



For Immediate Release

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**PA Office of Open Public Records
Orders PennDOT to Release Previously Denied Materials
to the Delaware Riverkeeper Network**

Harrisburg, PA – The Pennsylvania Office of Open Public Records ordered the Pennsylvania Department of Transportation (PennDOT) to release records to the Delaware Riverkeeper Network that PennDOT had previously sought to deny.

On March 10, 2016 the Delaware Riverkeeper Network had filed a Right to Know request with PennDOT seeking documents discussing its proposal to demolish the historic, 200 year old, Headquarters Road Bridge in Tinicum Township, Bucks County, PA. On April 18 PennDOT provided some documents but denied the majority of documents claiming they were exempt from disclosure because they were internal and/or pre-decisional communications. On May 9, the Delaware Riverkeeper Network challenged the refusal to release the information. After conducting an in camera review of the documents, the Appeals Officer Joshua Young of the Office of Open Public Records determined that a majority of the items must be released to the Delaware Riverkeeper Network and were not properly withheld by PennDOT.

Appeals Officer Young determined that most of the records PennDOT had originally denied the Delaware Riverkeeper Network:

- were not internal records as PennDOT had asserted, and that in fact a number of them had already been shared with a number of other members of the community including county and township officials as well as members of the office of Representative Marguerite Quinn;
- were not predecisional or deliberative in nature and merely included factual information, information about decisions that had already been made, innocuous information or just general information.

“PennDOT’s failure to provide the Delaware Riverkeeper Network with documents to which we are obviously entitled is inexcusable. PennDOT’s costly effort to deny us this information seems carefully calculated to allow PennDOT to continue to advance its decision to demolish a historic bridge and inflict irreparable harm on an Exceptional Value and Wild & Scenic stream despite public opposition and clear evidence that another option, one which will save both the creek and the bridge, is available, would be more timely, and would be less expensive,” said Maya van Rossum, the Delaware Riverkeeper, leader of the Delaware Riverkeeper Network. “The question now becomes whether PennDOT will waste more of the public’s tax dollars and personnel appealing this decision, or will they do what is obviously right and release the documents.”

The Delaware Riverkeeper Network is a regional nonprofit that has been working to protect exceptional value and high quality streams that seem targeted by PennDOT’s bridge replacement program.

The Headquarters Road (Sheephole) Bridge has been closed since March 2011. The 1812 bridge plays a key role in the Federal Wild and Scenic River designation that brings attention and resources to the Tinicum Creek and the Lower Delaware River. The bridge also has federal protection as the oldest and most prominent bridge in the bridge-themed Ridge Valley National Register Rural Historic District.

According to information on the record, the Headquarters Road Bridge is the oldest bridge of its type left in Pennsylvania and is one of only a few spans in America over 200 years old.

The Tinicum Creek, over which the bridge passes, has been honored with state and federal designations requiring the strictest possible protection at every level. It’s listed as one of the very few Federal Wild and Scenic streams in the East. It also was ranked first quality for protection on a countywide study based on its variety of uncommon plant communities, large numbers of rare plant and animal species, and the exceptional quality of the water.

According to the Delaware Riverkeeper Network, construction of a new larger bridge would be much more damaging to the integrity and quality of Tinicum Creek than rehabilitation of the existing bridge. The excavations, clearing, grading and channeling required would have direct and adverse impacts on streambank stability, water quality, river hydraulics, and aquatic organisms. A larger bridge requiring hardened banks would also bring more pollution, runoff and construction harms to Tinicum Creek. It would alter stream flows causing habitat harms and changes to the flood plain, threatening the trees that now stabilize the banks and prevent erosion.

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On October 16, 2008, Larry Ward, a Civil Engineering Supervisor with [the Department's] District 6 office received a letter from state Senator Charles T. McIlhinney, Jr. regarding construction work on the bridge located at the intersection of Headquarters and Cafferty Roads in Tinicum Township, Bucks County. Senator McIlhinney inquired whether the construction work was considered replacement work by [the Department]. Under the [RTKL], the [Requester] requests a copy of Mr. Ward's response to Senator Mcilhinney's inquiry or the response of other [Department] officials to the Senator regarding this matter.

On March 17, 2016, the Department invoked a thirty-day extension of time to respond to the Request. *See* 65 P.S. § 67.902(b). On April 18, 2016, the Department partially denied the Request, arguing that certain records reflected the internal, predecisional deliberations of Department employees and officials, 65 P.S. § 67.708(b)(10).

On May 9, 2016, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed the Department to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On May 19, 2016, the Department submitted a position statement and the sworn affidavit of Charles Davies, P.E., the Assistant District Executive (Design) of the Department's Engineering District 6-0. The Requester also submitted additional information on May 19, 2016.

On May 31, 2016, in response to a request for clarification from the OOR, the Department submitted an exemption log, identifying the records withheld by the Department and describing their contents, as well as a supplemental affidavit from Mr. Davies.

On June 3, 2016, the OOR ordered the Department to produce unredacted copies of the records at issue for *in camera* review. On June 13, 2016, the Department provided copies of the records, and the OOR conducted an *in camera* review.

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; however, 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, neither of the parties requested a hearing; however, the OOR has the requisite information and evidence before it to properly adjudicate this 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 the possession of a Commonwealth agency are presumed to be 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 to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *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). 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)).

The Department denied access to certain records, arguing they reflect the internal, predecisional deliberations of the Department and are, therefore, exempt under Section 708(b)(10) of the RTKL. Section 708(b)(10) exempts from public 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 prove three elements to establish this exemption: (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 or policy-making. *See Kaplan 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 Cmty. & 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 Env'tl. Prot.*, 103 A.3d 374, 385-86 (Pa. Commw. Ct. 2014).

The OOR has conducted an *in camera* review of the records alleged to be subject to this exemption.¹ Based upon this review, the records or parts of records set forth in Exhibit A, which is attached to this Final Determination, may be withheld from disclosure pursuant to Section 708(b)(10) of the RTKL.

These portions of the records consist of internal communications between Department employees/officials, and are predecisional as they occurred prior to the Department's decision to renovate or replace a particular bridge. *See Spatz v. City of Reading*, OOR Dkt. AP 2010-0655, 2010 PA O.O.R.D. LEXIS 717; *Lehigh Valley Planning Comm'n v. Pa. Dep't of Transp.*, OOR Dkt. AP 2010-0001, 2010 PA O.O.R.D. LEXIS 64. Likewise, the communications are deliberative in nature as they reflect discussions between Department employees and contractors regarding the renovation or replacement of the bridge, the approval or denial of bridge permit applications, and the weight limits to be posted on the bridge. Accordingly, the records or parts of records set forth in Exhibit A are exempt from disclosure under Section 708(b)(10). *See, e.g., Bongivengo v. Slippery Rock Univ. of Pa.*, OOR Dkt. AP 2012-1969, 2012 PA O.O.R.D. LEXIS 1472. As a result, they may be redacted from the records. *See* 65 P.S. § 67.706.

However, the remainder of the records claimed to be exempt under Section 708(b)(10) consist of records that are not internal to the Department and/or do not pertain to any particular Department action or decision. The Department states that the communications between its

¹ Section V(E)(13) of the OOR Procedural Guidelines provides that “[r]eferences to specific records submitted for in camera inspection, or the contents of such records, in the Final Determination will be ... by reference to generic descriptions or characterizations as set forth in the in camera inspection index.” As such, the OOR’s written analysis is constrained to generic descriptions of the withheld records.

employees and contractors are internal to the Department; however, Section 708(b)(10) does not protect communications shared with those who are not employees or officials of the Department, or those who do not have a contractual relationship with the Department. *See Cedar Trust v. Lower Macungie Twp.*, OOR Dkt. AP 2013-1799, 2013 PA O.O.R.D. LEXIS 1072. For example, the e-mail dated April 29, 2010 (11:21 a.m.) located at Bates Numbers 24, 26, and 31 was sent to the Chief of Police of Tinicum Township, and the e-mail dated October 5, 2010 (4:40 p.m.), which is located at Bates Numbers 25, 27 and 31-32, was sent to Department employees by the District Officer Manager for State Representative Marguerite Quinn. Also, the e-mail attachments referenced at Bates Numbers 12 and 13 were forwarded to Bucks County personnel, including the Bucks County Manager. Because these records² were sent to individuals outside of the Department, they are not “internal” to the Department and cannot be exempt under Section 708(b)(10).

Additionally, some of the e-mails are not predecisional or deliberative in nature. 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). 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). After a review of the records, the following records (or parts of records) are not predecisional or deliberative of any Department decision or action relating to the instant Request:

² As noted below, some of these records are neither internal nor predecisional or deliberative in nature.

- Bates No. 1: E-mail dated 1/6/10 at 5:08 p.m. only
- Bates No. 9: E-mail dated 3/11/10 at 10:24 a.m. only
- Bates No. 10: E-mail dated 3/22/10 at 12:19 p.m. only
- Bates No. 16
- Bates Nos. 17-19: All e-mails
- Bates No. 21: E-mail dated 6/18/10 at 11:06 a.m. only
- Bates Nos. 23-32: All e-mails

While Mr. Davies attests that all of the requested e-mails exchanged between Department personnel relate to “bridge weight limits, posting bridge of weight limits, permits, detours and renovation or replacement of the bridge[,]” a review of the records shows that many of the them consist of factual/background information regarding a decision that was already made by the Department (*i.e.*, the posted weight limit of the bridge), or that contain otherwise innocuous information unrelated to any particular Department decision or course of action, such as general information regarding emergency vehicle permits. For example, the e-mail attachment referenced at Bates Number 16 consists of the Department’s final approval of the bridge weight restriction and does not reflect the weighing of options or discussion regarding any decision or course of action of the Department. Therefore, regardless of whether these records are internal or predecisional, they are not exempt from disclosure because they are not deliberative in nature. *See, e.g., Norris v. Pa. Dep’t of Health*, OOR Dkt. AP 2014-1752, 2015 PA O.O.R.D. LEXIS 25.

CONCLUSION

For the foregoing reasons, the Requester’s appeal is **granted in part** and **denied in part**, and the Department is required to provide all responsive records, subject to the redaction of the information set forth in Exhibit A of this Final Determination, 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 according to court rules 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.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: 1 August 2016

/s/ Joshua T. Young

JOSHUA T. YOUNG, ESQ.
APPEALS OFFICER

Sent to: Lauren Williams, Esq. (via e-mail only);
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³ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

Exhibit A

1. The following records/parts of records (including attachments unless otherwise noted) are exempt from disclosure under Section 708(b)(10) of the RTKL:
 - Bates Nos. 1-2: E-mails dated 1/6/10 at 2:07 p.m. and 1/6/10 at 9:32 a.m. only
 - Bates Nos. 3-8
 - Bates No. 9: E-mails dated 3/11/10 at 8:10 a.m. and 3/10/10 at 10:51 a.m. only
 - Bates Nos. 10-11: E-mails dated 3/22/10 at 12:06 p.m. and 3/22/10 at 12:00 p.m. only
 - Bates Nos. 14-15
 - Bates Nos. 20-22: E-mails dated 6/23/10 at 9:56 a.m., 6/18/10 at 1:51 p.m., 6/18/10 at 11:05 a.m., and 6/18/10 at 9:31 a.m. only