

Pennsylvania Supreme Court Holds that Communications between Agencies and their Consultants are not Exempt under the Internal, Predecisional Deliberation Exception

Articles, Right to Know Law Blog October 21, 2021

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Section 708(b)(10)(i)(A) of the Law, which excepts from the general requirement for disclosure of public records:

A record that reflects:

(A) The *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

65 P.S. § 67.708(b)(10)(i).

In *Chester Water Auth. v. Pennsylvania Dept. of Community and Econ. Dev.*, 249 A.3d 1106, 1108 (Pa. 2021), reargument denied (June 17, 2021), the Requester, Chester Water Authority, sought documents reflecting communications among the Department of Community and Economic Development (“DCED”) and its consultant and the consultant’s subcontractors related to the potential sale of the water authority.

The Office of Open Records concluded that records that the DCED had exchanged with the consultants were internal to the agency, for purposes of the Section 708(b)(10)(i)(A) exception, due to the contractual relationships among the parties. The Commonwealth Court affirmed, stating:

[A]s it pertains particularly to the internal, predecisional deliberation exception, [the statutory deliberative process] exception “benefits the public and not the officials who assert the privilege” by recognizing “that if governmental agencies were forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.”

Finnerty v. DCED, 208 A.3d 178, 187 (Pa. Cmwlth. 2019).

The Pennsylvania Supreme Court, however, found that the text of Section 708(b)(10)(i)(A) prohibits disclosure of “*internal*, predecisional deliberations of an agency, its members, employees or officials,” as well as deliberations between such individuals and another agency and that the consultants were not agencies under the RTKL. Accordingly, the court concluded that private consultants providing services as independent contractors do not qualify as agencies, members, employees, or officials who may engage in protected internal communications and Section 708(b)(10)(i)(A) does not serve to insulate communications exchanged between a Commonwealth agency and a private consultant from a RTKL request.

The Court recognized and considered the aim to promote the free exchange of deliberative communications against the RTKL’s overarching policy of openness, but concluded that the Legislature already conducted the necessary balancing and knowingly chose to exclude consultants and contractors from the protections of Section 708(b)(10)(i)(A).

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