IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania Office of the Governor, Petitioner	:	
v.	:	
Todd Shepherd and Broad and Liberty, Inc. (Office of Open Records), Respondents	:	No. 1500 C.D. 2025
	:	Argued: September 14, 2026

BEFORE: HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE LORI A. DUMAS, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION
BY JUDGE FIZZANO CANNON FILED: November 3, 2026

The Pennsylvania Office of the Governor (Governor) petitions for review of the October 17, 2025 Final Determination Upon Remand (Remand Determination) of the Office of Open Records (OOR). The Remand Determination considered 12 documents, all of which the OOR ordered the Governor to provide responsive to a request made by Todd Shepherd on behalf of Broad and Liberty, Inc. (collectively, Requester) pursuant to the Right-to-Know Law (RTKL).[1] Upon review, we affirm.

I. Background

This petition for review arises from our June 5, 2025 remand directing the OOR to consider the alternative exemptions claimed by the Governor on several documents. We briefly recount the relevant facts as follows.

[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

In December 2023, Requester submitted an RTKL request (Request) to the Governor. Certified Record (C.R.) at 15-17.[2] The Governor partially granted the Request and provided redacted records, claiming that it redacted exempt information pursuant to Section 708(b)(6) & (17) of the RTKL, 65 P.S. § 67.708(b)(6) &(17). *Id.* at 17-19. The Governor denied the remainder of the Request, claiming that it was misdirected, that some responsive records were nonexistent, and that a portion of the Request was insufficiently specific. *Id.* at 17-19.

Requester appealed to the OOR on January 9, 2024. C.R. at 46. The Governor submitted two position statements and two attestations, made under the penalty of perjury, of Marc Eisenstein (Eisenstein Attestation I), the Agency Open Records Officer for the Governor. *Id.* at 62 & 67. In April 2024, the OOR advised the parties that it would conduct an *in camera* review of the responsive records. C.R. at 184. The Governor submitted a Supplemental Certified Record under seal that contained the records previously withheld (Supplemental Certified Record), together with a privilege log which served as an exemption index (Privilege Log) for purposes of *in camera* review. *Id.* at 193. In June 2024, the OOR issued its Final Determination on Requester's appeal, which was granted in part, denied in part, and dismissed as moot in part. C.R. at 221-22.

Requester petitioned for review in this Court. Upon conducting our own *in camera* review, this Court affirmed the Final Determination to a limited

[2] Because the Governor's reproduced record does not contain correspondences beyond the OOR's Final Determination, we refer to the certified record. *See Mulholland v. Workmen's Comp. Appeal Bd. (Bechtel Constr.)*, 669 A.2d 465, 466-67 (Pa. Cmwlth. 1995) (holding that a failure to include relevant docket entries in the reproduced record does not constitute a substantial defect unless the exclusion "preclude[s] the effective exercise of our appellate review") (citing Pa.R.A.P. 2152). As our review may be effectively conducted via reference to the certified record, we proceed accordingly. Certified record citations are to electronic pagination.

extent and largely reversed the Final Determination. However, we concluded that because the OOR incorrectly found 12 documents exempt under the predecisional deliberation exemption, 65 P.S. § 67.708(b)(10)(i)(A), the OOR improperly failed to consider alternative exemptions raised by the Governor as to the following documents:

REL0000028624
REL0000031847
REL0000031868 and REL0000031868.0001
REL0000031874 and REL0000031874.0001
REL0000031297
REL0000032037
REL0000032197
REL0000033919
REL0000034990
REL0000035514.

Accordingly, we remanded the matter to the OOR to consider the alternative RTKL exemptions raised by the Governor with regard to the listed documents.[3]

On October 17, 2025, the OOR issued the Remand Determination. C.R. at 257 & 269. The Remand Determination concluded that the Governor failed to prove that the withheld responsive records were exempt records. *Id.* at 257-68. As such, the Remand Determination directed that Requester was entitled to all 12 records, subject to any necessary personal identification information redactions pursuant to Section 708(b)(6), 65 P.S. § 67.708(b)(6).[4] *Id.* at 268. The Governor thereafter filed a petition for review with this Court.

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[3] While we appreciate the position of the Concurring Opinion that the Governor's personnel decisions could, in some circumstances, constitute predecisional deliberations, we note that this Court previously conducted an *in camera* review of the documents at issue in *Shepherd v. Pennsylvania Office of the Governor* (Pa. Cmwlth., No. 900 C.D. 2024, filed June 5, 2025) (*Shepherd I*), and determined that the predecisional deliberation exemption did not apply. That issue was not before the OOR on remand, and it is not before us in this current appeal.

[4] Section 708(b)(6) exempts:

II. Issues

Before this Court,[5] the Governor argues that the OOR failed to apply the entirety of Section 708(b)(7), which exempts a "result of a civil service or similar

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> (i) The following personal identification information:
>
> (A) A record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number.
>
> (B) A spouse's name, marital status or beneficiary or dependent's information.
>
> (C) The home address of a law enforcement officer or judge.
>
> (ii) Nothing in this paragraph shall preclude the release of the name, position, salary, actual compensation or other payments or expenses, employment contract, employment-related contract or agreement and length of service of a public official or an agency employee.
>
> (iii) An agency may redact the name or other identifying information relating to an individual performing an undercover or covert law enforcement activity from a record.

65 P.S. § 67.708(b)(6).

[5] In *Pennsylvania Office of Governor v. Brelje*, 312 A.3d 928 (Pa. Cmwlth. 2024), we discussed our review in RTKL appeals as follows:

> Pursuant to Chapter 13 of the RTKL, with respect to appeals relating to decisions of Commonwealth agencies, this Court is the ultimate factfinder in RTKL disputes. Accordingly, we owe no deference to the OOR's legal analysis or factfinding, as our standard of review of a final determination of the OOR is *de novo*. In addition, we are entitled to the broadest scope of review, covering all justiciable issues raised and presented below. Unlike in other administrative agency contexts, we may substitute our own findings of fact for that [sic] of the agency. We have the discretion to conduct a hearing, or to remand to the OOR, to supplement the record.

test administered by a Commonwealth agency." 65 P.S. § 67.708(b)(7)(iii). The Governor maintains that the withheld records contain a ranking of employees deemed potentially suitable for hire or promotion based on a test administered by the Governor. Governor's Br. at 11-12.[6]

III. Discussion

Under the RTKL, "records are presumed to be public records, accessible for inspection and copying by anyone requesting them, and must be made available to a requester unless they fall within specific, enumerated exceptions or are privileged." *Feldman v. Pa. Comm'n on Crime & Delinq.*, 208 A.3d 167, 171 (Pa. Cmwlth. 2019). Because the objective of the RTKL is "to empower citizens by affording them access to information concerning the activities of the government," the exemptions to disclosure of public records must be narrowly construed. *Id.* (quoting *SWB Yankees LLC v. Wintermantel*, 45 A.3d 1029, 1042 (Pa. 2012)); *see also California Borough v. Rothey*, 185 A.3d 456, 465 (Pa. Cmwlth. 2018). Such a narrow construction allows for the RTKL to effectuate its purpose of promoting

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Id. at 932 (citations omitted).

[6] The Governor also reasserts its arguments from *Shepherd I* that internal drafts of letters communicating personnel actions and records reflecting internal deliberations are exempt from access under Section 708(b)(10)(i)(A), 65 P.S. § 67.708(b)(10)(i)(A). Governor's Br. at 12. The Governor asserts that the relevant documents are both predecisional and deliberative, such that they are related to consideration of a course of action or proposed action. *Id.* at 15. The Governor acknowledges, however, that this second argument is restated merely "to ensure that all arguments are preserved for the possibility of further appeal." *Id.* at 8. Because we explicitly held in *Shepherd I* that the named documents were not exempt as predecisional deliberations pursuant to Section 708(b)(10)(i)(A), we do not reconsider the Governor's second argument here. *See Commonwealth v. Starr*, 664 A.2d 1326, 1331 (Pa. 1995) (holding that a court involved in later phases of a litigated matter shall not reopen questions decided by the same court or a higher court in the earlier phases of the matter).

access to official government information "in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions." *Off. of Gen. Couns. v. Bumsted*, 247 A.3d 71, 76 (Pa. Cmwlth. 2021) (quoting *Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034 (Pa. Cmwlth. 2011)).

Under Section 305(a) of the RTKL, 65 P.S. § 67.305(a), a record in the possession of a Commonwealth agency or local agency is presumed to be a public record. The RTKL defines a "public record" as:

> A record . . . of a Commonwealth or local agency that:
>
> (1) is not exempt under [S]ection 708 [of the RTKL];
>
> (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.

65 P.S. § 67.102. "The burden of proving that a record of a Commonwealth or local agency is exempt from public access shall be on the Commonwealth agency or local agency . . . by a preponderance of the evidence." *Id.* § 67.708(a)(1). A preponderance of the evidence standard is the lowest evidentiary standard, which "is tantamount to a more likely than not inquiry." *Delaware Cnty. v. Schaefer ex rel. Phila. Inquirer*, 45 A.3d 1149, 1156 (Pa. Cmwlth. 2012). Where an appeal involves a Commonwealth agency, an OOR appeals officer is first tasked with the obligation of determining whether the agency has met its burden of proof. *Id.* § 67.1101(b)(1); *McGowan v. Pa. Dep't of Env't Prot.*, 103 A.3d 374, 380-81 (Pa. Cmwlth. 2014). "Testimonial affidavits found to be relevant and credible may provide sufficient evidence in support of a claimed exemption." *McGowan*, 103 A.3d at 381 (quoting

Heavens v. Dep't of Env't Prot., 65 A.3d 1069, 1073 (Pa. Cmwlth. 2013)). Such affidavits are the means by which a governmental agency "justifies nondisclosure of the requested documents under each exemption upon which it relied. . . ." *Off. of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013). The affidavits "must be detailed, nonconclusory, and submitted in good faith . . . ." *Id.* Additionally, a privilege log "which typically lists the date, record type, author, recipients, and a description of the withheld record, can serve as sufficient evidence to establish an exemption, ***especially when the information in the log is bolstered with averments in an affidavit***." *McGowan*, 103 A.3d at 381 (emphasis added).

In relevant part, Section 708(b)(7) of the RTKL exempts from disclosure the following records relating to an agency employee:

> (iii) ***The result of a civil service or similar test administered by a Commonwealth agency***, legislative agency or judicial agency. The result of a civil service or similar test administered by a local agency shall not be disclosed if restricted by a collective bargaining agreement. Only ***test scores of individuals who obtained a passing score*** on a test administered by a local agency may be disclosed.

65 P.S. § 67.708(b)(7) (emphasis added). While the RTKL does not provide guidance on what constitutes a "similar test," a "civil service [exam]" is a "competitive examination [administered] either online or at a testing center." *Commonwealth of Pa. FAQs*, https://www.pa.gov/agencies/employment/how-to-apply/faqs (last visited November 2, 2026). A civil service exam pertains only to civil service jobs, and an individual must pass a civil service exam to hold a civil service position. *Id.* However, the General Assembly's express inclusion of "or similar test" acknowledges that Section 708(b)(7)(iii) was not intended to exempt only the test results of individuals in civil service positions. 65 P.S. §

67.708(b)(7)(iii); *see also Rancosky v. Wash. Nat'l Ins. Co.*, 170 A.3d 364, 371 (Pa. 2017) (emphasizing that "the object of all statutory construction is to ascertain and effectuate the General Assembly's intention").

Where an ambiguity exists in legislation, this Court may rely on dictionary definitions in order to interpret the meaning of terms according to their common and approved usages. *Ursinus Coll. v. Prevailing Wage Appeals Bd.*, 310 A.3d 154, 171 (Pa. 2024) (citing 1 Pa.C.S. § 1903(a)). Merriam Webster's Dictionary defines "similar" as something "having characteristics in common" with or "strictly comparable" with subject matter. *Merriam-Webster's Online Dictionary*, https://www.merriam-webster.com/dictionary/similar (last visited November 2, 2026). As such, a "similar test" must be "strictly comparable" to a civil service exam—a standardized, scored examination used to evaluate the qualifications and aptitude of potential employees. *See generally Shea & The Phila. Inquirer v. Pa. State Police*, OOR Dkt. AP 2009-0562, 2009 PA O.O.R.D. LEXIS 312, at *6 & *9 (holding that ***scored*** recertification examinations to determine successful completion of the academic requirement under the Municipal Police Officers' Education and Training Act were "similar" to a civil service examination).

While 10 out of 12 of the named documents were alternatively withheld pursuant to Section 708(b)(7), the Governor challenges the disclosure of only 3 on appeal under this exemption.[7] Governor's Br. at 9. The challenged records are all part of the same email chain and are named as follows:

[7] The Governor did not challenge the disclosure of the following documents:

REL0000028624
REL0000031868 and REL0000031868.0001
REL0000031874 and REL0000031874.0001
REL0000032037

REL0000031847
REL0000032197
REL0000034990

Id. The Governor challenges disclosure of these three documents on the grounds that its interview process for ranking suitable employee candidates constitutes a "similar test administered by a Commonwealth agency."[8] *Id.* at 11-12 (citing Section 708(b)(7)(iii)). We disagree.

By the Governor's own admission, candidates for senior level positions are considered through "interviews, reference checks and other appropriate means." Governor's Br. at 11-12. None of these fall within the parameters of a standardized scored examination. Further, the Governor fails to offer any argument to support how a job interview constitutes a "similar test" beyond a conclusory statement presuming such. *See Commonwealth v. Walter*, 966 A.2d 560, 566 (Pa. 2009) (holding that conclusory assertions without argument preclude adequate appellate review).

Our own *in camera* review of the three documents reveals a ranked list of two candidates according to the Governor's preference post-interview. The emails neither contain test scores nor contend that the candidates were tested in any capacity beyond the interviews and reference checks. Therefore, we cannot conclude that the candidate ranking falls within the purview of the "similar test"

REL0000032197
REL0000033919
REL0000035514.

[8] While the Privilege Log indicates Section 708(b)(7) as an alternative exemption, neither Eisenstein Attestation I nor Eisenstein Attestation II address the exemption's applicability to any of the withheld documents. *See* C.R. at 67-70 & 93.

results exempted by Section 708(b)(7)(iii). Accordingly, the OOR properly ordered disclosure of the documents.

IV. Conclusion

Based on the foregoing discussion, the Remand Determination is affirmed.

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CHRISTINE FIZZANO CANNON, Judge

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Pennsylvania Office of the Governor, Petitioner	:	
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O R D E R

AND NOW, this 3rd day of November, 2026, the October 17, 2025 Final Determination Upon Remand of the Office of Open Records is AFFIRMED.

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CHRISTINE FIZZANO CANNON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania Office of the Governor, Petitioner	:	
	:	No. 1500 C.D. 2025
v.	:	
	:	Argued: September 14, 2026
Todd Shepherd and Broad and Liberty, Inc. (Office of Open Records), Respondents	:	

BEFORE: HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE LORI A. DUMAS, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

CONCURRING OPINION BY JUDGE DUMAS **FILED: November 3, 2026**

Based upon the evidence provided to the Office of Open Records (OOR),[1] our prior decisions,[2] and the arguments presented to this Court on appeal,[3] I am constrained to agree with the well-reasoned analysis of the majority. Nevertheless, I am troubled by this decision. In my view, broadly, the Governor's

[1] Eisenstein Suppl. Attestation, 4/3/24, ¶13 (merely parroting language from Section 708(b)(7)(ii), (vi), (vii), and (viii) of the RTKL, Act of February 14, 2008, P.L. 6, 65 P.S. § 67.708(b)(7)(ii), (vi), (vii), (viii)).

[2] *See, e.g.*, *Shepherd v. Pa. Off. of the Governor* (Pa. Cmwlth., No. 900 C.D. 2024, filed June 5, 2025) (rejecting the Governor's reliance on Section 708(b)(10) of the RTKL, 65 P.S. § 67.708(b)(10)).

[3] *Compare* Exemption Log, 4/1/24 (specifically identifying Section 708(b)(7)(ii), (iv), (vi), (viii) of the RTKL, 65 P.S. § 67.708(b)(7)(ii), (iv), (vi), (viii)), *with* Pet'r's Br. at 8-12 (suggesting that the OOR should have considered the entirety of Section 708(b)(7) of the RTKL, 65 P.S. § 67.708(b)(7), yet focusing its discussion solely on Section 708(b)(7)(iii) of the RTKL, 65 P.S. § 67.708(b)(7)(iii)).

hiring protocols, as well as the facts and deliberations that inform the Governor's personnel decisions, should be exempt from disclosure under the RTKL.

I acknowledge that this Court has previously rejected similar claims. In *Office of General Counsel v. Bumsted*, 247 A.3d 71 (Pa. Cmwlth. 2021), requesters sought applications submitted to the Office of General Counsel (OGC) for a vacancy on the Commonwealth Court. OGC denied the request, invoking both the agency employee exemption, *see* Section 708(b)(7) of the RTKL, 65 P.S. § 67.708(b)(7),[4] as well as the predecisional deliberation exemption, *see* Section 708(b)(10) of the RTKL, 65 P.S. § 67.708(b)(10). *Bumsted*, 247 A.3d at 75-76. Upon review, the Court narrowly construed both exemptions. Regarding the agency employee exemption, we concluded that an applicant for appointment sought judicial office rather than agency employment. *Id.* at 80. As for the predecisional deliberative exemption, we reasoned that "factual information is not deliberative in character." *Id.* at 85 (cleaned up). Absent from the applications were "any notes or opinions that could be considered deliberative," and consequently, the applications were not exempt. *Id.*

Nevertheless, I note that the prevailing reasoning in Pennsylvania may differ from other states, several of which hold that similar records related to applications to the governor for employment or appointment are exempt from disclosure. The New Jersey Supreme Court, for example, has reasoned that there is a compelling public interest in "effective pre-appointment screening of prospective appointees[.]" *Nero v. Hyland*, 386 A.2d 846, 853 (N.J. 1978) (holding that a character investigation, which had informed the governor's decision regarding a prospective nominee, was not a public record subject to disclosure); *see also, e.g.*,

[4] OGC specifically invoked Section 708(b)(7)(iv) of the RTKL, which exempts "[t]he employment application of an individual who is not hired by the agency." 65 P.S. § 67.708(b)(7).

Salina J. v. Brownback, 394 P.3d 134 (Kan. 2017) (broadly construing a personnel records exemption to include records relating to applicants seeking political appointment); *Cal. First Amend. Coal. v. Super. Ct.*, 67 Cal. App. 4th 159 (Cal. Ct. App. 1998) (concluding that applications for gubernatorial appointment were exempt under the deliberative process exemption even though they were primarily factual because confidentiality would promote candor and enhance the size of the applicant pool).[5]

For these reasons, respectfully, I concur.

LORI A. DUMAS, Judge

[5] In so doing, the California appellate court expanded upon earlier precedent limiting access to gubernatorial records that would reveal the substance or direction of the governor's judgment and mental processes. *See Times Mirror Co. v. Super. Ct.*, 813 P.2d 240 (Cal. 1991). The court reasoned persuasively:

> In an accusatory political system where blame frequently flows upward and public officials, whether appointed or elected, are judged by standards that vary with the shifting political winds, the Governor is well advised to delve deeply into a candidate's background. That process of review is greatly benefited by an applicant's candor in disclosing potentially embarrassing facts that may be of only marginal relevance to the person's abilities. Candor is less likely to be forthcoming if the applicant knows the facts will be disclosed regardless of the outcome. Perhaps probing inquiries and public disclosures are the price one pays to be a public official but it is not likely a cost that one who is merely an applicant for appointment to a position would be willing to suffer.

Cal. First Amend. Coal., 67 Cal. App. 4th at 172.