

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

WEATHERLY AREA SCHOOL DISTRICT,
Appellant
v.
GERARD GREGA,
Appellee
Jeffrey A. Rockman, Esquire
Gerard Grega
No. 21-0862
Appeal from OOR Dkt. AP 2021-0204
Counsel for Appellant
Pro Se

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CARBON COUNTY
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FILED

MEMORANDUM OPINION

Serfass, J. - July 21, 2021

Weatherly Area School District (hereinafter "Appellant" or "the District") initiated this action on March 25, 2021, with the filing of the "Appeal of Final Determination of Office of Open Records" seeking review of the February 26, 2021 decision of the Pennsylvania Office of Open Records (hereinafter "OOR") in AP 2021-0204. Gerard Grega (hereinafter "Appellee") challenged the District's appeal. Upon consideration of the record in this case, and the hearing held on this matter, we make the following:

FINDINGS OF FACT

1. Appellant, Weatherly Area School District, is a Carbon County school district and a local agency under the Pennsylvania Right-to-Know Law (hereinafter "RTKL") with a principal administrative office located at 602 Sixth Street, Weatherly, Carbon County, Pennsylvania.

FS-25-21

2. Appellee, Gerard Grega, is an adult individual residing at 2432 Wetzel Run Drive, Weatherly, Carbon County, Pennsylvania.

3. Appellee is a member of the Weatherly Area School Board.

4. Terry Young is the superintendent of the Weatherly Area School District.

5. Jeffrey A. Rockman, Esquire, by and through the Slusser Law Firm, is the solicitor for the Weatherly Area School District.

6. On December 17, 2020, Appellee sent a Right-to-Know request to the District seeking the following:

"COPIES of all TEXT MESSAGES and/or district E-mails sent to/from/between Mrs. Young, WASD Supt (text using her personal cell [telephone number omitted]) Slusser Law Firm - Slusser or Rockman (Cells), and/or with any combination of current Board members' Cell numbers or WASD E-mail addresses whether I (Grega) was included on the TEXT STRING/S, E-mails or not, pertaining to or discussing any type of WASD-Board/Administrative subject matter, school business, or school-related topics. I am requesting all TEXTS and/or E-mails exchanged (as described above) beginning Thursday-December 1, 2020 (start of business) through Friday, December 18, 2020 (end of business)."

7. On January 21, 2021, after invoking a thirty-day (30-day) extension during which to respond, Teresa Barna, the District's Open Records Officer, sent Appellee a written response indicating that his request was denied, providing attestation that the text messages do not exist, asserting that the emails between Superintendent Young and the Slusser Law Firm are protected by the attorney-client privilege, and further asserting that the emails between Superintendent Young and other board members do not exist in electronic format.

8. On February 1, 2021, Appellee filed an appeal with the OOR.

9. Appellee challenged the denial and stated grounds for disclosure, and also asserted that the emails exist in electronic format and that the District is capable of electronic redaction.

10. On February 10, 2021, the District submitted a signed affidavit of Attorney Rockman.

11. The District argued that the denial was proper under the RTKL as the emails requested contain legal advice or opinions protected by the attorney-client privilege, and further argued that Appellee did not challenge the District's assertion that the records are privileged.

12. On February 10, 2021, Appellee submitted a statement arguing that any emails where he is the subject should be provided without redaction.

13. On February 11, 2021, the District supplemented the record stating that Appellee does not have the authority to waive the attorney-client privilege on behalf of the District.

14. On February 26, 2021, the OOR issued a final determination pursuant to which Appellee's appeal was granted and the District was required to provide the requested records within thirty (30) days.

15. The OOR held that the Appellee sufficiently challenged the District's denial based on the attorney-client privilege, that the District did not provide sufficient evidence of a good faith search for the requested text messages, and that the District failed to provide sufficient evidence to support its denial under an RTKL exemption or pursuant to the attorney-client privilege.

16. On March 25, 2021, the District filed an appeal of the OOR's final determination with this Court pursuant to 65 Pa.C.S.A. § 67.1302.

17. The District's appeal challenged the OOR's decision regarding the disclosure of the emails as protected by the attorney-client privilege.

18. On May 20, 2021, this Court held an evidentiary hearing in this matter.

19. Attorney Rockman argued that the emails contain attorney-client communication regarding client business and are per se protected under the privilege, that Appellee has not

contested that the emails are privileged, and that Appellee's requests under the RTKL are improper as the District's School Board policies provide Appellee with an alternative avenue to request the records.

20. Appellee argued that the emails do not contain privileged information, that he is seeking information specific to him as a member of the District School Board, and that the District has not conducted a good faith search for the requested records.

21. At the evidentiary hearing, Attorney Rockman submitted as exhibit WASD-4 the requested records to the Court under seal for in-camera review.

CONCLUSIONS OF LAW

1. "[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, 45 A.3d 1029, 1042 (Pa. 2012).

2. The RTKL 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.Cmwlth. 2010), *aff'd*, 75 A.3d 453 (Pa. 2013).

3. Appellant is a local agency subject to the RTKL that is required to disclose public records. 65 Pa.C.S.A. §§ 67.102 & 67.302.

4. Records in possession of a local agency are presumed public unless exempt under the RTKL or any other Federal or State law or regulation or protected by a privilege, judicial order, or decree. 65 Pa.C.S.A. § 67.305.

5. The RTKL places the burden of proof on the local agency receiving the request to demonstrate that a record is exempt from public access by a preponderance of the evidence. 65 Pa.C.S.A. § 67.708(a)(1).

6. Likewise, the burden of proof in claiming a privilege is on the party asserting that privilege. Levy v. Senate, 34 A.3d 243, 249 (Pa.Cmwlth. 2011), *aff'd in part, rev'd in part sub nom. Levy v. Senate of Pennsylvania*, 65 A.3d 361 (Pa. 2013).

7. The local agency must affirmatively provide evidentiary support establishing that the requested records are protected by a privilege as "a generic determination or conclusory statements are not sufficient to justify the exemption of public records." Office of Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa.Cmwlth. 2013).

8. An agency can meet its burden through the submission of a sworn affidavit. However, those affidavits must do more than recite conclusory statements regarding application of the

privilege. West Chester Univ. of Pennsylvania v. Schackner, 124 A.3d 382, 393 (Pa.Cmwlth. 2015). "The evidence must be specific enough to permit [the] [c]ourt to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions." Id.

9. An agency must provide some type of affidavit, statement, or testimony in support of each element of the privilege. Brown v. Greyhound Lines, Inc., 142 A.3d 1, 12-13 (Pa.Super. 2016).

10. An agency can also meet its burden through the submission of records for in-camera review. Documentary evidence may not be needed "when an exemption is clear from the face of the record." Office of Governor v. Davis, 122 A.3d 1185, 1194 (Pa.Cmwlth. 2015).

11. The attorney-client privilege applies to communications only if (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; and (4) the privilege has been claimed and is not waived by the client. Ford-Bey v. Pro. Anesthesia Services of North

America, LLC, 229 A.3d 984, 990-91 (Pa.Super. 2020) (citing Vocabet v. UPMC Presbyterian, 119 A.3d 1012, 1027 (Pa.Super. 2015)).

12. When assessing the applicability of the attorney-client privilege, the court need not consider what type of information or document is sought. Rather, "the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege." Levy, 65 A.3d at 373-74.

13. It is clear upon review of the District's exhibit WASD-4 that the records sought by Appellee contain information that is protected by the attorney-client privilege.

14. The records include communications between Superintendent Young and Attorney Rockman regarding requests for legal advice and the Weatherly Area School District has not waived the privilege.

15. We find that disclosure of the requested records would result in the disclosure of information that is otherwise protected by the attorney-client privilege.

16. Based upon the District's evidentiary support, we find that the requested records are protected by the attorney-client privilege and, therefore, are not public records subject to disclosure under the RTKL.

CONCLUSION

For the foregoing reasons, the "Appeal of Final Determination of Office of Open Records" filed by the Weatherly Area School District is granted, the Final Determination of the Pennsylvania Office of Open Records dated February 26, 2021 is reversed and we will enter the following

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DISTRICT,	:	
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	:	
v.	:	Appeal from OOR Dkt. AP
	:	2021-0204
GERARD GREGA,	:	
Appellee	:	
Jeffrey A. Rockman, Esquire		Counsel for Appellant
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ORDER OF COURT

AND NOW, to wit, this 21st day of July, 2021, upon consideration of the "Appeal of Final Determination of Office of Open Records" filed by Weatherly Area School District, and after hearing held thereon, and following our review of the record, including an in-camera review of the documents submitted by the school district in this matter, and for the reasons set forth in our memorandum opinion bearing even date herewith, it is hereby

ORDERED and DECREED that the appeal of Weatherly Area School District is **GRANTED** and the Final Determination of the Pennsylvania Office of Open Records dated February 26, 2021 is **REVERSED**.

BY THE COURT:


Steven R. Serfass, J.