



**IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA**

**CIVIL ACTION - LAW**

COUNTY OF CENTRE, )  
Petitioners, )  
 )  
v. )  
 )  
SIMON CAMPBELL, )  
Respondent. )

No. 2017-1863

2017 SEP 13 PM 3:52

*Attorney for Petitioner:*  
*Attorney for Respondent:*

*Elizabeth A. Dupuis, Esquire*  
*Pro Se*

**OPINION AND ORDER**

**Kistler, J.**

Presently before the Court is Centre County’s Petition for Review of the Final Determination issued by the Office of Open Records (“OOR”) on April 17, 2017. The OOR granted in part Simon Campbell’s (“Requester”) February 3, 2017 Right to Know Law (“RTKL”) request for documents. Centre County granted the request in part on February 9, 2017. Requester appealed to the OOR on February 15, 2017, to which Centre County submitted a response on March 10, 2017 and a supplemental response on March 17, 2017. In its Final Determination, the OOR overturned Centre County’s decision in part. A hearing was held on the Petition for Review of the Final Determination on August 29, 2017. Upon review, the Court affirms the decision of the OOR.

**FINDINGS OF FACT**

Requester is an adult resident of Bucks County. In January of 2017, the Centre County Commissioners announced that they had decided to recuse themselves from the election board and appoint Keith Bierly, Suzette Sims, and Joseph Davidson to serve on the election board in their place. Requester sought three categories of records in his February 3, 2017 RTKL request:

O  RD  S

- (1) A copy of the Court Order and associated court opinion appointing Keith Bierly, Suzette Sims, and Joseph Davidson to be members of the county election board (as announced at the Commissioner's meeting of 1-31-17).
- (2) A copy of the formal pleadings submitted to Judge Kistler or the Court by the County or any Commissioner regarding the Commissioners decision to "recuse" themselves from serving on the election board.
- (3) A copy of any/all written communications from 1-1-17 and 2-2-17 between any combination of the following people: any County Commissioner, Betsy Dupuis, Judge Kistler, Keith Bierly, Suzette Sims, and Joseph Davidson that relate to the subject of which three (3) people would serve as (purported) replacement election board members.

The County granted this request in part by providing all documents responsive to the first and second categories of records. As to category three, the County provided responsive documents, but redacted an email between Attorney Dupuis and the County Commissioners. Along with the redacted email, the County sent the affidavits of Natalie Corman, the County's Open Records Officer, and Attorney Dupuis, the County Solicitor, attesting that the redacted portions of the email were subject to attorney-client privilege and also concerned predecisional deliberations.

Upon appeal, the OOR held that portions of the redacted email were not subject to the attorney-client privilege and ordered those portions disclosed. An *in camera* review of the unredacted email had led the OOR to conclude that several portions of the email contained only facts and did not contain opinions, advice, or deliberations. The OOR ordered the disclosure of: the first sentence, beginning with "After" and ending with "interest"; the third sentence, starting with "as you know" through the end of the first paragraph; the first phrase of the second paragraph, i.e., the material preceding the initial comma in the paragraph; and the last sentence of the third paragraph, beginning with "Both" and ending with "involved".

## DISCUSSION

The Pennsylvania RTKL governs access to public records. *Bowling v. Office of Open Records*, 75 A.3d 453, 455 (Pa. 2013). As the first level of appellate review, this Court reviews the matter *de novo*. *Com. Pennsylvania Gaming Control Bd. v. Office of Open Records*, 48 A.3d 503, 507 (Pa. Commw. Ct. 2012) *appeal granted*, 74 A.3d 1027 (Pa. 2013); *In re Right to Know Law Request Served on Venango Cnty.'s Tourism Promotion Agency. Lead Econ. Dev. Agency*, 83 A.3d 1101, 1105 (Pa. Commw. Ct. 2014); 65 P.S. §67.1301(a). As such, a reviewing court may substitute its own findings of fact for that of the agency. *Gaming Control Bd.*, 48 A.3d at 507.

Centre County argues the information the OOR ordered disclosed from the redacted email is both subject to attorney-client privilege and exempt from disclosure as a predecisional deliberation. The basis for the attorney-client privilege claim is that Attorney Dupuis, as the County Solicitor, was providing legal advice for her clients, the County Commissioners. The claim of predecisional deliberation is based on the fact that the email was sent prior to the Commissioners' decision to recuse.

### **A. Attorney-Client Privilege**

Under the RTKL, "privilege" includes both the attorney-work product doctrine and the attorney-client privilege. 65 P.S. § 67.102. To establish a statement or writing is subject to the attorney-client privilege, a party must show (1) that the individual asserting the privilege is a client or sought to become a client, (2) that the communication was made to an attorney, (3) that the communication was made outside the presence of strangers and relates to a fact communicated to the attorney by a client for the purpose of securing legal advice, and (4) that the

privilege has not been waived. *See Commonwealth v. Mrozek*, 657 A.2d 997 (Pa. Super. Ct. 1995). The attorney-client privilege does not protect against the disclosure of facts. *Upjohn Co. v. U.S.*, 449 U.S. 383, 396 (1981).

Centre County failed to prove the portions of the email identified by the OOR as purely factual were communications for the purpose of securing legal advice. Although the County has certified that the email was sent by an attorney to her clients to communicate legal advice, this does not establish that the underlying facts contained in the email were communicated to the attorney in confidence. Having reviewed the unredacted email in full, the Court finds that the portions the OOR ordered to be disclosed are purely factual in nature. The County argued at the hearing on August 29, 2017 that the final sentence of the email contains legal advice. The Court agrees that the final sentence contains legal advice, but notes that the OOR only ordered the final sentence disclosed up to the word “involved.” The final clause is the only portion of this sentence that contains privileged information and that clause was not ordered disclosed.

#### **B. Predecisional Deliberations**

The RTKL exempts records reflecting predecisional deliberations of an agency from disclosure pursuant to RTKL requests. For the exemption to apply, the agency must satisfy a three prong test to prove the communication was part of the deliberative process. *Carey v. Pennsylvania Dept. of Corrections*, 61 A.3d 367, 379 (Pa. Commw. Ct. 2013). The agency must show:

- (1) The information is internal to the agency
- (2) The information is deliberative in character; and
- (3) The information is prior to a related decision, and thus “predecisional”.

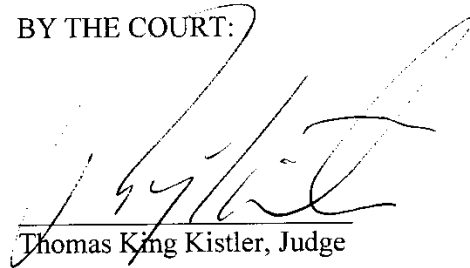
*Id.*

The County has failed to meet the first and second prongs of the test outlined in *Carey*. No information has been presented to show that the facts contained in the email are internal to the agency. Additionally, the County failed to show how the facts alleged in the email are deliberative. Although some portions of the email are deliberative, the Court finds the portions ordered to be disclosed by the OOR are not deliberative, but are merely statements of fact.

**ORDER**

AND NOW, this 13<sup>th</sup> day of September, 2017, the Final Determination of the Office of Open Records is hereby AFFIRMED. Petitioner shall provide all responsive records in its possession within thirty (30) days.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'TK Kistler', is written over a horizontal line. The signature is stylized and cursive.

Thomas King Kistler, Judge

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CIVIL ACTION-LAW

COUNTY OF CENTRE,  
PLAINTIFF

v


NO. 2017-1863

SIMON CAMPBELL,  
DEFENDANT

NOTICE

Pursuant to Rule 236 of the Pennsylvania Rules of Civil Procedure, you are hereby notified that on 13<sup>th</sup> September, 2017, the following Order has been entered upon the above docket.

Mail Date of Notice: 09/15/17

By:   
Prothonotary