

Regulatory, Compliance and Government Practice

MAY 2021

Pennsylvania Supreme Court Holds That Documents Exchanged by Consultants With Local and State Agencies Do Not Fall Within the Deliberative Process Privilege

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The Pennsylvania Supreme Court's April 29, 2021, decision in a Right-to-Know Law (the "RTKL") case has broad ramifications in matters where a state or local governmental agency has contracted with a private consultant and seeks to protect records the parties have exchanged while the agency deliberates. *Chester Water Authority v. Pennsylvania Department of Community and Economic Development*, Nos. 44 & 45 EAP 2019, ___ Pa. ___, ___ A.3d ___, 2021 WL 1740596. The majority opinion was authored by Justice Saylor,^[1] joined by Justices Todd, Donohue and Mundy. Justice Dougherty concurred, and Justice Wecht and Chief Justice Baer dissented.

The City of Chester is in Act 47 financial recovery, and the Department of Community and Economic Development (DCED) had engaged consultants^[2] to assist it in performing the agency's Act 47 duties. During the furnishing of services, the consultants exchanged records with or provided records to DCED. 2021 WL 1740596 *1. The Chester Water Authority, concerned with the potential for privatization, had sought these records under the RTKL from DCED. The agency declined to produce certain records, asserting the "deliberative process privilege." Both the Office of Open Records and on appeal the Commonwealth Court had sustained the objections. *Id.* *3. The Pennsylvania Supreme Court reversed.

At issue was the Right-to-Know Law, Act of Feb. 14, 2008, P.L. 6, No. 3 (as amended 65 P.S. §§67.101-67.3104) (the "RTKL"), and specifically the exemption from disclosure for records reflecting "internal, predecisional deliberations," as set forth in 65 P.S. §67.708(b)(10)(i)(A), and as frequently referred to as the "deliberative process privilege." This provision provides an exemption for a record that reflects:

(A) [t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. §67.708(b)(10)(i)(A)(emphasis added).

The private consultants apparently had prepared reports, memos and similar materials for DCED, which the Supreme Court categorized as "records exchanged between a Commonwealth agency and private consultants." 2021 WL 1740596 *1. Justice Saylor, writing for the majority, observed that the contractor and its subcontractors as private consultants are "plainly not" DCED's employees or officials. *Id.* *5.

The Supreme Court held that the statutory deliberative-process exception does not extend to records exchanged between a Commonwealth agency and private consultants, concluding that the deliberative process privilege applies only to records that reflect communications between and among an agency's members, employees and officials, and that therefore can be characterized as "internal" in a narrow and strict sense. *Id.* *6.^[3]

There are several caveats to the Court's decision. Documents of the consultants never provided to the agency were not an issue. Such records could be produceable to the extent the consultants were performing a governmental function under 506(d) of the RTKL, 65 P.S. §67.506(d)(1) or if required by contract.^[4] Neither were the records in question created and retained by the agency based on information imparted by the consultants orally. Consultants may now choose not to provide documentation or limit the

documentation imparted during the deliberative process period. Note also that the Court rejected DCED's attempt to categorize the consultants as "agents," although it is not clear that an agency relationship would have prompted the Court to rule differently, given that agents are not "employees or officials." Although attorney-client privilege was asserted at one point, the Court concluded that the purportedly privileged documents had in fact been produced and held that this aspect of the case was moot.^[5] Finally, note that a document otherwise exempt under the deliberative process privilege could become public and subject to RTKL production if "brought to the attention of, or referenced" during an open meeting under the Sunshine Act. See 65 Pa. C.S. §708 (document presented is public).^[6] See generally the Sunshine Act, 65 Pa. C.S. §§701-714.

The general belief prior to the *Chester Water* decision was that the documents exchanged with consultants were sufficiently internal and of necessity encompassed within the agency's deliberative process privilege. See *Farmworker Legal Aid Clinic v. Berks County*, OOR Docket AP2016-0973, cited in J. Chadwick Schnee, *The Right-to-Know Law – A Practice Guide*, at 153 & n.99 (2d Ed. 2020). That belief is no longer viable.

There is little doubt that this decision will have a significant impact on the work of state and local government. Governmental agencies may opt to embrace the *Chester Water* decision and operate in an "open book" manner, or may choose to employ one or more of the methods available that may protect disclosure of materials exchanged while deliberations are underway. Private parties providing governmental services in current contracts with state and local agencies need to contemplate what documentation has been provided with the expectation of confidentiality, and to discuss with their local and state clients how to address confidentiality issues during deliberative processes. Other private parties, including communications media, citizens, and competitors, seeking documents and information during deliberations have a new tool with which to examine the on-going workings of state and local governmental agencies.

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1. Justice Saylor relinquished his post as Chief Justice effective April 1, 2021, but remains a Justice on the Pennsylvania Supreme Court and is expected to retire at the end of the calendar year.
 2. The consultant-contractor engaged two subconsultants, a financial advisor and a legal advisor.
 3. There is extensive discussion in the Court's *Chester Water* opinions about the federal Freedom of Information Act; we view this discussion as interesting but not critical to the case's holding or reasoning.
 4. Note the potential argument, particularly in the context of state contracts, that a contractual term of a contractor's agreement with the Commonwealth actually extends the contractor's RTKL responsibilities.
 5. Had counsel retained the consultant and subconsultants, it may have been possible to protect some of the records as attorney work product or attorney-client communications. This approach is no panacea, of course. The attorney-client and work product privileges are technical, narrow and fact-specific.
 6. See also *Mollick v. Worcester Twp.*, OOR Dkt. AP 2018-1070 (document referenced although not physically present).

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