JOHN A. LAWRENCE
STATE REPRESENTATIVE
13TH LEGISLATIVE DISTRICT

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

HARRISBURG OFFICE
P.O. BOX 202013
HARRISBURG, PA 17120
(717) 260-6117

JENNERSVILLE OFFICE
1 COMMERCE BLVD., SUITE 200
WEST GROVE, PA 19390
(610) 869-1602

Law Office of Carl W. Ewald, PC
Carl Ewald
205 North Monroe Street
Media, PA 19063

Re: Lawrence v. City of Chester
Docket No. AP 2023-2332

January 22, 2024

Dear Mr. Ewald –

I trust all is well.

On November 30, 2023, the Pennsylvania Office of Open Records issued a Final Determination in the matter of *Lawrence v. City of Chester*. As noted on page 10 of the Final Determination, my appeal was granted, and the City is required to provide the requested records within 30 days. As of today, the records have not been provided.

Section 1302 of the Pennsylvania Right-To-Know law provides a 30 day window to appeal a Final Determination. No such appeal was filed within 30 days of November 30, 2023. At this time, the Final Determination is binding on all parties.

Please forward "copies of the 'Two Credible Plans' provided by Chester Mayor Kirkland to the Receiver" as referenced in my August 24, 2023 Right-To-Know request. I expect to receive the documents no later than January 25, 2024.

Kind Regards –

John Lawrence
State Representative
Commonwealth of Pennsylvania

John Lawrence

From: John Lawrence
Sent: Thursday, August 24, 2023 3:33 PM
To: cnewsome@chestercity.com
Cc: Kathleen Book; Karen Updegraff
Subject: RTK Request from Rep Lawrence
Attachments: 1287_001.pdf

Good Afternoon Candice -

Please see the attached Right to Know request. Thank you.

Kind Regards - John Lawrence

John Lawrence
State Representative
Commonwealth of Pennsylvania
610 869 1602 Jennersville Office
717 260 6117 Capitol Office
RepLawrence.com

pennsylvania
OFFICE OF OPEN RECORDS

Standard Right-to-Know Law Request Form

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: ___CITY OF CHESTER_____(Attn: AORO)

Date of Request: ___AUG 24 2023___ Submitted via: X Email ☐ U.S. Mail ☐ Fax ☐ In Person

PERSON MAKING REQUEST:

Name: ___REP JOHN LAWRENCE_____ Company (if applicable): __PA HOUSE OF REPRESENTATIVES__

Mailing Address: __1 COMMERCE BLVD STE 200_____

City: _WEST GROVE _____ State: _PA___ Zip: _19390___ Email: _JLAWRENCE@PAHOUSEGOP.COM___

Telephone: __610-869-1602_____ Fax: _____

How do you prefer to be contacted if the agency has questions? ☐ Telephone X Email ☐ U.S. Mail

RECORDS REQUESTED: *Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.*

__COPIES OF THE "TWO CREDIBLE PLANS" PROVIDED BY CHESTER MAYOR KIRKLAND TO RECEIVER__

__MICHAEL DOWEARY AS REFERENCED IN THE APRIL 17 2023 DVJOURNAL ARTICLE ENTITLED_____

__"RECEIVER: CHESTER'S DIRE FINANCIAL STRAITS MAY LEAD TO DISONCORPRATION."_____

_____

_____

DO YOU WANT COPIES? ☐ Yes, printed copies (*default if none are checked*)
X Yes, electronic copies preferred if available
☐ No, in-person inspection of records preferred (*may request copies later*)

Do you want certified copies? ☐ Yes (*may be subject to additional costs*) ☐ No

RTKL requests may require payment or prepayment of fees. See the Official RTKL Fee Schedule for more details.

Please notify me if fees associated with this request will be more than X $100 (or) ☐ $_____.

ITEMS BELOW THIS LINE FOR AGENCY USE ONLY

Tracking: _____ Date Received: _____ Response Due (5 bus. days): _____

30-Day Ext.? ☐ Yes ☐ No (If Yes, Final Due Date: _____) Actual Response Date: _____

Request was: ☐ Granted ☐ Partially Granted & Denied ☐ Denied Cost to Requester: $_____

☐ Appropriate third parties notified and given an opportunity to object to the release of requested records.

NOTE: In most cases, a completed RTKL request form is a public record.
More information about the RTKL is available at https://www.openrecords.pa.gov

Form updated Feb. 3, 2020

https://delawarevalleyjournal.com/receiver-chesters-dire-financial-straits-may-lead-to-disincorporation/

Receiver: Chester's Dire Financial Straits May Lead to Disincorporation

Posted to Politics April 17, 2023 by Linda Stein

The official charged with overseeing the City of Chester's dismal finances is predicting the city might reach the point where it will be disincorporated or dissolved.

Michael Doweary, the receiver appointed three years ago by former Gov. Tom Wolf to help pull the cash-strapped municipality out of insolvency, blamed elected city officials who filed appeals to block a bankruptcy and who also appealed court-approved modifications to the receiver's plans.

Chester needs a plan by the end of 2023, or it will cease to exist as a municipality, Doweary said.

Vijay Kapoor, Doweary's chief of staff, called the situation "sobering."

"Chester is really running out of time," Kapoor said. "There needs to be a focus right now on solving Chester's problems. If a comprehensive solution is not found by the end of the year, there may be no alternative for Chester but disincorporation."

If that were to happen, all municipal employees would be fired while the city's elected officials would be dismissed. A state administrator would then oversee the municipality as a disenfranchised territory.

Kapoor claimed that if a bankruptcy lawyer had not brokered a bargain with bondholders, the city would be out of money by this September.

The city's newly completed 2019 audit showed a $6.8 million loss and a negative $27.7 million fund balance. Also, the city has not made $40 million in payments to its pension fund.

Kapoor said Chester would need a $5 million loan in January to make its payroll.

And in 2025, Chester faces "a significant fiscal cliff," said Doweary.

"If you're out of money, you can't keep the lights on. Chester's financial situation is critical, and it is running out of time to find a solution," he said.

When Kapoor said city officials had not devised their own plan, Mayor Thaddeus Kirkland objected.

"We provided the Receiver with two credible plans," said Kirkland. Both involved deals with the Chester Water Authority (CWA), including selling it to Aqua PA.

"Offers to monetize (that asset) are not a comprehensive plan," Doweary countered. "Those were just offers for the system, not a plan.

"Bankruptcy is the only thing to bring all of the creditors to the table."

Elected officials have been unwilling to cut back on pensions, one of the biggest items of bloat in the city budget. Kirkland said one former employee, whose husband died, told him: "How am I going to make it if you cut my pension?"

CWA lawyer Frank Catania said CWA is the only entity that has offered to help Chester, proposing in 2019 to give the city $60 million in exchange for dropping any efforts to take over or sell the authority.

"It's not a solution to sell (CWA) to Aqua," he said of the city's current fiscal crisis. Doing that "shifts the burden from Chester to the ratepayers."

"The city (Chester) is in a bad spot (financially)," Catania said. He asked why the state has not given Chester a deal like those it gave to Philadelphia, Harrisburg, and Pittsburgh, which have also run into financial difficulties over the years.
Last year, the legislature and Wolf approved an extension of the Pennsylvania Intergovernmental Cooperation Authority's oversight of Philadelphia until 2047.
"The state has overseen Chester for more than 25 years," said Catania. "I think they have an obligation to help it, and rather than offer to help, they let the problem get much, much worse.

"It's hard to conclude anything other than it was done on purpose."

Catania also cited recent remarks by Philadelphia mayoral candidate Jeff Brown, saying many people in state government share his attitude.

A spokesperson for Gov. Josh Shapiro did not respond when asked about state help for Chester.

The state Supreme Court has agreed to hear appeals on the Chester cases. In the meantime, said Kapoor, elected officials have resumed their control of various city departments after a Commonwealth Court judge had ousted them.

In that ruling, Judge Ellen Ceisler blasted city officials for nepotism and self-dealing.
Also, federal grant programs that came online due to COVID are ending, so Chester may have to lay off some 20 people in January.

"We need to have a plan in place by the end of the year," said Doweary.

About the Author

Linda Stein

Linda Stein is News Editor at Delaware Valley Journal.

Candice Newsome
City Clerk/Open Records Officer

Telephone (610) 447-7795
Facsimile (610) 447-7794
cnewsome@chestercity.com

Right-To-Know Law Extension Notice

August 31, 2023

Rep. John Lawrence
1 Commerce Blvd, Ste 200
West Grove PA 19390

Dear Rep. John Lawrence:

Thank you for writing to City of Chester with your request for records pursuant to Pennsylvania's Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.* On August 31, 2023, you requested **"see attached".**

Pursuant to Section 902(a) of the RTKL, an additional 30 days are required to respond because:

- ☐ The request requires redaction in accordance with Section 706 of the RTKL.
- ☐ The request requires the retrieval of a record stored in a remote location.
- ☒ A timely response cannot be accomplished due to bona fide staffing limitations.
- ☐ A legal review is needed to determine whether the record is subject to access.
- ☐ The requester has not complied with the Agency's policies regarding access to records.
- ☐ The requester refuses to pay applicable fees authorized by the RTKL.
- ☐ The extent or nature of the request precludes a response within the required time period.

City of Chester expects to respond to your request on or before October 8, 2023.

Respectfully,

Candice Newsome

Candice Newsome
City of Chester Open Records Officer

John Lawrence

From: Candice Newsome <cnewsome@chestercity.com>
Sent: Friday, September 15, 2023 11:05 AM
To: John Lawrence
Subject: [EXTERNAL]: FW: City of Chester Open Records Request
Attachments: Xerox Scan_08312023162738.pdf

Greetings Rep. John Lawrence,

Attached is a copy of your Open Records Request. Your request is denied for the following reasons:
This information is exempt from disclosure under Section 67.708(b)(10)(i)(A) "A record that reflects: (A) 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."; and Section 67.708(b)(17)(vi)(B) "A record of an agency relating to a noncriminal investigation, including: (vi) A record that, if disclosed, would do any of the following: (B) Deprive a person of the right to an impartial adjudication."

Enjoy the rest of your day!

Candice Newsome
City Clerk/Open Records Officer
City of Chester
1 Fourth Street
Chester PA 19013
610-447-7795 (phone)
610-447-7794 (fax)
cnewsome@chestercity.com

-----Original Message-----
From: Candice Newsome

Sent: Thursday, August 31, 2023 4:29 PM
To: jlawrence@pahousegop.com
Subject: City of Chester Open Records Request

Greetings Rep. John Lawrence,

Please see the attached letter in regards to your Open Records Request for the City of Chester.

Thanks and enjoy the rest of your day!

Candice Newsome
City Clerk/Open Records Officer
City of Chester
1 Fourth Street
Chester PA 19013
610-447-7795 (phone)
610-447-7794 (fax)
cnewsome@chestercity.com

-----Original Message-----
From: copy <copy@chestercity.com>
Sent: Thursday, August 31, 2023 4:29 PM
To: Candice Newsome <cnewsome@chestercity.com>
Subject: Xerox Scan

Please open the scanned attachment

Sent by: [cnewsome@chestercity.com]
Number of Images: 4
Attachment File Type: PDF

Device Name: VersaLink B7025
Device Location:

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

From: John Lawrence
To: DC, OpenRecords
Subject: Rep Lawrence - Appeal to OOR Regarding Chester City RTK Request Denial
Date: Thursday, September 28, 2023 3:07:55 PM
Attachments: 1559_001.pdf

Good Afternoon Ms. Wagenseller -

Please see the attached appeal to the Office of Open Records regarding the City of Chester's recent denial of a right-to-know request dated August 24, 2023.

Please let me know if there are any questions or concerns.

Kind Regards - John Lawrence

John Lawrence
State Representative
Commonwealth of Pennsylvania
610 869 1602 Jennersville Office
717 260 6117 Capitol Office
RepLawrence.com

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this information in error, please contact the sender and delete the message and material from all computers.

JOHN A. LAWRENCE
STATE REPRESENTATIVE
13TH LEGISLATIVE DISTRICT

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

HARRISBURG OFFICE
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HARRISBURG, PA 17120
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JENNERSVILLE OFFICE
1 COMMERCE BLVD., SUITE 200
WEST GROVE, PA 19390
(610) 869-1602

Office of Open Records
Liz Wagenseller, Executive Director
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

September 22, 2023

Dear Ms. Wagenseller –

I write to appeal the City of Chester's denial of an open records request.

As you are aware, to file an appeal under the Right-to-Know Law, a requester must provide:

1. A copy of the original right-to-know request.
2. A copy of the agency's response.
3. A written statement explaining the grounds that the record is a public record.
4. A written statement addressing the grounds stated by the agency for denying the request.

COPY OF THE ORIGINAL RIGHT-TO-KNOW REQUEST
A copy of my original right-to-know request is attached.

AGENCY RESPONSE
A copy of the City of Chester's response is attached. The denial is additionally reproduced below:

> *This information is exempt from disclosure under Section 67.708(b)(10)(i)(A) "A record that reflects: (A) 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."*

WRITTEN STATEMENT EXPLAINING THE GROUNDS THAT THE RECORD IS A PUBLIC RECORD

The Pennsylvania Right-To-Know law prescribes the following definition of a "public record:"

> *"Public record." A record, including a financial record, of a Commonwealth or local agency that:*
> *(1) is not exempt under section 708;*
> *(2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or*
> *(3) is not protected by a privilege.*

The law further prescribes the following definition of a "record:"

> *"Record." Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a dataprocessed or image-processed document.*

The requested record, "Copies of the 'Two credible plans' provided by Chester Mayor Kirkland to Receiver Michael Doweary as referenced in the April 17 2023 DVJournal article entitled 'Receiver: Chester's Dire Financial Straits May Lead to Disincorporation'," is a "record" under the definition provided by law. The law prescribes that any "record" of a Commonwealth or local agency is a "public record" unless it meets one of the three circumstances outlined in the definition of a "public record."

City of Chester alleges the requested records are shielded from release due to two separate clauses of section 708(b). The City does not allege any other provision of section 708 as a basis for denying this open records request. I assert that the requested records are not exempt under section 708, as they do not fall under any of the exceptions contemplated in the law.

WRITTEN STATEMENT ADDRESSING THE GROUNDS STATED BY THE CITY OF CHESTER FOR DENYING THE REQUEST

I disagree with the City's assessment, and I will address each of the city's alleged grounds for denial.

REBUTTAL OF CHESTER'S ASSERTION THAT THE REQUESTED RECORDS ARE EXEMPT FROM DISCLOSURE UNDER § 67.708(b)(10)(i)(A).

City of Chester improperly asserts the exemption under § 67.708(b)(10)(i)(A). For this exemption to apply, three elements must be satisfied:

1) "[t]he records must ... be 'internal' to a governmental agency";
2) the deliberations reflected must be predecisional, i.e., before a decision on an action; and
3) the contents must be deliberative in character, i.e., pertaining to proposed action. *See* Kaplin v. Lower Merion Twp., 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011).

It cannot be credibly asserted by the local agency that plans, transmitted from the Mayor to the Receiver, satisfy **all three elements** of the test established by the Commonwealth Court. Arguably, the requested records do not meet **any** of the three required elements.

The documents are not "internal" to a governmental agency. The Mayor specifically states that he provided the requested records to the Receiver. There can be no doubt that the requested records were transferred from one entity (Chester) to another (the Receiver.)

I am not seeking *deliberations* that led to the Mayor's final plans offered to the Receiver, nor am I seeking "research, memos or other documents used" in any predecisional deliberations leading up to his recommendations. I am seeking the "two credible plans" provided to the Receiver. A plan is not a deliberation, a plan is a document outlining a proposed action.

Further, 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 Envtl. 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, aff'd No. 512 C.D. 2014 (Pa. Commw. Ct. 2014). City of Chester must establish the internal, predecisional and deliberative nature of the responsive record with sufficient specificity to allow the OOR to determine its applicability. See Scolforo, 65 A.3d at 1104. City of Chester must explain how the information withheld reflects or shows the deliberative process in which an agency engages during its decision-making. *See* Twp. of Worcester v. Off. of Open Records, 129 A.3d 44, 61 (Pa. Commw. Ct. 2016). City of Chester fails to assert any basis for the supposed "deliberative" nature of the requested records.

A record must make recommendations or express opinions on legal or policy matters and cannot be purely factual in nature. Kaplin, 19 A.3d at 1214. Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. McGowan 103 A.3d at 382-83 (Pa. Commw. Ct. 2014).

The records being sought are the "two credible plans" transmitted from the City of Chester by its Mayor to the Receiver, presumably after the Mayor took such time and engaged in such

deliberations to develop his "two credible plans." In plain terms, the proposal must consist of non-deliberative and factual information offered by the Mayor to support his "two credible plans," and not the deliberations themselves. *See* Driscoll v. Chester Heights Borough, OOR Dkt. AP 2018-2054. Even more likely, these "credible plans" include estimates, projections, actual budget figures or comparisons. In such cases, the OOR has concluded that such materials are not deliberative in nature. *See* Lucia v. Pa. Dep't of Transp., OOR Dkt. AP 2017-2205; *see also* Brambila v. Pa. Dep't of Transp., OOR Dkt. AP 2017-0374.

Even if these plans were *used* in deliberations, if they contain factual information, the reports themselves are not deliberative in nature. *See* Yakim v. Municipality of Monroeville, OOR Dkt. AP 2018-0070 ("The evidence indicates that the memorandum consists of non-deliberative and factual information used by the Municipality to 'formulate' the budget, rather than containing the deliberations themselves.").

It is unlikely, but not beyond the realm of possibility, that the finalized plans consist of both deliberative and non-deliberative/factual information offered by the Mayor to support his "two credible plans." In such cases, redaction of the record is appropriate and not a denial. With that possibility in mind, Requester seeks an in-camera review of the subject records to make a proper determination whether the Mayor's "credible plans" contain deliberative or non-deliberative information.

REBUTTAL OF CHESTER'S ASSERTION THAT THE REQUESTED RECORDS ARE EXEMPT FROM DISCLOSURE UNDER § 67.708(b)(17)(vi)(B)

City of Chester improperly asserts the exemption under § 67.708(b)(17)(vi)(B). It strains credulity for the local agency to assert that the disclosure of the Mayor's "two credible plans" for fiscal recovery of the city transmitted to the Receiver relates to a noncriminal investigation or would somehow deprive a person of their right to an impartial adjudication.

Section 708(b)(17) of the Right To Know Law exempts from disclosure records of an agency "relating to a noncriminal investigation," including, among other things, "complaints submitted to an agency" and "investigative materials, notes, correspondence and reports" and "[a] record that, if disclosed, would…[r]eveal the institution, progress or result of an agency investigation." 65 P.S. §§ 67.708(b)(17)(i),(ii) and (vi).

To successfully assert the noncriminal investigative records exemption, the local agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. Pa. Dep't of Health v. Office of Open Records, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination or probe

must be "conducted as part of an agency's official duties." Id. at 814. An investigation is only an official probe when conducted by agencies acting within their legislatively granted fact-finding or investigative powers. Johnson v. Pa. Convention Center Auth., 49 A.3d 920 (Pa. Commw. Ct. 2012); *see* also Pa. Dep't of Public Welfare v. Chawaga, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would "craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure." Id. at 259.

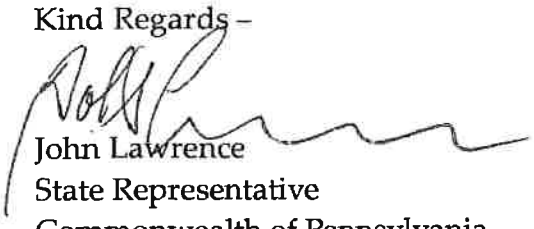
As there is no ongoing investigation or probe within the meaning of the law, the Mayor's "two credible plans" were not prepared pursuant to a noncriminal investigation. There is no indication whatsoever that the Mayor's "two credible plans" were created for use in an official probe conducted by the City of Chester (or any other government entity,) thus the local agency's assertion of this exception is misplaced.

As the requested record was not created in furtherance of an official investigation or probe, it bears mentioning that the local agency is equally unable to assert that providing these records would deprive the Mayor (or anyone else employed by the City) of an impartial adjudication.

CONCLUSION

For the aforementioned reasons, I appeal the decision of the City of Chester to deny my request for records, and ask the Office of Open Records to order the City to release the requested records as required under the law.

Kind Regards –



John Lawrence
State Representative
Commonwealth of Pennsylvania

pennsylvania
OFFICE OF OPEN RECORDS

September 29, 2023

Via E-File Portal Only:

John Lawrence
House of Representatives
1 Commerce Boulevard
Suite 200
West Grove, PA 19390
jlawrenc@pahousegop.com

Via E-File Portal Only:

Candice Newsome
Agency Open Records Officer
Chester City
1 4th Street
Chester, PA 19013
cnewsome@chestercity.com

RE: OFFICIAL NOTICE OF APPEAL - Lawrence and House of Representatives v. Chester City OOR Dkt. AP 2023-2332

Dear Parties:

Review this information and all enclosures carefully as they affect your legal rights.

The Office of Open Records ("OOR") received this appeal under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. on September 28, 2023. A binding Final Determination ("FD") will be issued pursuant to the timeline required by the RTKL, **please see the attached information for more information about deadlines.**

Notes for both parties (more information in the enclosed documents):

- The docket number above must be included on all submissions related to this appeal.
- Any information provided to the OOR must be provided to all parties involved in this appeal. Information that is not shared with all parties will not be considered.
- All submissions to the OOR, other than *in camera* records, will be public records. Do not include any sensitive information- such as Social Security numbers.

If you have questions about this appeal, please contact the assigned Appeals Officer (contact information enclosed), providing a copy of any correspondence to all parties involved in this appeal.

Sincerely,

Elizabeth Wagenseller

Elizabeth Wagenseller
Executive Director

Enc.: Description of RTKL appeal process
Assigned Appeals Officer contact information
Entire appeal as filed with OOR

The Right-to-Know Law Appeal Process

Please review this information carefully as it affects your legal rights.

The Office of Open Records ("OOR") has received the enclosed appeal, which was filed under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, et seq. A binding Final Determination will be issued by the OOR pursuant to the statutory timeline, subject to the notice of deadlines enclosed herein. If you have any questions, please contact the Appeals Officer assigned to this case. Contact information is included on the enclosed documents. **With limited exceptions, the Appeals Officer should be contacted through the E-File Portal.**

Submissions to the OOR

Both parties may submit evidence, legal argument, and general information to support their positions to the assigned Appeals Officer. Please contact the Appeals Officer as soon as possible.

Any information provided to the OOR must be provided to all parties involved in this appeal. Information submitted to the OOR will not be considered unless it is also shared with all parties.

Include the docket number on all submissions.

The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

It is strongly advised that attorneys and other party representatives **file an Entry of Appearance** by uploading an Entry of Appearance form to the E-File Portal or completing the form at: https://www.openrecords.pa.gov/Appeals/EntryOfAppearance.cfm.

NOTE TO AGENCIES: If an Entry of Appearance is not filed, the AORO is responsible to inform attorneys and other party representatives of all docket activity.

Generally, submissions to the OOR — other than *in camera* records — will be public records. Do not include sensitive or personal information, such as Social Security numbers, on any submissions.

Agency Must Notify Third Parties

If records affect a legal or security interest of a third party; contain confidential, proprietary or trademarked records; or are held by a contractor or vendor, **the agency shall notify the Appeals Officer immediately.** The Appeals Officer may direct the agency to notify such parties of the appeal and provide proof of that notice.

If directed to provide notice, such notice will include: (1) A copy of all documents included with this letter; and (2) A statement advising relevant third parties that interested persons may request to participate in this appeal by contacting the Appeals Officer or completing the form at https://www.openrecords.pa.gov/Appeals/DIPRequest.cfm. (see 65 P.S. § 67.1101(c)).

The Commonwealth Court has held that "the burden [is] on third-party contractors... to prove by a preponderance of the evidence that the [requested] records are exempt." (*Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)). **A third party's**

failure to participate in a RTKL appeal before the OOR, after receiving notice, may be construed as a waiver of objections regarding release of requested records.

If either party has questions about this requirement, they should immediately contact the Appeals Officer.

Statements of Fact & Burden of Proof

Statements of fact must be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Statements of fact or allegations submitted without an affidavit may not be considered.

Under the RTKL, the agency has the burden of proving that records are exempt from public access (see 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR**.

The law requires the agency position to be supported by sufficient facts and citation to all relevant sections of the RTKL, case law, and OOR Final Determinations.

An affidavit or attestation is required to prove that records do not exist.

Sample affidavits are on the OOR website, openrecords.pa.gov.

Any evidence or legal arguments not submitted or made to the OOR may be waived.

Preserving Responsive Records

The agency must preserve all potentially responsive records during the RTKL appeal process, including all proceedings before the OOR and any subsequent appeals to court.

Failure to properly preserve records may result in the agency being sanctioned by a court for acting in bad faith.

See *Lockwood v. City of Scranton*, 2019-CV-3668 (Lackawanna County Court of Common Pleas), holding that an agency had "a mandatory duty" to preserve records after receiving a RTKL request. Also see generally *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018), holding that "a fee award holds an agency accountable for its conduct during the RTKL process..."

Mediation

The OOR offers a mediation program as an alternative to the standard appeal process. To participate in the mediation program, both parties must agree in writing.

The agency must preserve all potentially responsive records during the RTKL appeal process. Mediation is a voluntary, informal process to help parties reach a mutually agreeable settlement. The OOR has had great success in mediating RTKL cases.

If mediation is successful, the requester will withdraw the appeal. This ensures that the case will not proceed to court — saving both sides time and money.

Either party can end mediation at any time.

If mediation is unsuccessful, both parties will be able to make submissions to the OOR as outlined on this document, and the OOR will have no less than 30 calendar days from the conclusion of the mediation process to issue a Final Determination.

Parties are encouraged to consider the OOR's mediation program as an alternative way to resolve disputes under the RTKL.

pennsylvania

OFFICE OF OPEN RECORDS

APPEALS OFFICER:	**Joshua Young, Esq.**
CONTACT INFORMATION:	**Commonwealth of Pennsylvania** **Office of Open Records** **333 Market Street, 16th Floor** **Harrisburg, PA 17101-2234**
PHONE:	**(717) 346-9903**
FACSIMILE:	**(717) 425-5343**
Preferred method of contact and submission of information:	**E-FILE PORTAL**

PARTIES WITHOUT COMPUTER OR INTERNET ACCESS SHOULD PROCEED BY MAIL OR FACSIMILE

Please direct submissions and correspondence related to this appeal to the above Appeals Officer. Please include the case name and docket number on all submissions.

You must copy the other party on everything you submit to the OOR.

The OOR website, https://openrecords.pa.gov, is searchable and both parties are encouraged to review prior final determinations involving similar records and fees that may impact this appeal.

pennsylvania

OFFICE OF OPEN RECORDS

IN THE MATTER OF	:	
	:	
JOHN LAWRENCE,	:	
Requester	:	
	:	
v.	:	**Docket No.: AP 2023-2332**
	:	
CHESTER CITY,	:	
Respondent	:	

Please accept my appearance for the Agency in the above captioned case.

Attorney:	Carl Ewald
Firm:	Law Office of Carl W. Ewald, PC
Address:	205 North Monroe St. Media, PA 19063
Email:	carlewald@gmail.com
Phone #:	610-891-0108

Law Offices of
Carl W. Ewald, P.C.

205 North Monroe Street
Media, Pa. 19063

Email: carlewald@gmail.com
Telephone: (610)891-0108

October 17, 2023

Joshua Young, Esq.
Appeals Officer
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Re: John Lawrence v. Chester City,.
Docket # AP 2023-2332

Dear Appeals Officer Young:

I have just entered my appearance in this appeal. Apparently, there has been some difficulty with notice. The documents are not transmitting through the new portal system for the City.

I was aware that Miss Newsom had received an email alerting her to additional documents in the portal. However, whenever we checked the portal, there were no new cases listed. Attached is a screenshot of what Ms Newsome sees when she logs into your portal.

I had requested that she reach out to the office of open records for clarification. I had not realized that her husband had suddenly passed. Please accept this request to reopen the record in this matter so that the City may appropriately respond.

Thank you for your consideration in this matter.

Sincerely,

Carl W. Ewald, Esquire

openrecords.pa.gov/Portal/index.cfm

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OOR
Office of Open Records

RIGHT-TO-KNOW LAW | APPEALS | SUNSHINE ACT | TRAINING | ABOUT

APPEAL E-FILE PORTAL - MY APPEALS

Request Date	Docket Number	Name	Interest	FD Date
01/23/2023	2023-0158	Todd Shepherd v. Chester City	Agency	02/10/2023
01/03/2023	2023-0006	Laura Blenman v. Chester City	Requester	01/24/2023

File an Entry of Appearance

Request Direct Interest Participant Access

pennsylvania
OFFICE OF OPEN RECORDS

October 18, 2023

Via E-File Portal Only:

John Lawrence
House of Representatives
1 Commerce Boulevard
Suite 200
West Grove, PA 19390
jlawrenc@pahousegop.com

Via E-File Portal Only:

Candice Newsome
Agency Open Records Officer
Chester City
1 4th Street
Chester, PA 19013
cnewsome@chestercity.com

Carl Ewald
Law Office of Carl W. Ewald, PC
205 North Monroe St.
Media, PA 19063
carlewald@gmail.com

RE: Lawrence and House of Representatives v. Chester City OOR Dkt. AP 2023-2332

Dear Parties:

In light of Attorney Ewald's correspondence regarding the City's delayed receipt of the OOR's Notice of Appeal in this matter, to ensure that both parties have a meaningful opportunity to participate in the appeal, the case deadlines are hereby extended as follows:

- The record will be reopened until the end of the day (11:59:59 p.m.) on October 24, 2023 for the parties to make submissions
- The Final Determination will be issued by November 6, 2023.

Sincerely,

/s/ Joshua Young

Joshua Young
Senior Deputy Chief Counsel

Law Offices of
Carl W. Ewald, P.C.

205 North Monroe Street
Media, Pa. 19063

Email: carlewald@gmail.com
Telephone: (610)891-0108

October 24, 2023

Joshua Young, Esq.
Appeals Officer
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Re: John Lawrence v. Chester City.
Docket # AP 2023-2332

Dear Appeals Officer Young:

As you are aware, I was just recently tasked with responding to the OOR appeal in this matter. I have reviewed the request and I have been trying since last week to obtain any responsive documents from the City. Unfortunately, this is taking longer than expected. I do not yet know whether any such documents exist. The City is in receivership, the staff is very limited, and there is little institutional knowledge.

The request is based on a vague reference to "two credible plans" quoted in a newspaper article. Due to the vagueness of the statement the request is based on, I am not able to evaluate whether a document is a public record until I have a copy. I need more time and some more specificity to adequately respond. Therefore, I am requesting a 30-day extension to all deadlines to allow me to hopefully resolve this amicably with the requestor. If the requestor is agreeable, I am willing to participate in the mediation program and I am submitting a signed copy of the mediation agreement with this letter.

I reached out to Representative Lawrence today to discuss this request at both of his offices. However, I have not yet received a response. Hopefully I can connect with Representative Lawrence this week.

Thank you for your consideration in this matter.

Sincerely,

Carl W. Ewald, Esquire

pennsylvania

OFFICE OF OPEN RECORDS

OOR MEDIATION AGREEMENT

OOR Dkt. No. 2023-2332

Requester Name: John Lawrence

Agency Name: City of Chester

The Requester and Agency (collectively, the "Parties") agree to participate in the OOR's Informal Mediation Program to resolve the matters at issue in this appeal.

The Parties agree to participate in the mediation process in good faith. If the Parties agree, there may be more than one session if the Mediator determines that the appeal could be resolved. The Parties acknowledge that mediation sessions are not open to the public and the content of discussions during mediation is confidential and not admissible as evidence in this appeal.

The Parties agree to extend the Final Determination deadline in this appeal for 30 calendar days beyond the conclusion of the mediation process or, if the Requester agreed to grant the OOR a 30-day extension on the appeal form initiating this appeal, the Final Determination deadline will include that extension. If the Requester does not withdraw the appeal, the Mediator will indicate the conclusion of the mediation process in writing if further mediation sessions are not likely to result in a resolution of the dispute. The Parties acknowledge that this Mediation Agreement, the Requester's withdrawal, and the OOR's withdrawal acknowledgement will be included in the OOR's administrative appeal file and subject to public access.

Upon receipt of this completed Mediation Agreement, a Mediator will contact the Parties to establish a mutually convenient date, time and location to conduct a joint mediation session.

Requester Signature: _____ Date: _____

Agency Representative Signature: _____ Date: 10/24/23

pennsylvania
OFFICE OF OPEN RECORDS

October 25, 2023

Via E-File Portal Only:

John Lawrence
House of Representatives
1 Commerce Boulevard
Suite 200
West Grove, PA 19390
jlawrenc@pahousegop.com

Via E-File Portal Only:

Candice Newsome
Agency Open Records Officer
Chester City
1 4th Street
Chester, PA 19013
cnewsome@chestercity.com

Carl Ewald
Law Office of Carl W. Ewald, PC
205 North Monroe St.
Media, PA 19063
carlewald@gmail.com

RE: Lawrence and House of Representatives v. Chester City OOR Dkt. AP 2023-2332

Dear Attorney Ewald:

Thank you for your email. Please note that the OOR is amenable to granting you and the City additional time to review the responsive records; however, to do so, the City will need to secure an equivalent extension of time to issue the Final Determination from the Requester. As it stands, the Final Determination is due on November 6, 2023; therefore, the requested thirty-day extension is not feasible. Should you secure an extension form the Requester, please notify me at your earliest convenience; otherwise, the case deadlines remain as set forth in my last correspondence.

Sincerely,

/s/ Joshua Young

Joshua Young
Senior Deputy Chief Counsel

pennsylvania
OFFICE OF OPEN RECORDS

October 30, 2023

Via E-File Portal Only:

John Lawrence
House of Representatives
1 Commerce Boulevard
Suite 200
West Grove, PA 19390
jlawrenc@pahousegop.com

Via E-File Portal Only:

Candice Newsome
Agency Open Records Officer
Chester City
1 4th Street
Chester, PA 19013
cnewsome@chestercity.com

Carl Ewald
Law Office of Carl W. Ewald, PC
205 North Monroe St.
Media, PA 19063
carlewald@gmail.com

RE: Lawrence and House of Representatives v. Chester City OOR Dkt. AP 2023-2332

Dear Parties:

In light of Representative Lawrence's correspondence granting a two-week stay of the proceedings to permit the City to review the records responsive to the Request, new case deadlines are established as follows:

- Party submissions due by the end of the day (11:59:59 p.m.) on November 7, 2023.
- Final Determination due to be issued by November 20, 2023.

Sincerely,

/s/ Joshua Young

Joshua Young
Senior Deputy Chief Counsel

Law Offices of
Carl W. Ewald, P.C.

205 North Monroe Street
Media, Pa. 19063

Email: carlewald@gmail.com
Telephone: (610)891-0108

November 6, 2023

Joshua Young, Esq.
Appeals Officer
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Re: John Lawrence v. Chester City,
Docket # AP 2023-2332

Dear Appeals Officer Young:

As requested, this letter provides additional information in regard to the above referenced appeal. This appeal involves a request under the Pennsylvania Right to Know Law, 65 P.S. §§ 67.101, et seq. (the "RTKL") submitted by John Lawrence ("Appellant") to the City of Chester (the "City"). Appellant requested:

> COPIES OF THE "TWO CREDIBLE PLANS" PROVIDED BY CHESTER MAYOR KIRKLAND TO RECEIVER MICHAEL DOWEARY AS REFERENCE IN THE APRIL 17, 2023 DV JOURNAL ARTICLE ENTITLED "RECEIVER: CHESTER'S DIRE FINANCIAL STRAITS MAY LEAD TO DISINCORPORATION."

Attached is the Affidavit of Kenneth Schuster, Solicitor. The Solicitor's Office consulted with the office of the Mayor to determine what documents were referred to. (Affidavit at ¶ 4). Two documents were identified and reviewed. (Affidavit at ¶ 5).

Lawrence's request relates to two proposals made for the sale of City real property and assets. (Affidavit at ¶ 6). No bid has been approved and no contract has been awarded. (Affidavit at ¶ 7). To expose existing bids before they are approved or awarded puts the City at a disadvantage in bidding. (Affidavit at ¶ 8).

If a bid is awarded, and a contract is executed, the City would release copies of all bids. (Affidavit at ¶ 9). However, this request is premature. (Affidavit at ¶ 10).

Pursuant to 65 P.S. § 67.708(b)(10)(i)(A) internal, predecisional deliberations, are protected from disclosure. The Commonwealth Court has noted that "[t]he predecisional deliberative exception set forth in Section 708(b)(10)(i) codifies the deliberative process

privilege," making a separate analysis unnecessary. Office of Governor v. Scolforo, 65 A.3d 1095, 1100 (Pa.Cmwlth. 2013). The predecisional deliberations exception broadly protects "research, memos or other documents used in the predecisional deliberations." Exception 10(i) provides as follows:

> (10) (i) A record that reflects:
> (A) 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.
> (B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.

Communications between the Mayor and the Receiver are internal to the agency or between officials of two agencies. (Affidavit at ¶ 11). These discussions of plans or alternatives for how to solve the City's financial distress are related to future decisions. (Affidavit at ¶ 12). They are at the core of this exception because they reflect the strategy to be used to develop or achieve the successful adoption of a budget. Those discussions are deliberative in character. (Affidavit at ¶ 13). "Strategy" within this exemption means "the art of devising or employing plans or stratagem toward a goal." Knauss v. Unionville-Chadds Ford Sch. Dist.,. 09-09003 (C.P. Chester August 2, 2010). Documents which agencies use to "informally discuss, question and learn about topics that would enable them to prepare a budget" are protected and are not required to be produced in response to a right to know request. *Id.*

The deliberations of City staff are exempt under Section 708(b)(10)(i) *Kaplin v. Lower Merion Township*, 19 A.3d 1209 (Pa. Commw. Ct. 2011) (Communications between Township staff and the Board of Commissioners regarding the logistics of issuing a decision were exempt under Section 708(b)(10)(i)).

The requested records all relate to the research, memos or other documents used in predecisional deliberations. The requested documents represent research undertaken to investigate and learn about strategies for how to budget in the future to remediate the City's financial distress. Accordingly, these documents are protected as predecisional deliberations.

Additionally, 65 P.S. § 67.708(b)(22)(i) protects evaluations made for an agency relative to disposing of real property or an interest in real property. Exception 22 provides as follows:

> (22) (i) The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to the following:

(A) The leasing, acquiring or disposing of real property or an interest in real property.
(B) The purchase of public supplies or equipment included in the real estate transaction.
(C) Construction projects.
(ii) This paragraph shall not apply once the decision is made to proceed with the lease, acquisition or disposal of real property or an interest in real property or the purchase of public supply or construction project.

In Hofrichter v. Cecil Twp., OOR Dkt. AP 2016-0431, the Township had considered the purchase of real estate, but ultimately voted not to go forward with the purchase. The OOR held that records of appraisals were exempt where an agency did not move forward. In Citizens for Pennsylvania's Future v. Pennsylvania Tpk. Comm'n, OOR Dkt. AP 2015-0726 OOR again recognized that documents are exempt where the agency did not yet make a decision as to whether to proceed with the leasing, acquiring, or disposing of real property. See also Hausner v. Pa. Fish and Boat Comm'n, OOR Dkt. AP 2015-1337, 2015 PA O.O.R.D. LEXIS 1578 (holding that real estate appraisals are exempt where no decision has been made to acquire the property in question); Baker v.Pa. Dep't of Transp., OOR Dkt. AP 2009-0692, 2009 PA O.O.R.D. LEXIS 106 (holding that real estate appraisals are exempt where no agreement or deed has been drafted to acquire the property).

Herein, the City has debated and researched proposals to solve the City's financial distress which would involve the disposal of real property and assets of the City. But, no decision has been made and no contracts have been entered. Accordingly, the proposals including evaluations of the value of those assets are exempt from disclosure.

Likewise exception 26 protects bids prior to the award of a contract. Exception 26 provides as follows:

(26) A proposal pertaining to agency procurement or disposal 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 agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

The crux of the issue with respect to the request is whether the award of the contract has occurred yet. If it has not, the request was properly denied.

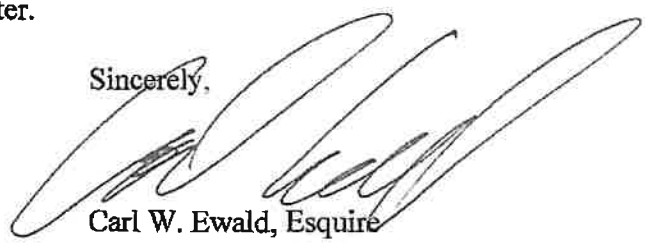
The meaning of the "award of the contract" for purposes of RTKL subsection 708(b)(26) has been definitively resolved by the Courts. In UnitedHealthcare of Pennsylvania, Inc. v. Pennsylvania Dep't of Human Servs., 187 A.3d 1046 (Pa.Cmwlth. 2018), the agency solicited offers through an RFP process and had selected the preferred

vendors, but had not yet executed a contract. In reviewing the issue, the Commonwealth Court held that "the General Assembly intended the phrase 'award of the contract' "for purposes of Section 708(b)(26) to mean **the execution of the contract, not the selection of offerors**." Id. (*emphasis added).* Thus, it is clear that, until a contract is fully executed, an agency may withhold procurement information under subsection 708(b)(26).

Herein, the process is in even more of a preliminary stage than in UnitedHealthcare. No decisions have been made. No contract has been awarded. Any proposals are subject to the exception.

Thank you for your consideration in this matter.

Sincerely,



Carl W. Ewald, Esquire

AFFIDAVIT

Kenneth Schuster, pursuant to 18 PS Section 4904, deposes and states as follows:

1. I am the Solicitor for the City of Chester.
2. In Docket # AP 2023-2332– The Requestor seeks copies of two documents referenced by the Mayor in a newspaper interview.
3. The request stated:
   "COPIES OF THE "TWO CREDIBLE PLANS" PROVIDED BY CHESTER MAYOR KIRKLAND TO RECEIVER MICHAEL DOWEARY AS REFERENCE IN THE APRIL 17, 2023 DV JOURNAL ARTICLE ENTITLED "RECEIVER: CHESTER'S DIRE FINANCIAL STRAITS MAY LEAD TO DISINCORPORATION."
4. My Office consulted with the office of the Mayor to determine what documents were referred to.
5. Two documents were identified and reviewed.
6. Lawrence's request relates to two proposals made relating to the sale of City real property and assets.
7. No proposal has been approved and no contract has been awarded.
8. To expose existing bids/proposals before they are approved or awarded puts the City at a disadvantage in bidding.
9. If a bid is awarded, and a contract is executed, the City will release copies of the bids/proposals received.
10. However, this request is premature.
11. Communications between the Mayor and the Receiver are internal to the agency or between officials of two agencies.
12. Discussions of plans or alternatives for how to solve the City's financial distress are related to future decisions.
13. Those discussions are deliberative in character. These discussions relate to the internal debate as to how to solve the financial problems of the City.
14. The requested documents reflect that the Mayor has debated and researched proposals to solve the City's financial distress which would involve the disposal of real property and assets of the City.
15. At this time, no decision has been made and no contracts have been entered.

Executed this 6th day of November, 2023.

Kenneth Schuster

pennsylvania
OFFICE OF OPEN RECORDS

November 13, 2023

Via E-File Portal Only:

John Lawrence
House of Representatives
1 Commerce Boulevard
Suite 200
West Grove, PA 19390
jlawrenc@pahousegop.com

Via E-File Portal Only:

Candice Newsome
Agency Open Records Officer
Chester City
1 4th Street
Chester, PA 19013
cnewsome@chestercity.com

Carl Ewald
Law Office of Carl W. Ewald, PC
205 North Monroe St.
Media, PA 19063
carlewald@gmail.com

RE: Lawrence and House of Representatives v. Chester City OOR Dkt. AP 2023-2332

Dear Representative Lawrence:

I write to request a two-week extension of time to issue a Final Determination in the above-referenced Right-to-Know Law ("RTKL") appeal for the purpose of seeking additional information regarding the "proposals" responsive to your RTKL request and to determine whether in camera review of the records is necessary. At your earliest convenience, please confirm whether you will agree to this extension, which will result in a Final Determination due date of December 4, 2023.

Sincerely,

/s/ Joshua Young

Joshua Young
Senior Deputy Chief Counsel

OOR Lawrence V Chester City AP 2023-2332

John Lawrence <Jlawrenc@pahousegop.com>
Mon 11/13/2023 10:47 PM

To:DC, OpenRecords <RA-OpenRecords@pa.gov>
Cc:cnewsome@chestercity.com <cnewsome@chestercity.com>;carlewald@gmail.com <carlewald@gmail.com>

Good Evening Ms. Wagenseller, Mr. Young –

Regarding your letter dated today, I agree to a two week extension to the aforementioned request for a due date of December 4.

Thank you very much.

Kind Regards – John Lawrence

John Lawrence
State Representative
Commonwealth of Pennsylvania
610 869 1602 Jennersville Office
717 260 6117 Capitol Office
RepLawrence.com

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pennsylvania
OFFICE OF OPEN RECORDS

November 14, 2023

Via E-File Portal Only:

John Lawrence
House of Representatives
1 Commerce Boulevard
Suite 200
West Grove, PA 19390
jlawrenc@pahousegop.com

Via E-File Portal Only:

Candice Newsome
Agency Open Records Officer
Chester City
1 4th Street
Chester, PA 19013
cnewsome@chestercity.com

Carl Ewald
Law Office of Carl W. Ewald, PC
205 North Monroe St.
Media, PA 19063
carlewald@gmail.com

RE: Lawrence and House of Representatives v. Chester City OOR Dkt. AP 2023-2332

Dear Parties:

Please allow this correspondence to confirm that the Final Determination in this matter is now due to be issued by **December 4, 2023**.

Additionally, to ensure the OOR has the information necessary to make an informed decision in this matter, the City is directed to provide a supplemental submission addressing the following:

- In the City's initial submission, the records responsive to the Request (seeking "two credible plans" referenced in the news article) are characterized as "two proposals made for the sale of City real property and assets"; however, the Schuster Affidavit also references "communications between the Mayor and the Receiver" and "discussions of plans or alternatives to solve the City's financial distress[.]" Please provide an exemption log describing the form of the responsive documents (e.g., proposal, email communication, memo, etc.) and including a general description of their contents. The log should also explain who created the responsive documents, the person or people to whom the documents were sent, and the exemptions raised for each of the responsive documents. Finally, based on the information provided in response to the inquiries above, the exemption log should briefly describe how each of the documents fits within each of the exemptions raised.

Please note that any factual assertions made in the supplemental submission should be accompanied by a sworn affidavit or statement made under the penalty of perjury, and the supplemental submission should be provided no later than the end of the day **(11:59:59 p.m.)** on **November 21, 2023**.

Sincerely,

/s/ Joshua Young

Joshua Young
Senior Deputy Chief Counsel

pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
JOHN LAWRENCE,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2023-2332**
	:	
CITY OF CHESTER,	:	
Respondent	:	

FACTUAL BACKGROUND

On August 24, 2023, Representative John Lawrence ("Requester") submitted a request ("Request") to the City of Chester ("City") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking "copies of the 'Two Credible Plans' provided by Chester Mayor Kirkland to Receiver" as referenced in a news article.[1]

On August 31, 2023, the City invoked a thirty-day extension to respond. *See* 65 P.S. § 67.902(b)(2). On September 15, 2023, the City denied the Request, arguing that the requested records reflect the internal, predecisional deliberations of the City, 65 P.S. § 67.708(b)(10)(i)(A), and relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17)(vi)(B).

On September 28, 2023, the Requester appealed to the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure. The OOR invited both parties to

[1] A copy of the news article was submitted along with the Requester's appeal form.

supplement the record and directed the City to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On October 17, 2023, the City's legal counsel, Carl Ewald, Esq., entered his appearance in this matter and claimed that neither the City nor its Open Records Officer had notice that an appeal had been filed with respect to this Request.

On October 18, 2023, to ensure the City had a meaningful opportunity to participate in this appeal, the OOR reopened the record until October 24, 2023 for the City to make a submission and extended the deadline by which a Final Determination had to be issued to November 6, 2023.

On October 24, 2023, the City requested a second, thirty-day extension of time to make a submission.

On October 27, 2023, the Requester submitted an unsworn position statement, arguing that the records sought in the Request exist and provided a two-week extension of the Final Determination due date to afford the City additional time to review the responsive records and make a submission related thereto.[2]

On November 6, 2023, the City submitted a position statement, identifying the records responsive to the Request as "two proposals made for the sale of City real property and assets" and reiterating its argument under Section 708(b)(10) of the RTKL. The City also argued that the records constitute the contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by the City relate to the disposal of real property, 65 P.S. § 67.708(b)(22), and proposals pertaining to the disposal of agency supplies, services or construction prior to the award of the contract, 65 P.S. § 67.708(b)(26).[3] In support of

[2] As a result of this extension, the City's submission was due by November 6, 2023 and the deadline to issue a Final Determination became November 20, 2023.

[3] On appeal, the City abandoned its argument with respect to Section 708(b)(17) and did not discuss the exemption in its submission; therefore, the OOR will not further address the argument in this Final Determination.

its position, the City submitted the affidavit of Kenneth Schuster ("Schuster Affidavit"), the City's Solicitor.[4]

On November 13, 2023, the OOR sought two additional weeks to issue a Final Determination, which the Requester granted the same day.[5] On November 14, 2023, the OOR confirmed the extension and directed the City to make a supplemental submission, in the form of an exemption log, further describing the responsive records, identifying the individuals to which the proposals were transmitted, and making clear the exemption(s) raised for each record.[6] The City did not respond.

LEGAL ANALYSIS

The City is a local agency subject to the RTKL. 65 P.S. § 67.302. Records in the possession of a local 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. As an agency subject to the RTKL, the City is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 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)).

[4] The Schuster Affidavit was made subject to the penalties set forth in 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.
[5] As a result, the Final Determination due date was extended to December 4, 2023.
[6] The City was granted until the end of the day on November 21, 2023 to provide its supplemental submission.

1. **The City has not proven that records are exempt under Section 708(b)(26) of the RTKL.**

The City denied the Request, arguing that the responsive records are "two proposals made relating to the sale of City real property and assets." Section 708(b)(26) of the RTKL exempts from disclosure:

> A proposal pertaining to agency procurement or disposal 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 agency proposal evaluation committees established under 62 Pa.C.S. § 513 (related to competitive sealed proposals).

65 P.S. § 67.708(b)(26).

In support of its argument, the City provided the Schuster Affidavit, which affirms that, following Attorney Schuster's review of the responsive documents, he determined that the records relate to the sale of certain real property and assets of the City and that no proposal has been approved or contract awarded with respect to the property and assets. *Schuster* Affidavit, ¶¶ 5-7. The Schuster Affidavit further asserts that "[t]o expose existing bids/proposals before they are approved or awarded puts the City at a disadvantage in bidding[,]" particularly where no decision has been made regarding the sale of the property and assets. *Schuster* Affidavit, ¶ 8, 15. Finally, the Schuster Affidavit confirms that if a bid is awarded and a contract is executed, the City will release copies of the proposals received.[7] *Schuster* Affidavit, ¶ 9.

[7] Under the RTKL, a statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the City has acted in bad faith, "the averments in [the Schuster Affidavit] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

While the Schuster Affidavit is authored by the City's Solicitor, who, in addition to consulting with the Mayor's Office, reviewed the documents responsive to the Request, neither the City's position statement nor the Schuster Affidavit has explained how proposals related to the sale of the City's real property and assets fall within Section 708(b)(26). More specifically, the City has not demonstrated how the proposals constitute the procurement or disposal of "supplies, services or construction," as contemplated in the exemption; rather, the proposals, which are the only responsive records identified by the City, pertain to the disposal of real property and "assets," a term which the City does not define or otherwise describe. *See Adelman v. City of Phila.*, OOR Dkt. AP 2019-0447, 2019 PA O.O.R.D. LEXIS 500 (concluding that proposals related to the sale of real property do not qualify for exemption under Section 708(b)(26)). Additionally, the City does not argue or offer evidence to support a finding that the proposals contain 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. Therefore, because RTKL exemptions are to be narrowly construed, *see California Borough v. Rothey*, 185 A.3d 456, 465 (Pa. Commw. Ct. 2018) (quoting *Office of the Gov. v. Davis*, 122 A.3d 1185, 1191 (Pa. Commw. Ct. 2015) (*en banc*)), the City has failed to meet its burden of proving that the responsive proposals are exempt from disclosure under Section 708(b)(26).

2. The City has not proven that records are exempt under Section 708(b)(22) of the RTKL.

The City also denied access to the records under Section 708(b)(22) of the RTKL, which exempts from disclosure "[t]he contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to the follow:

(A) The leasing, acquiring or disposing of real property or an interest in real property.

(B) The purchase of public supplies or equipment included in the real estate transaction.

(C) Construction Projects.

65 P.S. § 67.708(b)(22). However, as noted above, RTKL exemptions must be narrowly construed, and neither the City's position statement nor the Schuster Affidavit explain how proposals/bids for the sale of real property and assets constitute a real estate appraisal, engineering or feasibility estimate, environmental review, audit or evaluation; instead, the news article provided by the Requester, the factual contents of which neither party has disputed or otherwise challenged, states that the proposals "involved deals with the Chester Water Authority (CWA), including selling it to Aqua PA[.]" Additionally, while the Schuster Affidavit states that "[t]he requested documents reflect that the Mayor has debated and researched proposals to solve the City's financial distress which would involve the disposal of real property and assets of the City," it does not discuss how proposals/bids fit into any of the categories of document set forth in Section 708(b)(22). Because the City has not presented evidence sufficient to prove that the proposals are, more likely than not, exempt from disclosure under Section 708(b)(22), the City has failed to meet its burden of proof. *See Campbell v. Pa. Interscholastic Ath. Ass'n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that, under the RTKL, the preponderance of the evidence standard applies, which is the lowest evidentiary standard tantamount to a more likely than not inquiry); *see also Highmark Inc. v. Voltz*, 163 A.3d 485 (Pa. Commw. Ct. 2017) ("Under Section 708(a)(1), a party bears the burden of proving any RTKL exception applies 'by a preponderance of the evidence.'").

3. The City has not proven that the records are exempt under Section 708(b)(10) of the RTKL.

Lastly, the City denied the Request pursuant to Section 708(b)(10) of the RTKL, which 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 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. *Kaplan v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011). Furthermore, "[o]nly … confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice [are] protected as 'deliberative'." *Payne v. Pa. Dep't of Health*, 240 A.3d 221 (Pa. Commw. Ct. 2020) (citing *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 378 (Pa. Commw. Ct. 2013)).

With respect to this exemption, the Schuster Affidavit affirms as follows:

> Communications between the Mayor and the Receiver are internal to the agency or between officials of two agencies.
>
> Discussions of plans or alternatives for how to solve the City's financial distress are related to future decisions.
>
> Those discussions are deliberative in character. These discussions relate to the internal debate as to how to solve the financial problems of the City.
>
> The requested documents reflect that the Mayor has debated and researched proposals to solve the City's financial distress which would involve the disposal of real property and assets of the City.

Schuster Affidavit, ¶¶ 11-14.

Despite providing the City with several opportunities, and additional time, to present evidence describing the records and further explaining its arguments related thereto, the City has not submitted evidence to establish that the proposals, themselves, contain confidential deliberations of representatives of the City and/or the Receiver[8]; rather, the only evidence presented suggests that the proposals are bids for sale of City real property and assets, *see Schuster* Affidavit, ¶¶ 8-9; City Position Statement, pp. 2-3, presumably submitted by outside bidders. Once again, the RTKL's exemptions, including Section 708(b)(10), must be construed narrowly. *Pa. Pub. Util. Comm'n v. Nase*, 302 A.3d 264 (Pa. Commw. Ct. 2023). Factual information, such as that which may be contained in a proposal or bid to purchase the City's real estate or assets, is not deliberative in character and, even if the proposals were found to be deliberative, any factual information contained therein would have to be disclosed if severable from the remainder of the proposals.[9] *McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374, 385-86 (Pa. Commw. Ct. 2014). Therefore, because the City has not adequately explained how the proposals reflect the deliberative process in which the City engaged during its decision-making, the City has failed to prove that the proposals are deliberative in character. *See Payne*, 240 A.3d at 227.

Furthermore, with respect to whether the records are internal, the City has not explained who received the proposals when they were sent to the Office of the Receiver by the Mayor. While "the origination of records from outside an agency does not preclude the application" of Section

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[8] The Receiver for the City of Chester was appointed by then-Governor Tom Wolf, confirmed by a Judge of the Commonwealth Court and appears to be an employee within the Pennsylvania Department of Community and Economic Development. *See https://www.chesterreceivership.com/.*

[9] Notably, on his appeal form, the Requester confirms that he is "not seeking *deliberations* that led to the Mayor's final plans offered to the Receiver, nor am I seeking "research, memos or other documents used" in any predecisional deliberations leading up to his recommendations." (emphasis in original). Furthermore, even if the City could successfully argue the proposals contain deliberations, there is a question of whether they would be *confidential* deliberations, as the City acknowledges on appeal that the proposals will be released once a bid is awarded and a contract is executed. *Schuster* Affidavit, ¶ 9; *see also Payne*, 240 A.3d at 227-28.

708(b)(10)(i)(A), *see Office of the Governor v. Davis*, 122 A.3d 1185, 1193 (Pa. Commw. Ct. 2015) (*en banc*) (citing *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81 (Pa. Commw. Ct. 2013) (records originating with Penn State University, which is not an agency under the RTKL, may become records of an agency when records are used in agency decision-making)), records such as the proposals, which appear to have been authored by outside bidders, were not clearly generated for the sole purpose of assisting the City with its deliberations, nor do they, on their face, constitute "research, memos or other documents," as contemplated on Section 708(b)(10)(i)(A). Without more detail, the City has failed to establish that the proposals contain confidential deliberations.

Additionally, to the extent the City argues that the responsive records include communications between the Mayor and the Receiver related to the proposals, *Schuster* Affidavit, ¶¶ 11-14, the City must establish that the communications were shared only with representatives of the Mayor's Office and the Receiver or other employees of the Pennsylvania Department of Community and Economic Development to qualify as internal. Communications exchanged with third-party contractors or consultants are not internal to an agency. *Chester Water Auth. v. Pa. Dep't of Cmty. and Econ. Dev.*, 249 A.3d 1106, 1113-114 (Pa. 2021) (holding that "Section 708(b)(10)(i)(A) does not serve to insulate communications exchanged between a Commonwealth agency and a private consultant from the [RTKL]'s general requirement of openness"). Given that the Receiver's team consists of various operational, financial and economic development-related consultants,[10] the City has the burden of establishing that the communications were shared only with internal parties, which it has failed to do in this instance.

In its position statement, the City also argues that the proposals reflect "[t]he strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or

[10] *See https://www.chesterreceivership.com/team.*

regulation[,]" 65 P.S. § 67.708(b)(10)(i)(B); however, the Schuster Affidavit does not discuss this subsection of Section 708(b)(10). *See West Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) ("The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemption") (citing *Carey*, *supra*); *see also Davis*, 122 A.3d at 1193 ("Position statements are akin to briefs or proposed findings of fact, which, while part of the record, are distinguishable from the evidentiary record") (citations omitted); *Hous. Auth. of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (noting that "assertions in brief" are "not evidence of record"). Accordingly, the City has not met its burden of proving that Section 708(b)(10)(i)(B) applies to the responsive proposals.

CONCLUSION

For the foregoing reasons, the appeal is **granted**, and the City is required to provide the Requester with the responsive records 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 Delaware County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per 65 P.S. § 67.1303, but 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.[11] All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

[11] *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: 30 November 2023

/s/ Joshua T. Young

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Sent via e-file portal to: Hon. John Lawrence; Carl Ewald, Esq.; Candice Newsome, AORO