



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

September 30, 2013

J. Chadwick Schnee, Esquire (jschnee@pa.gov)
Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Re: Right-to-Know Appeal – Docket # AP 2013-1753
Bagwell v. Pennsylvania Department of Education

Dear Mr. Schnee:

On September 19, 2013, the Pennsylvania Department of Education (PDE) received notice from the Office of Open Records (OOR) that it had received the above-docketed appeal. This submission by PDE is to supplement the record regarding the above-docketed appeal, pursuant to the notification received from the OOR on September 19, 2013.

Background and Facts

On July 19, 2013, PDE received from Ryan Bagwell a request under the Pennsylvania Right to Know Law, 65 P.S. §§ 67.101 *et seq.* (RTKL). The request was for copies of letters, memos, reports, contracts and emails sent to former Secretary of Education Ron Tomalis and/or Jane Shoop between November 5, 2011 and July 31, 2012 from any of seven (7) identified individuals. The identified individuals are all current or former members of Penn State's Board of Trustees (Board), an employee of the Board, an employee of a Board member or former counsel to the Special Investigations Task Force (Task Force) of the Board.

By letter dated July 26, 2013, PDE advised Mr. Bagwell that it required up to an additional 30 days, until August 26, 2013, in which to provide a response. By letter dated August 22, 2013, a Deputy General Counsel in the Governor's Office of General Counsel (Office) confirmed with Mr. Bagwell that PDE would provide the responsive documents that had been reviewed to that point on August 26, 2013, and that Mr. Bagwell had agreed to grant an additional extension until September 9, 2013, for the Office to perform a legal review on the remaining part of his request. On August 26, 2013, PDE provided responsive documents to Mr. Bagwell that had been reviewed to that point.

On September 9, 2013, PDE granted in part and denied in part Mr. Bagwell's request. PDE provided Mr. Bagwell with copies of additional responsive documents. In addition, PDE provided Mr. Bagwell with a log of the remaining documents that were not provided to him

based on three exceptions: (1) a non-criminal investigation; (2) attorney-client privilege and attorney work product; and/or (3) internal predecisional deliberations.

The documents not provided to Mr. Bagwell are exempt from access under the RTKL.

PDE's partial denial of Mr. Bagwell's request should be affirmed based on the exemptions cited by PDE. The RTKL defines a "public record" as a record 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. 65 P.S. § 67.102. In addition, "privilege" is defined in the RTKL to include the attorney-client privilege and the attorney-work product doctrine. 65 P.S. § 67.012. Since the withheld documents responsive to Mr. Bagwell's request are, as explained below, either exempt under section 708 or subject to a privilege, they are not public records.

The records requested by Mr. Bagwell are protected from disclosure pursuant to the exceptions cited in PDE's partial denial to Mr. Bagwell. Mr. Bagwell's argument is basically as follows:

- The withheld records are records of PDE but PDE cannot use the predecisional deliberation exception in the RTKL to preclude disclosure of the records because the exception applies only to communications internal to a Commonwealth agency. The withheld records are records that were exchanged between a Commonwealth agency (PDE) and a non-Commonwealth agency (Penn State); thus, the exception cannot apply.
- The withheld records are records of PDE but PDE cannot use the noncriminal investigation exception because it applies only to investigations by Commonwealth agencies. Since the investigation that is the subject of some of the withheld records was not an investigation conducted by PDE, but by a nonpublic entity (Penn State), the exception cannot apply.
- The withheld records are records of PDE but PDE did not provide evidence that the withheld records are exempt from disclosure pursuant to the attorney-client privilege or the attorney-work product doctrine because the index does not demonstrate that the withheld records would reveal legal advice given to the Commonwealth.

As is explained in detail below, Mr. Bagwell's arguments should be denied. Even though the withheld records are records of PDE, they are records that pertain to the business or activities of the Board and Tomalis was in possession of the records while serving in his role as a member of the Board. It is not reasonable to state that records are subject to the RTKL but then further state that those same records cannot be protected from disclosure based on exceptions in the RTKL. The withheld records are records of PDE because Tomalis had them in his possession and was the secretary of an agency subject to the RTKL; however, Tomalis had them in his possession only because of his role as a member of the Board. Therefore, since the withheld records are both records "of" PDE and "of" Penn State, the rights that belong to PDE, as an agency subject to the RTKL, to exert exceptions to the disclosure of certain records, encompass those records that pertain to Board business and activities even when the records are between Board members

and/or Board counsel. Tomalis received the records because he was a member of the Board and they pertain to Board business and activities, not to PDE business and activities.

The Commonwealth Court in *Bagwell v. Pennsylvania Department of Education*, ___ A.3d ___, 2013 WL 3778927 (Pa. Cmwlth. 2013), noted that regulation of Penn State and other state-related institutions is to protect students and citizens of the Commonwealth; thus, there was a nexus between the Board, Board counsel and Tomalis when Tomalis was a member of the Board and involved in Board business and activities. That nexus allows PDE to protect from disclosure records in the possession of Tomalis that pertain to Board business and activities based on the internal, predecisional deliberations exception, the attorney-client privilege, the attorney-work product doctrine and the investigation exception.

Records that reflect internal, predecisional deliberations of agency members, employees or officials, or predecisional deliberations between agency members and members, employees or officials of another agency are exempt from disclosure under the RTKL. 67 P.S. § 67.708 (b)(10)(i)(A). This includes predecisional deliberations relating to contemplated or proposed policy or course of action and documents used in the predecisional deliberations.

The predecisional deliberations exception consists of distinct parts. Exempt from disclosure are records that reflect:

- (1) The internal, predecisional deliberations of an agency;
- (2) **The internal, predecisional deliberations of an agency's members, employees or officials;** or
- (3) The predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency.

PDE submits that Mr. Bagwell is incorrect in stating that the predecisional deliberations exemption only applies to communications that are internal to a Commonwealth agency. Records that reflect the internal, predecisional deliberations **of an agency's official** are exempt from disclosure, as well as documents used in the predecisional deliberations. As a member of the Board, Tomalis received communications, reports and/or memoranda to be reviewed in his capacity as a Board member for purposes of contemplating or proposing policy or courses of action by the Board. These are records that Tomalis used for his own internal, predecisional deliberations relating to contemplated or proposed policy or course of action. Thus, the withheld records are records used by Tomalis in his predecisional deliberations and/or are communications between Tomalis and other Board members that reflect internal predecisional deliberations. Therefore, the withheld records are exempt from disclosure under the RTKL and are not public records.

Under the RTKL, a record of an agency relating to a noncriminal investigation is exempt from disclosure. 65 P.S. § 67.708(b)(17). This exemption includes complaints, investigative materials, notes, correspondence, and reports. In this case, it is public knowledge that the Board hired the Freeh Group to be counsel to a Special Investigations Task Force (Task Force) and to conduct an investigation and that Tomalis was the co-chairman of the Task Force. Therefore, communications, reports, or memoranda received by Tomalis from any of the individuals

identified by Mr. Bagwell that pertain to the investigation conducted by the Freeh Group are exempt from disclosure under the RTKL; thus, they are not public records. Again, as noted above, the Court in *Bagwell* noted that PDE regulation of Penn State was to protect students and citizens of the Commonwealth. Therefore the nexus between Tomalis, the Board and Board counsel allows PDE to protect records pertaining to the investigation from disclosure under the RTKL.

PDE does not agree with Mr. Bagwell that the noncriminal investigation exemption applies only to agency investigations. The RTKL states that “[a] **record of an agency** relating to a noncriminal investigation” is exempt from disclosure. The RTKL does not require that the investigation be conducted by a Commonwealth agency. See, *A.R. Building Company v. Pennsylvania Housing Finance Agency*, 500 A.2d 943 (Pa. Cmwlth. 1985) (finding that a private applicant’s market survey submitted to an agency was an investigation of market conditions and not subject to another citizen’s scrutiny). Therefore, any records Tomalis received regarding the investigation are protected from disclosure even though the investigation was not conducted by PDE.

Mr. Bagwell also argues that the records that were withheld under the attorney-client privilege and/or the attorney-work product doctrine do not demonstrate that the records would reveal legal advice given to the Commonwealth. However, PDE does not agree that the legal advice or the attorney work product within the withheld records must be legal advice provided to the Commonwealth.

The definition of privilege under the RTKL includes the attorney-client privilege and the attorney-work product doctrine. 65 P.S. § 67.102. “The attorney-client privilege provides that: In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.” 42 Pa.C.S. § 5928. In addition, the Pennsylvania Supreme Court has stated that the attorney-client privilege covers both confidential client to attorney communications and confidential attorney to client communications made for the purpose of obtaining or providing legal advice. See *Gillard v. AIG Insurance Co.*, 15 A.3d 44, 59 (Pa. 2011).

Since the Freeh Group was retained as counsel to the Task Force, of which Tomalis was the co-chairman, any communications, reports or memoranda received by Tomalis regarding legal advice provided by the Freeh Group are protected from disclosure based on the attorney-client privilege. As a member of the Board, and particularly as co-chair of the Task Force, Tomalis had a relationship with the Board and Board counsel such that advice by Board counsel would be protected from disclosure notwithstanding that Tomalis was on the Board because of his status as the Secretary of Education. It would be unreasonable to find that records containing confidential legal advice that have been determined to be records “of” PDE cannot be protected by PDE from disclosure under the RTKL. Again, the nexus between Tomalis, the Board and Board counsel allows PDE to protect records from disclosure. Thus, documents received by Tomalis from any of the individuals identified by Mr. Bagwell that seek or contain legal advice from the Freeh Group are protected by the attorney-client privilege. As such, those documents are exempt from disclosure under the RTKL, and therefore, do not constitute public records.

In addition, the Board engaged the law firm of Reed Smith as special counsel to advise the Board with respect to various matters arising out of allegations by the Attorney General of the Commonwealth of Pennsylvania regarding misconduct by senior administration officials and a former employee. For the same reasons noted above, any communications, reports or memoranda received by Tomalis regarding legal advice provided by the law firm of Reed Smith are protected from disclosure based on the attorney-client privilege. Thus, documents sent to Tomalis from any of the individuals identified by Mr. Bagwell that seek or contain legal advice from the law firm of Reed Smith are protected by the attorney-client privilege. Such documents are exempt from disclosure under the RTKL, and therefore, do not constitute public records.

In addition, the attorney-work product doctrine protects the “mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics, including those of a party’s representative who is not the party’s attorney” from disclosure. *Lavalle v. OGC*, 769 A.2d 449 (Pa. 2001), citing to Pa.R.C.P. 4003.3. The Commonwealth Court has ruled that records reflecting attorney-work product are not public records under the RTKL. *Maleski v. Corporate Life Ins. Co.*, 641 A.2d 1, 5 (Pa. Cmwlth. 2007) (finding that DOC Records Manual was not a public record because it was attorney-work product containing the mental impressions of DOC attorneys). Any documents sent to Tomalis that reflect the mental impressions, conclusions or opinions of the Freeh Group or the law firm of Reed Smith respecting the value or merit of a claim or defense or respecting strategy or tactics and legal advice and litigation are protected by the attorney-work product doctrine. Thus, any documents sent to Tomalis from any of the individuals identified by Mr. Bagwell that reflect the mental impressions, conclusions or opinions of the Freeh Group or the law firm of Reed Smith are exempt from disclosure under the RTKL, and therefore, do not constitute public records.

Notwithstanding that PDE identified certain documents as being protected from disclosure by the attorney-client privilege and/or attorney-work product doctrine, any records so identified that pertain to the Task Force investigation are also protected from disclosure by the noncriminal investigation exception. 65 P.S. § 67.708(b)(17).

Conclusion

Based on all of the above, PDE respectfully requests that Mr. Bagwell’s appeal be denied.

Sincerely,



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