

Not All Information Contained in an Agency Employee's File is a Public Record.

Right to Know Law Blog April 9, 2019

Requesters, instead of seeking specific records, occasionally ask for a collection of documents contained in an agency's file. This is typical in zoning and code enforcement cases where the agency opens a file for a specific property. For example in *Fiddler v. Warren City*, AP 2018-2093 (April 5, 2019), the Requester sought the City Planner's file used at a Zoning Hearing Board hearing for a specific property. While most records contained in such files are public, this OOR determination serves as an important reminder that agencies should review their files prior to turning them over to a requester.

In *Fiddler*, the ORR agreed with the City that certain records contained in the City Planner's file should be withheld under "personal notes" exemption set forth in Section 708(b)(12) of the RTKL, which protects:

Notes and working papers prepared by or for a public official or agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.

65 P.S. § 67.708(b)(12).

This exemption covers documents "necessary for that official that are 'personal' to that official in carrying out his public responsibilities." "Personal" does not mean that a record has to involve a public official's personal affairs; rather, the term covers those documents necessary for that official to carry out his personal public responsibilities. In other words, the records must be for the employee's own personal use and not distributed outside of his or her office. For example, in *Orner v. E. Nottingham Twp.*, AP 2014-0617, the OOR found that personal notes that were used by a supervisor as a reference in making comments at a meeting were exempt from disclosure. However, in *Katz v. Lower Merion Sch. Dist.*, AP 2015-0222, the OOR stated that records shared between agency officials cannot be for an official's personal use.

In *Fiddler*, the OOR agreed that the agency properly withheld correspondence that the City Planner highlighted and/or bracketed, even though the underlying records were public, because the printed, highlighted and bracketed correspondence was contained in the employee's file and were for his own use. Similarly, the OOR held that the employee's handwritten notes of dates, questions, and tasks to be completed were exempt.

The OOR also found that certain correspondence was exempt under Section 708(b)(17) of the RTKL, which exempts from disclosure records of an agency "relating to a noncriminal investigation, including: complaints submitted to an agency and investigative materials, notes, correspondence and reports. 65 P.S. §§ 67.708(b)(17)(i)-(ii).

In order for this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. Further, the inquiry, examination, or probe must be "conducted as part of an agency's official duties" and, to limit the scope of this exception, noncriminal investigations must be conducted pursuant to any agency's legislatively granted fact-finding and investigative powers.

It was undisputed that there had been complaints, investigations and hearings regarding a zoning issue on the subject property. Moreover, the OOR has recognized that zoning officers have the legislatively granted fact-finding authority to conduct noncriminal investigations of alleged zoning violations. Accordingly, documents contained in the file that reflected complaints, investigative steps and discussions, evidence and related hearings were properly withheld.

Finally, the OOR agreed that most of the communications contained in the file between the City Solicitor and City employees either seeking or providing legal advice were properly withheld pursuant to the attorney-client privilege and/or the attorney-work product doctrine. For example, an email circulated among employees containing questions for the Solicitor was properly withheld. However, an email containing only ancillary scheduling material that was devoid of any confidential communications was not exempt and should have been provided.

The *Fiddler* determination is a good reminder to Open Records Officers that some information contained in agency or employee files is exempt from disclosure under the RTKL. When requests are made for a file, Open Records Officers should work with their solicitor to make sure only public information is provided.

If you have any questions or comments, please do not hesitate to contact Chris Voltz or any of the other Municipal and School Attorneys at Tucker Arensberg, P.C.