

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Rittenhouse,	:	
Appellant	:	
	:	
v.	:	No. 1630 C.D. 2011
	:	Argued: March 12, 2012
Board of Supervisors of Lower	:	
Milford Township	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE J. WESLEY OLER, JR., Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY SENIOR JUDGE OLER**

FILED: April 5, 2012

David Rittenhouse (Requester) has filed a notice of appeal from an order of the Court of Common Pleas of Lehigh County (trial court), affirming a final determination of the Office of Open Records (OOR).

Requester submitted a request to Lower Milford Township (Township) pursuant To the Right To Know Law (RTK Law),¹ seeking records related to asbestos at a proposed quarry.² The Township’s Open Records Officer responded

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

² Specifically, Requester sought “[a]ll communications, including letters, faxes, e-mails, phone logs, memos, reports, lab results related to asbestos at or around the proposed quarry for the land comprising approximately 628 acres situated on both sides of West Hill Road.” (R.R. at 12a).

by providing eleven separate e-mails and attachments and denying access to the remaining records as protected attorney work product under Pa. R.C.P. No. 4003.3.³

Requester appealed to OOR. Before OOR, the Township supplemented the record with a memorandum of law in support of its partial denial, a redacted copy of the privileged record (contested document) and an attestation of work-product privilege from its Solicitor, Emil Kantra, Esquire (Counsel).⁴ In this regard, Counsel explained that Requester is involved in eight separate litigation matters with the Township involving various zoning challenges, as well as an action for injunctive relief in the Commonwealth Court's original jurisdiction involving the Department of Environmental Protection.

In discussing the Township's supplemental filing, OOR noted:

³ Rule 4003.3 provides:

Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1, even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, ... or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

⁴ It appears that the attestation was not included in the certified record forwarded by OOR to the trial court; consequently, it was not included in the trial court's certified record to this Court.

The Township clarifies that only one responsive record had been withheld in response to the Request, referred to as “Privileged Document” in the e-mail of Phillip Getty, the Township-hired hydrogeologist to the Solicitor of the Township and Solicitor of the Planning Commission relating to pending litigation. Counsel advises the “Privileged Document” was prepared in anticipation of litigation and contents include Getty’s mental impressions and opinions in relation to the proposed quarry. The redacted copy of the September 18, 2009 e-mail, referred to by the Township as “Privileged Document” is included with the submission, and notes an “ArchiveSummary.txt” is attached. From the e-mail description, the attachment is a series of figures and the redacted e-mail itself contains the “detailed draft report regarding the proposed quarry plan.”

Counsel argues that the work-product privilege extends beyond mental impressions or strategy of an attorney to those of an attorney’s hired representative Getty is the consultant of the Township, and a representative for the purpose of pending litigation. ...

[Counsel] attests the e-mail includes “mental impressions, conclusions, opinions, legal theories, legal research, strategy and work product of Phillip Getty.”

(OOR opinion at pages 2-3).

In its opinion, OOR concluded the contested document and its contents regarding the proposed quarry pertain to, and were prepared in anticipation of, litigation involving Requester. Further, there was no dispute that the contents of the redacted e-mail were authored by Getty, a non-attorney representative of the Township, and retained for litigation. Citing LaValle v. Office of General Counsel, 564 Pa. 482, 769 A.2d 449 (2001), OOR noted that the work-product privilege applies to a representative other than an attorney with regard to opinions relating to the merit of a claim or defense or relating to strategy or tactics. Here, OOR determined, Counsel’s attestation was sufficient in terms of showing that the

redactions reflected protected mental impressions and thus overcame the presumption of openness. Accordingly, Requester's appeal was denied.

Requester appealed and the trial court affirmed. The trial court's Pa. R.A.P. 1925(a) statement notes, "The reason for this Court's August 4, 2011 Order [denying Requester's amended notice of appeal] is that the document, which the Court reviewed in camera, is protected by Pa. R.C.P. [No.] 4003.3, in that the redacted material comprises mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics." (Trial Court's 1925(a) statement dated October 6, 2011, Item 34 of certified record).

Requester has appealed to this Court,⁵ raising a number of issues for review.⁶ At the outset, we emphasize that the purpose of the RTK Law is to promote access to official government information in order to prohibit secrecy, to scrutinize public officials' actions and to make them accountable for their actions. Bowling v. Office of Open Records, 990 A.2d 813 (Pa. Cmwlth. 2010), petition for allowance of appeal granted, __ Pa. __, 15 A.3d 427 (2011). The RTK Law requires a local agency to provide "public records" upon request. Section 302(a) of the RTK Law,

⁵ An appellate court's scope of review from a decision of a trial court in a case under the RTK Law is limited to determining whether findings of fact are supported by competent evidence or whether the trial court committed an error of law, or an abuse of discretion in reaching its decision. Mollick v. Township of Worcester, 32 A.3d 859 (Pa. Cmwlth. 2011).

⁶ In his appellate brief, Requester initially argued that OOR's decision should be reversed based on the Township's failure to serve Requester with its brief and a redacted form of the contested document in the proceedings before OOR. Requester asserted that he was prejudiced in that OOR used the brief and contested document in reaching its decision. At argument before this Court, counsel for Requester conceded that she now has the materials and it appears that she has not been prejudiced in her ability to set forth her case.

65 P.S. §67.302(a). A local agency has the burden of proving that requested records are exempt from public access. Section 708 of the RTK Law, 65 P.S. §67.708.

Presently, Requester's main argument centers on the Township's failure to grant access to the redacted portion of the contested document based on the work product doctrine set forth in Pa. R.C.P. No. 4003.3. In this regard, Requester argues that the Pennsylvania Rules of Civil Procedure do not apply to any proceedings other than those brought by praecipe for writ of summons or by filing of a complaint. Requester reasons that the Township's assertion that the contested document is not being produced because of pending litigation involving a curative amendment and land development plan review cannot serve as a basis for withholding the redacted document because those proceedings are not subject to the Rules of Civil Procedure.

Section 102 of the RTK Law, 65 P.S. §67.102, defines 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 privilege.

In turn, the term "privilege" is defined in Section 102 as:

The attorney work-product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court incorporating the laws of this Commonwealth.

Regardless of the applicability of the Rules of Civil Procedure to the underlying actions between Requester and the Township, it is abundantly clear that the RTK Law was drafted in such a way as to avoid compulsory disclosure of documents otherwise protected by a privilege. Consequently, to the extent Requester maintains that the Township could not use Pa. R.C.P. No. 4003.3 to prevent access to the contested document, we conclude this argument is without merit.

In the alternative, Requester argues that the work-product privilege set forth in Pa. R.C.P. No. 4003.3 does not prevent access to the contested document because the document is otherwise “discoverable” under Pa. R.C.P. No. 4003.5, which expressly allows the “discovery of facts known and opinions held by an expert” that are “acquired or developed in anticipation of litigation for trial.”

In this regard, the question before this Court is whether the trial court and OOR correctly held that the contested document is exempt from disclosure because it is protected by the work product privilege set forth in Pa. R.C.P. No. 4003.3. Case law has recognized that the primary purpose of Pa. R.C.P. No. 4003.5 is to avoid unfair surprise to an adversary concerning the facts and substance of an expert’s proposed testimony. Expressway 95 Business Center, LP v. Bucks County Board of Assessment, 921 A.2d 70 (Pa. Cmwlth. 2007). Given this limited purpose, we do not believe that Pa. R.C.P. No. 4003.5 should be so expansively construed and applied as to vitiate the work product doctrine recognized in Section 102 of the Law and elaborated upon in Pa. R.C.P. No. 4003.3, as the doctrine relates to disclosure of “mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.”

Requester also argues that the Township waived the work product privilege because it allegedly provided copies of the contested document to counsel for the planning commission as well as the Township manager. In Legrande v. Department of Corrections, 920 A.2d 943 (Pa. Cmwlth.), petition for allowance of appeal denied, 593 Pa. 751, 931 A.2d 639 (2007), a decision under the prior version of the RTK Law,⁷ this Court recognized that disclosure of a document protected by a privilege, which is by definition not a public record, does not convert the document into a public record. Citing LaValle, 564 Pa. at 500, 769 A.2d at 460, the Legrande court noted, “[T]he character of the material as work product serves not as an exception to the disclosure of material which would otherwise qualify as accessible, in which case waiver principles might be pertinent, but rather, as a definitional limitation upon what would be accessible in the first instance. We find that, where records are not the *type* of materials within the [Law]’s initial purview, waiver principles cannot be applied to transform them into records subject to its coverage.” Legrande, 920 A.2d at 949.

We believe the rationale set forth in Legrande is equally applicable under the current version of the RTK Law. Here, under the new version of the RTK Law, the contested document is not one that would be otherwise accessible but for the work product privilege. As in the prior RTK Law, the contested document at issue in this action is not within the purview of the RTK Law in the first place. Consequently, we reject this argument as well.

⁷ Act of June 21, 1957, P.L. 390, as amended, formerly 65 P.S. §66.1-66.9, repealed by Act of February 14, 2008, P.L. 6, effective January 1, 2009.

Having addressed all of the arguments raised by Requester in his appeal, we could, theoretically, end our opinion here. However, in an abundance of caution, we conducted our own in camera review of both the redacted and unredacted versions of the contested document. Based on this review, we perceive no error in the trial court's conclusion that the redacted portion of the contested document comprises a "representative's," as that term is used in Pa. R.C.P. No. 4003.3, mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics and is therefore not a "public record" under Section 102 of the RTK Law.

Accordingly, the order of the trial court is affirmed.

J. Wesley Oler, Jr., Senior Judge

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David Rittenhouse,	:	
	:	
Appellant	:	
	:	
v.	:	No. 1630 C.D. 2011
	:	
Board of Supervisors of Lower	:	
Milford Township	:	

ORDER

AND NOW, this 5th day of April, 2012, the August 4, 2011 order of the Court of Common Pleas of Lehigh County is affirmed.

J. Wesley Oler, Jr., Senior Judge