

Elaine DiRienzo, the Open Records Officer (ORO), denied access under Section 708(b)(10)(i)(A) stating the studies and analyses are being reviewed (“the Denial”). She explained “until these records become a final approved plan, the studies reflect the internal predecisional deliberations of PennDOT regarding the best course of action for the location being studied.”

The Requester timely appealed on January 4, 2010. It contends that PennDOT has a responsibility to keep it updated as a commission on planning for the region, and that the scope of work has changed since PennDOT shifted deliberations to its “value engineering group.” The Requester explains that a public meeting on August 31, 2009, was conducted at which PennDOT presented recommendations, and its Request seeks information underlying the recommendations. The Requester advises that “without the requested technical information, we have no basis for determining if [PennDOT] recommendations adequately meet other needs including the need to improve safety.” The Requester contends it cannot await a final decision because “we are supposed to be involved in the pre-decisional deliberations.”

PennDOT supplemented the record with legal argument regarding the exception and an affidavit of Michael W. Rebert, District Executive responsible for the project at issue (“Affidavit”). In the notarized Affidavit, Mr. Rebert attests that “A Point of Access Study (“Study”) for this project is currently being drafted and reviewed as part of [PennDOT’s] deliberations toward a final approved plan for the project [and] no other studies have been undertaken or completed at this time.” Affidavit, ¶¶3-4. He attests that while alternatives “have been explored and presented at public meeting, no final decisions regarding the final configuration of those elements or scope of the project have been made.” Affidavit, ¶5. He further attests that “once a decision has been made and plans are approved, the engineering and studies underlying the decision will be made public with the presentation of the plans.”

PennDOT argues that the identity of the Requester and reason for the Request is irrelevant to whether the Study is public. PennDOT notes the Requester concedes that deliberations are ongoing, and no decisions have been made. PennDOT also argues that “the studies and analyses related to this project are incomplete and under review, and reflect the ongoing predecisional deliberations of [PennDOT].”

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). PennDOT is a Commonwealth agency subject to the RTKL that is required to disclose public records. *See* 65 P.S. §67.301. Records of a Commonwealth agency are presumed to be “public” unless the record is: (1) exempt under Section 708(b); (2) is protected by a privilege; or (3) is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. *See* 65 P.S. §67.305. PennDOT asserts the records requested are protected by Section 708(b)(10)(A)(i), the predecisional deliberative exception. PennDOT bears the burden of proving the exception’s application by a preponderance of the evidence, 65 P.S. §67.708(a), meaning the “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001).

Pursuant to Section 708(b)(10)(i)(A), a record *reflecting* the “internal, predecisional deliberations of an agency... or predecisional deliberations between agency members, employees or officials...” are protected from mandatory disclosure under the RTKL. 65 P.S. §67.708(b)(10)(i)(A). The OOR has consistently held that to establish this exception, an agency must show the communication is: (1) **internal** to the agency, including representatives, (2) **predecisional**, meaning it was made before a decision was made; 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. *See Com. v. Vartan*, 557 Pa. 390, 733 A.2d 1258 (1999).

The Affidavit shows that the Study is predecisional and internal to PennDOT and the engineers working on its behalf. The Study is described by counsel and in the Affidavit as being incomplete, in draft form and under review for the Project. The Affidavit attests that the Study does not represent a decided upon scope of work, and that the content shows decisions in the making, policies or recommendations, are protected by (b)(10). Although generally, this exception will not protect “purely factual” information, as described, the Study does not consist of facts as much as of recommendations for the U.S. 22/400 Project. The Study itself **is** a recommendation and analysis, and in an incomplete draft stage, which by nature is deliberative, and qualifies for protection.

The OOR agrees with PennDOT that the Requester’s prior role as a participant in the predecisional deliberations is irrelevant to this appeal, except to the extent that it underscores the deliberative nature of the record at issue.

CONCLUSION

For the foregoing reasons, the Requester’s Appeal is **denied**. PennDOT established that the Study is protected by Section 708(b)(10), and properly protected it on that basis.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal or petition for review 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. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: February 1, 2010


LUCINDA GLINN, ESQ.
APPEALS OFFICER

Sent to: Michael Kaiser (Lehigh Valley Planning Commission); S.F.J. Martin, Esq. for PennDOT