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J. Chadwick Schnee
Appeals Officer
Office of Open Records
Commonwealth Keystone Building
400 North Street, Plaza Level
Harrisburg, PA 17120-0225

Re: *Bagwell v. Dept. of Education*, OOR Dkt. No. AP 2013-1753

September 30, 2013

Dear Mr. Schnee,

This is a reply to your e-mail of September 23, 2013, which invited both parties to submit additional evidence and argument in the above-named appeal. This case challenges the Department of Education's (the "Department") decision to withhold 155 records. In doing so, it cited four exceptions to the Right-to-Know Law ("RTKL"): (1) 65 P.S. § 67.708(b)(10)(i), which permits an agency to withhold records that are "predecisional;" (2) 65 P.S. § 67.708(b)(17), which allows an agency to withhold records reflecting a noncriminal investigation; (3) the attorney-client privilege (42 Pa.C.S. § 5928); and (4) the attorney-work product doctrine.

The subject of this appeal is a request for records that were sent to former Secretary of Education Ron Tomalis from a number of named individuals. The Department's final response indicates that some or all of the withheld records document Tomalis's activities as a trustee of the Pennsylvania State University ("PSU"). Records received by the Secretary of Education in his capacity as a member of the PSU Board of Trustees are subject to the disclosure provisions of the RTKL. *Bagwell v. Dept. of Education*, 2013 Pa. Commw. LEXIS 267. However, PSU itself is not an "agency" under the RTKL. *Roy v. Pennsylvania State University*, 568 A.2d 751 (Pa. Commw. Ct. 1990).

I. The exemption for predecisional deliberations does not apply.

The Predecisional Deliberation Exception exempts from public disclosure records that reflect predecisional deliberations between agency members, employees or officials. 65 P.S. §67.708(b)(10)(i)(A). This exception is rooted in the deliberative process privilege, which permits the government to withhold documents containing confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice. *Commonwealth v. Vartan*, 557 Pa. 390,399, 733

A.2d 1258, 1263 (Pa. 1999).

For the deliberative process privilege to apply, the communication must have been made before the deliberative process was completed, and it must be deliberative in nature. “It must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Information that is purely factual, even if decision-makers used it in their deliberations is usually not protected.” See *Vartan*.

The OOR has adopted a three-part test to determine whether a record may be exempt from disclosure because of the predecisional deliberation exemption. First, the deliberations reflected must be "internal" to the agency. Second, the deliberations reflected must have occurred prior to a decision. Finally, the content of the record must be deliberative in character.

None of the requested records reflect deliberations that are strictly internal to the Department or any other Commonwealth agency. According to the Department’s index, all of the withheld records reflect communications between the Secretary of Education and representatives of PSU. Because PSU is not an “agency” under the RTKL, any deliberations that the records reflect occurred between employees of a Commonwealth agency and a non-Commonwealth agency. They were not “internal” to the Commonwealth. Therefore, the predecisional deliberation exemption cannot apply.

II. The Noncriminal Investigation exemption does not apply because the requested records do not document a noncriminal investigation by a Commonwealth agency.

Pursuant to 65 P.S. §67.708(b)(17), a record of an agency relating to a noncriminal investigation is exempt from public disclosure. For the exception to apply, the Department must demonstrate that “a systematic or searching inquiry, a detailed examination of official probe” was conducted regarding a noncriminal matter. *Johnson v. Pennsylvania Convention Ctr. Auth.*, 49 A.3d 920,925 (Pa. Commw. Ct. 2012). The Department has offered no evidence to support the contention that it was conducting a “systematic inquiry or probe.”

It is expected that the Department will argue that some of the withheld records reflect PSU’s review of its response to reports of child sexual abuse, widely known as the Freeh Report, Section § 67.708(b)(17) does not apply to those records. In *Johnson*, the Court emphasized that the Noncriminal Investigation Exception only applies to investigations conducted by an “agency.” Underscoring that point, the Court wrote:

“This Court noted that the ‘noncriminal investigation’ exemption applies to investigations

‘conducted **as part of an agency’s official duties.**’ *Department of Health*, 4 A.3d at 814 (emphasis added).”

PSU is not an “agency” under the RTKL, nor is it a Commonwealth agency. It was under no obligation to conduct such a review. The Freeh investigation was an elective endeavour, and not part of its statutory, regulatory or otherwise official duties. Therefore, any records pertaining to investigation conducted by the Freeh group cannot be withheld pursuant to § 67.708(b)(17).

III. The Department failed to show that the requested records are subject to the attorney-client privilege and/or the attorney-work product doctrine.

Under the RTKL, certain records that reflect communication between an individual and an attorney may be exempt from disclosure if the criteria is met. The attorney-client privilege is statutory. 42 Pa.C.S. § 5928. Pursuant to this statute, four elements must be satisfied in order to successfully invoke the protections afforded by the attorney-client privilege:

1. The asserted holder of the privilege is or sought to become a client.
2. The person to whom the communication was made is a member of the bar of a court, or his subordinate.
3. The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
4. The privilege has been claimed and is not waived by the client.

The party asserting the attorney-client privilege must set forth facts showing that the privilege is properly invoked. *Levy v. Senate*, 34 A.3d 243, (Pa. Cmwlth. 2011). An agency seeking to claim the attorney-client privilege bears the burden to prove the exclusion by a preponderance of the evidence. 65 P.S. § 67.708(a).

The Department argues that any communication with employees of the Freeh Group are privileged because it served as counsel to the Special Investigations Task Force (“SITF”) of PSU’s Board of Trustees. The Department further argues that any communication made by employees of the law firm of Reed Smith are also privileged because that firm served as counsel to the Board of Trustees. However, the attorney-client privilege is much narrower than the Department argues.

First, the allegedly privileged communication must be made to an attorney, or a subordinate thereof. Here, the Department has offered no evidence that any of the withheld records document communications with an attorney. Though the Department's index identifies the individuals who participated in the communications, the Department has not shown that any of the participating individuals were attorneys.

Even if the OOR finds that an attorney played a role in some communications documented by the withheld records, such a finding by itself does not prove the applicability of the attorney-client privilege. The Department must also show that the holder of the privilege was, or sought to become, a client of the attorney, and that the holder has claimed the privilege.

Here, the Department is *claiming* the attorney-client privilege without *holding* the attorney-client privilege. The SITF holds the privilege with regard to communications with the Freeh Group, and the Board of Trustees holds the privilege with regard to communications with Reed Smith. Because the Department does not hold the privilege, it cannot claim the privilege. Therefore, it cannot meet its burden of proving that attorney-client privilege applies to the requested records.

Finally, a record may only be withheld because of the attorney-client privilege if it was conducted for the purpose of securing a legal opinion, service or assistance. According to the Department, PSU hired the Freeh Group to be counsel to the Special Investigations Task Force and to conduct an investigation. Therefore, the communications could be related to some sort of investigation, the need for legal advice, or neither. The mere fact that an attorney was involved in a communication does not prove that the communication involved providing a legal opinion, service or assistance.

CONCLUSION

Though records that document the Secretary of Education's trustee activities are subject to the RTKL, PSU is not a Commonwealth agency, nor is it subject to the disclosure provisions of the the RTKL. Since records that reflect communications between Tomalis and PSU are not internal to the Department, the predecisional deliberation exception cannot apply to the withheld records. Furthermore, only records relating to a noncriminal investigation conducted by a Commonwealth agency may be withheld pursuant to the noncriminal investigation exception. Since PSU is not a Commonwealth agency, the noncriminal investigation exception cannot apply to the requested records. Finally, the Department has not shown that the attorney-client privilege applies to the withheld records.

For the foregoing reasons, I respectfully request that the OOR **REVERSE** the Department's decision and order it to release the remaining records it has not disclosed.

Respectfully submitted,

/s/

Ryan Bagwell