15 and RFP 06-15 (Reissued).

4. As to RFP 06-15 (Reissued), all records reflecting the decision to assign the relative weights (i.e., number of points) to be afforded to the eleven (11) subcategories of the “Soundness of Approach/Work Statement Questionnaire” component of the technical score, including all documents reflecting when the decision to assign relative weights was made, how the relative weights were assigned, and who was involved in assigning the relative weights to these eleven subcategories.

5. As to RFP 06-15 (Reissued), all documents reflecting the decision to create … the “quantitative” formula that the Department claims was used to evaluate and score the “quality” component of the technical score, including all documents reflecting decisions to revise the “quantitative” formula, all documents reflecting when the “quantitative” formula was created, and all documents reflecting when the formula was actually applied.

6. All documents, including email communications, reflecting or relating to the decision to create and use of any form of a “heritage factor” or “disruption factor” in evaluating offers submitted in response to RFP 06-15 or RFP 06-15 (Reissued) including those reflecting any effort by the Department to convince any offeror not to accept a contract in any Zone to avoid “disruption.”

7. All documents, including email communications, relating to or referring to the decision to withdraw RFP 06-15.
(8) All documents, email communications and calendar entries, relating to any decision to meet with any offeror to discuss RFP 06-15 or RFP 06-15 (Reissued), such as any meeting by the Department with Pennsylvania Health and Wellness ([“Centene”]) to discuss contract awards.

(9) All documents reflecting or relating to the identification and/or discovery of any “scoring errors” associated with RFP 06-15 or RFP 06-15 (Reissued), including as to how any scoring error came to the attention of the Department.

(10) All documents, including email communications, reflecting any decision to re-score or re-evaluate the bids submitted in response to RFP 06-15 (Reissued) following the alleged discovery of a scoring error, including documents reflecting or relating to the decision to re-score the bids.

(11) All documents, including email communications and calendar entries, reflecting any communications between the Department and any offeror selected for contract negotiations with the Department under RFP 06-15 (Reissued) both before and after discovery of any alleged “scoring error”.

(12) All documents, including email communications, exchanged between the Department and the Bureau of Diversity, Inclusion & Small Business Opportunities relating to RFP 06-15 or RFP 06-15 (Reissued).

(13) All documents, including email communications sent to or from any executives of the Office of Medical Assistance Programs which reference “Aetna.”

(14) All records, including email communications, reflecting the development and staffing of the Evaluation Committees for RFP 06-15 and RFP 06-15 (Reissued), including as to the identity of the members of each Evaluation Committee.

(15) All records, including email communications, reflecting the involvement of any executives of the Office of Medical Assistance Programs in any aspect of the RFP process for RFP 06-15 or RFP 06-15 (Reissued), including as to the development of the Evaluation Committees, selection of Project Officers, and the scoring, ranking, or selection of offerors for contract negotiation.

(16) All records, including email communications, relating to or reflecting the decision to alter any aspect of RFP 06-15 (Reissued) from the components of RFP 06-15, including with regard to scoring for Small Diverse Business and Small Business factors; Quality and Performance Management factors including HEDIS scores; Provider Network Management and Composition factors; value-Base Purchasing factors; or Pharmacy factors, including drug use review programs.
All records, including email communications, reflecting why the number of offerors selected for contract negotiation in each Zone for RFP 06-15 (Reissued), differ in any way from the number of offerors selected for contract negotiation as to those same Zones with respect to RFP 06-15.

All records relating to any aspect of the procurement process, including email communications between any representative of the Department and any offeror selected for contract negotiation under RFP 06-15 (Reissued), which occurred between November 23, 2016 and December 29, 2016.

On February 10, 2017, the Department invoked a thirty-day extension of time to respond to the Request. See 65 P.S. § 67.902. On March 13, 2017, the Department partially denied the Request, granting access to records responsive to Items (3), (7), (8)-(11), (13) and (18), but redacted personal identification information, 65 P.S. § 67.708(b)(6), and procurement information that was provided prior to the award of a contract, see 65 P.S. § 67.708(b)(26), and withholding records that it claimed are records of the Department’s proposal evaluation committee, see id., reflect the Department’s internal, predecisional deliberations, see 65 P.S. § 67.708(b)(10)(i)(A), or are personal notes and working papers of Department employees or officials, see 65 P.S. § 67.708(b)(12).

The Department denied Items (1), (2), (4), (5), (6), (12), (14) and (15) in their entirety, claiming that responsive records reflect the Department’s internal, predecisional deliberations, are protected by the attorney-client privilege or the attorney-work product doctrine, see 65 P.S. § 67.102, and are records of the Department’s proposal evaluation committee or procurement records that are exempt from disclosure prior to the award of a contract.

Regarding Items (16) and (17), the Department claimed that the only documents that reflect the changes between the proposals are available on its website, see 65 P.S. § 67.704, that any internal correspondence discussing potential changes is protected by the attorney-client privilege or the attorney-work product doctrine, that some records are records of the
Department’s proposal evaluation committee, and that others reflect the Department’s internal, predecisional deliberations.

On March 28, 2017, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. See 65 P.S. § 67.1101(c).

On April 5, 2017, Geisinger Health Plan (“GHP”) submitted a request to participate in the appeal pursuant to 65 P.S. § 67.1101(c), which the OOR granted on April 12, 2017. Along with the Request, GHP submitted a statement made under penalty of perjury by David Weader, Esq., GHP’s Chief Legal Officer and Regulatory Affairs Officer, who argues that the records include confidential, proprietary information, see 65 P.S. § 67.708(b)(11), and contain an offeror’s financial information and proposals pertaining to an agency procurement.

On April 7, 2017, the Requester submitted a position statement, along with notarized position statements made under penalty of perjury by Jason Rottman, the Requester’s Chief Executive Officer, and by Mark Schwemler, Esq., attesting in part to the fact that the Department did not produce certain records.

On the same day, the Department submitted a position statement reiterating its grounds for denial. In support of its position, the Department submitted statements made under penalty of perjury by Erin Slabonik, Division Director of Program Initiatives, Contract Management and Communications; Barry Bowman, Managed Care Operations Chief and Director of the Division of Monitoring and Compliance, within the Office of Medical Assistance Programs, Bureau of

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1 On appeal, the Requester does not challenge the Department’s redactions of personal identification information. See 65 P.S. § 67.708(b)(6). As a result, the Requester has waived any objections regarding the Department’s redactions pursuant this exemption. See Pa. Dep’t of Corr. v. Office of Open Records, 18 A.3d 429 (Pa. Commw. Ct. 2011).
Managed Care Operations; Andrea Bankes, the Department’s Open Records Officer; Kathleen Grogan, Esq., the Department’s Deputy Chief Counsel; and Sallie Rodgers, Esq., another Deputy Chief Counsel.

On April 10, 2017, Pennsylvania Health & Wellness, Inc. (“PHW”) submitted a request to participate in the appeal, which the OOR granted on April 12, 2017. Along with the request, PHW submitted a statement made under penalty of perjury by Pamela Shipley, the Regional Vice President of Centene, the parent company of PHW, who argues that the records contain an offeror’s financial information, constitute proposals pertaining to procurement, and contain records of a proposal evaluation committee. Ms. Shipley also argues that the records contain confidential, proprietary information.

On April 13, 2017, UPMC For You, Inc. (“UPMCFY”) submitted a request to participate in the appeal, which the OOR granted on the same day. On April 21, 2017, UPMCFY made a submission, arguing that the records contain an offeror’s financial information, constitute proposals pertaining to procurement, and contain records of a proposal evaluation committee. UPMCFY also argues that the records contain confidential, proprietary information. In support of its position, UPMCFY submitted the affidavit of its President, John Lovelace.

On April 13, 2017, AmeriHealth Caritas (“Caritas”) submitted a request to participate in the appeal, which the OOR granted on April 20, 2017. Along with the Request, Caritas submitted a statement made under penalty of perjury by Suzanne Craig, Esq., who argues that the records contain confidential, proprietary information and an offeror’s financial information and proposals pertaining to agency procurement, and that the release of the records would threaten infrastructure security, see 65 P.S. § 67.708(b)(3).
On April 13, 2017, Trusted Health Plans, Inc. (“THP”) submitted a request to participate in the appeal, which the OOR granted on April 20, 2017. Along with the Request, THP submitted a statement made under penalty of perjury by Robin Barclay, THP’s Director of Corporate Development, who argues the records contain confidential, proprietary information, an offeror’s financial information and proposals pertaining to agency procurement.

On April 14, 2017, Health Partners Plans, Inc. (“Health Partners”) submitted a request to participate in the appeal, which the OOR granted on April 20, 2017. Among other things, Health Partners argues that the requested records contain an offeror’s financial information, constitute proposals pertaining to a procurement, and contain records of a proposal evaluation committee. Health Partners also argues that the records contain confidential, proprietary information. Along with the Request, Health Partners submitted a statement made under penalty of perjury by Kearline Jones, its Vice President, who attests to the veracity of Health Partners’ arguments.

On April 26, 2017, the Requester agreed to grant the OOR an extension of time to conduct an in camera review. On the next day, the OOR ordered the production of records for in camera review. Specifically, the Order required production of records that were withheld on the basis they contain internal, predecisional deliberations; i.e., records responsive to Items (1), (3)-(7), (10), (12), and (14)-(16); and records that were withheld on the basis that they are protected by the attorney-client privilege or the attorney-work product doctrine; i.e., records responsive to Items (16) and (17).

On May 17, 2017, the Department submitted the records for in camera review. Accompanying the submission were statements made under penalty of perjury by Ms. Bankes and Jonathan Curtis, Esq., Assistant Counsel for the Department. Ms. Bankes reiterates that all records responsive to Items (8), (9), (11), (13) and (18) that were granted in part were sent to the
Requester. Attorney Curtis attests that he advised the Department as to which documents to withhold and that the exemption log, which was submitted along with the records for in camera review, only contains the records withheld on the bases that they contain proposals pertaining to an agency procurement, reflect the Department’s predecisional deliberations or are protected by the attorney-client and attorney work-product privileges. Upon request by the OOR, the Department resubmitted the records with Bates numbers on May 26, 2017.

**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 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. 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). Here, in his submission on appeal, the Requester asks the OOR to review the requested
records *in camera* and conduct an evidentiary hearing. The OOR subsequently conducted an *in camera review*; however, the request for a hearing is denied, as the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in 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. **Certain records were properly withheld pursuant to 65 P.S. § 67.708(b)(26)**

The Department argues that many of the requested records are records of a proposal evaluation committee or are procurement records prior to the award of a contract, and therefore, are exempt from disclosure. Section 708(b)(26) of the RTKL, exempts from disclosure:

A proposal pertaining to agency procurement … 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).


Here, Ms. Slabonik attests that:


6. To date, the procurement process that was commenced by Reissued RFP 06-15 has not resulted in the award of any agreements….
12. When the Department issues an RFP, it assembles an evaluation committee consistent with section 513(e) which provides for an “evaluation committee” to be assembled, for the purpose of “evaluation” of the technical submittals of the submitted proposals. 62 Pa.C.S. § 513(e)….

15. For Reissued RFP No. 06-15, the Department assembled an evaluation committee (“Evaluation Committee”)….

17. In the context of Reissued RFP No. 06-15, the Project Officer set forth his recommendation in the document referred to in Requester’s appeal as the Recommendation for Selection memorandum.

18. As it pertains to Reissued RFP No. 06-15, offerors were chosen for negotiations through the evaluation process….

19. The negotiations between the Department and the selected offerors have not yet commenced.

20. Initially, the Requester was not selected for contract negotiations in all five zones per the selection letter issued on November 18, 2016.

21. However, on or about December 16, 2016, by letter, the Department notified all offerors of an error in the calculation of the Small Diverse Business (“SDB”) and Small Business Participation submittals and rescinded all the initial selection letters….

23. Based on the recalculated scores, the Requester was not selected for contract negotiations in any of the five zones per the selection letter issued on December 22, 2016.

26. As stated above, the procurement process commenced by Reissued RFP No. 06-15 has not yet resulted in the award of contracts or agreements.

27. I responded to and interpreted [Items 1-6 and 8-18] to be asking for documents that would be included as part of the offerors’ proposals and documents that would include the scoring and evaluation sheets, used by the Evaluation Committee….

28. In addition, I responded to and interpreted [Items 1-6 and 8-18] to be asking for … documents related to the re-scoring but not evaluation documents….

54. In addition, some of the documents responsive to [Items 1-6 and 8-18] contained proposal information.
Under the RTKL, an affidavit 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). Therefore, the Department has provided evidence that certain records relate to procurement and predate the award of a contract and that others were used or produced by the Evaluation Committee. Accordingly, the Department has met its burden of proving that all records withheld on the basis that they are records of a proposal evaluation committee or are procurement records, with the exception of two records identified below, are exempt from disclosure.

Further, in several recent final determinations involving the Department and the same RFP, the OOR has held, among other things, that the bids, proposal materials and scoring materials of the Evaluation Committee for RFP No. 05-16 and RFP No. 05-16 (Reissued) are exempt from disclosure under Section 708(b)(26) of the RTKL. *See United HealthCare of Pa., Inc. v. Pa. Dep’t of Human Servs.*, OOR Dkt. AP 2017-0656, 2017 PA O.O.R.D. LEXIS 775; *United HealthCare v. Pa. Dep’t of Human Servs.*, OOR Dkt. AP 2017-0146, 2017 PA O.O.R.D. LEXIS 239; *United HealthCare v. Pa. Dep’t of Human Servs.*, OOR Dkt. AP 2017-0408, 2017 PA O.O.R.D. LEXIS 424; *AmeriHealth Caritas v. Pa. Dep’t of Human Servs.*, OOR Dkt. AP 2017-0477, 2017 PA O.O.R.D. LEXIS 514. The Department argues that many of these records are also *either* records of a proposal evaluation committee *or* procurement records *and* reflect the Department’s internal, predecisional deliberations. As the Department has proven the former exemption applies with regard to these records, the OOR need not address whether these records are also subject to the latter exemption.

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2 All Direct Interest participants argue that the records contain confidential, proprietary information, *see 65 P.S. § 67.708(b)(11),* and Caritas argues that disclosure of the records would threaten infrastructure security. However, since the records that implicate both of these concerns have been properly withheld under Section 708(b)(26), the OOR need not address the application of other exemptions.
However, *in camera* review establishes that only the following records are not procurement records or records of the Evaluation Committee:

- Bates no. 1_23: the attached slideshow (the email itself and the other attachment are exempt)
- Bates no. 1_47: the email from Laval Miller-Wilson

The slideshow attached to Bates no. 1_23 is not deliberative; it is merely a general presentation about the Department’s Contractor Partnership Program and only mentions the relevant RFP one time. Likewise, Bates no. 1_47, the email from Mr. Miller-Wilson, is not deliberative. It generally describes the function of the Pennsylvania Health Law Project and merely states that it could probably be used in the relevant selection process. Accordingly, the Department must provide these records to the Requester.

2. **Some records reflect the Department’s internal, predecisional deliberations**

The Department argues that many of the records responsive to various Items of the Request that are not exempt under Section 708(b)(26) reflect the Department’s internal, predecisional deliberations.\(^3\) Section 708(b)(10) of the RTKL exempts from disclosure records 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.

65 P.S. § 67.708(b)(10)(i)(A). An agency must show three elements to substantiate this exception: (1) the deliberations reflected are “internal” to the agency; (2) the deliberations are

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\(^3\) The Department argues that many records are both records pertaining to procurement records of a proposal evaluation committee or procurement records and reflect the Department’s internal, predecisional deliberations. As the Department has proven that one of the former exemptions applies with regard to these records, the OOR need not address whether these records also reflect the latter.
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 and/or policy-making. See Office of the Governor v. Scolforo, 65 A.3d 1095 (Pa. Commw. Ct. 2013); 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. Agency, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; Kyle v. Pa. Dep’t of Comm. & Econ. Dev., OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310. Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. McGowan v. Pa. Dep’t of Envtl. Prot, 103 A.3d 374, 385-86 (Pa. Commw. Ct. 2014). However, factual material can still qualify as deliberative information if its “disclosure would so expose the deliberative process within an agency that it must be deemed exempted”; or, in other words, when disclosure of the factual material “would be tantamount to the publication of the [agency’s] evaluation and analysis.” Id. at 387-88 (citing Trentadue v. Integrity Communication, 501 F.3d 1215, 1228-29 (10th Cir. 2007)).

The OOR has conducted an in camera review of the records. Several of the records withheld by the Department under Section 708(b)(10) include draft documents, which include some deliberative comments made by those reviewing the document contained in the margins. While the drafts contain many tracked changes showing how the documents evolved into the final versions, the track changes themselves are not deliberative in nature. Yoder v. Lancaster County Solid Waste Mgmt. Auth., OOR Dkt. AP 2016-0796, 2017 PA O.O.R.D. LEXIS 636 (reasoning that because Section 708(b)(9) of the RTKL (relating to draft records) exempts only limited types of draft documents, not all draft documents are exempt); Glenza v. Pa. Dep’t of Envtl. Prot., OOR Dkt. AP 2016-1493, 2017 PA O.O.R.D. LEXIS 187 (holding that
certain drafts do not reflect deliberations and, therefore, are not subject to withholding under Section 708(b)(10) of the RTKL. Instead, the deliberations mostly occurred in the comments within the drafts, as that is where individuals explained their rationales for making various changes. Most of the records are strictly factual in nature and cannot be withheld as reflecting internal, predecisional deliberations. Only the following portions may be redacted, as in camera review confirms that they are deliberative in nature, internal to the Department and predate a decision:

- Bates nos. 1_22, 73 & 75: Only the comments to the attachments may be redacted.
- Bates no. 2_46: Only the second sentence of the email sent by Ms. Rock at 8:26 on July 21, 2016; the third sentence of the email sent by Ms. Rock at 7:52 on July 21, 2016; and the comments made to the attached document may be redacted.
- Bates no. 2_47: Only the email sent by Ms. Allen on July 21, 2016 at 7:31 may be redacted.
- Bates nos. 2_48 & 58: Only the comments to the attachment may be redacted.
- Bates no. 2_49: Only the fourth through the seventh sentences of the email sent by Ms. Hudson at 11:59 on July 20, 2016 may be redacted.
- Bates no. 2_50: The fourth through the seventh sentences of the email from Ms. Hudson sent at 11:59 on July 20, 2016 may be redacted. The fourth page of emails may be withheld in its entirety.
- Bates no. 2_51: Only the email sent by Ms. Hudson at 12:21 on July 20, 2016, the email sent by Attorney Rogers at 12:18 on July 20, 2016, and the fourth through the seventh sentences of the email sent by Ms. Hudson at 11:59 on July 20, 2016 may be redacted.
- Bates no. 2_54: All emails except the top three may be redacted. The comments to the attached document may also be redacted.
- Bates no. 2_56: Only the comments to the “redlined” attachment may be redacted.

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4 Under Section 708(b)(10)(i)(A) of the RTKL, predecisional deliberations between two agencies are also protected. Kaplin v. Lower Merion Twp., 19 A.3d 1209, 1216 (Pa. Commw. 2011). Therefore, the Department’s communications with other departments does not negate the internal nature of the records.
• Bates no. 2_59: The second sentence of the email sent by Ms. Slabonik at 12:58 on July 11, 2016 may be redacted. The comments to the attachments may also be redacted.

• Bates nos. 2_60 & 61: Only the comments in the attachments can be redacted.\(^5\)

Accordingly, the Department must provide these records to the Requester as set forth above.

3. **The Department has proven that some records contain attorney work-product**

The Department argues that some records responsive to the Request are protected by the attorney-client privilege and the attorney work-product doctrine.\(^6\) The RTKL’s definition of “privilege” includes the attorney-client privilege as well as the attorney-work product doctrine. 65 P.S. § 67.102.

The work-product doctrine is similar to the attorney-client privilege, and 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; see also *Heavens v. Pa. Dep’t of Envt. 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”). Although the doctrine “manifests a particular concern with matters arising in anticipation of litigation,” “anticipation of litigation is not a prerequisite to the application of the … doctrine as it pertains to the work product of attorneys acting in their professional

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\(^5\) The Department also claims that Bates no. 2_60 contains attorney work product. While some of the comments already found to be exempt may also constitute attorney work product, the body of the email is factual in nature and does not contain legal opinions or conclusions of law.

\(^6\) As the Department has proven that most of these records are records of a proposal evaluation committee or procurement records or contain internal, predecisional deliberations, the OOR need not determine whether the records are protected by the attorney work-product doctrine and/or the attorney-client privilege. Further, the Department originally asserted that some communications responsive to Items 16 and 17 of the Request are protected by the attorney-client privilege and the attorney work-product doctrine. On its exemption log, the Department identifies records responsive to other Items of the Request as being protected by the attorney work-product doctrine and/or the attorney-client privilege; conversely, it claims that records responsive to Items 16 and 17 are exempt on other grounds. Regardless, the Department is permitted to modify its arguments, and where the Department’s original rationale differs from that contained in the exemption log, the OOR will consider the exemptions asserted in the exemption log as superseding the Department’s previously asserted grounds for denial.

An *in camera* review of the records reveals that Bates no. 1-91 is the only record listed on the log that was withheld solely because it contains attorney work-product. Bates 1-91 includes emails sent by Attorney Rogers on January 11, 2017 at 8:34 and 10:44 and by Attorney Antonuk on the same day at 10:55. These emails contain the attorneys’ opinions and suggestions made in their professional capacities regarding the Department’s response to a bid protest. However, the emails sent by Ms. Slabonik on January 11, 2017 at 10:47 and 11:01 do not contain attorney work-product. Accordingly, while the Department may withhold the emails sent by Attorneys Rogers and Antonuk, it cannot withhold the other portions of the e-mail chain. Additionally, the Department also submitted a statement made under penalty of perjury by Attorney Grogan, who attests:

4. Of all the records responsive to the [Request] above, three of my emails contained attorney work-product.

5. Each of the emails were authored by an attorney in the course of his or her professional duties, sent to another attorney, and contained the mental impressions, theories, and strategies of an attorney in order to prevent further litigation.

   a. The first email withheld is an email from Attorney John A. Kane which discusses a possible settlement proposal in order to prevent further litigation between the Department and [the Requester].

   b. The second email withheld contains my response to that first email in the form of a counter proposal.

   c. The third email withheld contains the same response as the second email but includes an attachment of RFP 06-15 REISSUED Addendum 1.pdf which I am told that the [R]equester has received a copy.
Although the records produced by the Department for *in camera* review do not include emails from Attorney Grogan or Attorney Kane, the Department has produced evidence that these emails contain opinions produced by attorneys acting in their professional capacities. Accordingly, the Department has met its burden of proving that these records are privileged.

4. **The Department has demonstrated that no additional records exist**

The Requester argues that the Department has not produced all the records it said it would. However, Ms. Bankes attests that:

3. On February 3, 2017, [the Requester] submitted a RTKL request to my office….

4. I then notified the appropriate Program Offices in the Department that may have had responsive records and created an electronic folder for responsive records to be placed and gathered for review and possible production for this underlying request.

5. All responsive documents were gathered and placed in the electronic folder.

6. On March 13, 2017, the Department responded to [the Request].

7. The only documents withheld were [pursuant to an exemption or privilege]….

8. On or about March 21, 2017, the Department sent [the Requester] a CD containing all of the responsive documents granted in part….

The Requester attests that he did not receive records responsive to Items (8), (11) and (13) of the Request that the Department claimed were provided. In response to a request for clarification by the OOR, the Department submitted a second statement made under penalty of perjury by Ms. Bankes, who attests that all records responsive to the disputed Items were sent to the Requester.

The OOR makes no determination as to whether additional records should exist. *See, e.g., Troupe v. Borough of Punxsutawney*, OOR Dkt. AP 2010-0743, 2010 PA O.O.R.D. LEXIS 731 (“While … evidence may establish that a [record] should exist, the OOR lacks jurisdiction to

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7 The Requester also attests that he received no records responsive to Item (6). However, the Department indicated that records responsive to this Item were withheld in their entirety pursuant to Section (b)(26).
rule on the propriety of the lack of such [record]—the OOR may only determine whether a responsive record does, in fact, exist”). Based upon the evidence provided, the Department has met its burden of proving that no additional records exist in its possession, custody or control.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is granted in part and denied in part, and the Department is required to provide the Requester the records as set forth above 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. 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.8 This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

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FINAL DETERMINATION ISSUED AND MAILED: July 14, 2017

/s/ Blake Eilers
Blake Eilers, Esq.
Appeals Officer

Sent to: Mark Schwemler, Esq. (via email only);
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