



FINAL DETERMINATION

IN THE MATTER OF

**SIMON CAMPBELL,
Requester**

v.

**PENNSBURY SCHOOL DISTRICT,
Respondent**

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**Docket No.: AP 2021-1390
(Consolidated)**

INTRODUCTION

Simon Campbell (“Requester”) submitted two requests (collectively, the “Requests”) to the Pennsbury School District (“District”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking deposition transcripts and communications. The District denied the Requests, and the Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied in part** and **dismissed as moot in part**, and the District is not required to take any further action.

FACTUAL BACKGROUND

On May 27, 2021, the first Request (“Request One”) was filed, seeking, in pertinent part:

Between the date range of May 20, 2021 and the present, any and all written communications exchanged between any and all Pennsbury school district officials/solicitor that references in its content, explicitly or implicitly, the “edited-out” speech of citizens Tim Daly, Robert Abrams, and Doug Marshall from the May 20, 2021 meeting and/or the perceived need or decision to edit the tape. When I use the term “Pennsbury school district officials/solicitor” I am referring to any and all of the school board directors, the Superintendent, the Supervisor of

Communication Strategies, any employee or contractor tasked with editing the tape, and any lawyer from Rudolph Clarke, LLC.

On July 6, 2021, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the District denied Request One, arguing that the responsive records are protected by the attorney-client privilege.

On June 10, 2021, the second Request (“Request Two”) was filed, seeking the following:

Item 1 – The Redner deposition transcript without redactions as reference by the Hon. Gerald Austin McHugh in the attached Court Order of March 15, 2021.

Item 2 - Between the dates of July 13, 2020 and the present, all written communications sent by Pennsbury’s litigation counsel to counsel for Brian Shaffer in the matter of Brian Shaffer v. Pennsbury School District, Civil Action No. 2:20-cv-03415, re: this lawsuit that occurred in the United States District Court for the Eastern District of Pennsylvania, and that relates to this lawsuit.

Item 3 - Between the dates of July 13, 2020 and the present, all written communications received by Pennsbury’s litigation counsel from counsel for Brian Shaffer in the matter of Brian Shaffer v. Pennsbury School District, Civil Action No. 2:20-cv-03415, re: this lawsuit that occurred in the United States District Court for the Eastern District of Pennsylvania, and that relates to this lawsuit.

Item 4 - Between the dates of February 17, 2020 and the present, all written communications sent by Pennsbury’s litigation counsel to counsel for Cheryl Morett in the matter of Cheryl Morett v. Pennsbury School District, Civil Action No. 2:20-cv-00872, re: this lawsuit that occurred in the United States District Court for the Eastern District of Pennsylvania, and that relates to this lawsuit.

Item 5 - Between the dates of February 17, 2020 and the present, all written communications received by Pennsbury’s litigation counsel from counsel for Cheryl Morett in the matter of Cheryl Morett v. Pennsbury School District, Civil Action No. 2:20-cv-00872, re: this lawsuit that occurred in the United States District Court for the Eastern District of Pennsylvania, and that relates to this lawsuit.

Item 6 - All transcripts for all depositions taken in the two aforementioned lawsuits; i.e. Brian Shaffer v. Pennsbury School District, Civil Action No. 2:20-cv-03415 and Cheryl Morett v. Pennsbury School District, Civil Action No. 2:20-cv-00872.

On July 16, 2021, following a thirty-day extension to respond, 65 P.S. § 67.902(b), the District denied Request Two, arguing records responsive to Items 1 and 6 are exempt from disclosure as

records related to District employees, 65 P.S. § 67.708(b)(7), as records related to a noncriminal investigation, 65 P.S. § 67.708(b)(17), records of discussions held in executive sessions, 65 P.S. § 67.708(b)(21), and records that are protected by the attorney-client privilege. The District denied Items 2, 3, 4 and 5, arguing that the responsive records are protected by the attorney-work product doctrine and records that relate to litigation, including efforts to negotiate a settlement of litigation.

On July 19, 2021, the Requester appealed to the OOR, challenging the denial of the Requests and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the District to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On August 6, 2021, the District submitted a position statement, reiterating its reasons for denial. The District also provided a copy of correspondence and attachments sent to the Requester on August 5, 2021, in which the District provided records responsive to Request Two. Accompanying the District's submission was the sworn affidavit of Chris Berdnik, Open Records Officer and Chief Financial Officer for the District. Also on August 6, 2021, the Requester submitted correspondence to the OOR, seeking additional time to submit argument in light of the District's submission, while also submitting a request for *in camera* review. The OOR granted the Requester's request for additional time, extending the record closing date until August 17, 2021; however, the Requester did submit additional evidence or argument on appeal.²

¹ The appeals were docketed at OOR Dkt. AP 2021-1390 and OOR Dkt. AP 2021-1391. Because the appeals involve the same parties and similar issues, on July 21, 2021, the Requester's Motion to Consolidate was granted and the appeals consolidated at OOR Dkt. AP 2021-1390. See 65 P.S. § 67.1102(b)(3) (stating that "the appeals office shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

² With his request for an extension of time to make a submission, the Requester granted to OOR additional time, until August 30, 2021 to issue its final determination. See 65 P.S. § 67.1101(b)(1).

LEGAL ANALYSIS

“The 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 L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law 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. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party sought a hearing but the Requester did request *in camera* review; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter. Therefore, the request for *in camera* review is hereby denied.

The District is a local agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.302. Records in the possession of a local agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). The burden of proof in claiming a privilege is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The District provided certain records on appeal

During the course of the appeal, the District provided the Requester with copies of certain communications responsive to Items 2, 3, 4 and 5 of Request Two. As such, the appeal as to the records provided is dismissed as moot. *See Kutztown Univ. of Pa. v. Bollinger*, 2019 Pa. Commw. Unpub. LEXIS 521, *6 (holding that an appeal is properly dismissed as moot where no controversy remains).

2. The District has proven that records responsive to Request One are protected by the attorney-client privilege

The District asserts that the communications responsive to Request One are protected by the attorney-client privilege. The RTKL defines “privilege” as “[t]he attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth.” 65 P.S. § 67.102. In order for the attorney-client

privilege to apply, an agency must demonstrate that: 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. *See Bousamra v. Excelsa Health*, 210 A.3d 967, 983 (Pa. 2019) (internal citations omitted). “[A]fter an agency establishes the privilege was properly invoked under the first three prongs, the party challenging invocation of the privilege must prove waiver under the fourth prong.” *Office of the Governor v. Davis*, 122 A.3d 1185, 1192 (Pa. Commw. Ct. 2014) (citing *Id.*). An agency may not rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to withhold records”). The attorney-client privilege protects only those disclosures necessary to obtain informed legal advice, where the disclosure might not have occurred absent the privilege, and where the client’s goal is to obtain legal advice. *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Commw. Ct. 2001).

In support of the District’s position, Mr. Berdnik attests as follows:

7. On July 6, 2021, the District provided a final response to Mr. Campbell’s May 27, 2021 request, indicating that Item 4 of the request was denied because the only records located in the District’s record search are protected by attorney-client privilege.

8. Upon receipt of Mr. Campbell’s May 27 request, the District conduct[ed] a record search for responsive emails.

9. The District located email correspondence between Board members, District employees and the solicitor’s office. All of these emails involved

consultation with the solicitor's office. None were exclusively between Board members and District employees.

10. The emails from Board members and District employees included concerns expressed to the solicitor, guidance sought from the solicitor, and questions posed to the solicitor. The solicitor's emails responded to these inquiries and offered legal advice.

11. The legal advice sought and provided was related to compliance with Board Policies, specifically Board Policy 903 governing public participation at meetings, and all applicable legal requirements under the Sunshine Act, First Amendment rights, and any other applicable law or regulation.

12. The law firm of Rudolph Clarke, LLC serves a solicitor to the District.

13. At all relevant times, the District was a client of Rudolph Clarke.

14. All attorneys participating in the above-described communications are licensed members of the Pennsylvania bar.

15. The communications related to facts and circumstances that were provided to Rudolph Clarke by the District, outside of the presence of strangers, with no non-District or non-Rudolph Clarke parties being involved on the responsive email chains.

16. The purpose of the communications was to secure a legal opinion regarding compliance with applicable policies and laws, and to obtain assistance in determining a course of action that would be compliant with those policies and laws.

17. The District's interest in securing legal advice was due to the fact that the matter being discussed may be governed by legal requirements and could have legal implications.

18. The District claims the privilege of these communications and has not waived it.

19. Based upon these circumstances, I determined that the responsive emails were exempt from disclosure pursuant to attorney-client privilege, as recognized under Section 102 of the RTKL.

...

66. The District did not locate or withhold any additional records that are responsive to Mr. Campbell's May 27 ... requests.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the District has acted in bad faith, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Here, the District has proven that the withheld records are communications between District employees and officials and the District’s solicitor, and that the communications sought and provided legal advice related to compliance with policies, including Board Policy 903 governing participation at meetings, legal requirements under the Sunshine Act, First Amendment rights and any other applicable laws and regulations. The District has also demonstrated that the communications sought and provided legal advice on determining a course of action to be compliant with policies and laws, and that no outside parties were part of the communications and the privilege has not been waived. As such, the District has demonstrated that the withheld communications responsive to Request One are protected by the attorney-client privilege.

The District also argues that deposition transcripts responsive to Request Two are protected by the attorney-client privilege. However, the District has not established how the requested deposition transcripts, particularly the transcript sought at Item 1 that Mr. Berdnik attests was ordered by a judge, to be turned over to a plaintiff in a civil litigation matter, is protected by the attorney-client privilege. In its position statement, the District asserts that unresolved objections may be part of the deposition transcripts, which implies that opposing counsel was present during the depositions, thus, making it difficult to establish privilege. Therefore, the District has not

demonstrated that deposition transcripts are protected by the attorney-client privilege; however, some of the records may be protected by the Rules of Professional Conduct, as discussed below.

3. Records of settlement negotiations are exempt from disclosure

The District argues that the remaining withheld records are confidential settlement negotiations under Rule 1.6(a) of the Pennsylvania Rules of Professional Conduct. First, the District argues that the transcripts requested at Items 1 and 6 are transcripts of depositions taken during the course of discovery and in connection with efforts to settle ongoing litigation. The District also argues that it is not in possession of the requested transcripts, as they are maintained by the District's special litigation counsel. Additionally, the District asserts that the withheld records responsive to Items 2, 3, 4, and 5 of Request Two are communications between the District's counsel and counsel for the plaintiffs and are directly related to efforts to settle the litigation. In support of the District's argument, Mr. Berdnik attests as follows:

21. All of the documents requested in Mr. Campbell's June 10 request are related to litigation to which the District is a party. The Morett case has been resolved by a settlement agreement, and the Shaffer case is still being litigated, including efforts to settle the matter between the parties.

22. In both cases, the depositions were taken during the course of discovery and in connection with efforts to settle ongoing litigation.

23. The depositions were held for the purpose of gathering information that would guide the parties' litigation strategy and decisions regarding settlement.

24. Based upon my experience as Chief Financial Officer of the District, and based upon the experience and professional opinions of other District administrators and elected officials, the District's position is that these records should be protected from disclosure because the public disclosure of any deposition transcript will directly impact the District's ability to settle a case or handle any litigation in the way that is most beneficial to the District community.

25. Even if a case has already been settled, the disclosure of a deposition transcript would impact future litigation because it would have a censoring impact on the types of questions and answers that occur during any deposition involving a public agency subject to the RTKL.

26. The District is not in possession of the responsive transcripts. The transcripts are maintained by the District's special litigation counsel, Sweet Stevens Katz and Williams, LLP ("SSKW").

27. Upon receipt of Mr. Campbell's June 10 request, I instructed Rudolph Clarke to coordinate with SSKW regarding the responsive records.

28. Both SSKW and Rudolph Clarke are subject to the PA Rules of Professional Conduct, which restrict the release of information pertaining to the representation of a client. See Pa. R.P.C. 1.6(a).

29. In addition, the discovery process is a noncriminal investigation conducted by the District's legal counsel, on behalf of the District, and therefore the deposition transcripts are exempt from disclosure under Section 708(b)(17) of the RTKL.

30. Upon learning of these civil lawsuits filed against the District, the District retained counsel to represent it. Part of the duties of counsel in this context is to gather information relative to the case. This is a systemic inquiry that is governed by the Rules of Civil Procedure.

31. The transcripts are investigative materials related to the District's efforts to litigate and/or settle a legal dispute.

32. The District has a duty to defend itself against these lawsuits.

33. The Public School Code establishes that the District is an entity that can sue and be sued. See 24 P.S. §2-211, 24 P.S. § 4-406, 24 P.S. § 2-214, 24 P.S. § 6-611, 24 P.S. § 17- 1714-A.

34. As the Chief Financial Officer of the District, a large part of my duties include overseeing the responsible stewardship of public funds. Inherent in this responsibility is the District's duty to protect and conserve taxpayer funds by vigorously defending or strategically settling any litigation matter filed against the District.

35. During the discovery phase of any lawsuit to which the District is a party, the District legal counsel is charged with investigating and discovering facts on the District's behalf.

...

38. The legal guidance provided to the District by its special counsel regarding how to proceed in its duty to defend against the lawsuit is, in part, based upon and guided by the content of depositions.

39. Based upon these circumstances, I determined that the District's duty to conduct a thorough and appropriate investigation into civil litigation matters would be severely compromised if these deposition transcripts were released to the public.

40. Mr. Campbell's request referred to the order of Judge McHugh issued on March 15, 2021, relating to the disclosure of Ms. Redner's deposition to the plaintiff in Shaffer v. Pennsbury School District, who had requested a copy of the deposition through the discovery process.

41. Ms. Redner's deposition was taken in connection with the discovery process in Morett v. Pennsbury School District.

42. Judge McHugh determined that disclosure of Ms. Redner's deposition to the plaintiff in Shaffer v. Pennsbury School District was appropriate in the course of discovery. Judge McHugh's ruling did not relate to or in any way govern the disclosure of the record to the public under the RTKL.

...

60. With regard to Items 2, 3, 4, and 5 of Mr. Campbell's June 10 request, a supplemental response has been provided.

61. Upon receiving notice of Mr. Campbell's appeal, the District consulted with its special counsel to determine if there was any correspondence exchanged between counsel that did not pertain to efforts to settle or otherwise resolve these lawsuits. Following further review, the District determined that communications pertaining exclusively to scheduling could be released in response to Mr. Campbell's request.

62. The remaining communications between counsel relate to efforts to settle a litigation matter.

63. The communications consist of discussions related to the language of a proposed settlement agreement and efforts to negotiate and agree upon same, notes pertaining to settlement discussions, exchange of discovery and production of documents, passwords for file access, information related to settlement demands and settlement offers, legal theories, legal arguments, and explanations of the legal positions of each party.

64. These records are correspondence regarding litigation or efforts to settle litigation.

65. The release of these records is restricted under Rule 1.6(a) of the Rules of Professional Conduct.

66. The District did not locate or withhold any additional records that are responsive to Mr. Campbell's ... June 10 [R]equests.

In *City of Pittsburgh v. Silver*, the Commonwealth Court held that “correspondence contained in the file of an assistant city solicitor between attorneys for the estate of Curtis Mitchell and city officials regarding efforts to negotiate a settlement of pending litigation” were not subject to public access under the RTKL because the release of such records would violate the ethics-based rule of confidentiality under the Rule 1.6(a) of the Pennsylvania Rules of Professional Conduct, although the Court noted that a fully-executed settlement agreement would be subject to public access. 50 A.3d at 301. In *Office of Open Records v. Center Township*, the Commonwealth Court clarified that:

In *Silver*, this Court declined to determine whether the OOR or the trial court erred in concluding that the settlement negotiations at issue were covered under the attorney-client privilege or the work-product doctrine. Presumably, we did so because the settlement negotiations involved discussion with third parties and did not reflect the solicitor’s legal impressions and, therefore, were not protected under either privilege... Instead, this Court focused on Pa.R.P.C. 1.6 and its embodiment of the rule of confidentiality established in professional ethics. Significantly, the ethics-based rule of confidentiality provides protection to a wider scope of client information than is afforded by the attorney-client privilege and work-product doctrine in that it ‘applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.’ Pa.R.P.C. 1.6. Although the RTKL specifically shields from disclosure information covered under the attorney-client privilege and the work-product doctrine, *see* 65 P.S. § 67.102 (defining ‘privilege’), both of which are referenced in Pa.R.P.C. 1.6, the RTKL does not have a counterpart provision embodying the ethics-based rule of confidentiality that is otherwise covered under Pa.R.P.C. 1.6. At its core, then, the issue in *Silver* concerned a clash between the RTKL, which permits disclosure of information protected by the ethics-based rule of confidentiality, and Pa.R.P.C. 1.6, which prohibits such disclosure. It is against this backdrop, and the fact that disclosure of the settlement negotiations violated the ethics-based rule of confidentiality, that this Court concluded, *sua sponte*, that our Supreme Court’s authority under Article V, Section 10(c) trumped the RTKL’s requirement that the documents should be disclosed and that the OOR lacked subject matter jurisdiction to order disclosure.

When its holding is understood in context, *Silver* stands for the limited proposition that the RTKL cannot mandate and the OOR cannot order the disclosure of settlement documents when that disclosure would contravene the ethics-based rule of confidentiality in Pa.R.P.C. 1.6.

95 A.3d 354, 360-61 (Pa. Commw. Ct. 2014).

Accordingly, based on the evidence provided, the District has established that the withheld settlement negotiations are not subject to access as set forth in *Silver*. Additionally, the District has demonstrated that the requested deposition transcripts are in possession of the District's special litigation counsel and are directly related to the special counsel's representation of the District in litigation matters. Therefore, as the transcripts and communications are related to litigation matters and settlement negotiations, pursuant to Pa.R.P.C. 1.6(a), the OOR cannot require the District's special litigation counsel to provide the withheld records.

CONCLUSION

For the foregoing reasons, the appeal is **denied in part** and **dismissed as moot in part**, and the District is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Bucks County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.³ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: August 30, 2021

/s/ Kathleen A. Higgins

KATHLEEN A. HIGGINS
DEPUTY CHIEF COUNSEL

³ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

Sent to: Simon Campbell (via email only);
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