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| IN THE MATTER OF | : | |
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| FORD TURNER, | : | |
| Complainant | : | |
| | : | |
| v. | : | RTKL Appeal No. 2017-01 |
| | : | |
| JOINT STATE GOVERNMENT | : | |
| COMMISSION | : | |
| Respondent | : | |

FINAL DETERMINATION

INTRODUCTION

Ford Turner, Business Writer of the *Reading Eagle*, submitted two requests (Requests) to the Joint State Government Commission (JSGC) pursuant to the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* (RTKL), seeking information relating to the work of an advisory committee formed under Senate Resolution No. 267, Printers No. 1615 (2015). The resolution directed JSGC to establish the advisory committee to study issues relating to drug addiction and treatment. JSGC denied the requests and Requester appealed. For the reasons stated in this Final Determination, the appeal is denied and JSGC is not required to take any further action on the requests.

FACTUAL BACKGROUND

On May 15, 2017, JSGC received two written requests from Requester. Request one sought copies of “Any and all attendance records, rosters of people attending or lists of individuals present at each meeting conducted to date by the Advisory Committee carrying out work called for in Senate Resolution 267 of the Session of 2015.” Request two sought copies of “All minutes or records of proceedings made during each meeting to date of the Advisory Committee carrying out work called for in Senate Resolution 267 of the Session of 2015.” In a

letter dated May 22, 2017, JSGC denied request one for records of the advisory committee's meeting attendance based on section 708(b)(10)(i) of the RTKL. JSGC also denied request two based on the same provision of the RTKL, stating that formal minutes were not generated for advisory committee meetings and instead, notes of the meeting were taken for internal use for future purposes of developing policy and legislative recommendations and that such notes are classified as a work product summarizing predecisional deliberations by the advisory committee and JSGC staff.

Requester appealed the decision in a letter dated June 2, 2017. After receiving Requester's appeal, LRB sent a letter to JSGC and Requester on June 6, 2017 asking JSGC to provide an affidavit to demonstrate the nonexistence of the records requested and the dates of all meetings convened by the advisory committee prior to the date of the request and whether the meetings were open to the public. JSGC responded with an affidavit dated June 8, 2017 that stated, in part, that the JSGC does not generate formal minutes for advisory committee meetings. The affidavit stated that meetings of the advisory committee were held on Tuesday, July 12, 2016; Thursday, September 15, 2016; Thursday December 1, 2016; and Thursday, February 2, 2017. In addition, the affidavit represented that the advisory committee meetings were closed to the public, as authorized by 65 Pa.C.S. § 712 (relating to General Assembly meetings covered).

LEGAL ANALYSIS

“[T]he objective of the Right-to-Know Law... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees LLC v. Wintermantel*, 615 Pa. 640, 662, 45 A.3d 1029, 1042 (2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable

for their actions ...” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commonwealth 2010), *aff’d*, 621 Pa. 133, 75 A.3d 453 (2013).

LRB is required by section 503(c)(1) of the RTKL to hear appeals from all legislative agencies. *See* 65 P.S. § 67.503(c)(1). In performing that duty, LRB must appoint an appeals officer. The appeals officer has the legal duty to “[r]eview all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). The appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Department of General Services*, 20 A.3d 613, 617 (Pa. Commonwealth 2011). A hearing was not conducted in this appeal, but LRB has the necessary, requisite information and evidence to properly adjudicate the matter.

Section 305 of the RTKL imposes a statutory duty on the Legislative Branch of State government to release certain records. Section 303(a) states simply that “[a] legislative agency shall provide legislative records in accordance with this act.” 65 P.S. § 67.305(a). The terms “legislative agency” and “legislative record” are defined in the RTKL. 65 P.S. § 67.102.

In this case, Requester seeks information relating to meetings of the advisory committee. While JSGC is specifically enumerated in the definition of legislative agency under section 102 of the RTKL, the advisory committee is not. The statutory definition does not refer to advisory committees, regardless of whether they are formed under statute or by resolution of the General Assembly. Therefore, the advisory committee in question is not a legislative agency within the meaning of the RTKL. As a matter of law, the requests should be denied on the basis that the advisory committee is not subject to the RTKL.

It is noted that the advisory committee exists by virtue of a resolution that directed JSGC to form the advisory committee. Apparently, JSGC facilitates the activities of the advisory committee. However, Requester does not seek records of JSGC meetings, but of advisory committee meetings. The administrative relationship between JSGC and the advisory committee in no way alters the conclusion that the advisory committee itself is not a legislative agency under the RTKL.

Even if the advisory committee were deemed a legislative agency for purposes of the RTKL, the requests should have been denied because the information sought by Requester is not a legislative record subject to disclosure. 65 P.S. § 67.303(a). The definition of “legislative record” contains a list of information relating to a “standing committee, subcommittee or conference committee of a legislative agency.” The list includes “[t]he minutes of, record of attendance of members at a public hearing or a public committee meeting and all recorded votes taken in a public committee meeting.”

The advisory committee established by JSGC is *not* among the type of committees identified in the defined term. Furthermore, according to the affidavit submitted by JSGC, none of the four meetings convened by the advisory committee between July 12, 2016 and February 2, 2017 were public meetings. As stated in the affidavit, “they were closed to the public.”¹

Consequently, as a matter of law, the records sought by Requester were not legislative records subject to disclosure under the RTKL. Even if they were, JSGC has presented evidence that the records fall within an exemption.

¹ JSGC included in its affidavit the additional ground that the advisory committee meetings were closed to the public as a reason for denial, which was not included in the initial denial to Requester. An agency does not waive a ground for non-disclosure if not included in its initial denial. See *Levy v. Senate of Pennsylvania*, 619 Pa. 586 (Pa. Superior 2013).

A legislative record in the possession of a legislative agency is presumed to be available in accordance with the RTKL unless an exemption applies. 65 P.S. § 67.305(b). Upon receipt of a request under the RTKL, a legislative agency is required to assess whether a record is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. The legislative agency bears the burden of proving by a preponderance of the evidence the applicability of any cited exemption. *See* 65 P.S. § 67.708(a)(2). The 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.” *Pennsylvania State Troopers Association v. Scolforo*, 18 A.3d 435, 439 (Pa. Commonwealth 2011) (*quoting Department of Transportation v. Agricultural Lands Condemnation Approval Board*, 5 A.3d 821, 827 (Pa. Commonwealth 2010)).

In its denial letter to Requester, JSGC asserts that the requested information falls under the exemption at section 708(b)(10)(i). Notwithstanding a few exceptions that are not relevant here, the exemption includes:

A record that reflects ... [t]he 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.

See 65 P.S. § 67.708(b)(10)(i)(A). This provision has been labeled by the courts as the predecisional deliberation exemption.

To qualify under the predecisional deliberation exemption, the agency must demonstrate that the communication is: (1) internal to the agency, (2) predecisional, therefore made before the decision was made, and (3) deliberative in character, meaning the communication makes recommendations or contains opinions on a certain subject and is not purely factual in nature.

Kaplin v. Lower Merion Twp., 19 A.3d 1209, 1212 (Pa. Commonwealth 2011). The Commonwealth Court of Pennsylvania has expanded on each of these requirements, of which the Requester raises issue with element (3). In *McGowan v. Pennsylvania v. Department of Environmental Protection*, the court stated that in order to demonstrate that a document is deliberative, the agency must show how the contents relate to the deliberation process in a particular decision and that the document contemplated or proposed future action by agency officials or employees. 103 A.3d 374, 383 (Pa. Commonwealth 2014). In that case, the court held that department documents consisting of unfinished and summarized rough draft reports relating to a creek re-designation report and emails that concerned public outreach and the timing for release of the final report fell under the exemption, concluding the documents were deliberative in nature and involved the contemplated course of agency action. *Id.* at 384-85.

In this case, any notes from advisory committee meetings, working documents or drafts compiled by the advisory committee would be considered predecisional, as the documents are part of the advisory committee's deliberative process and contain information that will be used to complete the report required by Senate Resolution No. 267 (2015).

The *McGowan* court continued by addressing purely factual material within information that is deliberative in character, stating that information which is purely factual, even if used in the decision-making process, is not protected under the exemption. *Id.* at 385. However, the court stated that it can be difficult to segregate purely factual material from deliberative communications and suggests that the exemption "is intended to protect the deliberative process of government and not just deliberative material." *Id.* at 386 (*quoting Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977)).

Requester argues on appeal that attendance lists of the advisory committee's meetings are purely factual. There is no evidence of any separate list of meeting attendees or attendance records or that the names of the attendees are provided in notes from any of the advisory committee meetings. JSGC states in its affidavit that the advisory committee includes private citizens who volunteer their time and expertise to assist the General Assembly and participation is often predicated on their input being kept confidential, enabling them to discuss issues candidly. Releasing the names of the individuals who serve on the advisory committee could impede the deliberative process of government and discourage qualified individuals from serving on such committees in the future.

LRB concludes that JSGC has met its burden of proving that section 708(b)(10)(i)(A) applies to the records sought by Requester. The records fall within a specific exemption under section 708 and Requester does not have a right of access to them under the RTKL.

CONCLUSION

For the foregoing reasons, Requester's appeal is denied and JSGC is not required by the RTKL to take any further action. This Final Determination is binding on all parties. Within 30 days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court of Pennsylvania. 65 P.S. § 67.1301(a). If a party appeals, it must serve notice of the appeal to all other parties and LRB. Pursuant to section 1303(a) of the RTKL, LRB has the right to respond. 65 P.S. § 67.1303(a).

FINAL DETERMINATION ISSUED AND MAILED: June 27, 2017

Duane M. Searle, Esq.
Appeals Officer

