

From: [Eilers, Blake](#)
To: [Brown, Charles \(OOR\)](#); [Henry, Faith](#)
Subject: FW: [External] RE: Ralph v. Reading: AP 2020-1271-75 - Request for Reconsideration
Date: Tuesday, March 16, 2021 1:45:59 PM
Importance: High

Please see below re: the PFR in these matters.



Blake Eilers, Esq.

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From: Eric Smith <esmith@timoneyknox.com>
Sent: Tuesday, March 16, 2021 1:44 PM
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Subject: [External] RE: Ralph v. Reading: AP 2020-1271-75 - Request for Reconsideration
Importance: High

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Dear Attorney Eilers:

In response to the City's motion for reconsideration, the Requester's position is as follows:

First, the City waived this 'selection and compilation' argument because it failed to raise it at any previous time in this Right-to-Know litigation. Specifically, the City failed to raise this argument in its initial response, letter brief, reply to supplemental memoranda, subsequent letters and emails, and numerous attestations attached thereto. *See, e.g., Easton v. Express Times*, 2012 Pa. Commw. Unpub. LEXIS 307 (rejecting what was for the agency "essentially a second opportunity to litigate claims" that the OOR had already denied.); *Commonwealth v. Engelkemier*, 148 A.3d 522 (Pa. Commw. Ct. 2016) (finding the agency waived the issue of the specificity of the request).

Likewise, if not considered waived, then, the motion for reconsideration is improper and should also be denied. "The only proper grounds for granting reconsideration are new and material evidence or facts, a change in the controlling law or a clear error in applying the facts or law to the

case at hand so that it is necessary to correct a clear error and prevent a manifest injustice from occurring. Mere disagreement with the court's conclusion is not a basis for reconsideration." *Scartelli General Contractors Inc, v. Selective Way Insurance Company*, 6 Pa. D. & C. 5th 61, 63-64 (Lackawanna Cty.2008). See also *Oliver v. Irvello*, 2016 Phila. Ct. Com. Pl. LEXIS 12, *14 and *W.C. v. Janssen Pharms., Inc.*, 2015 Phila. Ct. Com. Pl. LEXIS 324, *6-7 "[C]ourts routinely refuse to address arguments made in motions for reconsideration that could have been made in the original underlying motion". *W.C. v. Janssen Pharms., Inc.*, 2015 Phila. Ct. Com. Pl. LEXIS 324, *6-7. New arguments should not be considered in a motion for reconsideration. *Kelly v. Siuma*, 34 A.3d 86, 94 (Pa. Super. 2011).

Second, the cited *Sporck v. Peil* case is readily distinguishable from this Right-to-Know request. In *Sporck*, defendants produced hundreds of thousands documents during discovery. Out of these documents, defense counsel actively selected and compiled a folder of an unknown quantity for defendant to review before his deposition. That is much different from the matter before the OOR.

Here, there is no record whatsoever to support a similar finding that Attorney Lachat, or any other City attorney, actively sorted and selected a few documents or emails out of thousands to send to Attorney Merolla. There is also no deposition at issue here. Indeed, the City's attorneys' forwarding of emails from myself and other members of my firm suggests a reactive approach, not necessitating legal opinion. See Final Determination at 12. The routine act of forwarding emails on what seemingly is strictly to pass along the information, is not protected. Nor is there any evidence in the record to show that anything more than a routine forwarding of emails was at work here.

Finally, it is note worth that many of the documents referenced by counsel for the City in the below Motion for Reconsideration were not ordered to be turned over per your Office's Final Determination, including RDG000003-1 through RDG000003-74, RDG00001301 through RDG000013-46, RDG000134-1, and RDG000260 through RDG000260-20. As such, the City's references to these documents should be disregarded.

The City's motion for reconsideration should be denied.

Respectfully,

Eric B. Smith, Esq.



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