IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Geoffrey Johnson, Petitioner	:	
v.	:	
Pennsylvania Convention Center Authority, Respondent	:	No. 1844 C.D. 2011
	:	Argued: May 14, 2012

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION BY
JUDGE McGINLEY FILED: August 1, 2012

Geoffrey Johnson (Johnson) petitions for review of the Final Determination of the Office of Open Records (OOR) which denied, in part, his Right to Know Law[1] (RTKL) request.

On May 12, 2011, Johnson submitted a RTKL request to the Pennsylvania Convention Center Authority (PCCA), the owner and operator of the Convention Center Facilities in Philadelphia.[2]

According to Johnson, the records relate to a significant public issue of alleged "union strife" at the Pennsylvania Convention Center. Johnson seeks access to records which relate to a "labor management agreement" known as the

[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104, which repealed the former Right-To-Know-Law (former RTKL), Act of June 21, 1957, P.L. 390, as amended, formerly 65 P.S. §§66.1-66.4.

[2] PCCA is a Commonwealth agency under its enabling legislation, 64 Pa.C.S. §6004 and §6006, and by definition under Section 102 of the RTKL, 65 P.S. §67.102.

Customer Satisfaction Agreement (CSA) which was executed by the PCCA in 2002, and all trade unions which provided labor at the Convention Center including: Carpenters Regional Council, I.B.E.W. Local 98 (Electricians), Laborers Local 332, IATSE Local 8 (Stage Hands), Riggers Local 161 and Teamsters Local 107, and several PCCA contractors whose job it was to lower costs and ensure customer satisfaction for those who booked trade shows and other events at the facility. The CSA was signed by all unions and made part of and incorporated into the collective bargaining agreements of PCCA's six labor unions. The CSA includes provisions for customer, exhibitor and contractor rights, work jurisdictions, the engagement of Elliot-Lewis Corporation, the "Labor Supplier," which coordinated the activities among the trade unions, and dispute resolution procedures.

PCCA provided some documents, but withheld those in response to Document Request Nos. 3 and 4, which applied to disputes between the trade unions over "work jurisdiction" and/or disputes between various trade unions and the labor supplier over work assignments and other matters. Document Request Nos. 3 and 4 asked for:

> 3. Any documents regarding the Customer Satisfaction Agreement (hereinafter CSA), grievances under the CSA, grievance procedures under the CSA, allocation of labor, work rules for any Labor Unions, jurisdictional decisions, jurisdictional disputes, dispute resolutions and/or dispute resolution procedures under Section K of the CSA, and/or Local 98, Pre-Show Conferences, Show Services Advisory Committee Meetings, violations of the CSA, or alleged violations of the CSA, and/or the rights of any Labor Union under the CSA from 2003 to present.

> 4. Any communications regarding the CSA, grievances under the CSA, grievance procedures under the CSA, allocation of labor, work rules for any Labor Unions, jurisdictional decisions, jurisdictional disputes, Local 98, Pre-Show Conferences, Show Services Advisory Committee Meetings, Violations of the CSA, alleged violations of the CSA, the rights of any Labor Union under the CSA, by and between any of the following parties: Pennsylvania Convention Center Authority (hereinafter PCCA), its officers, agents or employees, Philadelphia Area Labor-Management Committee (hereinafter PALM), its officers, agents or employees, the Pennsylvania Convention and Visitors Bureau (hereinafter PCVB), its officers, agents or employees, any House Contractor as defined in the CSA, its officers, agents or employees, any Customer or Exhibitor as defined in the CSA, its officers agents or employees, any Labor Union that is a signatory to the CSA, its officers, agents or employees, and/or the Philadelphia Expositional Services Contractors Association (hereinafter PESCA), its officers, agents or employees from 2003 to the present.

Right to Know Request Form, May 12, 2011, ¶¶3, 4, at 2; Reproduced Record (R.R.) at 33a.

Relying on Section 708(b)(7) of the RTKL, PCCA did not provide grievance material and similar records related to union laborers, and which specifically pertained to and were provided under a labor management agreement among several signatories and which were appended to and made part of collective bargaining agreements. In addition, PCCA withheld records under Section 708(b)(17) of the RTKL that reflected the investigation of such grievances filed against the PCCA, alleged violations of the PCCA and the resolution of jurisdictional disputes among various trades and the PCCA.

Johnson appealed. The OOR concluded that PCCA met its burden of proving the documents were exempt from public disclosure under the RTKL. Specifically, the OOR concluded that records sought by Johnson consisted of "grievance material" and records which related to union laborers under Section 708(b)(7)(vi), (vii) and (viii); and that Section 708(b)(7) was applicable because labor union employees qualify as agency employees.

Johnson raises two issues on appeal[3]: (1) whether the OOR erred when it determined that the records sought by Johnson in Item Nos. 3 and 4 of his RTKL request were exempted from disclosure under Sections 708(b)(7)(vi), (vii) and (viii) of the RTKL; and (2) whether the OOR erred when it determined that the records sought by Johnson in Item Nos. 3 and 4 of his RTKL request were exempt from disclosure under Section 708(b)(17)(i) of the RTKL?

I.

First, Johnson contends that the OOR erred when it concluded that the PCCA met its burden of establishing that the subparts of Item Nos. 3 and 4 are exempt under Section 708(b)(7)(vi), (vii) and (viii) which exempts the following records ***"relating to an agency employee"***:

> (vi) Written criticisms of an employee.

[3] This Court's scope of review under the RTKL is plenary. Stein v. Plymouth Township, 994 A.2d 1179 (Pa. Cmwlth. 2010). This Court's standard of review under the Law is an independent review of the OOR's orders and this Court may substitute its own findings of fact for that of the OOR. Bowling v. Office of Open Records, 990 A.2d 813, 818 (Pa. Cmwlth. 2010) (*en banc*), appeal granted, 609 Pa. 265, 15 A.3d 427 (2011).

> (vii) ***Grievance material***, including documents related to discrimination or sexual harassment. (Emphasis added).
>
> (viii) Information regarding discipline, demotion or discharge contained in a personnel file.

Johnson argues this exemption pertains to records of grievance and disciplinary matters ***between an agency and its individual employees***, and not the records requested which pertain to jurisdictional and other disputes among multiple trade unions that perform work at the Convention Center. He claims that this section has nothing whatsoever to do with the records requested. This section pertains to records of individual employees and personnel files. The exemption is meant to protect the privacy interests of employees and no such privacy interests are implicated here.

PCCA counters by arguing that the records concern and relate to written criticisms, complaints and decisions of individuals and other representatives of the PCCA who were contracted to perform professional services on behalf of the agency through collective bargaining and labor and facility management agreements. PCCA contends that simply because they are not on PCCA's direct payroll, the material is still grievance material which should not be made public. This Court must disagree with PCCA's position.

First, Section 708(b)(7) exempts "grievances materials" relating to "agency employees." Clearly, this Section is designed to protect personal information about individual employees which is private. Here, Johnson requested: (1) records that "relate to the CSA;" (2) "grievances under the CSA;" (3) "grievance procedures under the CSA;" (4) "allocation of labor, work rules for

any Labor Unions, jurisdictional disputes, dispute resolutions and/or dispute resolution procedures under Section K of the CSA, and/or Local 98, Pre-Show Conferences, Show Services Advisory Committee Meetings;" and (5) "violations of the CSA or the rights of any Labor Union."

The records requested relate to disputes between entities (trade unions) that supply services to PCCA on shows and exhibitions pursuant to the terms of a contract, the CSA. None of the trade union members are employees of PCCA. None of the records sought relate to criticisms of PCCA employees, or the demotion, discipline or discharge of any individual. Rather, the records sought pertain to disputes between the various trade unions and "Labor Supplier."

The Reproduced Record contains *in camera* examples of documents that were withheld. For example, one "jurisdictional grievance" was filed by the electrical union on behalf of all of its members to complain that exhibitors plugged in their own extension cords. The union grieved on behalf of all its electrician-members because it believed its members were entitled under the CSA to provide all electrical services. Allowing the exhibitors to plug in their own extension cords translated to an additional 36 hours of labor.

Such records do not relate to any conduct of any individual whose privacy interests may be violated if they are released. Section 708(b)(7) exempts information about ***individual agency employees***, not labor disputes. Simply because "grievance material" is mentioned in Section 708(b)(7), does not mean that all grievance materials in every situation, including a union's "jurisdictional grievance" under a labor management agreement is exempt. The Section is meant to protect information relating to individual or personal grievances. The Section is

not meant to exclude information pertaining to union or policy-type grievances initiated by the union on behalf of workers which involve a grievance over basic contract principles such as seniority, vacation, etc.

PCCA apparently believes that the grievance materials do, in fact, relate to "individuals" because the work is performed by individuals and any grievances would be a "criticism" or "complaint" against these individuals. PCCA argues that it does not matter that these individuals are not technically PCCA "employees", they are still individuals who perform contract services.

Again, this Court must disagree. No individual interests are implicated as the records sought relate only to disputes between entities that supply services to PCCA pursuant to the terms of a contract. There is no record requested that would require the disclosure of any confidential employee record or material from a personnel file which could be used to harm the employee or cause him embarrassment or humiliation. Section 708(b)(7) does not apply to the records requested in Request Nos. 3 and 4.

Accordingly, the portion of the OOR's Decision which denied Johnson access based on Section 708(b)(7) must be reversed.[4]

[4] To the extent PCCA argues that these records are exempt under Section 708(b)(8)(i) it is mistaken. Section 708(b)(8)(i) exempts records "pertaining to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings." Johnson does not seek any materials which relate to "negotiations or strategy" relating to labor relations in arriving at a collective bargaining agreement. Johnson indicated that he specifically crafted his request to exclude this material. His requests pertain to union complaints and how those disputes were resolved.

II.

Johnson next contends that the OOR erred when it concluded that the records sought by Johnson in Requests Nos. 3 and 4 were exempt from disclosure under Section 708(b)(17)(i) of the RTKL which exempts records "of an agency relating to a non-criminal investigations, including: complaints submitted to an agency."

For this exemption to apply, the PCCA was required to demonstrate that "a systematic or searching inquiry, a detailed examination of official probe" was conducted regarding a noncriminal matter. Department of Health v. Office of Open Records, 4 A.3d 803 (Pa. Cmwlth. 2010). Johnson argues that his request sought documents relating to "actual grievances" filed, grievance procedures under the CSA, allocation of labor, work rules for any Labor Unions, jurisdictional decisions, jurisdictional disputes, dispute resolutions and/or dispute resolution procedures under Section K of the CSA. The requests seek information pertaining to labor management issues. They did not seek any investigations or materials related to investigations or any document that was part of "a systematic or searching inquiry, a detailed examination or official probe."

PCCA counters by arguing that grievances, alleged violations and disputes (and their respective resolutions) filed against the PCCA under the CSA, are the equivalent of "a complaint submitted to an agency." PCCA claims that these materials directly relate to the investigation of such grievances, disputes and/or violations. The investigation, as a result of the filing of a grievance, dispute or other violation of the CSA against the PCCA, reveals "the institution, progress or result of such investigation." As such, the documents implicate the noncriminal

investigation exception under Section 708(b)(17). Again, this Court must disagree with PCCA.

Recently, this Court reviewed the "noncriminal investigation" exception of the RTKL. This exception was applied to preclude disclosure of materials related to noncriminal investigations conducted by an agency acting within its legislatively-granted fact-finding and investigative powers. That is, its "official duties."

For example, in Department of Health, 4 A.3d 803 (Pa. Cmwlth. 2010), the Department of Health petitioned for review of the final determination of the OOR that granted the request of a nursing and rehabilitation center to obtain certain documents, including notes, witness statements, and other materials, related to governmentally mandated inspections and surveys conducted by Department of Health. The "noncriminal investigation" at issue was conducted by the Department to assess a nursing home's compliance with statutory and regulatory provisions and to determine if any corrective and/or disciplinary action needed to be taken. This Court noted that the "noncriminal investigation" exemption applies to investigations "conducted **as part of an agency's official duties**." Department of Health, 4 A.3d at 814 (emphasis added). Because the Department of Health was clothed with the authority to oversee and regulate the health and safety of nursing homes, its investigations were within its "official duties" and considered noncriminal investigations for purposes of RTKL.

In Pennsylvania Public Utility Commission v. Gilbert, 40 A.3d 755 (Pa. Cmwlth. 2012), "noncriminal investigations" were conducted by the PUC to analyze possible violations and pipeline incidents reported by pipeline operators.

The PUC acted pursuant to its powers under the Pipeline Safety Act, 49 U.S.C. §§60101-60137, to inspect interstate pipelines for compliance with applicable state and federal gas safety regulations. The investigations were conducted pursuant to the PUC's official duties and were noncriminal investigations protected under the RTKL.

In Sherry v. Radnor Township School District, 20 A.3d 515 (Pa. Cmwlth. 2011), Judy Sherry sought all "de-identified[5] records or reports of Academic Honor Code violations maintained by the Radnor Township School District for the 2007–2008 and 2008–2009 school years." Sherry, 20 A.3d at 516. The School District denied the request based on the "noncriminal investigation" exception found at Section 708(b)(17). This Court noted that the School District's records pertaining to Honor Code violations "surpassed the District's routine performance of its duties and entail a systematic or searching inquiry, detailed examination, and/or official probe into purported student rule violations on the District's premises." Sherry, 20 A.3d at 523.

In this controversy, unlike in the above-cited controversies, the information requested pertains to disputes between the PCCA and its labor unions which arise out of the CBA and the CSA which included specific procedures for "dispute resolution" between PCCA and its unions. See Paragraph J of the CSA; R.R. at 89a. The PSSA suggests that because it had to "investigate" the allegations of the dispute, the materials were protected. This Court disagrees.

[5] The term "de-identified" refers to the fact that the names of students and teachers were redacted from the report.

First, the mere receipt by PCCA of ***notice of a dispute under the CSA*** is not the equivalent of a "complaint submitted to an agency." Such "notice" does not invoke the agency's legislatively-granted fact-finding and investigative powers and it does not involve the PCCA's "official duties." Rather, in this instance, the PCCA acted solely in the context of its status as a party to the CBA and CSA, and pursuant to the procedures outlined in the CBA and CSA, a labor services agreement, to determine whether a breach occurred.

Here, the information sought involved unions complaining about work assignments, or breaches of the CSA. The public has the right to know who is performing services for the government agency, the scope of services, the disputes concerning the scope of services, the costs relating to those services, and the resolution of disputes concerning the services. There was no danger of an invasion of personal privacy rights, public endangerment, or divulgence of secret information.

Accordingly, the decision of the OOR, insofar as it denied access to the items requested in Request Nos. 3 and 4, is reversed.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 1st day of August, 2012, the Decision of the Office of Open Records in the above-captioned matter is reversed insofar as it denied access to the items requested in Request Nos. 3 and 4.

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BERNARD L. McGINLEY, Judge