IN THE

Commonwealth Court of Pennsylvania

CD 504 C.D. 2017

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioner,

– v. –

SUNRISE ENERGY, LLC,

Respondent.

APPEAL FROM THE MARCH 27, 2017 FINAL DETERMINATION OF THE PENNSYLVANIA OFFICE OF OPEN RECORDS, DOCKET NO. 2017-0079

AMICI CURIAE BRIEF OF THE COUNTY COMMISSIONERS' ASSOCIATION OF PENNSYLVANIA, THE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, THE PENNSYLVANIA STATE ASSOCIATION OF BOROUGHS, THE PENNSYLVANIA MUNICIPAL LEAGUE, THE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP COMMISSIONERS AND THE PENNSYLVANIA SCHOOL BOARDS ASSOCIATION

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I. STATEMENT OF INTEREST OF AMICI CURIAE

The County Commissioners Association of Pennsylvania ("CCAP") is an organization which came into being in 1886 as a largely volunteer group. Beginning in the late 1880's, CCAP and its predecessor, the Pennsylvania State Association of County Commissioners, received recognition from the Pennsylvania General Assembly in various statutes permitting it to be designated as a "State Association", to hold annual meetings, and to cooperate with other similar state associations. In 1955, under the County Code, CCAP was officially recognized as a state association empowered to discuss and resolve questions arising in the discharge of the duties and functions of the respective officers of the Counties, and to provide uniform, efficient, and economical means of administering the affairs of Pennsylvania' s Counties. 16 P.S. §441(a).

CCAP's mission and vision encompasses providing "a strong, unified voice for the Commonwealth' s 67 counties," and advocating and providing "leadership on those issues that will enhance and strengthen the ability of county commissioners to better serve their citizens and govern more effectively and efficiently." CCAP Corporate Mission Statement, available at http://www.pacounties.org/AboutUs/Pages/default.aspx (last accessed October 27, 2016).

CCAP acts through its staff members, Board of Directors, and Committees, the latter two being comprised of representatives of CCAP member Counties, who serve to direct the advocacy and efforts on behalf of those members. Important to this case, CCAP regularly provides consultative support to County Solicitors through CCAP Staff and the undersigned counsel, who serves as the CCAP Solicitor. CCAP provides regular continuing legal educational opportunities and support for Solicitors, permits Solicitors to consult with the CCAP Solicitor for advice on real and hypothetical situations, and administers an email listserv for Solicitors which allows for an exchange of ideas on issues of common interest to their practice on behalf of the County.

The Pennsylvania State Association of Township Supervisors ("PSATS") is a non-profit association that has been providing training, educational and other member services to officials from over 1,400 townships of the second class in the Commonwealth of Pennsylvania for almost 100 years. PSATS also advocates for its members before the legislative, executive and judicial branches at the state and federal levels on matters of importance to the administration of townships and the performance of township officials' duties. One of its affiliate professional associations is the Pennsylvania State Association of Township Solicitors; through that association PSATS provides consulting services and educational opportunities to approximately 300 hundred municipal solicitors.

The Pennsylvania State Association of Boroughs ("PSAB") is a state-wide, non-partisan, non-profit organization representing Pennsylvania's boroughs since 1911. PSAB represents the interests of boroughs, helping to shape the laws applicable to boroughs, and generally providing legislative advocacy, research, education and other services. In particular, its primary objectives are to provide legislative/regulatory representation, promoting constructive and cooperative relationships between governments, to deliver training and technical assistance to borough officials, and to provide cost-effective programs and services.

The Pennsylvania Municipal League ("PML") is a non-profit, non-partisan organization, providing 117 years of service to local governments throughout the Commonwealth of Pennsylvania. PML represents cities, boroughs, townships, towns and home-rule municipalities by acting as an agent for cooperation and communication between local governments and the Commonwealth, and voicing common concerns before the legislative, executive, and judicial branches of both the state and federal governments. PML serves 93 direct members representing over 3.6 million Pennsylvania citizens. PML's member services and programs, including conferences and publications, impact more than 1,000 local governments in PA.

The Pennsylvania State Association of Township Commissioners ("PSATC") in a non-profit, municipal organization comprised of townships of the

first class throughout Pennsylvania. For over 90 years, PSATC has worked to advance the interests of first class townships by promoting uniform, economical and efficient methods of local government administration. PSATC addresses questions and subjects pertaining to the duties of the elected and appointed township officials. The organization currently has 65 member townships.

Pennsylvania School Boards Association ("PSBA") is a voluntary non-profit association whose membership includes nearly all of the 500 local school districts and 29 intermediate units of this Commonwealth, numerous area vocational technical schools and community colleges, and the members of the boards of directors of those public school entities. The mission of the PSBA, organized in 1895 and the first such association in the nation, is to promote excellence in school board governance through leadership, service and advocacy for public education. The efforts of PSBA in assisting local school entities and representing the interests of effective and efficient governance of our public schools also benefit taxpayers and the general public interest in the education of our youth.

In that capacity, PSBA endeavors to assist courts and other decision-makers in selected cases presenting important legal issues of statewide or national significance, by offering the benefit of the Association's statewide and national perspective, experience and analysis relative to the legal policy, management, liability, fiscal, ethical and other considerations, ramifications and consequences

that should inform any resolution of the particular disputed issues in such cases. For decades, PSBA's informed insight, thorough research and careful legal analysis have made the Association a respected and valued participant in all types of legal proceedings involving public schools.

Amici's interest in this case is the full preservation of the attorney-client privilege and work product doctrine applicable to the representation by private and in-house attorneys on behalf of government entities. No individual or entity other than amici, its member or counsel have paid in whole or in part for the preparation of this brief, or authored any portion thereof.

II. SUMMARY OF ARGUMENT

A government attorney's work runs the gamut of professional legal activities, ranging from attendance a public meetings, to consultation on day to day legal issues specific to a municipal entity (such as the Sunshine Law) or applicable to all entities (like contract breaches), to drafting and negotiation of contracts or collective bargaining agreements, to handling litigation brought by or against a municipal entity. While the solicitor's duties may be vast, the Office of Open Records' Final Determination here at issue has the practical impact of rendering only a small portion of this work protected from disclosure to third parties.

In particular, the OOR has essentially held that only materials prepared in anticipation of litigation are protected from a Right to Know Request. Drafts of contracts, legal research memoranda, collective bargaining strategies, and the like, all become public records available to the public and the negotiation opponents alike where they exist. To protect these mental impressions, the solicitor will be discouraged from putting pen to paper, impeding the representation. While the government should be transparent, transparency should not be at the expense of the government's ability to advocate for and protect its legal interests. Only through protection of both litigation and non-litigation work product can this occur.

Furthermore, once the protection of non-litigation material is recognized, if waiver of that protection can occur at all, it should only occur in situations where

the government entity clearly intended to waive. A finding that waiver can occur through any dissemination outside of the agency unless there is a complete commonality of interests and in every non-litigation setting essentially destroys the protection altogether. It would eliminate the ability of the attorney to consult with other municipal solicitors or associations, consultations which result in efficiencies for the government and the public. Further, it would prevent cooperation between municipalities, or municipalities and private entities and individuals, because in practice no person or entity can ever have complete commonality of interests with a government entity. Frankly, its status as taxing entity alone makes a government body adverse to any individual or entity it taxes, and could, under the OOR's analysis, prevent commonality in nearly every circumstance.

These real-world impacts of the OOR's Final Determination illuminate why it must be overturned; to hold otherwise renders the Right to Know Law's language that materials "protected by a privilege" are not "public records" useless.

III. ARGUMENT

A. By failing to recognize the exclusion of work product from the definition of public records, limiting the application of the work product doctrine solely to materials in anticipation of litigation, and holding the doctrine could be waived, the Office of Open Records had not only misapplied the law, but also placed in jeopardy of disclosure the vast majority of the municipal solicitors' strategies, mental impressions, and work on behalf of municipal entities, all to the detriment of efficient and effective government operations.

Under the Right to Know Law, a "public record" is a record of a government agency 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. Records in the possession of a government agency are presumed to be public unless they fall within one of these three categories of records that are not within the definition of a "public record". Bagwell v. Pa. Dep't of Educ., 114 A.3d 1113, 1122 (Pa. Cmwlth. 2015); Bagwell v. Pa. Dep't of Educ., 103 A.3d 409, 414 (Pa. Cmwlth. 2014); and 65 P.S. §67.305 (emphasis added).

Of particular import in the underlying case is the question of privilege, defined by the RTKL to include:

> The attorney **work-product** doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court incorporating the laws of this Commonwealth.

65 P.S. §67.102 (emphasis added). In the context of the work product doctrine, "the mental impressions, theories, notes, strategies, research and the like created by an attorney in the course of his or her professional duties" are protected from disclosure. Bagwell, 114 A.3d at 1124. This is particularly true in the context of litigation or in anticipation of litigation, but the doctrine's application is not limited to the context of adversarial proceedings. Heavens v. Pa. Dep't of Envtl. Prot., 65 A.3d 1069, 1077 (Pa. Cmwlth. 2013); Bagwell, 103 A.3d at 417.

In the underlying matter, the Office of Open Records' Final Determination was focused, in part, on the application and potential waiver of the work product doctrine to the documents requested by the Respondent.

1. The work product doctrine should apply regardless of whether the materials were related to litigation or not, and any holding to the contrary by the OOR was in error.

On the question of application of the work product doctrine, the argument was first raised by the Respondent in its submission to the OOR that the work product doctrine protects those materials "prepared in anticipation of litigation;" nothing in the Respondent's submissions contemplates non-litigation materials as subject to the protection of the doctrine. R.R. p. 000009a. To the contrary, the Respondent's argument goes on at length to explain why, because the Petitioner was not "a party" to the litigation (but merely an amicus), the documents in issue

cannot be protected as work product. R.R. p. 000010a. Clearly, the Respondent took the position that, outside of the litigation context, work product did not apply.

Against this backdrop, the OOR made a particular point on multiple occasions about the work product doctrine's application in the context of litigation. O.O.R. Final Determination, pg. 7. Specifically, it notes that the doctrine had "a particular concern with matters arising in anticipation of litigation" and "it protects…any material…prepared in anticipation of litigation." Id. While that may be because the context of the documents in issue were litigation-related, it is important to the *amici* that the OOR's determination not operate to serve as a limitation of application in all circumstances. Indeed, both this Court in Bagwell v. Pennsylvania Office of Attorney General, 116 A.3d 145, 148 (2015) and more recently the Superior Court in Clemens v. NCAA, 2017 Pa. Super. LEXIS 570, *23-25 (Pa. Super. July 25, 2017) have specifically held that the work product doctrine is not limited to materials prepared in anticipation of litigation.

Even if this case law wasn't directly on point on this issue, to take the Respondent and OOR's apparent limitation of the doctrine at face value would have profound implications for the government attorney. Specifically, Pennsylvania statutes clearly contemplate that the municipal Solicitor's work in particular encompasses more than merely litigation. For instance, Pennsylvania's County Code clearly recognizes the fact that Counties require attorneys not just for

the prosecution of litigation, but for the broader legal advice necessary for them to conduct their day to day business. Section §902 of the County Code describes the duties of the Solicitor to include commencing and prosecuting "all suits brought, or to be brought, by the county", as well as defending "all actions or suits brought against the county," as well as doing "all and every professional act" and rendering "legal advice incident to the office which may be required of him by the commissioners". 16 P.S. §902.

The Borough Code is even more specific, defining the duties of the Borough Solicitor to include preparing or approving "bonds, obligations, leases, conveyances, ordinances or assurances to which the borough…is a party", commencing and prosecuting actions on behalf of the Borough and defending actions or suits brought against the Borough, and furnishing "an opinion in writing upon any question of law which may be submitted" by officers and employees of the Borough. 8 Pa.C.S. §1117(a). Similar language is repeated in the First Class Township Code, 53 P.S. §56204, the Second Class Township Code, 53 P.S. §66103, and in the Third Class City Code, 11 Pa.C.S. §11603.

Were this Court to affirm the OOR's final determination, it would significantly harm the interests of municipalities by leaving the vast majority of municipal solicitors' work unprotected from disclosure, especially given that a significant portion of their work is consultative in nature. Materials related to the

negotiation and drafting of contracts, bonds, ordinances, leases, and day to day legal advice would fall outside of the protection of work product. Solicitors would be disinclined to create documents to assist in the representation or to memorialize conversations or thought processes about the representation, out of fear of disclosure under the Right to Know Law. Where documents had to be created, such as in the context of labor negotiations, a municipality might be compelled to share its solicitor's written strategies and recommended proposals for upcoming collective bargaining negotiations with the very people it would be negotiating with, thereby placing it at a distinct disadvantage. All of this would, as a practical matter, inhibit the attorney's representation of the government client, all to the detriment of the client.

Moreover, in the context of the work done by the *amici curiae* on behalf of their members, the limited definition of work product would also affect their individual abilities to provide valuable services for the municipality's benefit. Many of these associations provide training and consultative services to appointed municipal solicitors, to include consultation services between the association Solicitor/counsel and the Solicitor on legal matters of interest to Solicitors. This might include conversations, written or verbal, about the application of law to facts, mental impressions and theories of law.

Similarly, the training opportunities and association email listservs provided by municipal associations give solicitors the opportunity to consult with their fellow solicitors about legal concerns shared by municipalities. The availability of these consultative opportunities are important to the efficient and effective operation of government by eliminating the need for municipal entities to research legal matters independently. Opportunities for collaboration like those presented by the various state municipal associations operate to the benefit of municipalities because they reduce the individual time, effort and expense necessitated by municipalities operating wholly as silos.

These services are only valuable, however, to the extent that government attorneys can argue that they would be subject to the work product doctrine; to follow the OOR's finding that only litigation-related materials are protected by the doctrine would eliminate the availability and benefit of these opportunities. This Court should not endorse such a position.

2. When the work product doctrine applies, a document is not subject to disclosure under the Right to Know Law because it does not fall within the definition of a "public record," and theories of waiver are not applicable.

Whether limited to litigation or not, the OOR in the underlying case found, based on the affidavits from the Respondent, that the emails contained the legal and factual analysis of the attorneys, and therefore, constituted work product thereof. O.O.R. Final Determination, pgs. 8-9. Despite finding the documents to

fall within the ambit of attorney work product, the OOR ultimately found that the privilege had been waived by disclosure to a third party and/or because they were communications from non-Commission attorneys. Id. at 9, 13.

However, it does not appear from past precedent of this and other Pennsylvania appellate courts that the work-product doctrine is waivable based on disclosure to third parties. For instance, this Court in Rittenhouse v. Bd. of Supervisors held that "disclosure of a document, which is by definition not a public record, does not convert the document into a public record." 41 A.3d 975 (2012), citing Legrande v. Dep't of Corr., 920 A.2d 943 (Pa. Cmwlth. 2007). If the document does not meet the definition of a "public record" in the first instance, then, due to application of a privilege, "waiver principles cannot be applied to transform them into records subject to" the Right to Know Law. Id., citing Legrande at 949.

Importantly, Legrande, cited in Rittenhouse, itself cited to LaValle v. Office of General Counsel, 564 Pa. 482, 499-500, 769 A.2d 449, 460 (Pa. 2001), in which the Supreme Court found that waiver could not apply to documents that did not fall within the definition of "public records" like those constituting work product. Specifically, in LaValle, the Supreme Court found that a report prepared by an accounting consultant to the Department of Transportation in connection with litigation was protected as work product. Having found it to constitute work

product, the Supreme Court rejected the idea that waiver principles could be applied to transform a document from work product to a non-privileged "public record", even though the document had been disclosed, either in whole or in part, to certain Senators. Id.

Similarly, in Rittenhouse, the requestor argued that the Township waived the privilege otherwise attached to a document prepared by an expert in the context of litigation because it was produced to counsel for the Planning Commission and the Township manager. Based on the language cited in Legrande and LaValle, the Court rejected the requestor's argument.

While the cases upon which Rittenhouse rely were decided under the prior version of the Right to Know Law, the definitions of "public record" did not change to the extent that "privileged" documents are excluded therefrom. As such, both the prior case law and the analysis in Rittenhouse remain good law. Inasmuch as the OOR's decision ignored this prior case law, its Final Determination is in error.

3. Even if the work product privilege could be waived in the context of a Right to Know Law request, the Office of Open Records misapplied Pennsylvania precedent regarding how waiver should be evaluated.

Admittedly, this Court in Bagwell took a different approach to the question of waiver than present in Rittenhouse, Legrande and LaValle. In Bagwell, this Court analyzed whether the disclosure of the work product documents to third

party organizations and government entities, including as part of cooperation with law enforcement and the creation of a report specifically intended to be released to the public on the same subject as the work product documents. 103 A.3d at 413. The Court ultimately came to the conclusion that the selective and limited waiver of records to certain identified individuals did not waive the privilege, stating "where the disclosure was very limited, the work-product privilege remained intact and was not waived for other purposes." Id. at 419. The Court noted that, in assessing waiver, the context and content of disclosure are material. Id. at 420.

In making its determination in the underlying case, the Office of Open Records largely disregarded not only Legrande, LaValle and Rittenhouse, but also Bagwell. While the OOR referenced this Court's decision in Bagwell, it gave no specific consideration to the "context and content" of the disclosures between the PUC and First Energy as in that case. For instance, the fact that the disclosures might have been between representatives of only two entities may have been a sufficiently limited disclosure such that waiver did not apply even if it were available.

The OOR's failure to consider the context and content of the disclosures in accordance with Bagwell presents the same problem to the municipal Solicitors represented by the municipal association *amici* as does the OOR's apparent limitation of the doctrine to litigation materials. In the contexts of consultations

and communications between municipal Solicitors and municipal association representatives, any disclosure of a municipal Solicitor's mental impressions or legal theories to the association would be "selective and limited". The disclosures would be on matters of mutual interest and in the context of mutual representation of various municipal bodies. As such, it is the *amici's* position that they would not be considered "waivers" of the work product doctrine under Bagwell; the OOR's failure to apply Bagwell's analysis, however, places the status of these discussions in jeopardy.

4. Rather than examine context and content of the disclosures to evaluate waiver under Bagwell, the OOR instead relied on the common interest doctrine to show waiver, but in the course of doing so inappropriately limited the scope of the doctrine contrary to Pennsylvania case law.

The OOR's failure to specifically apply the "context and content" of the underlying disclosures was likely a result of its focus instead on the "common interest doctrine". Raised below by the Petitioner in specific response to the OOR's request for additional briefing on waiver, the common interest doctrine was asserted as one of the ways in which communications to third parties would not waive the attorney-client or work product privileges. R.R. 000107a-000108a. However, by focusing solely on the application of the common interest doctrine, the OOR fails to recognize other bases – such as selective disclosure above – and

other contexts, could justify disclosure even to third parties and still protect the privilege.

The focus on the common interest doctrine is particularly problematic here, inasmuch as the Pennsylvania case law on the issue has been extremely limited, and indeed has not directly arisen in the context of a Right to Know case. And, where it has been applied, it has been applied solely in the context of attorney-client communications and not work product. As such, the Petitioner's reference was likely not for the proposition that the doctrine was applicable and had to be applied rigidly, but rather as exemplary of the ways in which Courts could evaluate whether waiver had occurred. The OOR's rigid application of the doctrine was therefore erroneous, and serves again to jeopardize the particular legal practices of the government attorney.

First, like the proposed limitation on work product, the OOR's evaluation of the common interest doctrine focuses solely on the existence of litigation and the nature of the Petitioner's legal interest in litigation to that of the third party. However, case law examining the application of the common interest doctrine has not limited its use solely to the litigation context. See Young v. Presbyterian Homes, Inc., 50 Pa. D. & C.4th 190, 197 (C.C.P. Lehigh 2001). Indeed, the Young Court noted that the Uniform Rules of Evidence, while not specifically adopted by Pennsylvania, protect as confidential any "communication made for the purpose of

facilitating the rendition of professional legal services to the client," even where made "by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein." Uniform Rules of Evidence (U.L.A.) Rule 502(b). The common interest doctrine is highly desirable because it allows for greater efficiency and avoidance of duplication of efforts by allowing entities to pool resources on matters of common interest. Young at 198.

The Third Circuit, in a seminal common interest doctrine case, more specifically made the point regarding litigation versus transactional application stating: "the community-of-interest privilege allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others. It applies in civil and criminal litigation, and even in purely transactional contexts." Teleglobe Communs. Corp. v. BCE, Inc. (493 F.3d 345 (3rd Cir. 2007), citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §76 and PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES §4.35 (2nd Ed. 1999). Because of the nature of the municipal solicitor's practice, a litigation limitation on the common interest doctrine would again leave much unprotected to the detriment of efficient and effective government.

Secondly, the manner in which the doctrine was applied in this context operated to require complete commonality on all matters between the parties exchanging information, whereas the case law on the doctrine looks to the question of commonality on the subject matter presented. See Teleglobe at 365, 366, citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §76 cmt. e. Indeed, nothing in the specific language of the case cited by the OOR, In re Condemnation of 16.2626 Acre Area, 981 A.2d 391 (Pa. Cmwlth. 2009) requires identical interests. To the contrary, the Court states:

> [I]t is not necessary or appropriate to address issues concerning the extent of the parties' common interest or the evidence required to prove the same until we first determine whether the record establishes, at a minimum, that the City and the RDA in fact share any "common legal interest" with regard to these proceedings.

Id. at 398. The Court did not therefore hold that interests had to be identical, but instead that the nature of and the parties' respective interests for the particular "proceedings" in issue would be essential to the analysis.

In the context of a municipality, like the Petitioner, there are times when its interests on one issue may be aligned with a person or entity while at the same time adverse to that same entity on another issue because of the multitude of different services, obligations and interests held by the municipality. For instance, in a County, an entity might have pending an appeal of its corporate office's property tax assessment, to which the County would be adverse. However, that same entity

may also have a common interest with the County in the County's acquisition of a property from a third party to be developed for the County by the entity. The entity and County's attorney/representatives in the development project might discuss acquisition strategy and drafts of the sale document in the context of their mutual needs regarding the efficient completion of the project. Would it truly be proper for the pending adverse property assessment to render the common legal interests in the development project unprotected against inquiry from the third party selling the land? The OOR's rigid application of the common legal interest doctrine could lead to such a result, thereby impeding the County's bargaining position in the sale. Given the broad array of legal issues and entanglements of government entities, this Court should be very wary of the practical impact of the OOR's common interest analysis.

Alternatively, Pennsylvania law permits municipalities to enter into intergovernmental cooperation agreements. 53 Pa.C.S. §2301, *et seq*. In these scenarios, municipalities have a general mutual interest in a particular issue and, while not necessarily wholly aligned and while outside of the litigation context, the solicitors for the two municipalities are often called upon to work together through relevant issues benefiting both municipalities. Particularly where these matters involve other third parties, such as in the context of transportation matters through multiple municipalities or jointly held assets, a rigid application of the common

interest doctrine could prevent and/or impede these mutually beneficial efforts by exposing the Solicitors' efforts and discussion are exposed to public disclosure.

Because the OOR's decision below fails to appropriately apply the Right to Know Law as to the exclusion of attorney work product from the definition of public record, the scope of the doctrine's application to non-litigation materials, and the availability of waiver to the doctrine, it should be overturned.

B. The Office of Open Records erred in finding that records of a government attorney can only be protected under Rule 1.6(a) of the Pennsylvania Rules of Professional Conduct if they are related to litigation and contained only in the file of a government attorney where "representation" by an attorney is not limited to litigation.

Petitioner has argued that the emails in issue were not subject to public access because their release would violate the ethics-based rule of confidentiality under Rule 1.6(a) of the Pennsylvania Rules of Professional Conduct. The OOR rejected this argument, stating that because "the withheld correspondence relates to the filing of an amicus brief(,) the correspondence does not relate to the Commission's participation as a party in litigation, and there is no evidence that the withheld e-mails are contained only in the litigation file of a Commission attorney," Rule 1.6(a) is inapplicable. O.O.R. Final Determination, pg. 14. In taking the position that Rule 1.6(a) applies only to litigation and materials in an attorney's litigation file, the OOR misinterprets the Rule's language and intention.

Specifically, under the Rule, a lawyer is precluded from revealing information "relating to the representation of a client unless the client gives informed consent." Nothing in the Rule limits the disclosure preclusion solely to information related to litigation or materials in a litigation file. To the contrary, it references any information "relating to the representation of a client," which is reinforced in the comments. For instance, Comment 1 repeats the reference to the "representation of a client", both in the context of prospective, current and former client relationships. Comment 2 again uses the term "representation", noting that the prohibition against disclosure "contributes to the trust that is the hallmark of the client-lawyer relationship", which encourages the client to seek "legal assistance" and communicate "fully and frankly with the lawyer." The lawyer "needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct." Pa. R.P.C. 1.6, Comment 2. Furthermore, this "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, Comment 3.

Based on the broad use of the term "representation" above, it's clear that the rule is intended to cover a wide expanse of information exchanged with and

obtained by the lawyer as part of an attorney-client relationship. Indeed, although "representation" is not specifically defined in the Rule, the Preamble notes that lawyers perform various functions as a "representative" of the client, by providing them with an informed understanding of the client's legal rights and obligations, as well as their practical implications. 204 Pa. Code §81.1(2). The lawyer may be an advocate for the client, zealously asserting the client's position under the rules of the adversary system. Id. The lawyer may be a negotiator, seeking advantageous results for the client. Id. Or, the lawyer may act as an evaluator, examining the client's "legal affairs and reporting about them to the client or others." Id.

Furthermore, case law clearly provides that the knowledge of a licensed lawyer is generally applied in three principal domains of professional activity:

1. He instructs and advises clients in regard to the law, so that they may properly pursue their affairs and be informed as to their rights and obligations.
2. He prepares for clients documents requiring familiarity with legal principles beyond the ken of the ordinary layman, -- for example, wills and such contracts as are not of a routine nature.
3. He appears for clients before public tribunals to whom is committed the function of determining rights of life, liberty and property according to the law of the land, in order that he may assist the deciding official in the proper interpretation and enforcement of the law. Since, in order to determine such rights, it is necessary first to establish the pertinent facts, which are frequently uncertain, controverted, and best ascertainable, as experience has demonstrated, by the application of rules of evidence tested by centuries of usage, a lawyer, being technically fitted for the purpose, examines and cross-examines witnesses, and presents arguments to jurymen to guide them to a proper determination of the facts. As ancillary to participation in trials and in legal argumentation, he prepares pleadings and other documents incidental to the proceedings.

Shortz v. Farrell, 193 A. 20, 21 (Pa. 1937). While Pennsylvania courts have otherwise been reluctant to establish a precise definition of the "practice of law", they have noted that the "core element of practicing law is the giving of advice to a client and placing oneself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney." Office of Disciplinary Counsel v. Marcone, 855 A.2d 654, 660 (Pa. 2004), citing In the Matter of Perrello, 386 N.E.2d 174, 175 (Ind. 1979).

Finally, as discussed at length above, Pennsylvania statutes clearly contemplate that the municipal Solicitor's work in particular encompasses more than merely litigation. These statutes contemplate both litigation-related work and very important consultative legal work necessary to the efficient and legally-compliant operation of local government.

Based on all of the above, it's clear that the "practice of law", and by extension the "representation of clients" under Rule 1.6(a); extends beyond merely representing a client in a litigation matter. Limiting the application of Rule 1.6(a)'s confidentiality provisions merely to instances where a government attorney is representing a municipal client in litigation, and only to documents maintained solely in a litigation file, ignores this history and has the practical impact of rendering a significant portion of the Solicitor's work unprotected. Any materials

related to the negotiation and drafting of contracts, bonds, ordinances, leases, and day to day legal advice would be vulnerable to disclosure.

Because the application of the Right to Know Law is solely to government entities, such a finding by the Office of Open Records has the practical impact of placing the government entity at a distinct disadvantage in protecting its legal position as compared to a private entity. While public openness is a laudable goal, it should not come at the legal expense (whether political, financial, or otherwise) of the government entity, whose legal strategy and position would thus become public information accessible. In order to prevent this practical result, and in order to give full effect to the Rules of Professional Conduct, the various municipal codes governing the Solicitor's duties, and Pennsylvania case law, the Office of Open Records' Final Determination that Rule 1.6(a) is inapplicable because it is limited to litigation only should be rejected.

IV. CONCLUSION

For the forgoing reasons, the Final Determination of the Office of Open Records should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 2135, I certify the following:

This brief complies with the type-volume limitation of Rule 2135; this brief contains 5,866 words excluding the parts of the brief exempted by this rule.

By /s/ Crystal H. Clark
Crystal H. Clark

AFFIDAVIT OF SERVICE

DOCKET NO 503 CD 2017

----------X

Pennsylvania Public Utility Commission

v.

Sunrise Energy, LLC

----------X

I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on August 24, 2017

I served the ***AMICI CURIAE*** **BRIEF OF THE COUNTY COMMISSIONERS' ASSOCIATION OF PENNSYLVANIA, THE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS, THE PENNSYLVANIA STATE ASSOCIATION OF BOROUGHS, THE PENNSYLVANIA MUNICIPAL LEAGUE, THE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP COMMISSIONERS AND THE PENNSYLVANIA SCHOOL BOARDS ASSOCIATION** within in the above captioned matter upon:

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Sworn to before me on August 24, 2017

/s/ Robyn Cocho
Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2022

/s/ Elissa Diaz
Elissa Diaz

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