

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

ROBERT P. DAGES,	:	
	:	
Plaintiff	:	
	:	
v.	:	No. 11-0333
	:	
THE COUNTY OF CARBON,	:	
	:	
Defendant	:	

Robert P. Dages	Pro Se
Robert L. Knupp, Esquire	Counsel for Defendant
PA Office of Open Records	Unrepresented

MEMORANDUM OPINION

Serfass, J. - July 1, 2011

Here before the Court is Plaintiff's "Notice of Appeal/Petition for Judicial Review" of the denial of his request for records from Defendant, the County of Carbon (hereinafter "County"), pursuant to the Pennsylvania Right to Know Law, 65 P.S. §§ 67.101 - 67.3104, (hereinafter "RTKL"). For the reasons that follow, Plaintiff's appeal to this Court is denied and the denial of his request for records by the Pennsylvania Office of Open Records is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

On September 23, 2010, Plaintiff directed a letter to William J. O'Gurek, Chairman of the Carbon County Commissioners,

requesting that he identify the "case law" relied upon to support the County's involvement in the "Packerton Business Park Project." (Plaintiff's Exhibit B). Via letter dated September 24, 2010, Commissioner O'Gurek replied to the Plaintiff denying his request for identification of "case law" on the basis of attorney-client privilege, attorney work product, and attorney's work in progress. (County's Exhibit C). On November 18, 2010, Plaintiff submitted a "Standard Right-to-Know Request Form" to the County, (Plaintiff's Exhibit D) in which he requested that he be provided with "the suggested 'case law' alluded to in the Commissioner's meetings which justify the County Commissioners to be in competition with private business as 'developers' on the Packerton Yards project". (Id.)

On November 23, 2010, the County's Right-to-Know Officer, Marianne Butrie, responded to Plaintiff in a letter denying his request for information. (Plaintiff's Exhibit E). In this determination letter, Mrs. Butrie stated that Plaintiff's request was denied because the information requested is not a public record, since it is protected by the attorney-client privilege, the attorney work product privilege and involved an attorney's work in progress. (Id.). Mrs. Butrie further stated that Plaintiff's request was denied pursuant to Section 708(b)(10)(i)(A) of the RTKL (pre-decisional deliberation

exception), and Sections 708(b)(17)(ii) and 708(b)(17)(iv) of the RTKL (non-criminal investigation exception).

On December 10, 2010, Plaintiff appealed from the County's Right-to-Know determination to the Executive Director of the Commonwealth of Pennsylvania's Office of Open Records (hereinafter "OOR"). In Plaintiff's written appeal, he states that he and other citizens expressed concerns at a June 2010 Commissioners' meeting regarding the County using public funds to purchase and develop private property, in particular the "Packerton Business Park Project," in competition with private businesses. (Plaintiff's Exhibit F). Plaintiff alleges that Commissioner O'Gurek responded that "it is constitutional and there is 'case law' to support [the County's] position." (Id.). At the July 1, 2010 Commissioners' meeting, Plaintiff states that the Commissioners were asked about the case law they are relying upon. (Id.). Plaintiff alleges that Commissioner O'Gurek responded that he did not have to answer that question due to attorney-client privilege. (Id.).

On January 14, 2011, Audrey Buglione, Esquire, Appeals Officer for the Office of Open Records, issued a Final Determination denying Plaintiff's appeal. (Plaintiff's Exhibit A). The OOR determined that the information sought by Plaintiff was protected by the attorney-client privilege, citing affidavits provided by Commissioner O'Gurek and the County's

solicitor, Michael L. Ozalas, Esquire. (Id.). On February 14, 2011, Plaintiff filed with the Court a "Notice of Appeal/Petition for Judicial Review" (hereinafter "Appeal") of the OOR's Final Determination. (Plaintiff's Exhibit C). In his Notice/Petition, Plaintiff requests that the Court order the County to provide an answer to the following question:

"What is the alleged specific constitutional provisions/authority in the Constitution of the Commonwealth of Pennsylvania and the alleged 'case law' upon which the Carbon County Commissioners rely for Carbon County and its Commissioners to purchase and develop any private property (specifically here the Packerton Business Park Project) and to use public funds for these purposes in direct competition with private business owners and/or Developers?"

(Id.). Plaintiff also alleges that the answer to the aforementioned question is not protected by the attorney-client privilege. (Id.).

On February 25, 2011, the Prothonotary of Carbon County received a letter from Dena Lefkowitz, Chief Counsel for the OOR, stating that the OOR will rest upon its Final Determination, and will not be submitting a brief to the Court or appearing for oral argument in this matter¹. On April 26, 2011, the County submitted a brief in response to the Appeal. In its brief, the County argues that the requested information is protected by the attorney-client and work product privileges,

¹ Pursuant to §1303(a) of the RTKL, 65 P.S. §67.1303(a), the OOR has the discretion to determine whether it will respond in actions to review its final determinations.

the "attorney work in progress" doctrine, and the pre-decisional deliberations exception under the RTKL.

On May 16, 2011, oral argument was held before the undersigned on Plaintiff's Appeal. At oral argument, Plaintiff argued that the information at issue is not within the scope of the attorney-client privilege. He also argued that the Pennsylvania Constitution provides him and all citizens with a right to petition the government for a redress of grievances, and that this right mandates that the County disclose which constitutional provisions and case law they are relying on to support their involvement in the Packerton Yards Project. Plaintiff further argued that failure to disclose the requested information would violate the spirit of the RTKL.

The County argued that the attorney-client privilege is a recognized exception to disclosure under the RTKL, and that the affidavits submitted by Commissioner O'Gurek and Solicitor Ozalas make clear that Plaintiff's request involves research performed by the County Solicitor at the direction of the Commissioners. Thus, the County asserted that they have met their burden to show that the requested information is protected by the attorney-client privilege.

DISCUSSION

The Right To Know Law, 65 P.S. §67.101-67.3104, was enacted on February 14, 2008 and became effective on January 1, 2009.

"The [RTKL] is remedial legislation 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). Pursuant to 65 P.S. §67.102 and §67.302, the County is a local agency which is subject to the RTKL and, as such, must provide access to public records in accordance therewith.

"[A] reviewing court, in its appellate jurisdiction, independently reviews the OOR's orders and may substitute its own findings of fact for that of the agency." Id. at 818. "[A] court reviewing an appeal from an OOR hearing officer is entitled to the broadest scope of review;" such review is independent in nature and not limited to the rationale set forth in the OOR's written determination. Id. at 820. The record reviewed on appeal consists of "the request for public records, the agency's response, the appeal, the hearing transcript, if any, and the final written determination of the appeals officer." Id. The RTKL allows the reviewing court, in conducting its review, to supplement the record through hearing or remand. Id. The reviewing court may also "review other material, including party stipulations, and also may conduct an *in camera* review of the documents at issue." Dept. of Corrections v.

Office of Open Records, 18 A.3d 429, 432 n. 6 (Pa. Cmwlth. 2011).

The definition of the term "record" is provided in the RTKL. Section 102 of the RTKL defines a "record" as:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

65 P.S. § 67.102. The RTKL further defines a "public record" as:

A record, including financial record, of a Commonwealth or local 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. Under the RTKL, information in the possession of a Commonwealth or local agency is presumed to be a public record, accessible and available to the public, unless one of these exemptions applies. 65 P.S. § 67.305(a). The purpose of the RTKL further requires that the exemptions be construed narrowly. See Bowling, 990 A.2d at 824. The burden of proof is on the public entity to demonstrate by a preponderance of the evidence that a record is exempt from public access. 65 P.S. § 67.708(a).

The RTKL excludes from the category of a public record, information which is protected by a privilege. 65 P.S. § 67.305(a)(2). For these purposes, privilege is defined within the RTKL as:

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 interpreting the laws of this Commonwealth.

The Attorney-Client Privilege

Under the RTKL, the attorney-client privilege is considered an exemption which precludes the disclosure of public records or information. 65 P.S. § 67.102. The purpose of the attorney-client privilege "is to protect confidential communications between the lawyer and his client, and to foster the free exchange of relevant information between them." Gillard v. AIG Ins. Co., 15 A.3d 44, 56 n. 13 (Pa. 2011)(citations omitted). "Professional assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." Id. at 47 n. 1. In Pennsylvania, the attorney-client privilege protects both confidential communications from the client to his or her attorney, and from the attorney to his or her client. Id. at 59.

In order for the attorney-client privilege to apply, it must be demonstrated 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. Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1264 (Pa. Super. 2007).

In this case, on December 22, 2010, the County submitted two (2) sworn affidavits to the OOR supporting its position that the requested information is protected by the attorney-client privilege. In relevant part, the sworn affidavit from Commissioner O'Gurek provides that:

1. "[O]n or about June/July 2010 in his capacity as chairman of the Carbon County Board of Commissioners, he requested that the County Solicitor provide legal research with regard to the Packerton Yards Project which is an economic development project in Carbon County."
2. "That the County Solicitor supplied him, as chairman of the Carbon County Board of Commissioners, with legal research performed by the County Solicitor, and the legal research constitutes opinions and confidential communications to the Client."
3. "That the aforementioned research was provided pursuant to an attorney-client relationship between the County Solicitor and the chairman of the Carbon County Board of Commissioners, and the legal research was requested by [Plaintiff] under Right-to-Know, and the request was denied."

4. That the holder of the privilege is the Carbon County Board of Commissioners and the Chairman of the Carbon County Board of Commissioners."
5. "That the communication from the County Solicitor to the Chairman of the Carbon County Board of Commissioners was made confidentially for the purpose of securing or providing legal advice."
6. "That the privilege is not waived."

(Plaintiff's Exhibit A, County's Exhibit E). In relevant part, the sworn affidavit from County Solicitor Ozalas provides that:

1. "[H]e is a practicing attorney in the Commonwealth of Pennsylvania and he was appointed Carbon County Solicitor by the Carbon County Commissioners, the Client."
2. "[H]e was requested by the Board of Commissioners Chairman, William O'Gurek (the Client), to provide legal research to Chairman O'Gurek with regard to the Packerton Yards Project..."
3. "That on or about June/July 2010 he supplied Chairman O'Gurek, as the Client, with legal research that he performed pursuant to the request."
4. "That the legal research provided (which was requested by [Plaintiff]) was made in the course of providing legal services to a client, and the legal research was for the purpose of providing legal analysis, opinion and advice of counsel regarding the issue involved."
5. "That the communication was made confidentially for the purpose of securing or providing legal advice."
6. "The legal research that he performed is protected by attorney work product privilege."

(Plaintiff's Exhibit A, County's Exhibit E).

Based upon the foregoing affidavits, we agree with the OOR

that the information requested by Plaintiff is protected by the attorney-client privilege. The affidavits reflect that the County Commissioners, as the client of the County Solicitor, requested that the County Solicitor provide legal advice and assistance in the form of legal research regarding the Packerton Yards Project. They also reflect that the County Solicitor conducted this research and provided the results to Commissioner O'Gurek in a confidential manner. The affidavits assert that the County is invoking the attorney-client privilege regarding this legal research, and has not waived said privilege. Thus, the record demonstrates that the elements of the Fleming test have been met. Accordingly, the legal research conducted by the County Solicitor is protected by the attorney-client privilege, and, as such, is not subject to disclosure under the RTKL².

The Work Product Privilege

The work product privilege protects from disclosure "the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pa. R.C.P. 4003.3. While closely related to the attorney-client privilege, the work product privilege "is broader because it protects any material,

² We also note that records which include "information made confidential by law" are exempt from disclosure under the RTKL. 65 P.S. § 67.708(b)(17)(iv). As the attorney-client privilege is codified in Pennsylvania law at 42 Pa. C.S.A. § 5928, Section 708 of the RTKL also precludes disclosure of the information sought by Plaintiff.

regardless of whether it is confidential, prepared by the attorney in anticipation of litigation." Nat'l R.R. Passenger Corp. v. Fowler, 788 A.2d 1053, 1065 (Pa. Cmwlth. 2001). This privilege, first enunciated by the United States Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947), is premised on the reasoning that this type of privacy was "the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests." Id. at 511. The work product privilege has been adopted by all of the states, including Pennsylvania, at Pennsylvania Rule of Civil Procedure No. 4003.3. See Fowler, 788 A.2d at 1066.

Under the RTKL, information protected by a privilege is not considered a public record. 65 P.S. § 67.102; 65 P.S. § 67.305(a). Additionally, records which include "information made confidential by law" are exempt from disclosure under the RTKL. 65 P.S. § 67.708(b)(17)(iv).

In this case, the information requested by Plaintiff consists of the legal research conducted by the County Solicitor regarding the Packerton Yards Project. Such research clearly constitutes the County Solicitor's privileged work product. Therefore, as this research is protected by the work product

privilege, it is not subject to disclosure under the RTKL³.

CONCLUSION

For the foregoing reasons, we conclude that the records requested by Plaintiff are exempt from disclosure under the RTKL pursuant to the attorney-client privilege and work product privilege. Accordingly, Plaintiff's appeal to this Court is denied, and the denial of his request for records by the OOR is affirmed.

BY THE COURT:

Steven R. Serfass, J.

³ We note that, under the former version of the RTKL, records reflecting attorney work product were not considered public records. LaVelle v. Office of General Counsel, 769 A.2d 449, 495 (Pa. 2001).

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

ROBERT P. DAGES,	:	
	:	
Plaintiff	:	
	:	
v.	:	No. 11-0333
	:	
THE COUNTY OF CARBON,	:	
	:	
Defendant	:	

Robert P. Dages	Pro Se
Robert L. Knupp, Esquire	Counsel for Defendant
PA Office of Open Records	Unrepresented

ORDER OF COURT

AND NOW, to wit, this 1st day of July, 2011, upon consideration of Plaintiff's "Notice of Appeal/Petition for Judicial Review", oral argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby **ORDERED and DECREED** that Plaintiff's appeal is **DENIED**, and the denial of his request for records by the Pennsylvania Office of Open Records is **AFFIRMED**.

BY THE COURT:

Steven R. Serfass, J.