

NOTICE

Pennsylvania Rule of Civil Procedure 205.5. (Cover Sheet) provides, in part:

Rule 205.5. Cover Sheet

(a)(1) This rule shall apply to all actions governed by the rules of civil procedure except the following:

- (i) actions pursuant to the Protection from Abuse Act, Rules 1901 et seq.
- (ii) actions for support, Rules 1910.1 et seq.
- (iii) actions for custody, partial custody and visitation of minor children, Rules 1915.1 et seq.
- (iv) actions for divorce or annulment of marriage, Rules 1920.1 et seq.
- (v) actions in domestic relations generally, including paternity actions, Rules 1930.1 et seq.
- (vi) voluntary mediation in custody actions, Rules 1940.1 et seq.

(2) At the commencement of any action, the party initiating the action shall complete the cover sheet set forth in subdivision (e) and file it with the prothonotary.

(b) The prothonotary shall not accept a filing commencing an action without a completed cover sheet.

(c) The prothonotary shall assist a party appearing pro se in the completion of the form.

(d) A judicial district which has implemented an electronic filing system pursuant to Rule 205.4 and has promulgated those procedures pursuant to Rule 239.9 shall be exempt from the provisions of this rule.

(e) The Court Administrator of Pennsylvania, in conjunction with the Civil Procedural Rules Committee, shall design and publish the cover sheet. The latest version of the form shall be published on the website of the Administrative Office of Pennsylvania Courts at www.pacourts.us.

Law Office of Robert N. Rust III, Esquire

4461 Kohler Drive, Allentown, PA 18103

Tel: 610-821-0484 Fax: 610-821-9569

Robert N. Rust III
Attorney At Law
Direct Line: 484-707-5124
Email robertnrustiii@aol.com



Robert F. Van Duzer, Jr.
Paralegal, Juris Doctorate
Direct Line: 610-554-2745
Email: bobvd@fast.net

March 4, 2011

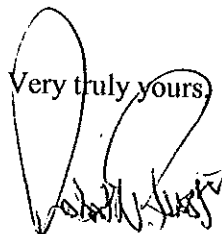
F. Peter Lehr, Esquire
1611 Pond Road
Ste 300
Allentown, PA 18104

RE: Lower Macungie Township
Thomas Streck
Open Records Appeal

Dear Counsel:

Enclosed herewith is a copy of an Notice of Appeal and Petition for Review.

Should you have any questions with regard to the above or should you wish to discuss same, please do not hesitate to call.

Very truly yours,


Robert Rust, Esquire

TCÄ/kps
Enclosure

COVER SHEET AND TABLE OF CONTENTS
FOR RECORD ON APPEAL TO COURT

- A. Addendum to the standard Right to Know Request.
- B. Letter of Attorney Miles dated January 5, 2011 appealing the denial of the Open Records Request.
- C. Correspondence of the Pennsylvania Office of Open Records dated January 6, 2011.
- D. Affidavit of Attorney Donald Miles.
- E. Correspondence of attorney F. Peter Lehr to Pennsylvania Office of Open Records in response to the Open Records Request.
- F. Affidavit of Renea Flexer, Township Open Records Officer.
- G. Affidavit of F. Peter Lehr, Esquire.
- H. Final Determination of Office of Open Records.

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA

In Re:
Thomas Streck,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
OFFICE OF OPEN RECORDS
and
BOARD OF SUPERVISORS OF LOWER
MACUNGIE TOWNSHIP, LEHIGH COUNTY
PENNSYLVANIA.

Appellees

CIVIL ACTION NO. 2011-876

Appeal From Denial
Of Open Records Request

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and notice are served, by entering a written appearance, personally, or by attorney, and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the court without further notice for money claimed in the Complaint or for any other claim or relief requested by the plaintiff. You may lose money or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOU LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

**LEHIGH COUNTY BAR ASSOCIATION
LEGAL REFERRAL SERVICE
1114 WALNUT STREET
ALLENTOWN, PENNSYLVANIA, 19102
610-433-7094**

FILED
11 MAR -7 AM 9:03
CLERK OF COURTS
LEHIGH COUNTY, PA

Basis of Jurisdiction

2. This Petition For Review and Notice of Appeal is filed pursuant to Section 1303 of the Right To Know Law [65 P.S. §67.1303] because this is an action or proceeding seeking judicial review of a Final Determination of OOR by which the Appellant/Requester is aggrieved.

Identity of Parties

3. Appellant is Thomas Streck, an adult individual residing at 8279 Spring Creek Road, Alburtis, Lower Macungie Township, Lehigh County, PA 18011.

4. The Appellees are:

(a) The Commonwealth of Pennsylvania, Office of Open Records, by and through the assigned OOR Appeals Officer, having a principal office at Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA17120-0225, and

(b) Board of Supervisors of Lower Macungie Township with its principal office located at 3400 Brookside Road, Macungie, Lower Macungie Township, Lehigh County, PA 18062-1428.

Identity of Governmental Agency That Made the Determination to be Reviewed

5. The determination for which Appellant seeks review was made by Renea Flexer, Township Secretary and Open Records Officer of Lower Macungie Township, and that determination was upheld by Final Determination of Lucinda Glinn, Esquire, the OOR assigned Appeals Officer.

Determination Sought to be Reviewed

6. Appellant seeks reversal of the OOR Final Determination with mailing date of February 7, 2011, which is included in the attached record on Appeal.

Short Statement of Relief Sought

7. Appellant respectfully requests the Court to review and reverse the OOR Final Determination of OOR dated and mailed February 7, 2011, and to instruct the Agency to provide all records requested by Appellant.

Statement of Objections

8. The OOR Final Determination erroneously found that the documents requested were "internal to the agency" or "used by or on behalf of making decisions on contemplated, proposed courses of actions" or "documents used in predecisional deliberations".

9. The OOR found that the records requested were made during negotiations prior to decisions being made and used "in order to deliberate and make a decision regarding (a) quarry".

10. The OOR final determination found that the requested records were clearly "deliberative" in character and were developed prior to making public decisions.

11. The OOR final determination erroneously concluded that such requests as made by the Appellant were "deliberative".

12. To find that "drafts" of documents to be "deliberative" would allow an exception to abrogate the rule that the decision-making of local government be transparent.

13. The logical conclusion to finding, in this instance, "drafts" to be a reason for a denial compromises the very intent of the Pennsylvania Right to Know Law.

14. The information sought by the Appellee from the Appellant are material and

relevant to discovering crucial facts and documents held by the Township for the unlawful secret negotiations entered into between the Township, its Board of Commissioners and a developer.

Harm Caused to Appellant

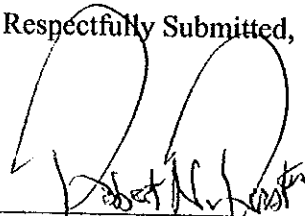
17. Appellant is substantially, immediately, directly, presently, and actually harmed by the OOR Final Determination and by the denial of the OOR Final Determination.

Specific Relief Requested

18. The Appellant prays this Honorable Court to enter Orders as follows:

- (a) That the Final Determination by OOR be reversed and set aside and the Agency be ordered to forthwith provide all the information requested by Appellant;
- (b) Award damages to the Appellant;
- (c) Grant such other and further relief that is deemed fair, just and equitable by the Court.

Respectfully Submitted,



BY: Robert Rust, Esquire
Attorney for Appellant

Date: March 4, 2011

VERIFICATION

I, Robert Rust, Esquire, verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information and belief, based upon my review of the Exhibits attached hereto and on information supplied to me by the Appellant.

I am making this verification as attorney for the plaintiff in that the Appellant is unavailable and his verification cannot be obtained within the time allowed for filing this pleading.

I understand that false statements hereunder are subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn falsification to authorities.

Date: 3/4/2011



A handwritten signature in black ink, appearing to read 'Robert Rust', is written over a horizontal line.

Robert Rust, Esquire

employee, staff person, consultant, agent and/or relative acting on behalf of any of them or on behalf of Lower Macungie Township, with David M. Jaindl personally, or David Jaindl d/b/a Jaindl Realty, LLP and/or Jaindl Land Company, or any officer, employee, staff person, consultant, and/or agent acting on behalf of David M. Jaindl, Jaindl Realty, LLP or Jaindl Land Company (hereafter, "Jaindl"), regarding or concerning any proposed land development (including, but not limited to, a proposed limestone quarry, any other proposed non-agricultural uses, and/or any proposed new zoning districts, in the then-existing Agricultural Protection zoning district), proposed zoning ordinance amendment, or proposed subdivision and land development amendment, by or for Jaindl in Lower Macungie Township, or concerning the "Memorandum of Understanding" with Jaindl eventually adopted by Lower Macungie Township on April 29, 2010.

2. Any electronic messages, emails, text messages, electronic attachments, or other electronic communications of any type concerning events occurring during, or dated or created, between November 6, 2009 and July 1, 2010, in the possession, custody, or control of Lower Macungie Township or a third-party contracted by the Township to perform a government function that concern or memorialize any meeting, conference, discussion, negotiation, agreement, report, or contact in their capacity as Township Commissioners or Township Commissioners-elect, between Commissioners Roger C. Reiss, Ryan T. Conrad, Douglas H. Brown, Ron H. Eichenberg, and/or Joseph S. Pugliese, or any officer, employee, staff person, consultant, agent and/or relative acting on behalf of any of them or on behalf of Lower Macungie Township with David M. Jaindl personally, or David Jaindl d/b/a Jaindl Realty, LLP and/or Jaindl Land Company, or any officer, employee, staff person, consultant, or agent acting on behalf of David M. Jaindl, Jaindl Realty, LLP and/or Jaindl Land Company (hereafter, "Jaindl"), regarding or concerning any proposed land development (including, but not limited to, a proposed limestone quarry, any other proposed non-agricultural uses, and/or any proposed new zoning districts, in the then-existing Agricultural Protection zoning district), proposed zoning ordinance amendment, or proposed subdivision and land development amendment, by or for Jaindl in Lower Macungie Township, or concerning the "Memorandum of Understanding" with Jaindl eventually adopted by Lower Macungie Township on April 29, 2010.

3. Any writings, memoranda, notes of meetings, correspondence, agreements, diaries, or other written or printed documents, electronic facsimiles, or audio recordings of any type, concerning events occurring during, or dated or created, between November 6, 2009 and July 1, 2010, in the possession, custody, or control of Lower Macungie Township or a third-party contracted by the Township to perform a government function (including records that have been created locally but are stored in off-Township-premises computers, servers, or Internet websites) that concern or memorialize any meeting, conference, discussion, negotiation, agreement, report, or contact in their capacity as Township Commissioners or Township Commissioners-elect, between and/or amongst Commissioners Roger C. Reiss, Ryan T. Conrad, Douglas H. Brown,

Ron H. Eichenberg, or Joseph S. Pugliese, or any officer, employee, staff person, consultant, agent or relative acting on behalf of any of them or on behalf of Lower Macungie Township, regarding or concerning any proposed land development (including, but not limited to, a proposed limestone quarry, any other proposed non-agricultural uses, and/or any proposed new zoning districts, in the then-existing Agricultural Protection zoning district), proposed zoning ordinance amendment, or proposed subdivision and land development amendment in Lower Macungie Township, by or for David M. Jaindl personally, or David Jaindl d/b/a Jaindl Realty, LLP or Jaindl Land Company, or any officer, employee, staff person, consultant, or agent acting on behalf of David M. Jaindl, Jaindl Realty, LLP or Jaindl Land Company, or concerning the "Memorandum of Understanding" with Jaindl eventually adopted by Lower Macungie Township on April 29, 2010.

4. Any electronic messages, emails, text messages, electronic attachments, or other electronic communications of any type concerning events occurring during, or dated or created, between November 6, 2009 and July 1, 2010, in the possession, custody, or control of Lower Macungie Township or a third-party contracted by the Township to perform a government function (including records that have been created locally but are stored in off-Township premises computers, servers, or Internet websites) that concern or memorialize any meetings, conferences, discussions, negotiations, agreements, reports, or contacts in their capacity as Township Commissioners or Township Commissioners-elect, between or amongst Commissioners Roger C. Reiss, Ryan T. Conrad, Douglas H. Brown, Ron H. Eichenberg, and/or Joseph S. Pugliese, or any officer, employee, staff person, consultant, agent and/or relative acting on behalf of any of them or on behalf of Lower Macungie regarding or concerning any proposed land development (including, but not limited to, a proposed limestone quarry, any other proposed non-agricultural uses, and/or any proposed new zoning districts, in the then-existing Agricultural Protection zoning district), proposed zoning ordinance amendment, or proposed subdivision and land development amendment in Lower Macungie Township, by or for David M. Jaindl personally, or David Jaindl d/b/a Jaindl Realty, LLP or Jaindl Land Company, or any officer, employee, staff person, consultant, or agent acting on behalf of David M. Jaindl, Jaindl Realty, LLP or Jaindl Land Company, or concerning the "Memorandum of Understanding" with Jaindl eventually adopted by Lower Macungie Township on April 29, 2010.

5. Any writings, memoranda, notes of meetings, correspondence, agreements, diaries, or other written or printed documents, electronic facsimiles, or audio recordings of any type, concerning events occurring during, or dated or created, between November 6, 2009 and July 1, 2010, in the possession, custody, or control of Lower Macungie Township or a third-party contracted by the Township to perform a government function, that concern or memorialize any meeting, conference, discussion, or consultation, whether in their capacity as Township Commissioners or Township Commissioners-elect, between

Commissioners Roger C. Reiss, Ryan T. Conrad, Douglas H. Brown, Ron H. Eichenberg, and/or Joseph S. Pugliese, or any officer, employee, staff person, consultant, agent and/or relative acting on behalf of any of them or on behalf of Lower Macungie Township, concerning any proposed amendment or revision of the Southwestern Lehigh County Comprehensive Plan on account of the proposed or adopted Zoning Ordinance amendments adopted by them on July 1, 2010.

6. Any electronic messages, emails, text messages, electronic attachments, or other electronic communications of any type concerning events occurring during, or dated or created, between November 6, 2009 and July 1, 2010, in the possession, custody, or control of Lower Macungie Township or a third-party contracted by the Township to perform a government function (including records that have been created locally but are stored in off-Township premises computers, servers, or Internet websites) that concern or memorialize any meetings, conferences, discussions, negotiations, agreements, reports, or contacts in their capacity as Township Commissioners or Township Commissioners-elect, between or amongst Commissioners Roger C. Reiss, Ryan T. Conrad, Douglas H. Brown, Ron H. Eichenberg, and/or Joseph S. Pugliese, or any officer, employee, staff person, consultant, agent and/or relative acting on behalf of any of them or on behalf of Lower Macungie concerning any proposed amendment or revision of the Southwestern Lehigh County Comprehensive Plan on account of the proposed or adopted Zoning Ordinance amendments adopted by them on July 1, 2010.

7. Any writings, memoranda, notes of meetings, correspondence, agreements, diaries, or other written or printed documents, electronic facsimiles, or audio recordings of any type, concerning events occurring during, or dated or created, between November 6, 2009 and July 1, 2010, in the possession, custody, or control of Lower Macungie Township or a third-party contracted, by the Township to perform a government function, that concern or memorialize any meeting, conference, discussion, or consultation, whether in their capacity as Township Commissioners or Township Commissioners-elect, between Commissioners Roger C. Reiss, Ryan T. Conrad, Douglas H. Brown, Ron H. Eichenberg, and/or Joseph S. Pugliese, or any officer, employee, staff person, consultant, agent and/or relative acting on behalf of any of them or on behalf of Lower Macungie Township, concerning any proposed, intended or considered use by the Township of any professional land use planners, stormwater management consultants, environmental consultants, traffic engineering consultants, geological consultants, or other planning consultants in connection with the limestone quarry proposed by Jaindl, with drafting or negotiation of the aforesaid "Memorandum of Understanding", or with the development and drafting of the Zoning Ordinance Amendments adopted on July 1, 2010.

8. Any electronic messages, emails, text messages, electronic attachments, or other electronic communications of any type concerning events occurring during, or dated or created, between November 6, 2009 and July 1, 2010, in the possession, custody, or control of Lower Macungie Township or a third-party contracted by the Township to perform a government function (including records

that have been created locally but are stored in off-Township premises computers, servers, or Internet websites) that concern or memorialize any meetings, conferences, discussions, negotiations, agreements, reports, or contacts in their capacity as Township Commissioners or Township Commissioners-elect, between or amongst Commissioners Roger C. Reiss, Ryan T. Conrad, Douglas H. Brown, Ron H. Eichenberg, and/or Joseph S. Pugliese, or any officer, employee, staff person, consultant, agent and/or relative acting on behalf of any of them or on behalf of Lower Macungie concerning any proposed, intended or considered use by the Township of any professional land use planners, stormwater management consultants, environmental consultants, traffic engineering consultants, geological consultants, or other planning consultants in connection with the limestone quarry proposed by Jaindl, with drafting or negotiation of the aforesaid "Memorandum of Understanding", or with the development and drafting of the Zoning Ordinance Amendments adopted on July 1, 2010.

("Request"). After invoking an extension, Renea Flexer, Open Records Officer ("ORO"), timely responded, denying the Request based upon lack of specificity required by Section 703, and that the records he appears to seek relate to draft regulations exempt under Section 708(b)(9), predecisional deliberations exempt under (b)(10), or draft minutes under (b)(21) ("Denial").

The Requester timely appealed arguing that the records sought are not exempt under Section 708(b)(9) and (b)(10) as predecisional deliberative drafts or (b)(21) as draft minutes and claims the Request is sufficiently specific as it seeks records of "secret negotiations."

The Township supplemented the record with an affidavit of the ORO attesting to the non-specific nature of the request and that the contents of the Jaindl records contain internal predecisional deliberations, draft minutes and draft regulations. The Township argues that the 8-part Request is vague and broadly worded, seeking all types of records over a nine month period concerning amendments, draft regulations and predecisional documents. The Request seeks records "of any type" concerning certain information because the Requester is engaged in litigation in Lehigh County relating to Jaindl's proposed development. The Township reports there is a motion to stay discovery pending and that the Request mirrors written discovery; Solicitor, F. Peter Lehr, Esquire, submitted a notarized affidavit regarding these facts.

The Requester also submitted an affidavit, signed by his counsel Donald Miles, Esquire, in which he outlines the litigation and alleges secret negotiations between the Township and Jaindl. Counsel advises that the Township and Jaindl negotiated a timetable and drafted a "Memorandum of Understanding" ("MOU") relating to development and related draft ordinances. The MOU was adopted and approved by Resolution 2010-12 on April 29, 2010. Counsel explains the litigation challenges the validity of zoning amendments.

LEGAL ANALYSIS

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. 2010). 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 or not hold a hearing is discretionary and non-appealable. *Id.* 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 party requested a hearing and the OOR has the requisite and necessary information before it, presented through sworn written testimony, to adjudicate the matter.

The Township is a local agency subject to the RTKL and required to disclose public records. *See* 65 P.S. §67.302. Records in possession, custody or control 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. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. §67.708(b). Here, the Township asserted the Request fails for

lack of specificity under Section 703 and asserted substantive exceptions under Section 708(b)(9), (b)(10) and (b)(21).

1. The Request is sufficiently specific

The RTKL requires a requester to provide sufficient specificity in making a request for records. Section 703 provides that a request "should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested..." 65 P.S. §67.703. From the language of the Request, the Requester seeks records over a nine-month period, from November 6, 2009 to July 1, 2010, related to Jaindl and proposed land development, proposed related ordinance and plan amendments, or records concerning or used in drafting the MOU with Jaindl.

While the Request consists of eight-parts and is phrased in a repetitive and confusing manner, complicating subject-matter sought, it provides sufficient detail to enable the Township to assess what records are sought and thus satisfies Section 703.

Parts 1 and 2 seek records (paper and electronic) regarding any proposed land development, proposed zoning ordinance amendment or proposed subdivision and land development amendment by or for Jaindl, or concerning the MOU.

Parts 3 and 4 seek records (paper and electronic) regarding the same subjects in the Township filed by or for David Jaindl personally.

Parts 5 and 6 seek records (paper and electronic) regarding any proposed amendment or revision of the Southwestern Lehigh County Comprehensive Plan on account of the proposed or adopted zoning ordinance amendments, adopted July 1, 2010. However, to the extent that the Request calls for the Township to make a judgment or agree to a conclusion that its amendment or revision to the Plan is "on account of" the proposed zoning amendments, the Request is

improper. See *Butterfield v. Dover Area Sch. Distr.*, OOR Dkt. AP 2010-1048, 2010 PA O.O.R.D. LEXIS 879 (“an agency cannot be expected to weigh the import or meaning of its records in order to fulfill a request. Such a request puts an agency in the untenable position of implicitly commenting upon its actions as part of its response”).

Parts 7 and 8 seek records (paper and electronic) concerning any proposed, intended or considered use by the Township of any planners or consultants in connection with the quarry proposed by Jaindl with drafting or negotiation of the MOU or with development and drafting of the zoning ordinance amendments approved on July 1, 2010.

The Township acknowledged that it interpreted the Request to seek records related to Jaindl and related zoning issues. Based upon the above determination of specificity and the construction of the Request, the substantive exceptions are addressed.

2. Section 708(b)(9) and (10) protect the records sought

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) [t]he 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 “evidence which as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW DICTIONARY 1064 (8th ed.); see also *Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

Section 708(b)(10) protects from disclosure “a record that reflects the internal, predecisional deliberations of an agency, its members, employees or officials...including predecisional deliberations relating to a budget recommendation...or other documents used in the predecisional deliberations.” 65 P.S. §67.708(b)(10)(i)(A). To establish this exception, an agency

must show the communication is: (1) *internal* to the agency, including its representatives, (2) *predecisional*, meaning it was made before the deliberative process of decision-making was completed; and (3) *deliberative in character* in that it makes recommendations or expresses opinions on legal or policy matters, and is not purely factual in nature. Section 708(b)(9) protects the "draft of [any] resolution ... ordinance or amendment thereto" and Section 708(b)(21) protects drafts of minutes prior to approval.

From the phrasing of the Request, the Requester seeks proposed ordinances and amendments on its face in Parts 1, 2, 3, 4, 5 and 6. These records are expressly protected by Section 708(b)(9). Further, the Township submitted an affidavit of its ORO attesting to the "draft" and internal and predecisional deliberative character of the contents of the Jaindl file.

Parts 7 and 8 seek any records related to engagement of consultants used to consider the quarry proposal or with drafting and negotiation of the MOU or of the ordinance amendments. The Request confines the records sought to those that are internal to the agency or used by or on behalf of making decisions on contemplated, proposed courses of action or any documents used in the predecisional deliberations. Accordingly, the OOR finds that the records at issue were made during negotiations, prior to decisions being made, and used in order to deliberate and make a decision regarding the quarry, or with drafting the MOU or of the zoning amendments. As described, the requested records are clearly "deliberative" in character and were developed prior to making public decisions.

Likewise, any records notes diaries or other records that memorialize any meetings concerning amendments to ordinances or plans, as are outlined in Parts 1 through 6 of the Request, are protected as predecisional deliberative records under Section 708(b)(10)(i)(A). From the Requester's submissions, the records sought were developed during "secret


negotiations” and without the benefit of public meetings as outlined in the Sunshine Act, 65 Pa. C.S. §§701 *et seq.*. As described, all of the potentially responsive records are drafts, constitute deliberations or were used in deliberating amendments or other decisions relating to Jaindl’s proposed development.

The Township substantiated that the Jaindl file contains “draft minutes,” however, the OOR reminds the Township that the term “draft” cannot be used to include recordings of any meetings. Audio recordings of public meetings are not exempt under Section 708(b)(21). *See Shoop v. Jackson Tp.*, OOR Dkt. AP 2010-0895, 2010 PA O.O.R.D. LEXIS 834.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **denied** and the Township is not required to take any further action. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Lehigh 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: February 3, 2011


LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Donald Miles, Esq.; F. Peter Lehr, Esq.