



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**CARL PRINE
and *THE PITTSBURGH TRIBUNE-
REVIEW*,
Complainants**

Docket No.: AP 2009-1009

v.

**GREEN TREE BOROUGH,
Respondent**

INTRODUCTION

Mr. Carl Prine, a reporter, on behalf of the Pittsburgh Tribune-Review (collectively the “Requester”) filed a right-to-know request with the Green Tree Borough (the “Borough”) pursuant to the Right-to-Know Law, 65 P.S. § 67.101, *et. seq.* (the “RTKL”). He sought records related to the hiring of the legal firm of Eckert Seamans to investigate a reported “leak” of Police Department information in 2009 and copies of records “involving the Aug. 27, 2009 Civil Service Commission hearing of Police Officer Charles Kern.” The Borough provided copies of redacted invoices and denied the request for records regarding the Commission hearing. The Requester filed a timely appeal with the Office of Open Records (the “OOR”).

For the reasons set forth in this Final Determination, the Requester's appeal is **granted in part, denied in part and dismissed as moot in part and denied in part.**

The Borough is directed to take further action as set forth below.

FACTUAL BACKGROUND

On October 23, 2009 the requester filed right-to-know requests seeking copies of the following: records "involving the Aug. 27, 2009 Civil Service Commission hearing of Police Officer Charles Kern." ("Request 1). The Requester advised that the documents responsive to the Request would include the Commission transcript, police incident report, email communication between the Police Chief and the officer that allegedly triggered the Commission hearing, employee performance reviews, doctor's notes, materials related to a woman at the scene of the death of retired judge Ralph Cappy "and other data typically procured under subpoena duces tecum." The Requester asserted that the records "have long been considered public documents under the [former] Pennsylvania Right to Know law, 65 P.S. §§ 66 and are generally available 10 days after the close of the hearing record and can be reviewed at the office of the Commission or purchased from the court reporting service."

The Requester also submitted a request for "any and all documents, electronic or paper, involving payments, directives or other material related to the hiring of the legal firm of Eckert Seamans to investigate a reported "leak" of Police Department information in 2009." ("Request 2").

Request 1: Commission Hearing records.

The Borough denied Request 1 citing 67.708(b)(7)(ii), (vi), (vii), and (viii) as well as 708(b)(8)(ii) and 708(c) and provided the following information:

- 1) The hearing arose from a disciplinary action report filed against the officer by the Chief of Police and the resulting discipline imposed upon the officer;
- 2) The officer exercised his contractual option to demand a hearing before the Borough's Commission;
- 3) The Commission received documentary and testimonial evidence into the record;
- 4) The Commission rendered a decision on November 18, 2009 and the officer has sixty (60) days to appeal, thus the decision is not yet final. Further, the officer filed a Motion for Reconsideration;
- 5) The adjudication is not yet "final, binding and nonappealable" and thus the transcript and related documents are exempt under section 707(c) of the RTKL; and
- 6) "There is no independent right for a non party to obtain a copy of a grievance transcript prior to the grievance procedure becoming final."
- 7) The RTKL¹ exempts the "limited class of transcripts that deal with the arbitration of a dispute or grievance under a collective bargaining agreement, which is the precise subject matter of the request . . ."
- 8) The RTKL does not distinguish between grievance procedures arbitrated privately versus those that are grieved publicly.
- 9) Even if the Commission, the Police Chief and the officer did consent to public release of the record (which the Borough denies) that does not make otherwise exempt records public.
- 10) The Borough contends that it does not maintain its own stenographer or court reporter, but rather contracts with an independent court reporter service.
- 11) At the time the Request was submitted there had not yet been a decision rendered by the Commission and the Borough is not aware that the RTKL "imposes a continuing duty to respond with documents that may come into existence during the Right to Know Appeal process."

The Requester provided a copy of the Decision and Order of the Civil Service Commission. ("Order"). The Order states that the parties had thirty (30) days from the date the hearing transcript became available within which to file Proposed Findings of Fact and Conclusions of Law. The Commission received these from both parties on October 5, 2009. *See Order*, p. 1. The Order further states as follows:

Pursuant to the Borough's Collective Bargaining Agreement, [the Officer] had the option to appeal the disciplinary determination either under the Civil Service Rules and Regulations or under the Grievance Procedure of the Collective Bargaining Agreement. [The Officer] elected to proceed

¹ The Borough cites to 65 P.S. § 708(7)(ii) but quotes the language of 65 P.S. § 708(b)(8)(ii). Therefore, the OOR determined that the citation was incorrect and that the Borough intended to cite § 708(b)(8)(ii).

under the Civil Service Rules and Regulations by filing an appeal to the Civil Service Commission. See Order, p.2, ¶ 4.

The Requester states that the request on October 23, 2009 was for the transcript of an August 27, 2009 “public hearing², convened before a publicly appointed board, advertized [sic] in the local media and attended by members of the public.” The Requester argues that the “transcript is neither part of a private arbitrated dispute nor does it involve social security benefits, Workers’ Compensation funds or any other recording that could be considered exempt from disclosure.” He asserts that 707(c) expressly makes the transcript public and that he is prepared to “pay any applicable fee of the stenographer or court reporter, according to the [Borough’s] procedure for the contracted rate.”

On December 30, 2009, upon the request of the OOR the Borough provided a copy of the “Grievance Procedure” found in the relevant Collective Bargaining Agreement (“CBA”) as well as the Civil Service Commission Rules and Regulations.

No evidence was presented regarding the request for “other data typically procured under subpoena duces tecum” as to what the Requester contends would be included.

Request 2: Material related to the hiring of the law firm.

The Borough provided legal invoices with investigative and legal advice redacted in response to Request 2. The Requester argues that records responsive to this request would include the contract binding the law firm to its duties and Borough minutes regarding the hiring of the firm. He also asked that the OOR inspect the redacted

² The Order indicates that the Officer had the choice of a public or private hearing and chose to have his appeal heard publicly. See *Order*, p. 2, ¶ 5.

invoices, *in camera*, “to determine if a reasonable person would believe such [redacted] notations could help anyone chart the progress of an investigation . . .” On December 30, 2009 the Borough granted access to the Retention Agreement between the Borough and the law firm as well as the requested minutes of the Borough Council Meeting.

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The Borough is a local agency subject to the RTKL. *See* 65 P.S. § 67.302.

Section 102 of the RTKL, defines the term “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.”

The RTKL provides further clarity in defining a “public record” as:

“A record, including a 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.

The RTKL states that agencies bear the burden of proving the applicability of any exceptions. Specifically, § 708 in pertinent part states:

(a) Burden of proof. —

(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.

65. P.S. § 67.708.

Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (8th ed. West 2004). *See also Commonwealth v. Williams*, 615 A.2d 716 (PA. 1992).

1. **The Requested Commission Hearing Transcript is a Public Record.**

The Order states that the parties had thirty (30) days from the date the hearing transcript became available within which to file Proposed Findings of Fact and Conclusions of Law. The Commission received these from both parties on October 5, 2009. *See Order*, p. 1. Therefore, at the time of the request on October 23, 2009, the requested transcript did exist. Thus, the Borough's argument that it does not have a continuing duty to produce records that are not in existence is without merit.

Transcripts of administrative hearings are generally available under the RTKL as set forth in Section 707(c). However, a transcript may not be subject to disclosure if exempt under another provision of the RTKL. In this case, the Borough argues that the Commission hearing was the arbitration of a dispute or grievance under a collective bargaining agreement thus exempt under section 708(b)(8).

Section 708(b)(8)(ii) excludes from public disclosure the following:

"In the case of the arbitration of a dispute or grievance under a collective bargaining agreement, an exhibit entered into evidence at an arbitration proceeding, a transcript of the arbitration or the opinion."

65 P.S. §67.708(b)(8)(ii). The exclusion does not apply to "the final award or order of the arbitrator in a dispute or grievance procedure." *Id.*

The Grievance Procedure in the CBA provides that a "police officer disciplined or discharged by the Borough may elect to contest his discipline or discharge through the grievance and arbitration procedure contained herein or through Civil Service procedures.

Once a police officer elects one forum, he may not change to the other.” The Civil Service Rules and Regulations provide that “No police officer subject to these Civil Service Rules and Regulations (hereinafter “Regulations”) shall be suspended, removed or reduced in rank until they have first been provided with a hearing of the type required in *Cleveland Bd. of Pub. Ed. V. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed. 2d 494 (1985).” See *Civil Service Rules and Regulations*, Article XV, §1501(a). The Regulations further provide that a stenographic record taken at the hearing “shall be filed with and preserved by the Commission.” *Id.* at § 1504.

Whether the hearing is open to the public is at the discretion of the accused/affected employee. *Id.* If the “accused/affected employee requests a closed hearing, the stenographic record shall be sealed and not available for public inspection in the event the charges are dismissed.” *Id.* The Commission’s adjudication shall consist of the following: “findings of fact; conclusions of law; discussion; order.” *Id.* at §1505. “The only aspect of the adjudication which shall be publicly read, and provided to the public, *unless the affected/accused employee has requested an open hearing*, shall be the ‘order’ section.” *Id.* (emphasis added).

The Regulations specifically address Inspection of Records and provide as follows:

Except as otherwise provided in these Rules and Regulations and by law, those records of the Commission qualifying as public records **shall be open to the public** and available for inspection during normal business hours in accordance with the right to review public records and the Borough’s procedure and regulations for access to public records.

Id. at § 1601. (emphasis added).

In the instant matter there is no dispute that the accused/affected employee chose a public hearing before the Commission. See Order, p.2, ¶ 4. While the CBA provides notice

to him that he has that right - in addition to the option to use the arbitration procedures set forth in the CBA - the Commission Regulations and the Supreme Court decision in *Loudermill* provide him the right to the Commission hearing, independent of the additional options provided for in the CBA. Had the police officer employee opted to pursue the grievance procedure provided for in the CBA as opposed to those available under the Commission Regulations, the transcript and exhibits would be expressly non-public as provided by section 708(b)(8)(ii). However, here the police officer chose, at his discretion, to afford himself the right to a public hearing before the Commission rather than utilize the grievance procedure available under the CBA. Therefore, the OOR finds that the hearing before the Commission is not the type of “arbitration of a dispute or grievance *under* a collective bargaining agreement” that is referred to in the RTKL section 708(b)(8)(ii).

The Commission Regulations do not preclude the records of a *public* hearing from public disclosure and, in fact, expressly state that unless otherwise provided for by Regulation or law Commission public records are available for inspection “in accordance with the right to review public records and the Borough’s procedure and regulations for access to public records.” Regulations, Article XVI, §1601. The Borough has not provided any information that indicates that it has a specific procedure or regulation regarding its access to public records that supersedes the access to public records provided for by the RTKL. Therefore, the RTKL section 707(c) applies.

Section 707(c) provides for the means to access transcripts as follows:

(1) **Prior to an adjudication** becoming final, binding and nonappealable, a transcript of an administrative proceeding **shall be provided** to a requester **by the agency stenographer or a court reporter, in accordance with agency procedure or an applicable contract.**

(2) **Following an adjudication** becoming final, binding and nonappealable, a transcript of an administrative proceeding **shall be provided** to a requester **in accordance with the duplication rates established in section 1307(b).**

65 P.S. §707(c). (emphasis added).

There is a dispute as to whether the adjudication was final, binding and nonappealable when the request was made. The Commission rendered its decision on November 18, 2009. Therefore, the request was made prior to the adjudication becoming final, binding and nonappealable. The Requester is entitled to be provided access to the transcript and included exhibits by “the agency stenographer or a court reporter in accordance with agency procedure or an applicable contract” as set forth in §707(c)(1). The Borough asserts that it does not have its own stenographer or court reporter, but rather contracts with an independent court reporter service. Accordingly, the Borough must provide the transcript as permitted and at the cost set forth in that agreement, and the Requester has agreed to pay the contract rate.

2. Redactions to the Legal Invoices are Permissible.

The Borough granted access to the contract and minutes. Therefore, the appeal as to those is dismissed as moot. Only the redactions to the legal invoices is discussed in regard to the requests related to the law firm. The Requester contests the Borough’s redaction of the description information from the legal invoices. He argues that the records are not investigatory and sought an in camera review which was not granted. Legal invoices are public records, with the exception of the descriptions that reveal information that is protected by the attorney-client privilege in accordance with *Schenck v. Township of Centre*. See also *Hylton v. Pottstown School District, supra* (holding basis for redaction of descriptions from solicitor invoices must be shown); *Meachem v. Pocono Mountain School District*, OOR Dkt. AP 2009-0448. The Commonwealth Court held in *Schenck*, as a matter of law, that the description of litigation related services is protected from disclosure as attorney-client privilege/work-product, and under the Sunshine Law, 65 Pa. C.S. §708 regarding

executive session subjects. *See Schenck*, 893 A.2d at 852-53. Pursuant to Section 706, an agency is required to explain the reasons for its redaction of a record, as such redaction constitutes a partial denial. *See* 65 P.S. §67.706 (“[i]nformation which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9”).

The Borough provided the Affidavit of its Solicitor that the redacted information from the legal invoices pertained to the investigation and potential litigation by the firm “to determine the identity of the person or persons who used Borough equipment and Borough services to copy Borough records and to release the records to the public without authorization for the designated Borough officials.” Molinaro, Jr. Esquire, Borough Solicitor, Affidavit, ¶ 2. Therefore, the redacted information from the description section of the legal invoices was properly withheld as allowed by *Shenk*.

CONCLUSION

For the foregoing reasons, this appeal is **granted in part, denied in part, dismissed in part as moot as follows**: The Request for the transcript is **granted** and the Borough shall provide it and related records, but may redact nonpublic and exempt information as defined in the RTKL. The request for the retention agreement and minutes is **dismissed as moot** as they were provided to the Requester. The appeal related to redacted invoices is **denied** and the Borough is not required to take further action. As no evidence was provided regarding what documents are typically procured under subpoena duces tecum, the OOR has no basis for ordering their release and that aspect of the appeal is **denied**.

The parties are advised that this is a Final Determination and is binding on the parties. Within thirty (30) days of the mailing date of this determination, either party may

appeal to the Allegheny County Court of Common Pleas. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1302.

FINAL DETERMINATION ISSUED AND MAILED: February 5, 2010

A handwritten signature in black ink, appearing to read "Audrey Buglione". The signature is fluid and cursive, with the first name "Audrey" written in a larger, more prominent script than the last name "Buglione".

APPEALS OFFICER
AUDREY BUGLIONE, Esq.

Sent to: Carl Prine, Peter Mollinaro, Jr., Esquire (Borough Solicitor)